No. 22-30691

In the United States Court of Appeals for the Fifth Circuit

JARIUS BROWN,
Plaintiff-Appellant,

v.

JAVARREA POUNCY; JOHN DOE #1; JOHN DOE #2,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT

MATTHEW C. CLIFFORD
ELLEN NOBLE
PUBLIC JUSTICE
1620 L Street, NW, Suite 630
Washington, DC 20036
(202) 797-8600
mclifford@publicjustice.net

Counsel for Amicus Public Justice

CERTIFICATE OF INTERESTED PERSONS

No. 22-30691
Jarius Brown v. Javarrea Pouncy; John Doe #1; John Doe #2

The undersigned counsel of record certifies that, in addition to the person and entities listed in Plaintiff-Appellant's Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case.

Public Justice is a non-profit, tax-exempt organization incorporated in the District of Columbia. Public Justice has no parent company, and no publicly held company has 10% or greater ownership interest in it.

These representations are made in order that the judges of this Court may evaluate possible disqualification.

1. **Amicus in Support of Plaintiff-Appellant:**

   Public Justice

2. **Counsel for Amicus:**

   Matthew C. Clifford (Public Justice)

   Ellen Noble (Public Justice)

Dated: February 2, 2023

/s/ *Matthew C. Clifford*
MATTHEW C. CLIFFORD

Counsel for Amicus Public Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Public Justice is a nonprofit legal advocacy organization that specializes in precedent-setting, socially-significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress for their injuries in the civil court system. This case is of interest to Public Justice because it raises questions regarding the applicable statute of limitation for § 1983 claims. The improper application of statutes of limitation is a major procedural barrier that prevents individuals whose federal rights have been violated from enforcing those rights in court.

INTRODUCTION

Congress passed § 1 of the Enforcement Act of 1871, today codified at 42 U.S.C. § 1983, to allow victims of civil rights abuses to prosecute claims against state actors in federal court rather than state court. But Defendants are asking this Court to apply a statute of limitation that would flip that purpose on its head by relegating victims with timely state-law claims against state actors to the very courts § 1983 was designed to avoid. Even though § 1983 was meant to provide such

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund this brief; and no person other than amicus, its members, and its counsel contributed money to fund this brief.

plaintiffs with a federal forum in lieu of state courts, Defendants argue for a procedural barrier that applies only to federal civil rights claims in federal court, and that makes federal court less accessible to victims of civil rights abuses than state court.

Congress did not specify a statute of limitation in enacting § 1983, but instead instructed courts to borrow the appropriate limitation period from the forum state. *See* 42 U.S.C. § 1988. The Supreme Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Owens v. Okure*, 488 U.S. 235 (1989), instructed courts on which state-law statute of limitation to borrow, explaining that courts should apply the forum state's general or residual statute of limitation for personal injury actions. But the Court in both *Wilson* and *Owens* recognized that there is always a final inquiry before a court can apply a state-law limitation: per the text of § 1988, courts may not apply a state-law limitation if it is "inconsistent" with the federal policy underlying § 1983.

This brief argues that while federal courts should generally apply the forum state's residual limitation for personal injury actions to § 1983 claims, they cannot do so in the limited circumstances where, as here, the residual limitation period is shorter than the statute of limitation that would apply to an analogous state-law claim. Applying a one-year residual limitation to time bar Mr. Brown from a federal forum, even though the Louisiana Civil Code would allow him to timely file an analogous state-law claim based on the same facts in state court, is categorically

inconsistent with the federal policy underlying § 1983: to provide individuals whose federal rights have been violated with access to federal courts in lieu of state courts.

Additionally, this brief explains which statute of limitation *should* apply when application of the general or residual personal injury limitation would be inconsistent with § 1983. The Supreme Court, faced with a similar situation, instructed courts to look to related federal laws designed to accommodate a balance of interests similar to those at stake in the federal statute providing the cause of action. For that reason, the best source from which to draw is the residual four-year limitation for federal statutes codified at 28 U.S.C. § 1658. While the law does not by its terms apply directly to § 1983, it was enacted to balance the very same interests at stake in setting a statute of limitation for § 1983 claims and is therefore well-suited to fill the legal gap when a state-law limitation is inconsistent with the federal policy underlying § 1983. Because applying Louisiana's one-year residual personal injury limitation would be inconsistent with § 1983, this Court should apply the residual four-year limitation for federal statutes, and hold that Mr. Brown's claim is timely.

ARGUMENT

I. Applying Louisiana's One-Year Residual Limitation to Mr. Brown's Claim Is Inconsistent with the Primary Federal Policy Underlying § 1983.

Applying Louisiana's one-year statute of limitation in this case would be inconsistent with § 1983's policy of ensuring access to a neutral federal forum in lieu of state court because it would make federal court *less* accessible than state court

and *more* hostile towards civil rights claims. Section 1988 "endorses the borrowing of state-law limitations provisions" for § 1983 claims, but only "where doing so is consistent with federal law." *Owens*, 488 U.S. at 239. Specifically, the Supreme Court has held that courts should borrow the forum state's general or residual personal injury statute of limitation for § 1983 claims, but "*only if* [that limitation] is *not* '*inconsistent* with the Constitution and laws of the United States.'" *Burnett v. Grattan*, 468 U.S. 42, 48 (1984) (emphases added) (quoting 42 U.S.C. § 1988).[2]

A state statute of limitation is inconsistent with federal law if its "application . . . 'would be inconsistent with the federal policy underlying the cause of action under consideration.'" *Robertson v. Wegmann*, 436 U.S. 584, 590 (1978); *see also Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004) (recognizing a "settled practice . . . to adopt a local time limitation as federal law if it [is] not inconsistent with federal law or policy to do so"); *Owens*, 488 U.S. at 239 (same). Thus, courts cannot apply Louisiana's one-year statute of limitation to § 1983 claims if doing so would be inconsistent with the federal policy underlying § 1983.

[2] Defendant responds to this argument by pointing to "multiple reasons why the application of a one-year prescriptive period to Brown's Section 1983 claim is consistent with Congress' intent in enacting Section 1983." ROA.201. But those purported *consistencies*, true or not, are entirely irrelevant here: § 1988 explicitly limits state-law borrowing to instances where it would not be *inconsistent* with federal law to do so.

A. It Is Inconsistent with § 1983 to Give Victims of Civil Rights Abuses Less Time to File Their § 1983 Claim Than They Would Have to File an Analogous State-Law Claim.

Applying a statute of limitation to a § 1983 claim that is *shorter* than the limitation that would apply to an analogous state-law claim is inconsistent with the federal policy underlying § 1983 because it eviscerates the law's primary purpose: to provide victims of civil rights deprivations with access to federal courts in lieu of state courts. *See Monroe v. Pape*, 365 U.S. 167, 174–80 (1961). Congress enacted the law "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" because those "representing [the] State . . . [were] unable or unwilling to enforce a state law." *Id.* at 174, 176. Indeed, "[i]t was not the unavailability of state *remedies* but the failure of certain States to *enforce* the laws with an equal hand that furnished the powerful momentum behind this [law]." *Id.* at 174–75 (emphases added). In enacting § 1983, Congress "was concerned that state instrumentalities could not protect [federal] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Thus, the federal policy underlying § 1983 was to give civil rights plaintiffs access to federal courts, providing them a forum where they would not face hostility or discrimination for asserting claims against state actors.

But applying a shorter statute of limitation to a § 1983 action than would apply to a state-law action based on the same set of facts flips that federal policy on its head. It imposes a state-law-derived procedural barrier on civil rights plaintiffs' access to federal courts, forcing them to bring their claims against state actors in state court.[3] Giving a plaintiff *less* opportunity to seek redress for the deprivation of a federal right in federal court under § 1983 than would be afforded to them by state law in state court is inconsistent with the federal policy underlying § 1983 because it requires the plaintiff to vindicate their civil rights in state court instead of federal court.

Justice Rehnquist made this very point in *Burnett*. He explained that a state statute of limitation is inconsistent with the policy underlying § 1983 if it "discriminates against federal claims, such that a federal claim would be time-barred, while an equivalent state claim would not." 468 U.S. at 60–61 (Rehnquist, J., concurring in the judgment); *see also Johnson v. Davis*, 582 F.2d 1316, 1317, 1319 (4th Cir. 1978) (holding that "a shorter period for remedying a 'constitutional tort' than for remedying the underlying state tort" would constitute "an unreasonable

[3] Whether this Court believes that state courts today will fairly enforce claims against state actors is beside the point. Courts must look at the original federal policy underlying the statute at the time it was enacted. *See Burnett*, 468 U.S. at 52 n.14 (assessing conflict between state statute and "Congress' policy *enacted in* the relevant substantive law" (emphasis added)); *Robertson*, 436 U.S. at 590–91 (identifying "underlying policies" of § 1983 by looking to cases examining the law's purpose when it was first enacted).

discrimination between the assertion of federally protected rights and rights protected under Virginia law"). Therefore, while courts must generally—per *Owens*—apply the forum state's general or residual personal injury limitation to a § 1983 claim, courts cannot apply that limitation when it is *shorter* than the limitation for an analogous state-law claim, which would make federal court less accessible than state court.

B. Louisiana's Civil Code Gives Mr. Brown Two Years to Make an Analogous Claim Under State Law.

Louisiana's one-year residual personal injury limitation is shorter than the limitation that state law would impose on Mr. Brown's analogous state-law claim. As Mr. Brown has correctly asserted, the Louisiana Civil Code grants him a two-year window during which to file his analogous claim because his "damages [were] sustained as a result of an act defined as a crime of violence." La. Civ. Code Ann. art. 3493.10; *see* ROA.20, 108, 111. State law defines a crime of violence to include second-degree battery, which is "the intentional use of force or violence upon the person of another" "when the offender intentionally inflicts serious bodily injury." La. Stat. Ann. §§ 14:2(B)(6), 14:33, 14:34.1(A). Mr. Brown has alleged that Defendants' use of force was intentional and his injury serious. *See* ROA.13, 24 (alleging unprovoked attack resulting in fractures to his face and eye socket that left

Mr. Brown struggling to remain conscious).[4] That alleged "act" of intentional force meets the criteria for second-degree battery, and the two-year limitation period would therefore apply. La. Civ. Code Ann. art. 3493.10.

1. Defendant's Alternative Interpretation of Article 3493.10 Is Both Atextual and Inconsistent with Settled Principles of Louisiana Law.

Defendants wrongly contend that Louisiana's one-year residual personal injury statute of limitation, and not the two-year limitation in article 3493.10, would apply to Mr. Brown's analogous state-law claim. ROA.195–200. Defendants argue that the two-year limitation is inapplicable because Mr. Brown cannot "simply declare" that Defendants committed crimes of violence, or "charge" them with such misconduct. ROA.197. That misses the point. As a limitation period for *civil* actions, article 3493.10 does not require that a defendant have been prosecuted or convicted for a crime of violence; rather, it asks in plain and unambiguous language whether a plaintiff has suffered damages "as a result of *an act defined*" as such by Louisiana law. La. Civ. Code Ann. art. 3493.10 (emphasis added). And Louisiana courts routinely decide whether an action is time-barred based "on the facts alleged in the petition, which are accepted as true." *Johnson v. Littleton*, 37 So. 3d 542, 545 (La.

[4] Louisiana courts have regularly found that acts resulting in similar, as well as less severe, injuries constitute second-degree battery. *See State v. Helou*, 857 So. 2d 1024, 1028–29 (La. 2003) (citing cases); *see also Harris v. Warden, La. State Penitentiary*, No. 12-cv-1731, 2015 WL 5231266, at *3–4 (W.D. La. Aug. 11, 2015) (victim suffering bruises to a foot and knee and complaining of pain inflicted by pepper spray), *report and recommendation adopted*, No. 12-cv-1731, 2015 WL 5244413 (W.D. La. Sept. 8, 2015).

Ct. App. 2010) (citing *Cichirillo v. Avondale Indus., Inc.*, 2004-2894 (La. 11/29/05), 917 So. 2d 424, 428); *see also Creighton v. Evergreen Presbyterian Ministries, Inc.*, 2015-1867 (La. App. 1 Cir. 10/28/16), 205 So. 3d 964, *rev'd*, 2016-2012 (La. 1/9/17), 214 So.3d 860 (Louisiana Supreme Court remanding for a finding as to whether article 3493.10 applied, without requiring parallel criminal proceeding, where lower court's dissent found that plaintiff's "factually supported allegation that [her mentally handicapped brother] was severely beaten sufficiently raises the issue of whether [her brother] was the victim of second-degree battery, a crime of violence as defined" by Louisiana law). So, the only question for a court assessing whether article 3493.10 applies before the factual record has been developed is whether the plaintiff has alleged an injury caused by an act that meets the criteria for a crime of violence.

Defendants also contend that deciding whether article 3493.10 applies based on the allegations in the complaint would allow a "creative plaintiff's lawyer" to "figure out a way to artfully plead" their client's basic battery claims into the two-year prescriptive period for crimes of violence. ROA.200. But this possibility exists in every case, and there are guardrails to prevent it. Improper manifestations by lawyers are sanctionable offenses. *See* Fed. R. Civ. P. 11(b); Model Rules of Prof'l Conduct rr. 3.1 & 3.3 (Am. Bar Ass'n 2020); La. Rules of Prof'l Conduct rr. 3.1 & 3.3. And, where a complaint is not time-barred on its face, a defendant may still

challenge the timeliness of a plaintiff's claims—indeed, twice more—at the summary judgment phase and at trial. *See, e.g.*, *Fossier v. Offshore Navigation, Inc.*, No. CIV.A. 87-4942, 1988 WL 51378, at *2 (E.D. La. May 18, 1988) (holding that "the Court is not allowed at this time to find plaintiff's claim time-barred" because "the Court must construe the material disputes in the light most favorable" to the non-moving party before trial, but that "[u]pon presentation of evidence at trial … defendant is certainly entitled to re-urge its prescription defense"). Defendants' concern is misplaced.

2. Defendants Rely on Case Law That Is Both Factually Distinguishable and Manifestly Inconsistent with the Louisiana Civil Code and Binding Precedent.

Defendants' assertion that the two-year limitation does not apply to excessive force claims against police officers is also misplaced. Relying on *Vallery v. City of Baton Rouge*, 2011-1611 (La. App. 1 Cir. 5/3/12), 2012 WL 2877599, Defendants argue that their violent acts against Mr. Brown cannot constitute a "crime" of violence because they were "acting as … law enforcement officer[s]," who "may use reasonable force to effect the arrest and detention, and also to overcome any resistance or threatened resistance of the person being arrested or detained." ROA.198–200 (quoting La. Code Crim. Proc. Ann. art. 220). But *Vallery* is distinguishable. In that case, the plaintiff himself alleged that there was an "altercation" with the defendant officer in which he "questioned" the officer during

the course of his arrest. By contrast, neither Mr. Brown nor Defendants have given the Court reason to believe that there was any "resistance or threatened resistance" to Mr. Brown's detention by Defendants. La. Code Crim. Proc. Ann. art. 220. Thus, the record in this case does not reflect the factual predicate underlying the *Vallery* decision.

Edwards v. Lewis, 2022-56 (La. App. 3 Cir. 9/28/22), 348 So. 3d 269, a similar decision issued in September, is similarly inapposite. In that case, relying on the same authorization for the use of force by law enforcement officers as in *Vallery*, the court held that defendant officers who intervened to prevent a detainee at a city jail from strangling himself with his shoestrings were not subject to article 3493.10 because they did not commit a "crime" of violence. *Id.* at 273–74.[5] But the facts in *Edwards*, too, are distinguishable. In that case, the plaintiff himself "admitted taking his shoestrings and wrapping them around his neck," and that the alleged crime of violence occurred when defendant officers used force while "removing the shoelaces from around [his] neck." *Id.* at 270–71. Defendant officers, in turn, contended that the plaintiff's actions put them in an "untenable situation," in which they "would have surely faced a claim for inadequate care" if they did *not* act to stop plaintiff

[5] Defendant's citation to *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015), for the proposition that "force can be used on a pretrial detainee" is entirely misplaced in this context, *see* ROA.199 n.3. That case concerned what a plaintiff must prove on the merits for a § 1983 excessive force claim, not the timeliness of their filing.

"from harming himself," and that their actions *did* prevent such harm. *Id.* at 271, 274. By contrast, Mr. Brown has not alleged, nor have Defendants presented, any grounds justifying similar actions in this case. Thus, the record in this case also does not reflect the factual predicate underlying *Edwards*.

Vallery and *Edwards* are also manifestly inconsistent with the Louisiana Civil Code. The Code mandates that "[w]hen a law is clear and unambiguous … [it] shall be applied as written." La. Civ. Code Ann. art. 9. But *Vallery* and *Edwards* failed to follow that mandate when they ignored the plain text of article 3493.10 directing them to apply it to "acts defined as" crimes of violence, and instead applied the law as if it contained a requirement that a defendant have *committed* a crime of violence. 2012 WL 2877599, at *2 (referring to the "commission" of a crime of violence); 348 So. 3d at 274 (referring to the "commission" of a crime of violence and noting that "the record does not contain a criminal complaint made against [the defendant officer], nor does it contain a bill of information or indictment"). There is no such requirement in the statute. By using the language "acts defined as" and then citing to Louisiana criminal law, article 3493.10 borrows only the criminal law's *description of conduct* that constitutes a crime of violence; it does not require that there be an actionable criminal offense.

For example, if a police officer molested a juvenile, a recognized crime of violence in Louisiana, La. Stat. Ann. §§ 14:2(B)(29), 14:81.2(A), then article

3493.10 would apply—even if, for example, the State declined prosecution, or the police officer had an exculpatory insanity defense barring criminal conviction. Article 3493.10 would nonetheless apply because the alleged *conduct* matches the conduct described in the criminal code as constituting a crime of violence. There is no requirement in the plain text of article 3493.10 that a crime have been *committed* in order for that limitation to apply. And adding such a requirement by judicial fiat would impermissibly "rewrite [the] law[ ] to effect a purpose that is not otherwise expressed." *Luv N' Care, Ltd. V. Jackel Int'l Ltd.*, 2019-0749 (La. 1/29/20), 347 So. 3d 572, 579. It would also be entirely unworkable. If a court had to determine if a criminal offense was in fact *committed* in assessing whether article 3493.10 applies, a civil court would have to conduct a full-fledged trial just to determine which statute of limitation applies under the Civil Code. That is obviously not what the Louisiana legislature had in mind.

Vallery and *Edwards* also rest upon the erroneous presumption that the use of force by police officers beyond that authorized by law creates *tort* liability, not *criminal* liability. *See Vallery*, 2012 WL 2877599, at *2; *Edwards*, 348 So. 3d at 274. But, of course, conduct that leads to tort liability can also lead to criminal liability—even for law enforcement officers. In fact, Louisiana regularly prosecutes officers under the criminal law for crimes of violence such as aggravated and second-

degree battery.[6] Again, the relevant question for a court is simply whether the complaint *alleges* that the plaintiff was injured by conduct of the nature described in the criminal law's definition of a crime of violence. La. Civ. Code Ann. art. 3493.10.

Vallery and *Edwards* also blatantly ignore the interpretative principle "under Louisiana jurisprudence" that statutes of limitation must be "strictly construed" *against* finding an action time barred. *Bustamento v. Tucker*, 607 So. 2d 532, 537 (La. 1992). Where a court is faced with two possible constructions of a state statute of limitation, one which would maintain the action and another that would bar the action, it must adopt the construction that would maintain the action. *Id.* This principle has been "well settled" for nearly a century. *See United Carbon Co. v. Mississippi River Fuel Co.*, 89 So. 2d 209, 212 (La. 1956). As such, it has "become part of Louisiana's custom under Civil Code article 3 and [will] be enforced as the law of the state" as *jurisprudence constante*. *Bergeron v. Richardson*, 2020-01409 (La. 6/30/21), 320 So. 3d 1109, 1115. On that basis, *Vallery* and *Edwards* also flatly

[6] *See, e.g., OPSO Arrests MPD Officer for Battery, Malfeasance in Office*, Ouachita Citizen (Nov. 3, 2021), https://www.hannapub.com/ouachitacitizen/news/crime/opso-arrests-mpd-officer-for-battery-malfeasance-in-office/article_c2d70fc0-3cbb-11ec-b840-93aaa196b0bf.html (aggravated battery charge against office alleged to have used taser on arrestee); *Louisiana Police Officer Arrested on Brutality Charge*, AP News (July 26, 2020), https://apnews.com/article/arrests-la-state-wire-louisiana-police-brutality-monroe-2d48c896e8ca9e8bb7da76dcf60d975e (second-degree battery charge against officer alleged to have punched and kicked arrestee); Clint Durrett, *Sheriff: Washington Parish Jail Officer Arrested, Fired After Striking Handcuffed Inmate*, WDSU News (Feb. 26, 2015), https://www.wdsu.com/article/sheriff-washington-parish-jail-officer-arrested-fired-after-striking-handcuffed-inmate/3375894 (second-degree battery charge against officer alleged to have struck inmate in the head and face with his hand).

ignored article 3 of the Civil Code when they ignored contrary *jurisprudence constante* entirely.

3. This Court Must Disregard *Vallery* and *Edwards* and Instead Determine How the Louisiana Supreme Court Would Decide This Issue Based on the Civil Code.

Because the intermediate decisions of *Vallery* and *Edwards* conflict with the Louisiana Civil Code, this Court should not follow them. *See Riverbend Cap., LLC v. Essex Ins. Co.*, No. CIV.A. 09-3599, 2010 WL 3942907, at *3 (E.D. La. Oct. 5, 2010) ("[I]n the unusual situation where an intermediate appellate state court's decision deviates from the commands of the Civil Code, a federal court must conclude that it is not bound by that decision."). When interpreting matters of state law, federal courts "are bound to apply the law as interpreted by the state's highest court." *Prudhomme ex rel. Reed v. Russell*, 802 F. App'x 817, 821 (5th Cir. 2020) (quoting *FDIC v. Abraham*, 137 F.3d 264, 267–68 (5th Cir. 1998)). When a "state's highest court has not spoken on an issue," federal courts' "task is to determine as best [they] can how that court would rule if the issue were before it." *Id.* (quoting *FDIC*, 137 F.3d at 268). The Louisiana Supreme Court has yet to specifically address the applicability of article 3493.10 in these circumstances, and, as described above, existing appellate case law is both illogical and irrevocably in conflict with the mandates of both the Louisiana Supreme Court and the Civil Code. In such

circumstances, federal courts disregard the decisions of state intermediate appellate courts.[7]

The fact that *Vallery* and *Edwards* are plainly in conflict with the Civil Code has special relevance for this Court when considering how the Louisiana Supreme Court would decide this issue. This Court is "doubly" reluctant to rely on intermediate appellate state court decisions when dealing with the law of Louisiana because its "*primary* sources of law are its constitution, codes, and statutes," *FDIC*, 137 F.3d at 268 (emphasis added), and judicial decisions are not even "an authoritative source of law" in the State, *Bergeron v. Richardson*, 2020-01409 (La. 6/30/21), 320 So. 3d 1109, 1114. Since courts applying Louisiana law have a primary "obligation to the Code, the 'solemn expression of legislative will,'" *Shelp v. Nat'l Sur. Corp.*, 333 F.2d 431, 439 (5th Cir. 1964) (quoting La. Civ. Code of 1870 art. 1, codified today at La. Civ. Code Ann. art. 2), the "prior errors in judicial interpretation" committed in *Vallery* and *Edwards* do not "insulate" this Court from its obligation to "determine [the] correct meaning" of article 3493.10, *Willis*-

[7] *See, e.g., McGeshick v. Choucair*, 9 F.3d 1229, 1235 (7th Cir. 1993) (disregarding Wisconsin intermediate appellate decision because it was not "consistent with the established caselaw of the Supreme Court of Wisconsin"); *Eaves v. United States*, No. 4:07CV-118-M, 2010 WL 2106651, at *3 (W.D. Ky. May 24, 2010) (disregarding Kentucky intermediate appellate decision because the methodology it used was "contrary to the principle [previously] set forth by the Kentucky Supreme Court"); *Nationwide Mut. Ins. Co. v. Merdjanian*, No. Civ.A. 03-5153, 2005 WL 545299, at *6 (E.D. Pa. Mar. 4, 2005) (disregarding Pennsylvania intermediate appellate decision because "the approach to statutory interpretation . . . recently taken by the Pennsylvania Supreme Court . . . indicates that the Supreme Court's reading of the relevant provisions [of the statute] would not support" that decision), *aff'd* 195 F. App'x 78 (3d Cir. 2006).

Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm'n, 2004-0473 (La. 4/1/05), 903 So. 2d 1071, 1087 n.16, *adhered to on reh'g* (June 22, 2005).[8] And the unambiguously clear and correct meaning of article 3493.10 is that it applies to Defendants' violent acts against Mr. Brown. Thus, the Louisiana Civil Code gives Mr. Brown two years from the day he was attacked to file a state-law claim that is analogous to his § 1983 claim.

* * *

Applying the one-year personal injury limitation would bar Mr. Brown from the federal forum that § 1983 was meant to provide, even though Louisiana's Civil Code would make his analogous state-law claim, predicated on the very same facts, timely in state court. As explained above in part I.A, that result is inconsistent with—indeed, antithetical to—the federal policy of providing a neutral, federal forum in lieu of state court for civil rights claims. Application of the one-year limitation discriminates against the federal forum, making it *less* accessible than the state court alternative.[9]

[8] *Vallery* and *Edwards* are not themselves enforceable customary law under article 3 of the Civil Code because they do not make for *jurisprudence constante*. *See Jorge-Chavelas v. La. Farm Bureau Cas. Ins. Co.*, 917 F.3d 847, 853 (5th Cir. 2019) (three cases insufficient); *Leonards v. Summit Claims*, 2012-255 (La. App. 3 Cir. 10/3/12), 101 So. 3d 144, 147 (Thibodeaux, C.J., concurring) (two cases insufficient), *writ denied*, 2012-2687 (La. 2/8/13), 108 So. 3d 89.

[9] This is just one way Louisiana's one-year limitation is inconsistent with § 1983. The Supreme Court has also recognized a state-law limitation may be inconsistent "if it fails to take into account practicalities that are involved in litigating federal civil rights claims," or if it reflects a "legislative choice" on the part of the forum state to limit remedies to victims of federal civil rights deprivations. *Burnett*, 468 U.S. at 50, 54–55. Mr. Brown's principal brief explains how Louisiana's

C. Evaluating Whether a Borrowed Limitation Period is Inconsistent with § 1983 Is Consistent with Precedent.

It is perfectly consistent with binding precedent for this Court to assess whether applying the one-year statute of limitation in this case would be inconsistent with § 1983. Defendants argue that this argument is foreclosed by the Supreme Court's decisions in *Wilson* and *Owens.* ROA.194–95. But neither of those cases addressed the situation presented here: where the otherwise applicable general or residual personal injury statute of limitation is *shorter than* the analogous state-law limitation. The *Wilson* court applied the same three-year limitation period to the plaintiff's § 1983 claims that the Tenth Circuit below had found to apply to plaintiff's analogous state-law claim; and the *Owens* court applied a residual personal injury statute of limitation that was *longer* than the statute of limitation applicable to the state-law analogue. Indeed, in neither case did the Court explore whether the state-law limitation being applied was "inconsistent" with federal policy underlying § 1983. In *Owens*, the Court expressly noted that it was not reaching the question. *See* 488 U.S. at 251 n.13.[10]

---

one-year residual personal injury limitation may be inconsistent for these reasons, too. *See* App.'s Br. 12–28.

[10] Defendants mistakenly invoke the Supreme Court's century-old decision in *O'Sullivan v. Felix*, 233 U.S. 318 (1914), where the Court applied Louisiana's one-year limitation period to a § 1983 claim. ROA.205–07. The Louisiana legislature only enacted article 3493.10, the longer two-year statute of limitation for crimes of violence, in 1999. *See* 1999 La. Sess. Law Serv. Act 832 (S.B. 156) (West). Thus, *O'Sullivan* is irrelevant.

No court has ever addressed the argument presented here. Defendants may point to instances where this Court has applied Louisiana's one-year residual personal injury limitation to § 1983 actions without considering whether an analogous state-law claim would be subject to a longer limitation period. But in none of those cases did the Court consider whether the application of the one-year limitation was inconsistent with the federal policy underlying § 1983 because it was shorter than the state-law analogue.[11] Ultimately, no court may "favor contemporaneous or later practices *instead of* the laws Congress passed," *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020),[12] and § 1988 requires courts *not* to borrow a state-law statute of limitation when doing so would be inconsistent with policy underlying § 1983.

* * *

[11] In *King-White v. Humble Independent School District*, 803 F.3d 754, 758–59 (5th Cir. 2015), this Court held that plaintiffs' § 1983 claim alleging sexual assault was subject to Texas's two-year residual personal injury limitation rather than the state's five-year limitation for sexual assault. Plaintiffs only argued that the state's five-year limitation should apply notwithstanding *Owens* because the residual statute of limitation included a specific reference to it. Since plaintiffs did not argue that applying the two-year limitation would be inconsistent with federal policy underlying § 1983, the Court did not consider that distinct issue.

[12] Defendants wrongly contend that courts may ignore the actual meaning of legislation because "Congress can change federal law." ROA.207. That is contrary to what the Supreme Court has instructed. *See McGirt*, 140 S. Ct. at 2468. Moreover, as explained in this section, *Owens* expressly reserved the inconsistency question for a later day, and no court has decided it since; thus, there is no errant interpretation of federal law for Congress to correct. This Court should not supply it with one needlessly; § 1988 already provides the answer.

Section 1983 was designed to provide a federal-court backstop for enforcing claims predicated on deprivations of federal civil rights by state actors. To close the federal forum to such claimants when the state forum is still open to them turns the federal statute inside out. Recognizing that the Civil Code provides Mr. Brown with a two-year window in which to file his analogous state-law claim, this Court should hold that applying the one-year limitation period, as Defendants argue, is inconsistent with § 1988, and refuse to apply it.

II. Because the Designated State-Law Limitation Is Inconsistent with § 1983, This Court Should Apply the Four-Year Residual Limitation for Federal Statutes Provided by 28 U.S.C. § 1658.

When applying the residual state-law limitation would be inconsistent with § 1983—as applying Louisiana's one-year limitation would be here—courts should look to federal law for the timeliness rule to be applied. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 162 (1983) (explaining that, when "state statutes of limitations [are] unsatisfactory vehicles for the enforcement of federal law," the Court has "instead used timeliness rules drawn from federal law—either express limitations periods from related federal statutes, or such alternatives as laches").

Following that principle here, this Court should apply the residual "catchall 4–year statute of limitation for actions arising under federal statutes enacted after December 1, 1990," codified at 28 U.S.C. § 1658, to Mr. Brown's § 1983 claim. *Jones*, 541 U.S. at 371. "[W]hen the state limitations periods with any claim of

relevance would '"frustrate or interfere with the implementation of national policies,"' or be 'at odds with the purpose or operation of federal substantive law,'" the Supreme Court has "looked for a period that might be provided by analogous federal law, more in harmony with the objectives of the immediate cause of action." *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (citations omitted) (quoting *DelCostello*, 462 U.S. at 161). Specifically, it has directed courts in this situation to apply "related" federal statutes of limitations, especially when they are "actually designed to accommodate a balance of interests very similar to th[ose] at stake." *DelCostello*, 462 U.S. at 162, 169.

Although § 1658 does not apply directly by its own terms to § 1983 actions, it is designed to balance the very same interests that are at stake in setting a timeliness rule for such actions.[13] Congress's interest when enacting § 1658 was to "alleviat[e] the uncertainty inherent in the practice of borrowing state statutes of limitations while at the same time protecting settled interests." *Jones*, 541 U.S. at 382. Congress made § 1658 prospective rather than retroactive so as to not obviate "the difficult work [that] already has been done" in borrowing state-law limitation periods. *Id.* But where, as here, the borrowed state-law limitation is inconsistent with

[13] Defendants argue that § 1658 "does not apply" to § 1983 claims. ROA.211–12. Yet again, Defendants are off base: the question is not whether § 1658 supersedes § 1988 as the directly-applicable statute for determining limitation periods for § 1983 claims, but whether it provides the best point of reference in federal law where § 1988 bars a court from borrowing a state's residual personal injury limitation.

§ 1983, that rationale is immaterial. The four-year catchall statute of limitation for federal statues reflects the very same balance of interests—including § 1983's "chief goals of compensation and deterrence" and its "subsidiary goals of uniformity and federalism," *Hardin v. Straub*, 490 U.S. 536, 539 (1989)—that are at stake when courts must determine a timeliness rule for § 1983 actions.[14]

Moreover, applying the four-year limitation period in § 1658 where the designated state-law limitation is inconsistent with § 1983 would further the uniformity and predictability interests that drove the Court's decisions in *Wilson* and *Owens*. *See Wilson*, 471 U.S. at 270 (discussing "federal interest in uniformity"); *Owens*, 488 U.S. at 243, 248 (discussing predictability concerns). If § 1658 fills the gap where applying the state-law limitation would be inconsistent, there would be only two possible statutes of limitation for any § 1983 claim: the general or residual state-law personal injury limitation period designated by *Wilson* and *Owens*, and the

[14] Defendants argue that applying Louisiana's one-year statute of limitation would be "consistent" with § 1983 because § 1986 specifies a one-year limitation for actions under it. ROA.201, 204. But § 1986, pertaining to *indirect* liability for *failure to prevent* a violation of a person's civil rights, was designed to accommodate a specific balance of interests not at all germane to § 1983, which covers *direct* liability for *causing* deprivations of civil rights. That Congress legislated a specific statute of limitation for § 1986 claims, while leaving other federal civil rights claims subject to § 1988, shows that it did *not* consider § 1986 claims to encompass a similar balance of interests as, for example, § 1983. *Cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices.").

four-year federal limitation period in § 1658. Two possible and easily-identifiable limitations is hardly, as Defendants contend, "chaos." ROA.212.[15]

In short, when the state-law residual statute of limitation is shorter than the limitation that would apply to an analogous state-law claim, courts should apply the catchall four-year statute of limitation in § 1658 because it is a "closely related" federal statute that reflects the same balance of interests at stake in setting a timeliness requirement for the filing of § 1983 actions, and because doing so promotes uniformity and predictability.

CONCLUSION

For the reasons above, this Court should hold that applying Louisiana's one-year limitation to Mr. Brown's § 1983 claim would be inconsistent with § 1983's primary purpose, and that his claim is timely under the applicable four-year limitation in § 1658.

Respectfully submitted,

Dated: February 2, 2023

/s/ *Matthew C. Clifford*

MATTHEW C. CLIFFORD
ELLEN NOBLE
PUBLIC JUSTICE
1620 L Street, NW, Suite 630
Washington, DC 20036

[15] And, to the extent that § 1988 might call for a court to apply both limitation periods to a single plaintiff's various § 1983 claims, *see* ROA.215–16, that is what Congress directed in § 1988. This Court "must give effect to Congress' choice." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 n.3 (2009).

(202) 797-8600
mclifford@publicjustice.net

Counsel for Amicus Public Justice

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), Fed. R. App. P. 29(a)(5), and Fifth Circuit Rule 29.3 because this brief contains 6,172 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 2, 2023

/s/ *Matthew C. Clifford*

MATTHEW C. CLIFFORD
PUBLIC JUSTICE
1620 L Street, NW, Suite 630
Washington, DC 20036
(202) 797-8600
mclifford@publicjustice.net

Counsel for Amicus Public Justice