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
NO. 21-3415

BRIEF FOR *AMICUS CURIAE* ORLEANS PUBLIC DEFENDERS IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that–in addition to the persons and entities listed in the Appellant's Certificate of Interested Persons–the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTERESTS OF *AMICUS CURIAE*[1]

Orleans Public Defenders ("OPD") is a not-for-profit organization created in the wake of the criminal justice system failure following Hurricane Katrina. OPD serves thousands of individuals unable to afford an attorney, approximately 85-90% of those accused of crimes in Orleans Parish. Because Louisiana's one-year prescriptive period for § 1983 claims does not adequately protect the individuals and clients that OPD serves, OPD submits this *amicus* brief in support of Plaintiff-Appellant.

INTRODUCTION

Section 1983 was borne out of "the alarming insecurity of life, liberty, and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents." *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). 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). The importance of protecting these rights by ensuring victims of civil rights violations have access to

[1] *Amicus* states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than *Amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

a neutral, federal forum remains paramount today. This is particularly true for victims of police misconduct who would otherwise be forced to seek redress from the very states whose actors have not only failed to protect them, but actively harmed them.

Louisiana is one of the few states in the country that imposes a one-year prescriptive period on police misconduct claims under 42 U.S.C. § 1983. Because of practical impediments and fear of retaliation in bringing a civil-rights claim within this restrictive one-year period (impediments that are amplified for individuals such as OPD's clients who simultaneously face criminal charges), victims of police misconduct in Louisiana are prevented from vindicating their federal civil rights in a neutral, federal forum—the precise result § 1983 was designed to prevent. As a consequence, police misconduct persists unfettered, and the most vulnerable populations in the state are deprived of their civil rights. That result defies federal policy and the very purpose of § 1983: to deter civil rights violations and hold state actors accountable.

ARGUMENT

I. Practical Impediments to Meeting the One-Year Prescriptive Period

A. Criminal Case Burdens Impede Ability to Bring Civil Suit

Individuals often experience police brutality or misconduct following a police traffic stop (as in Mr. Brown's case)[2], *Terry* stop or arrest for separate alleged criminal conduct.[3] These individuals, including many of OPD's clients, must contemplate any civil lawsuit while simultaneously confronting their own criminal charges. Managing the collateral consequences of facing criminal charges significantly amplifies the challenges they face in bringing a civil lawsuit within the one-year prescriptive period.

As a preliminary matter, dealing with criminal charges – challenging for any individual – is particularly burdensome for OPD's indigent clients, who often lack access to reliable transportation, stable housing, financial support, and educational resources. An arrest or charge may result in loss of employment, housing, parental

[2] *See* ROA.12.

[3] OPD clients may also face the possibility of "cover charges," or charges imposed on individuals to hide police misconduct. *See* Richard Webster, *He Was Filming on His Phone. Then a Deputy Attacked Him and Charged Him With Resisting Arrest.*, ProPublica (Dec. 22, 2021), https://www.propublica.org/article/he-was-filming-on-his-phone-then-a-deputy-attacked-him-and-charged-him-with-resisting-arrest ("Deputies can use ['cover charges'] — typically resisting arrest, battery of an officer and flight from an officer — to arrest people they have assaulted, experts say. The charges, which are sometimes used in combination with other offenses, allow officers to cover up their use of excessive force and help shield the department from civil liability, according to civil-rights attorneys."); Jonah Newman, *Chicago police use 'cover charges' to justify excessive force*, Chicago Reporter (Oct. 23, 2018), https://www.chicagoreporter.com/chicago-police-use-cover-charges-to-justify-excessive-force/.

rights, extensive monetary obligations, and other collateral consequences. OPD's clients may not be able to afford bond, and even if they can, they often face arduous conditions to remain on bond, including curfew, monitoring, and court-mandated substance abuse programs. For instance, an OPD client was arrested in November 2021, but the case was not accepted until April 2022. In July 2022, the judge ordered that the client had to wear an ankle monitor as a condition of release in addition to a curfew on weekdays and a prohibition on leaving home on the weekends. Another OPD client was arrested in June 2022, and the judge released that client on house arrest with an ankle monitor for the first month, also requiring the client to participate in a substance use disorder treatment program. These types of bond conditions, in addition to the cost of the bond itself, create a significant burden on individuals seeking to pursue timely civil-rights claims.

Even if a sentence is suspended after sentencing, probation conditions remain formidable long after the incident giving rise to the criminal charge. Such conditions can include paying supervision fees; reporting to a probation officer; staying in the relevant jurisdiction unless travel is approved; performing community service; paying restitution; undergoing medical, psychiatric, mental health, or substance abuse evaluations and treatment; agreeing to searches; paying for drug tests; taking adult education classes; completing sex offender treatment

programs; completing domestic violence counseling or therapy; and other conditions determined by the court. *See* La. Code Crim. Proc. art. 895. And, for individuals able to participate in diversion programs[4]—where prosecution is deferred and the case dismissed provided the accused complies with certain conditions—those conditions can be at least as onerous as regular probation. Such conditions may include the following: drug testing at $15-$100 per test; online education courses up to $135; Mothers Against Drunk Driving Victim Impact Panel Course at $50; DUI Driver Improvement Course at $100-$125; counseling at $25 or more per session; substance abuse treatment; domestic or anger management courses at $25-$35 per session for either 26 or 13 sessions; ignition interlock breathalyzer device at $75-$150 for installation, $20-$155 per month for recalibration, and $55-$150 for removal; and mobile breathalyzer device at $75 for enrollment, $96-$210 for calibration, and $55-$150 for restocking. Prosecutors also sometimes offer that the individual charged pay restitution in exchange for dismissal or a reduction in charges. This creates an additional financial burden for an individual who chooses to accept the offer rather than face the possibility of conviction or more serious charges.

[4] The length of the diversion program depends on the charges and, in many cases, does not begin until after the Article 701 screening period. For example, the DUI diversion track generally takes three months; the domestic track is generally three to nine months; the drug track is generally six months; and the theft track is generally three months.

OPD's clients may not know for months whether they will face criminal charges,[5] and trying to defend a criminal case while simultaneously bringing a civil lawsuit challenging police brutality would tax even well-resourced and educated individuals. Often, OPD's clients are using all their efforts just to survive. The mental toll of police brutality and incarceration, combined with demanding bond, probation, and other court conditions and costs, presents serious obstacles to their ability to pursue a civil-rights claim within one year.

B. Insufficient Time to Find an Attorney, Typically Pro Bono, in This Specialized Area of Law

In addition to the challenges specific to individuals facing criminal charges, core among the practical impediments for any victim of police misconduct is finding an attorney able and willing to navigate these civil-rights claims, which are complex and require considerable preparation. *See Burnett v. Grattan*, 468 U.S. 42, 50–52 (1984) ("A state law is not 'appropriate' if it fails to take into account practicalities that are involved in litigating federal civil rights claims . . .."). Crucially, Louisiana's one-year prescriptive period fails to provide potential plaintiffs with enough time to find attorneys to take their civil-rights cases.

[5] *See infra* note 11.

An individual has no right to appointment of an attorney in a civil-rights case,[6] and proceeding *pro se* against a police officer severely diminishes his or her chances of success.[7] This dilemma is further exacerbated by Louisianans' resource scarcity. According to the United States Census Bureau, Louisiana remains one of the poorest states in the nation: 19.6 percent of Louisianans live in poverty and the median household income is $53,571.[8] Considering these factors, many Louisianans are unable to afford to hire an attorney for a civil-rights case, and, since most Louisianans facing criminal charges are indigent,[9] those most likely to experience police misconduct will be unable to afford counsel. As a result, finding

[6] While *Gideon v. Wainwright*, 372 U.S. 335 (1963) established a right to appointment of counsel for indigent people charged with crimes, no such right has been established for plaintiffs in civil-rights cases. 28 U.S.C § 1915 allows a court to appoint counsel in a civil-rights action for those who cannot afford to hire an attorney, but it is discretionary. *Ulmer v. Chancellor*, 691 F.2d 209, 211-12 (5th Cir. 1982); *Branch v. Cole*, 686 F.2d 264, 266-67 (5th Cir. 1982) (holding a civil-rights complainant has no right to automatic appointment of counsel).

[7] *See Pro Se in Louisiana: Working to Make a Difference in the Lives of Self-Represented Litigants*, 60 La. Bar J. 216, 216 (Oct./Nov. 2012) http://files.lsba.org/documents/publications/BarJournal/Journal-Feature4-Oct-Nov2012.pdf ("Without training in the law and procedure, a self-represented litigant (SRL) may be at a severe disadvantage and risk losing his/her legal rights.").

[8] *QuickFacts Louisiana*, Unites States Census Bureau, https://www.census.gov/quickfacts/fact/table/LA/IPE120220#IPE120220 (last visited Feb. 2, 2023) (Poverty rate data is derived from the 2017-2021 Small Area Income and Poverty Estimates); *Census: Louisiana remains 1 of nation's poorest states*, AP (Sept. 27, 2019), https://apnews.com/article/1068e41cc2374eb9a3457b807de011f0.

[9] *See* Orleans Public Defenders, https://www.opdla.org/ (last visited Feb. 1, 2023) ("85% of people going through the criminal justice system will need a public defender."); Debbie Elliott, *Public Defenders Hard To Come By In Louisiana*, NPR (Mar. 10, 2017), https://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana ("[Public defenders] handle more than 80 percent of criminal cases in Louisiana.").

a civil-rights attorney is particularly challenging for many indigent victims of police misconduct given that they must be able to find a not only an attorney who is able to litigate civil rights claims, but one willing to do the work *pro bono* well before the one-year prescriptive period expires.

Even when an OPD attorney is able to refer an individual to a civil-rights attorney, the referral may not be timely. For instance, some individuals may not hire a criminal defense attorney until their arraignment—an event sometimes occurring after the one-year prescriptive period for § 1983 lawsuits expires. For those who qualify for a public defender, that public defender may be conditionally appointed only while the individual is incarcerated, meaning the public defender is unavailable to represent an individual for the period between his or her pretrial release from custody and arraignment. Indeed, while OPD represents all eligible, unrepresented individuals at their initial appearance and bond setting, in most instances that representation terminates upon a pretrial release from custody and until possible reappointment at a later arraignment date.[10] Without the ability to

[10] OPD-appointed clients may go many months with gaps in representation. For example, the court minutes for an OPD client arrested on May 20, 2020 read: "The appointment will last as long as the defendant is incarcerated. If the defendant is released they must obtain private counsel or apply for representation at the OPD office." The client posted bond on May 22, 2022 and OPD was not appointed again until arraignment on July 27, 2022. The court minutes for another client arrested on April 7, 2021 read: "[T]his appointment will last as long as the defendant is incarcerated—if the defendant makes bond and is released they must obtain private counsel or apply for representation at the public defenders office." The client posted bond on April 9, 2021 and was unrepresented until OPD was re-appointed on May 22, 2022. The court

timely find representation, victims of police misconduct are left without crucial resources to pursue their claims.

II. The One-Year Prescriptive Period Increases the Potential That Victims of Police Misconduct Face Retaliation for Bringing § 1983 Claims

In addition to the practical challenges in bringing a civil-rights claim for police misconduct, criminal charges – or the threat of criminal charges – serve as an effective deterrent to § 1983 claims because an individual facing such charges or threat is generally not inclined to risk retaliation from the authorities in whose hands their fate lies. Specifically, if a civil-rights claim is filed against the law-enforcement agency and an officer of that agency is the complainant in a concurrent criminal matter, the relevant law-enforcement officer may either be reluctant to support a prosecutor's dismissal of the charge or, alternatively, will more forcefully pursue the charge than had the plaintiff not filed the civil suit – knowing that agreeing to dismiss the criminal charges or plead them down could negatively impact an officer's defense to the § 1983 case. Accordingly, individuals whose liberty is at stake, such as OPD's clients, are often afraid to bring civil charges while criminal charges may still be brought or such charges are pending.

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minutes for a third client arrested on January 17, 2021 read: "[T]his appointment will last as long as the defendant is incarcerated—if the defendant makes bond and is released they must obtain private counsel or apply for representation at the public defender's office." The client posted bond on January 19, 2021 and was unrepresented until June 1, 2022.

Prosecutors possess immense power and discretion in the criminal legal system, including in charging decisions, plea-bargaining, and sentencing recommendations. Individuals facing criminal prosecution or who have had contact with the police have credible concerns that pursuit of a civil-rights claim will result in more aggressive prosecutorial action against them, and the threat of criminal charges can remain a deterrent for a long period of time. For instance, prosecutors in Louisiana may wait up to six years to decide whether to proceed with many criminal felony cases, meaning that the victim of a civil-rights violation often faces the risk of criminal charges long after the one-year prescriptive period for his or her § 1983 action has expired.[11] Moreover, prosecutors may wait as long as 150 days after an arrest before filing an indictment or information without consequences for the case.[12] Individuals can be arrested, released, and then wait years without prosecutors refusing the charges.[13] OPD clients thus routinely face a

[11] In Louisiana, prosecution can be instituted within the following time frames: "(1) Six years, for a felony necessarily punishable by imprisonment at hard labor. (2) Four years, for a felony not necessarily punishable by imprisonment at hard labor. (3) Two years, for a misdemeanor punishable by a fine, or imprisonment, or both. (4) Six months, for a misdemeanor punishable only by a fine or forfeiture." La. Code Crim. Proc. art. 572. Exceptions to the above prescriptive periods include prosecutions for certain sex offenses and offenses that carry the death penalty or life imprisonment. La. Code Crim. Proc. art. 571.

[12] La. Code Crim. Proc. art. 701(B). The only potential consequence for "failure to institute prosecution" is "release of the bail obligation." La. Code Crim. Proc. art. 701(B)(2)(b).

[13] For example, an OPD client arrested on February 14, 2020 still does not know whether they will be charged as of the date of this brief – nearly three years after they were arrested. And, a number of other OPD clients have waited a year or more to learn whether the prosecutor would pursue their case. For example, one client arrested on February 16, 2021 did not learn of their

Hobson's choice: file a § 1983 claim and risk exacerbating his or her criminal exposure, or let the one-year prescriptive period expire and the § 1983 claim die.[14]

Once the State has filed a bill of information or indictment against a person, the State retains its power to discourage civil litigation, either purposefully or inadvertently.[15] The State's behavior often creates a chilling effect for an aggrieved individual who contemplates bringing civil litigation while his criminal case is pending. Even in cases where an individual is fortunate enough to have the ability to secure counsel early, attorneys may either neglect to advise a client about the prescriptive period at all or advise the client not to file a § 1983 claim for concern

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case's refusal until October 13, 2022; another OPD client was arrested on February 16, 2021, but the District Attorney's Office did not refuse the charges until August 18, 2022. At least four OPD clients arrested in the spring of 2021 did not have their cases refused until the summer of 2022. Moreover, prosecutors can dismiss cases without prejudice. La. Code Crim. Proc. art. 691. Barring certain limited exceptions, such a dismissal "is not a bar to a subsequent prosecution." La. Code Crim. Proc. art. 693.

[14] Even in cases where an arrest does not take place, individuals contemplating a § 1983 lawsuit must confront the concern that such a step would invite retaliation from law enforcement. Incarcerated people who may be housed in facilities run by the officers who have violated their rights are even more vulnerable to this type of pressure. *See, e.g.,* ROA.10 (alleging Mr. Brown waited to bring a civil-rights case until he was transferred to a facility where the officers who assaulted him did not work). Law-enforcement officials have many tools at their disposal to intimidate and impede individuals from alleging civil rights violations. *See* Plaintiff's Memorandum for Motion for Partial Summary Judgment, ECF 93-1, *Lou v. Lopinto*, No. 2:21-cv-00080-WBV-DPC (E.D. La. Aug. 10, 2022), at 1 (arguing that following E.P.'s death after being held down and sat on by JPSO deputies, JPSO used meritless and unconstitutional criminal search warrants to obtain "E.P.'s school grades, pediatric medical records, and the medical records of E.P.'s father").

[15] *See, e.g.,* Compl. and Jury Demand, ECF 29, *Celestine v. Bissell*, No. 2:21-cv-00067-JTM-DPC at 3, 12 (E.D. La. Aug. 25, 2022) (alleging multiple civil rights violations after Mr. Celestine was tased subsequent to an unconstitutional investigative stop and seizure; Mr. Celestine was incarcerated for over a year after his arrest until the charges against him were eventually dismissed).

it might negatively impact the client's criminal case. *See, e.g.*, *Garig v. Travis*, 20-654-JWD-RLB, 2021 WL 2708910, at *5 (M.D. La. June 30, 2021) (Plaintiff was advised by her attorney that if she raised the § 1983 issues surrounding her arrest, the prosecutor could invalidate the pretrial intervention program and reinstitute her felony charges).

In OPD's experience, it has seen the State pressure individuals facing criminal charges to forgo litigation of issues such as unconstitutional stops and searches, and to enter into plea agreements. The State uses a variety of tactics such as: (1) threatening to make worse or no subsequent offers when the first offer is not accepted, when a counteroffer is made, or when the person charged chooses to litigate their case; (2) threatening to file a multiple bill of information, charging the person as a habitual offender if they do not accept a plea offer or if (s)he litigates suppression of evidence; (3) threatening other forms of sentencing enhancements; (4) offering probation in the case of a plea agreement, while threatening to oppose probation if the person charged loses at trial; or (5) threatening to revive old charges previously refused for prosecution, increasing a charge to a higher level offense, or adding new charges, in the event the person charged chooses to pursue a suppression issue or go to trial. These threats frequently happen sometime between the State's acceptance of the case for prosecution and a substantive

hearing, such as a suppression hearing. To avoid a harsher outcome if the State follows through with its threats, many choose to put the stress and trauma of the situation behind them rather than file a § 1983 claim while criminal charges are pending.

For victims of police brutality in Louisiana, these fears are a reality. As recently as 2020 in the case of Aaron Bowman in Monroe, Louisiana, a prosecutor refused to dismiss charges of resisting arrest due to Mr. Bowman's decision to bring a civil suit.[16] Mr. Bowman bravely filed his civil suit prior to the officer being charged with beating him and while his own criminal charges were still pending,[17] and he was punished for it: the district attorney in that case, Robert Tew, told Mr. Bowman's counsel, "I will be frank with you, I am not going to gut the officers' defense in their civil case by dismissing Aaron Bowman's criminal charge [] . . . [but if] they dismiss the civil case, I would look at Bowman's charges

[16] An officer beat Mr. Bowman with a flashlight in May 2019, and Mr. Bowman was charged with improper lane usage, aggravated flight from an officer, resisting an officer, and battery of a police officer. James Finn, *Charges dropped against black man in incident where Louisiana trooper beat him with flashlight*, The Advocate (July 17, 2022), https://www.theadvocate.com/baton_rouge/news/article_c7f57682-0dfc-11ed-8282-43732ddf7dc4.html.

[17] Mr. Bowman originally filed suit in state court on September 21, 2020, after the one-year prescriptive period. *See* Notice of Removal, ECF 1, *Bowman v. Ouachita Par. Sheriff's Off.*, No. 3:20-cv-01372, 2021 WL 900670 (W.D. La. Feb. 22, 2021).

then."[18] Unfortunately, by limiting the time to file to one year, Louisiana restricts federal relief to only those with the fortitude to resist such prosecutorial pressures.

III. The One-Year Prescriptive Period Is Untenable Under Doctrines of *Heck*, *Wallace*, and *McDonough*

The pursuit of civil-rights claims by victims of police misconduct is all the more complicated for OPD clients who have been charged with a crime, since they must navigate the oft-unpredictable *Heck*, *Wallace*, and *McDonough* doctrines to determine when their § 1983 claim has accrued.[19]

In *Heck*, the Supreme Court held that if a § 1983 suit "would necessarily imply the invalidity of [a] conviction or sentence," such a claim does not accrue "unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). Thus, if a court determines the § 1983 action would call into question the validity of a conviction which has not yet been overturned, the § 1983 claim does not accrue, and the court must *dismiss*—not stay—the action. *Edwards v. Balisok*, 520 U.S. 641, 649 (1997) ("A claim either is cognizable under § 1983 and should immediately go forward, or

[18] James Finn, *Charges dropped against black man in incident where Louisiana trooper beat him with flashlight*, The Advocate (July 17, 2022), https://www.theadvocate.com/baton_rouge/news/article_c7f57682-0dfc-11ed-8282-43732ddf7dc4.html.

[19] *See, e.g.*, Joint Stipulation to Dismiss, ECF 33, *Paul v. Walsdorf*, No. 2:21-cv-02144-ILRL-KWR (E.D. La. Oct. 27, 2022), at 2 (explaining that the plaintiff stipulated to the dismissal with prejudice of her civil-rights claim following her guilty plea in her criminal case due to *Heck* ambiguity).

is not cognizable and should be dismissed."). Conversely, if the "district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed." *Heck*, 512 U.S. at 487 (emphasis in original). Under this accrual rule, a person charged with a crime must determine if a successful § 1983 claim would undermine a conviction. This creates "inevitable uncertainty" for individuals charged with a crime who do not know whether the court will view the action as implicating the validity of a conviction or not:

> If a plaintiff files suit before the conviction is overturned, it could turn out that the § 1983 action has not yet accrued and will be dismissed under *Heck*. On the other hand, if a plaintiff waits until the conviction is overturned before filing a § 1983 damages action, it could turn out that § 1983 action accrued earlier and the claim would be time-barred.

3 Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983 § 9:59.

Further complicating the matter, in *Wallace* the Supreme Court held that *Heck* does not apply to pending criminal cases. *Wallace v. Kato*, 549 U.S. 384, 393 (2007) ("[T]he *Heck* rule for deferred accrual is called into play only when there exists 'a conviction or sentence that has not been ... invalidated,' that is to say, an 'outstanding criminal judgment.'"). Thus, when an individual's § 1983 claim arises from an instance of police brutality at the time of arrest, that individual may be in

the difficult position of having their § 1983 action "accrue before the setting aside of—indeed, even before the existence of—the related criminal conviction." *Id*. at 394. Such a rule forces OPD's clients to simultaneously pursue their § 1983 claims while also defending themselves against criminal actions arising from the same arrest.

If OPD's clients are ultimately convicted while the § 1983 claim involving police brutality is ongoing (or has been stayed), the *Heck* doctrine will revive and require dismissal of the § 1983 action, since the § 1983 claim would "impugn" the conviction. *Id*. As a result, any OPD client charged with a crime may face parallel criminal and civil litigation, only to have the civil suit dismissed under *Heck* with unclear consequences on the prescriptive period for re-filing the § 1983 suit. Though the Court acknowledged "[i]f under those circumstances [the § 1983 claimant] were not allowed to refile his suit, *Heck* would produce immunity from § 1983 liability, a result surely not intended," the Court declined to address how much time there would be to refile suit once the claim accrued anew. *Id*. at 395, n.4. This is not only a waste of judicial resources, but it also actively discourages OPD's clients from bringing § 1983 actions, as discussed *supra*, since pursuing a claim of police brutality before ultimate resolution of their criminal matter can severely prejudice their ability to successfully resolve the criminal case.

Recognizing that determining the accrual date of a § 1983 claim under *Heck* is not simple, the *McDonough* Court expanded the *Heck* doctrine to pending criminal prosecutions when the § 1983 "claims challenge the validity of the criminal proceedings [] in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction." *McDonough v. Smith*, 139 S. Ct. 2149, 2155, 2157-58 (2019). Thus, if the § 1983 claim challenges "the validity of the criminal proceedings" (or in other words, "directly challenges—and thus necessarily threatens to impugn—the prosecution itself"), the claim does not accrue until resolution of that criminal proceeding in the person's favor. *Id*. at 2157–59. The Court emphasized that this rule would (i) address the same pragmatic concerns in *Heck* related to "avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments," and (ii) avoid "practical problems in jurisdictions where prosecutions regularly last nearly as long as—or even longer than—the relevant civil limitations period," which would force a "significant number of criminal defendants [to] face an ***untenable choice*** between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them." *Id*. (emphasis added).

The combined impact of *Heck*, *Wallace*, and *McDonough* require a § 1983 plaintiff to determine whether their claim calls into question the validity of a conviction or criminal proceeding or not. Nahmod, *supra*, § 9:59. If it does, they can delay filing their claim; if it does not, they must file within the one-year period or be barred. If they are wrong, they risk either dismissal of the suit because a claim has not yet accrued or filing outside an expired prescriptive period because the claim has accrued.

Although these challenges face any § 1983 claimant, the one-year prescriptive period in Louisiana magnifies the challenges. First, § 1983 claimants are required to make these complex determinations swiftly to meet the one-year prescriptive period. Second, § 1983 claimants frequently must institute lawsuits while the underlying criminal case is pending to avoid forfeiting their claim entirely, given the risk that the case may not resolve within the one-year period. *See supra* note 13.

By compelling those charged with a crime to bring suit early, the short prescriptive period implicates the very concerns that *McDonough* sought to avoid: a defendant "tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context" against the officials seeking to convict him. *McDonough*, 139 S.

Ct. at 2158. Although the *Wallace* Court declined to extend *Heck* to all pending criminal cases despite the possibility that claims would "sometimes" accrue before resolution of the criminal action, the one-year prescriptive period all but guarantees that *every* § 1983 litigant charged with a crime pursue civil litigation during their prosecution, or else risk a court barring the claim based on the expired prescriptive period. *Wallace*, 549 U.S. at 394. And, while a district court *may* "stay the civil action until the criminal case or the likelihood of a criminal case is ended," *Wallace*, 549 U.S. at 393–94, nothing in the law requires that a court stay civil proceedings until the termination of the parallel criminal proceeding. That the shortened prescriptive period guarantees parallel litigation will only add to the burden of district courts considering such stays on an ad-hoc basis, all "at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases." *McDonough*, 139 S. Ct. at 2158. This is one of the very outcomes *McDonough* counseled against.

CONCLUSION

Amicus seeks dignity and redress for Louisianans by permitting them the same access to the federal court system for § 1983 claims as their counterparts in 47 other states—in accord with the very purpose § 1983 was designed to achieve. For the foregoing reasons, *Amicus* urges the Court to permit Mr. Brown's claim to proceed.

Dated: February 2, 2023

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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