IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0412

NATHAN SCOTT STEPP, *individually as a member of the West Virginia State Police;* **ZACH W. HARTLEY,** *individually as a member of the West Virginia State Police;* **OKEY S. STARSICK,** *individually as a member of the West Virginia State Police;* **ROBERT B. HICKMAN,** *individually as a member of the Roane County Sheriff's Department;* **ROANE COUNTY SHERIFF'S DEPARTMENT;** *and* **WEST VIRGINIA STATE POLICE,**

Defendants Below, Petitioners,

v.

BRADLEY COTTRELL, *on behalf of the Estate of Bernard Dale Cottrell,*

Plaintiff Below, Respondent.

Certified Question
from the United States District Court
for the Southern District of West Virginia
No. 2:18-cv-01281

RESPONDENT'S BRIEF

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CERTIFIED QUESTIONS

The United States District Court for the Southern District of West Virginia, the Honorable Chief Judge Thomas E. Johnston presiding, certified the following questions to this Court pursuant to W. Va. Code. §§ 51-1A-1 to 51-1A-13:

1) [D]oes West Virginia apply to its own Constitution the United States Supreme Court's rule as established in *Graham v. Connor*, 490 U.S. 386 (1989) and *United States v. Lanier*, 520 U.S. 259 (1997), which requires a constitutional claim that is covered by a specific constitutional provision to be analyzed under the standard specific to that provision and not under substantive due process?
2) [I]f answered in the affirmative, is a claim brought under Article III, Section 10 of the West Virginia Constitution considered redundant where Plaintiffs also alleged an Article III, Section 6 claim but are no longer allowed to pursue Article III, Section 6 as an avenue for relief?

As set out below, the answer to both questions before the Court is no.

STATEMENT OF THE CASE

Respondent's decedent, Bernard Cottrell, died on September 6, 2018 as a result of the use of force by Petitioner-Defendants Stepp, Hartley, and Hickman. See JA0004. Respondent has alleged that Petitioner-Defendants shot and killed Bernard Cottrell after Stepp intentionally collided his vehicle with Cottrell's, and without reasonable belief that Cottrell posed a threat of harm. See JA0007- 1.6

SUMMARY OF ARGUMENT

Petitioner's argument in favor of adopting the *Graham* rule seeks to paper over the legal differences between a plaintiff's ability to vindicate his federal constitutional rights through monetary damages in federal court under 42 U.S.C. § 1983, which *Graham* addresses, and a West Virginian's ability to vindicate his independent state constitutional rights, the civil remedy for which was seriously limited by this Court's decision in *Fields v. Mellinger*, 851 S.E.2d 789 (2020). A private right of action for constitutional violations "is necessary to enforce West

Virginia's citizens' constitutional rights and to ensure the government's responsibility to provide and to protect those rights from governmental wrongdoing or deprivation." *Id.* at 806 (Workman, J., dissenting).

The question now before this Court is whether, in light of *Fields v. Mellinger*, the federal *Graham* rule requiring constitutional claims to be brought under the most specific constitutional provision available to the plaintiff should apply to state constitutional claims, further curtailing a West Virginian's ability to vindicate their state constitutional rights through civil causes of action. Petitioners urge this Court to adopt *Graham*'s requirement. *See, generally*, Pet. Brief. However, "[s]tates have the power to interpret state constitutional guarantees in a manner different than the United States Supreme Court has interpreted comparable federal constitutional guarantees," *Peters v. Narick*, 165 W. Va. 622, 628 n. 13 (1980), and this Court has held that some provisions of the West Virginia Constitution are more protective of individual rights than the Federal Constitution. *See, e.g.*, *State v. Mullens*, 221 W. Va. 70, 89 (2007). The United States Supreme Court has "recognized that a state supreme court may set its own constitutional protections at a higher level than that accorded by the federal constitution." *State v. Bonham*, 173 W. Va. 416, 418 (1984). This Court should reject Petitioners' invitation to adopt the federal *Graham* rule and instead reassert that West Virginians have the ability to vindicate independent violations of their unique state constitutional rights to due process as enumerated in Article III, Section 10—even if such a claim arises at the same time as a previous claim rejected under section 6.

Yet should this Court apply the *Graham* rule, an Article III, Section 10 claim is not redundant to a Section 6 claim, because the West Virginia Constitution's due process rights are unique to West Virginia and more protective of individual rights than those enumerated in the

federal Constitution. Further, unlike Section 6, Section 10 is self-executing such that a private right of action for money damages exists for violations by state officials of West Virginians' due process rights.

ARGUMENT

I. The application of the *Graham* rule is not necessary.

This Court need not follow, nor is it limited by, federal precedent in interpreting and applying state constitutional guarantees. Federal jurisprudence is not a straitjacket for West Virginia law. Nevertheless, federal precedent and reasoning may be instructive to this Court. Petitioners' argument that this Court should follow *Graham* asks the Court to strip *Graham*'s rule from the legal context in which that case arose—a Section 1983 private cause of action for money damages for violation of the United States Constitution's search and seizure protections by law enforcement officers. Indeed, this is precisely the legal context this Court said was unavailable to West Virginians in *Fields* when it determined that there is no private right of action for monetary damages for violations of the unreasonable search and seizure clause, Article III, Section 6, of the West Virginia Constitution. 851 S.E.2d at 799. In support of its reasoning, this Court noted that Mr. Fields had "reasonable alternative remedies" available to him, including state law tort claims and claims for federal constitutional violations under 42 U.S.C. §§ 1983 and 1985. *Id.* It is, of course, axiomatic that Section 1983 remedies are available only for violations of federal rights, and are not available to vindicate violations of rights protected by state constitutions. See, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1721 (2019). Further, this reasoning equates a West Virginia law enforcement officer's use of excessive force in violation of Article III, Section 6 to a mere common law tort, which "treat[s] the relationship between a citizen and a [state] agent unconstitutionally exercising his authority as no different from the relationship

between two private citizens." *Bivens v. Six Unknown Named Agents of Federal Bureau of Investigation*, 403 U.S. 388, 391-92 (1971). The United States Supreme Court explicitly spurned such treatment in *Bivens*, noting that this equivalence between a state official and a private citizen "has consistently been rejected by this Court." *Id.* at 391. "The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind." *Id.* at 409 (Harlan, J., concurring).

Nevertheless, this Court has essentially foreclosed civil remedies for violations of Article III, Section 6 of the West Virginia Constitution by finding that no private right of action for money damages exists under that constitutional provision in West Virginia. As explained by Justice Harlan in his concurrence in *Bivens*,

> it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position [violation of his federal rights against unreasonable search and seizure by law enforcement agents]. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court....[A]ssuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.

403 U.S. at 409-10. This is especially true for violations of the search and seizure provisions of the federal and state constitutions. "For a person harmed by unconstitutional action that is not likely to recur to that individual—such as police misconduct—injunctive relief may be meaningless, if even procurable." Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 Penn. St. L. Rev. 877, 878 (2011) (hereinafter *Redressing Deprivations*). "[A]bsent a damage remedy, victims of governmental wrongdoing will have neither the incentive nor the means to file a civil action to redress the deprivation of their constitutional rights. As a

consequence, government officials may freely ignore constitutional constraints without formal legal consequence." *Id.* at 878-79.

Respondent's decedent, Bernard Cottrell, is in the same position that Mr. Bivens found himself in, although the violation of his rights against unreasonable search and seizure under the federal and West Virginia Constitutions are different in substance from Mr. Bivens' claims. Here, Mr. Cottrell was shot and killed during an investigatory stop by law enforcement officers. As in *Bivens*, injunctive relief would not "obviate the harm" Mr. Cottrell experienced. Further, because he died from his gunshot wounds, there would be no criminal charges or trial against Mr. Cottrell; the exclusionary rule is, therefore, similarly unavailing of relief. For individuals in Mr. Cottrell's position, "it is damages or nothing;" yet this Court has barred monetary damages for violations of the search and seizure clause of the West Virginia Constitution, leaving similarly situated West Virginians with no realistic avenue by which to vindicate the *violation itself* of this right (the common-law battery that created the constitutional violation may be vindicated subject to the Government Tort Claims and Insurance Reform Act, W. Va. Code Ann. §§ 29-12A-1, *et seq.*). Ultimately, this signals to law enforcement and other public officials in West Virginia that they are free to ignore the protections of the West Virginia Constitution because there is no legal redress practically available to those citizens whose rights have been violated; instead, these officials will only answer to the lesser federal constitutional guarantees of the Fourth Amendment. *See, Swiger v. Civil Service Com'r*, 179 W. Va. 133, 136 (1987) (when considering the due process guarantees of the state constitution, "we must be guided by our own principles in establishing our State standards, recognizing that so long as we do not fall short of the federal standard, our determination is final."). This Court in *Fields* made clear that the contours of federal constitutional jurisprudence do not apply to West Virginia's constitutional

analysis; yet Petitioners now are asking this Court to return to federal constitutional jurisprudence with the *Graham* rule. Applying *Graham* to state constitutional law would leave West Virginians with no civil legal remedy for the violation of fundamental constitutional rights, despite the fact that freedom from unreasonable searches and seizures is a right appropriately deeply rooted in history and tradition for substantive due process consideration.[1]

Moreover, Petitioners' argument that the *Graham* rule should apply here neglects to take into account further Supreme Court guidance in *United States v. Lanier*, in which the Court notes, "contrary to respondent's claim, *Graham v. Connor*...does not hold that *all* constitutional claims relating to physically abusive government conduct *must* arise under either the Fourth or Eighth Amendments[.]" 520 U.S. 259, 272, n. 7 (1997) (emphasis added). "[R]ather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Id.* Even if this Court were to adopt *Graham*, it would not foreclose, in the case *sub judice*, a substantive claim under Article III, Section 10. Here, the claim brought by Mr. Cottrell is that law enforcement officers used excessive force which: (1) violated Bernard Cottrell's right against unreasonable searches and seizures as enumerated in the West Virginia Constitution, Article III, Section 6, for which there is no private civil cause of action for money damages; and also (2) violated Bernard Cottrell's state constitutional right not to be deprived of "life, liberty, or property, without due process of law, and the judgment of his peers," West Virginia Constitution

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[1] *See*, Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?* 87 Tex. L.R. 7, 57-58 (2008) (finding that, in 1868, 34 of 37 state constitutions (including West Virginia's 1863 Constitution), covering approximately 84% of United States citizens, included clauses protecting individuals from unreasonable searches and seizures. "There was thus an Article V consensus [sufficient to meet Article V's "rule of recognition" threshold for the making of federal constitutional law] in the states in 1868 that freedom from unreasonable searches and seizures was a fundamental right that was implicit in the concept of ordered liberty.")

Article III, Section 10. In other words, not only was Bernard Cottrell battered by law enforcement officials during an investigatory stop in violation of his Article III, Section 6 rights for which he has no private right of action, he was also, independent of the battery, deprived of his interest in his life by those same law enforcement officials in violation of the due process rights afforded to him by Section 10. These are two separate state constitutional claims, arising under distinct state constitutional provisions, and capable of distinct legal remedy.[2]

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[2] Nor would this Court be writing on a blank slate in finding a cause of action for excessive force is actionable under Article III, Section 10 of the West Virginia Constitution. Pre-*Graham*, substantive due process standards for excessive force claims were well-developed in the circuit courts. *See, e.g., Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973),

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

See also, 4 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 3:56 and n. 3 (2017) (collecting circuit court cases). Further, *Graham* did not address whether Fourth Amendment standards are applicable where there was no seizure by law enforcement officers or where a seizure had been terminated. *Id.* at § 3:17 n. 5; ("even after *Graham*, there may still be *non-arrest* excessive force cases which are analyzed from a substantive due process perspective." *Id.* § 3:56). The Supreme Court has not foreclosed substantive due process analysis for excessive force claims:

> There are, however, four constitutional provisions that we have said forbid the use of excessive force in certain circumstances. The Fourth Amendment prohibits it when it makes a search or seizure "unreasonable." The Eighth Amendment prohibits it when it constitutes "cruel and unusual" punishment. The Fifth and Fourteenth Amendments prohibit it (or, for that matter, any use of force) when it is used to "deprive" someone of "life, liberty, or property, without due process of law."

Kingsley v. Hendrickson, 576 U.S. 389, 404 (2015) (Scalia, J., dissenting). In *Kingsley*, a Section 1983 excessive force case brought by a pretrial detainee against jail officers under the Fourteenth Amendment, the Supreme Court determined that the appropriate standard for excessive force violations under the Fourteenth Amendment is the objectively reasonable standard. *Id.* at 396-97 ("a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."); *see also, Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.") Any holding finding a right of action for an excessive force due process claim would necessarily be limited, as in the case below, to instances of objectively unreasonable force which deprives a person of their "life, liberty, or property" in violation of Article III, section 10 of the West Virginia Constitution.

II. Section 1983 jurisprudence is limited by considerations which are not applicable to this Court; the state constitutional remedies available to West Virginians should remain robust.

The Supreme Court's Section 1983 jurisprudence is unsuited for state courts' remedy determinations for violations of state constitutional rights for at least two reasons. First, state constitutions create rights that are independent of the federal constitution, even when those rights appear to be similar to one another. "The text or constitutional history of the state right may signal the framers' intent to accord broader protection to the citizen than kindred rights in the federal Constitution." Gildin, *Redressing Deprivations*, *supra*, at 905. Federal constitutional remedies are limited by the intent of the drafters of the Ku Klux Klan Act of 1871, from which Section 1983 originated. *Id.*, at 881-82, 898-905. The Supreme Court has inferred several immunity doctrines sheltering state and local officials from damages liability from the intent of the 1871 drafting Congress. *Id.* at 890-97.[3] "The intent of [the 1871] Congress does not bind, and should not guide, state courts crafting remedies for deprivations of state constitutional rights." *Id.* at 888.

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[3] The most recognizable of these immunities, federal qualified immunity jurisprudence, has been criticized by Supreme Court justices and legal scholars alike. *See, e.g.*, Justice Thomas's statement respecting the denial of certiorari in *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421-22 (mem) (2021):

> As I have noted before, our qualified immunity jurisprudence stands on shaky ground. …[T]he one-size-fits-all [qualified immunity] doctrine is also an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions….This approach is even more concerning because 'our analysis is [not] grounded in the common-law backdrop against which Congress enacted [§ 1983].

See also, Clark Neily, *The Conservative Case against Qualified Immunity* (Aug. 25, 2021), https://www.cato.org/blog/conservative-case-against-qualified-immunity; Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure* (Sep. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure; David Deerson, *The Case Against Qualified Immunity* (Jul. 13, 2020), https://www.nationalreview.com/bench-memos/the-case-against-qualified-immunity/; Karen Blum, *et. al.*, Letter to Congress, Holding Police Accountable for Civil Rights Violations (Jul. 2, 2020), https://reason.com/wp-content/uploads/2020/07/law-profs-letter-to-Congress-qualified-immunity-7-2-20.pdf.

Second, the Supreme Court is limited by federalism in ways that state courts are not. "[C]oncerns over federal incursion on the prerogative of the states do not exist when a state court enforces the guarantees of the state's own constitution." *Id.* at 882. In contrast to state court interpretation of their state's constitutional guarantees, "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which [the United States Supreme] Court examines state action." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring). "The national Court must remain highly sensitive to concerns of state and local autonomy, obviously less of a problem for state courts, which *are* local, accountable decisionmakers." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 NYU L.R. 535, 549 (1986) (emphasis in original). Further, "our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so." *Id.* at 551. This Court is not constrained by federalism or Congressional intent in the same way the United States Supreme Court is. The limitations built into federal Section 1983 jurisprudence are not binding on this Court.

This is especially true as this Court has acknowledged that the protections in Article III, Sections 1, 3, and 10 of the West Virginia Constitution are "unique to our state constitution as contrasted to the federal constitution," *Women's Health Center of West Virginia, Inc. v. Panepinto*, 191 W. Va. 436, 441 (1993). "Although our due process clause does not significantly differ in terms of its language from the Fifth and Fourteenth Amendments to the federal constitution, this Court has determined repeatedly that the West Virginia Constitution's due process clause is more protective of individual rights than its federal counterpart." *Id.* at 441-42. This Court continued:

> The provision of enhanced guarantees for "the enjoyment of life and liberty...and safety" by our state constitution both permits and requires us to interpret those guarantees independent from federal precedent. W.Va. Const. art. III, § 1. Accordingly, we are not bound by federal precedent in interpreting issues of constitutional law arising from these enhanced guarantees. Furthermore, because we are permitted to elevate our constitutional protections, we are similarly free to reject federal precedent[.]

Id. at 442 (internal citations omitted); *see also*, Syl. pt. 2, *Pauley v. Kelly*, 162 W. Va. 672 (1979) ("The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution."), *State ex rel Carper v. West Virginia Parole Bd.*, 203 W. Va. 583, 590 n. 6 (1998) ("This Court has determined repeatedly that the West Virginia Constitution may be more protective of individual rights than its federal counterpart."). This Court is not bound to try and fit the limitations of section 1983 jurisprudence, or the *Graham* rule, onto the heightened protections afforded by Article III, Section 10 the West Virginia Constitution. Instead, this Court should ensure that robust remedies remain available to citizens whose constitutional due process rights are violated.

III. Article III, Section 10 is self-executing such that a private right of action for its violation is warranted.

The language of Article III, Section 10 of the West Virginia Constitution supports a finding that this Constitutional provision is self-executing given the command in Article III, Section 1 that "all men...have certain inherent rights...namely: the enjoyment of life and liberty...and safety." "The principal test for determining whether a constitutional provision is self-executing is that the right it gives or the duty it imposes may be enforced without the aid of legislative enactment." *State ex rel. Trent v. Sims*, 138 W. Va. 244, 287 (1953). Here, the duty imposed by Section 10 is grounded directly in the language of the provision. "Generally, 'shall,' when used in Constitutions and statutes, leaves no way open for the substitution of discretion."

Baer v. Gore, 79 W. Va. 50, 90 S.E. 530, 531 (1916), *superseded by statute on other grounds*. The term 'shall' "has a peremptory meaning...it has the significance of operating to impose a duty which may be enforced, particularly...where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears." *Sims*, 138 W. Va. at 267. "It is fundamental that no individual can be required to forfeit constitutionally protected property and liberty interests without procedures designed to prevent arbitrary treatment by the government." *State ex rel. Askin v. Dostert*, 170 W. Va. 562, 568 (1982).

"Inherent in article III, § 10 of the *West Virginia* Constitution is the concept of substantive due process...'which forbids the government to infringe certain "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *State v. Leadingham*, 190 W. Va. 482, 490 (1993) (emphasis in original). As this Court has explained, "[t]hus whenever government action infringes upon a person's interest in life, liberty or property, due process *requires* the government to act within the bounds of procedures that are designed to insure that the government action is fair and based on reasonable standards." *Major v. DeFrench*, 169 W. Va. 241, 251 (1982) (emphasis added). "The 'liberty' of the Due Process Clause is grounded in protecting those concerns...that are vital to an individual's self-fulfillment and not in preserving formalities." *State ex rel Roy Allen S. v. Stone*, 196 W. Va. 624, 632 (1996). As defined by the West Virginia Constitution, "liberty" is not merely freedom from physical restraint, but rather "embrace[s] the right of a man to be free in the employment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." *Morrisey v. West Virginia AFL-CIO*, 243 W. Va. 86, 116 (2020) (quoting *Ex parte Hudgins*, 86 W. Va. 526, 532 (1920)). Liberty interests need not be defined "only at the most

specific level of our society's traditions," because such a reading "runs contrary to the holdings of many cases, fails to accord proper respect to diversity and individualism, and pretty much protects only those liberties that rarely need judicial protection." *Stone*, 196 W. Va. at 632.

Several state courts have determined that their states' constitutions have provisions that are self-executing for purposes of money damages. *See*, *Godfrey v. State*, 898 N.W.2d 844, 856-862 (Ia. 2017) (discussing state court cases that consider whether constitutional provisions are self-executing) (collecting self-executing due process state cases at 871); *Dorwart v. Caraway*, 312 Mont. 1, ¶¶ 40- 43 (2002) (same); *Widgeon v. Eastern Shore Hosp. Center*, 479 A.2d 921, 534 (Md. 1984) (same). The Iowa Supreme Court, in examining its own constitutional due process provision, found that provision to be self-executing, stating, "[i]t would be ironic indeed if the enforcement of individual rights and liberties in the Iowa Constitution, designed to ensure that basic rights and liberties were immune from majoritarian impulses, were dependent on legislative action for enforcement." *Godfrey*, 898 N.W.2d at 865. The *Godfrey* Court continued, "it is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens." *Id.* (citing *Corum v. University of North Carolina*, 330 N.C. 761, 783 (N.C. 1992); *King v. S. Jersey Nat'l Bank*, 66 N.J. 161, 177 (1974) ("Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country.")). The *Godfrey* Court concluded,

> The Iowa constitutional provision regarding due process of law is thus not a mere hortatory command, but it has been implemented, day in and day out, for many, many years. It has traditionally been self-executing without remedial legislation for equitable purposes, and there is no reason to think it is not self-executing for the purposes of damages at law.

Id. at 871. Discussing North Carolina's Declaration of Rights, that state's Supreme Court noted, "[t]he fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights…to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Corum*, 330 N.C. at 782-83. This Court has already determined that Article III, Section 10 provides unique, heightened due process protections to West Virginians; a finding that this provision is self-executing, and allowing its full enforcement, will only strengthen those protections.

Further, money damages are a traditional remedy for violation of due process rights. As Professor Akhil Reed Amar has noted,

> Few propositions of law are as basic today—and were as basic and universally embraced two hundred years ago—as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, there should be a remedy. The proposition that every person should have a judicial remedy for every legal injury done him was a common provision in the bills of rights of state constitutions; was invoked by *The Federalist* No. 43 in a passage whose very casualness indicated its uncontroversial quality ["But a right implies a remedy…" at 275 (J. Madison)]; and was the cornerstone of analysis in one of the most important and inspiring passages of *Marbury v. Madison*:
>
> …'[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded'… '[E]very right, when withheld, must have a remedy, and every injury its proper redress.'

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1485-86 (1987) (quoting *Madison v. Marbury*, 5 U.S. (1 Cranch.) 137, 162-63 (1803)). Ultimately, the remedy clause descends from Magna Carta. David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1199 (1992). Although initially the Magna Carta remedy was aimed at reforming the King's courts, "[b]y the last quarter of the eighteenth century, during which the American remedy

guarantees first appeared, the focus of popular distrust had shifted from the King's courts to the people's representatives." *Id.* at 1200.

After a first wave of early state constitutions that granted broad authority to legislatures, a second wave "stripp[ed] legislatures of many of their prerogatives and vest[ed] increased power in the judiciary....[A]t the time that many American remedy guarantees themselves, or their direct predecessors, were brought into existence, the evil was renegade legislatures." *Id.* at 1200-01. The drafting of West Virginia's constitutions in both 1863 and 1872 would have fallen into the "second wave" of state constitutions, vesting increased power in the judiciary to allow remedies for the violations of the rights enumerated in Article III. Indeed, W. Va. Code § 2-1-1 states, "the common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same..." W. Va. Code § 2-1-1. "The notion that unconstitutional actions by government officials could lead to compensatory and exemplary damages was well established in English common law." *Godfrey*, 898 N.W.2d at 866 (discussing English precedent at 866-67; surveying early state court cases that discuss English precedent at 867-68); *see also, Widgeon*, 479 A.2d at 928 (collecting state court cases that recognize a damages action as the appropriate remedy for state or federal constitutional deprivations); *Corum*, 330 N.C. at 784 (collecting federal and state court cases where a direct action for damages for constitutional violations was allowed); *Brown v. State of New York*, 89 N.Y.2d 172, 192 (N.Y. 1996) ("The damage remedy has been recognized historically as the appropriate remedy for the invasion of personal interests in liberty."). "'A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has

transgressed.'" *Fields*, 851 S.E.2d at 806 (Workman, J., dissenting) (quoting *Owen v. City of Independence, MO*, 445 U.S. 622, 651 (1999)). A private right of action for violation of Article III, Section 10 is warranted by the language of the provision itself and is grounded in English common law and the laws of West Virginia.

IV. Policy considerations caution against applying the *Graham* rule to violations of the West Virginia Constitution.

The issue before this Court affects West Virginians *writ large*, and is not specific to Mr. Cottrell. Police-community relations have long been a problem in West Virginia. Beginning in the 1990s, the West Virginia Advisory Committee to the U.S. Commission on Civil Rights has submitted a series of reports documenting civil rights issues in West Virginia; in particular, these reports focus on issues of police misconduct in the state. *See*, *Police-Community Relations in Southern West Virginia* (1993); *Rising Racial Tensions in Logan County, West Virginia* (1995); *Civil Rights Issues in West Virginia* (2003); and *Coping with Police Misconduct in West Virginia* (2004).[4] Testimony by panelists interviewed by the Advisory Committee in 1995 generally followed several themes, including distrust and fear of police, police misconduct and objectionable behavior, and the need for training for law enforcement personnel. West Virginia Advisory Committee, *Rising Racial Tensions in Logan County, West Virginia*, *supra*, at 15. The 2003 report notes, *inter alia*, such incidents of police brutality have heightened longstanding tensions between law enforcement agencies and impoverished West Virginians, adding to the perception that law enforcement officers in West Virginia "exhibit a pattern of discriminatory

[4] These reports can each be found online:
Police-Community Relations in Southern West Virginia (1993) https://www.hsdl.org/?view&did=473527; *Rising Racial Tensions in Logan County, West Virginia* (1995) https://www2.law.umaryland.edu/Marshall/usccr/documents/ cr12r116z.pdf; *Civil Rights Issues in West Virginia* (2003) https://www.usccr.gov/pubs/sac/wv0503/wvreport.pdf; *Coping with Police Misconduct in West Virginia* (2004) https://www.usccr.gov/pubs/sac/wv0104/wv0104.pdf.

treatment and petty harassment, including disproportionate stops and arrests." West Virginia Advisory Committee, *Civil Rights Issues*, *supra*, at iii. This report also noted, "many [misconduct] complaints are from poor people, both minority and white." *Id.* at 9. After the release of the 2003 report, West Virginia House delegate Carrie Webster requested the Advisory Committee to "share further insight on the problem of police misconduct in West Virginia," leading to the creation of the 2004 report. The 2004 report, in turn, found that police misconduct incidents in West Virginia "continue unabated," and "appear to be escalating," noting that current law enforcement disciplinary procedures were inadequate to deter police misconduct. West Virginia Advisory Committee, *Coping with Police Misconduct*, *supra*, at 2-10. Data collected by the American Civil Liberties Union of West Virginia through Freedom of Information Act requests to local law enforcement agencies, W. Va. Code § 29B-1-1, *et seq.*, showed that police use of force incidents have only continued to rise, increasing from 665 incidents in 2015 to 966 incidents in 2019. ACLU-West Virginia, *Police Misconduct Report 2020*, at 9.[5]

West Virginians rely on the courts of this state to protect their constitutional and statutory rights. For at least 30 years, minorities and poor people have complained that police misconduct is inadequately disciplined in the courts and among law enforcement agencies. Applying the *Graham* rule, then, would not only strip Section 10 of its important and enhanced protections, it would leave West Virginians without practical redress for the violation of a large swath of rights by state officials, rendering the protections promised by the West Virginia Constitution generally toothless—mere ideals rather than robust guarantees.

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[5] Available online at https://www.acluwv.org/sites/default/files/field_documents/2020_police_misconduct_report_aclu-wv_0.pdf.

CONCLUSION

This Court in *Fields* has foreclosed civil remedies under Article III, Section 6 of the West Virginia Constitution; while important, Section 6 does not rise to the unique and enhanced protections this Court has declared rest in Article III, Section 10. *See, e.g., Women's Health Center*, 191 W. Va. at 441-42. Because the due process protections Section 10 affords rise above the floor of the Fourteenth Amendment, this Court need not be limited by 1983 jurisprudence or federalism concerns and is "free to reject federal precedent." *Id.* at 442. It should do so here, and find that the *Graham* rule requiring constitutional claims be brought under the most specific provision available is inapplicable to the West Virginia Constitution. Further, this Court should find that claims arising under Article III, Section 10 are independent from claims under Section 6 and cannot therefore be redundant. Indeed, Section 10, unlike Section 6, contains language that is self-executing such that a damages remedy should be available to civil litigants. The availability of a damages remedy is grounded in English common law and the statutes of West Virginia, and shows that a violation of Section 10 is substantively independent of, and should not be limited by, a violation of Section 6.

Accordingly, Respondent respectfully requests that this Court answer the certified questions of the United States District Court for the Southern District of West Virginia:

> First, **NO**, West Virginia does not apply to its own Constitution the federal constitutional holding set forth in *Graham* requiring that a constitutional claim that is covered by a specific constitutional provision to be analyzed under the standard specific to that provision, rather than under substantive due process; and
>
> Second, **NO**, a claim brought under Article III, Section 10 of the West Virginia Constitution is not considered redundant where Plaintiffs have alleged an Article III, Section 6 claim but are no longer allowed to pursue Article III, Section 6 as an avenue for relief.

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2021, true and accurate copies of the foregoing Respondent's Brief were deposited in the U.S. Mail contained in a postage-paid envelope addressed to the following counsel for all other parties to this appeal as follows:

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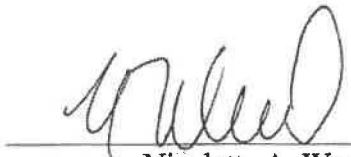

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