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)

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THE CERTIFIED QUESTIONS

Pursuant to the Uniform Certification of Questions of Law Act,[1] 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:

> (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 demonstrated below, the answer to both questions is yes.

STATEMENT OF THE CASE

I. Factual background[2]

On September 6, 2016, West Virginia State Police Trooper Zach Hartley ("Trooper Hartley"), Senior West Virginia State Police Trooper Nathan Scott Stepp ("Trooper Stepp"), and Roane County Sheriff's Deputy Robert Hickman ("Deputy Hickman") were dispatched to a domestic disturbance involving Bernard Cottrell that had turned violent. After a high-speed chase, the officers caught up with Bernard and were forced to use deadly force.

II. Procedural History

Respondent, Bradley Cottrell ("Bradley"), sued Trooper Stepp; Trooper Hartley; Trooper Starsick ("Trooper Starsick") (who was not present but who (Bradley alleges) is liable as

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1 *See* W. VA. CODE §§ 51-1A-1 to -13.

2 This section is derived from § II.A of the district court's certification order. *See* JA at 3–4.

Trooper Stepp's and Trooper Hartley's supervisor); the West Virginia State Police ("WVSP");[3] Deputy Hickman; and the Roane County Sheriff's Department ("RCSD"). Count I is a 42 U.S.C. § 1983 claim against Trooper Stepp, Trooper Hartley, and Deputy Hickman for excessive force in violation of Bernard's right to be free from excessive force, as secured by the Fourth Amendment.[4] Count II is a § 1983 claim against Trooper Starsick for supervisory liability for violating Bernard's right to be free from excessive force, also as secured by the Fourth Amendment.[5] Count III purported to be a § 1983 *Monell* claim[6] against the WVSP for excessive force.[7] Count IV is a claim against Trooper Stepp, Trooper Hartley, and Deputy Hickman purportedly arising under W. VA. CONST. art. III, § 6 ("§ 6") (the West Virginia Constitution's proscription against unreasonable searches and seizures)[8] and § 10 ("§ 10") (the West Virginia Constitution's due *process* clause). Counts V and VI are West Virginia common law claims against Trooper Stepp, Trooper Hartley, and Deputy Hickman for battery (Count V[9]) and negligence (Count VI[10]). And Count VII was a § 1983 *Monell* claim against the RCSD for excessive force.[11]

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3 The WVSP is an agency of the State of West Virginia. Thus, in order to evade state sovereign immunity, *see* W. VA. CONST. art. VI, § 35 ("The state of West Virginia shall never be made defendant in any court of law or equity . . . ."), Bradley sued WVSP up to the limits of any applicable insurance coverage, *see* syl. pt. 2, *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983). He also sued the Troopers only in their individual capacities in order to avoid the Eleventh Amendment. *See* JA 8 ¶ 7 (Trooper Stepp), 8–9 ¶ 8 (Trooper Hartley), and 9 ¶ 9 (Trooper Starsick).

4 JA 14–15 ¶¶ 44–55; *cf.* U.S. CONST. am. IV.

5 JA 15–16 ¶¶ 56–61.

6 *Cf. Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

7 JA 16–17 ¶¶ 62–73.

8 JA 18–19 ¶¶ 74–83.

9 JA 19–20 ¶¶ 84–87.

10 JA 20 ¶¶ 88–93.

11 JA 21–22 ¶¶ 94–105.

On March 13, 2019, the district court granted in part Defendants' motions to dismiss.[12] It dismissed Count III as barred by *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989).[13] It held that West Virginia law adopted the rule set out in *Graham v. Connor*, 490 U.S. 386 (1989), that the right to be free from excessive force in the United States Constitution is in most settings not secured by the Due Process Clause and specifically that in the setting of an arrest or investigatory stop, it is secured only by the Fourth Amendment (and in the setting of subduing an incarcerated prisoner, only by the Eighth Amendment[14]).[15] So the district court dismissed Count IV insofar as Bradley based it on a violation of § 10.[16] And it dismissed Count VII because Bradley's complaint failed as a matter of law to state a claim against the RCSD.[17]

That left Counts I, II, IV insofar as it relied on the violation of a right secured by § 6, V, and VI. On September 9, 2019, the Troopers and Deputy Hickman moved for summary judgment. The crux of Bradley's claims against the Troopers was that they had used excessive force, so the Troopers showed that they had instead used reasonable force (and that Trooper Starsick also was not liable as supervisor). Deputy Hickman argued that he had also used reasonable force, and he argued that *Graham* barred Bradley's § 10 claim against him, too.

On November 18, 2020, this Court held that § 6 does not contain an implied private cause of action for money damages.[18] Petitioners' motions for summary judgment thus remain pending, in part because the district court is concerned whether the non-existence of a § 6 private

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12 *See Cottrell on behalf of Est. of Cottrell v. Stepp*, No. 2:18-CV-01281, 2019 WL 1140198, at *1 (S.D. W. Va. Mar. 12, 2019).

13 JA 26 at 4.

14 U.S. CONST. am. VIII.

15 *See infra.*

16 JA 28–29 at 6–7.

17 JA 30–34 at 8–12.

18 Syl. pt. 3, *Fields v. Mellinger*, 851 S.E.2d 789 (W. Va. 2020).

cause of action for money damages might undercut the propriety of applying *Graham* to a § 10 claim. So the district court has asked (1) whether West Virginia law incorporates this *Graham* rule, and (2) if so, whether that remains true after the Court held in *Fields* that § 6 does not contain a private cause of action for money damages, implied or otherwise.[19]

As demonstrated below, the answer to both of the district court's questions is yes: *i.e.*, (1) yes, as a matter of law, the first rule from *Graham* precludes a claim based on the allegation that the defendant violated a right secured by § 10 (the "substantive due process" clause) where the plaintiff alleges only the use of excessive force during an arrest or investigatory stop, and (2) yes, that remains true notwithstanding the fact that § 6 does not give rise to a private cause of action for money damages.

SUMMARY OF ARGUMENT

Graham and *Fields* are both essentially self-explanatory: In *Graham*, the Supreme Court of the United States carefully explained that, regardless of whatever the right to "substantive due process" protects, it is not the right to be free from government-applied excessive force during an arrest or investigatory stop (or the right of an incarcerated prisoner to be free from government-applied excessive force while being subdued). There is no reason for West Virginia not to follow the same rule (and there are additional reasons for West Virginia to do so).

In *Fields*, this Court carefully explained that, and why, there is no implied private cause of action for money damages to remedy a violation the rights secured by W. VA. CONST. art. III, § 6 (and several other sections of Article III). Applying *Graham* post-*Fields* is supported, not undercut, by the basis for the holdings in both *Graham* and *Fields*—*i.e.*, the availability of more (or at least as) specific causes of action for violations of rights secured by § 6.

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[19] *See Cottrell on behalf of Est. of Cottrell v. Stepp*, No. 2:18-CV-01281, 2021 WL 1966830 (S.D. W. Va. May 17, 2021).

ARGUMENT

I. West Virginia has adopted, or should adopt, *Graham*.

The first certified question asks:

> [D]oes West Virginia apply to its own Constitution the United States Supreme Court's rule as established in [*Graham*] and [*Lanier*], 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?

Resolution of both certified questions requires careful recognition of the distinctiveness among several aspects of civil actions, including: (1) rights, and which specific legal provisions secure or create them; (2) causes of action, which provide a method to obtain a remedy for the violation of rights; and (3) analytical standards, which outline the parties' respective burdens in making out a cause of action, and which concomitantly provide courts with an outline for analysis of the parties' claims and defenses. The United States Supreme Court's opinion in *Graham* involved only (1) and (3); *Fields* (discussed later) involved only (2).

A. What *Graham* held.

Dethorne Graham alleged that several police officers subjected him to excessive force during an investigatory stop.[20] He sued them under § 1983 because, he claimed, they deprived him of a right secured by federal law—to wit, the right to substantive due process as secured by the Fourteenth Amendment.[21] Applying the general substantive due process standard (which required Graham to prove, *inter alia*, that the force at issue had been applied "maliciously and sadistically"), the district court found no such application and thus granted the officers' motion for a directed verdict;[22] the Fourth Circuit affirmed.[23]

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20 *See* 490 U.S. at 388–90.

21 *See id.* at 390; *cf.* U.S. CONST. am. XIV.

22 *See* 490 U.S. at 390.

23 *See id.* at 390–92.

The dissenting judge argued that *Tennessee v. Garner*, 471 U.S. 1 (1985), *inter alia*, "required that excessive force claims arising out of investigatory stops be analyzed under the Fourth Amendment's 'objective reasonableness' standard."[24] On appeal, the Supreme Court of the United States agreed with the dissenter, saying, "The validity of [an excessive force] claim must . . . be judged by *reference to the specific constitutional standard which governs* ***that right***, rather than to some generalized 'excessive force' standard" governing "substantive due process."[25]

Analysis of a § 1983 excessive force claim must therefore necessarily "begin[] by identifying *the specific constitutional* ***right*** allegedly infringed by the challenged application of force."[26] The Supreme Court went on to hold that only the Fourth Amendment's right to be free from an unreasonable seizure—*not* the Fourteenth Amendment's "generalized" right to substantive due process (beyond its initial role as the means by which the Fourth Amendment was originally incorporated against the states[27])—secured the right to be free from excessive force in the setting of an arrest or investigatory stop.[28] Consequently, only the Fourth Amendment's "objective reasonableness" standard—not "a single generic" standard governing substantive due process—governed Graham's claim.[29]

> The Court concluded:
>
> > Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. **Because the Fourth Amendment provides an explicit *textual***

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24 *Id.* at 392 (parallel citations omitted).

25 *Id.* at 394 (emphasis added).

26 *Id.* (emphasis added) (citation omitted).

27 *See Mapp v. Ohio*, 367 U.S. 643 (1961).

28 490 U.S. at 394.

29 *Id.* at 393–94.

> ***source of constitutional protection against this sort of physically intrusive governmental conduct*, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.**

490 U.S. at 395 (first emphasis in original).[30]

Graham assumed *sub silentio* that there was a private *cause of action*—an express one, in fact—for money damages to remedy a past violation of a *right* secured by federal law (there, the United States Constitution) and thus subject to the *standard* governing claims of violations of that right—*i.e.*, 42 U.S.C. § 1983. The existence of such a cause of action was thus not an issue in *Graham*: it was both undisputed and undisputable.

B. West Virginia should adopt *Graham*.

The United States Supreme Court's own reasons for the rule being part of federal law—set out in *Graham* itself—likewise support this Court adopting that rule as part of West Virginia law.[31] Most obviously, conduct that allegedly violates a *specific* right that applies in a *specific* setting is best adjudged by standards governing that specific right in that specific setting—standards developed and tailored over the years to safeguard that specific right. A vague, generalized right to "substantive due process" circumstances notwithstanding is governed by a concomitantly vague, generalized standard, and is far more poorly suited to the task.[32]

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[30] Similarly (although irrelevant to the instant case), *Graham* held that only the Eighth Amendment—again *not* the right to substantive due process—secures the right of an incarcerated person to be free from being subdued with excessive force (which the Eighth Amendment defines as force that is cruel and unusual). *Accord Whitley v. Albers*, 475 U.S. 312, 327 (1986) (categorically rejecting Whitley's substantive due process claim as an alternate basis for relief, saying, "We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified.").

[31] The second holding (mentioned *infra*) arose when the Court then went on to set out the "objective reasonableness" test for whether excessive force violates the Fourth Amendment.

[32] There is also much to be said for holding that *Fields* provides a good basis for overruling *Hutchison*—and for not mourning the death of "substantive due process" *en toto*: *See, e.g.*, *NASA v. Nelson*, 562 U.S. 134, 161 (2011) (Scalia, J., concurring) (referring to "the faux 'substantive' component of the Due Process Clause"); *Lightfoot v. District of Columbia*, 448 F.3d 392, 403 (D.C. Cir. 2006) (Silberman, S.J.,

Second, this first rule is wholly consistent with the universal canon requiring, for textual reasons, resort only to the most specific candidate law instead of a more general one.[33]

Third, adopting *Graham* serves another important goal—giving related sovereign laws valuable consistency and predictability:

> The provisions of our constitution relating to unreasonable search and seizure . . . , being substantially the same as the corresponding provisions of the federal constitution and taken therefrom, should be given a construction in harmony with the construction of the federal provisions by the Supreme Court of the United States.

Syl. pt. 2, *State v. Andrews*, 91 W. Va. 720, 114 S.E. 257 (1922).[34]

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concurring) ("Much has been written of the Supreme Court's invention of substantive due process (an oxymoron if there ever was one) . . . ."); *Gumz v. Morrissette*, 772 F.2d 1395, 1404–09 (7th Cir. 1985) (Easterbrook, J., concurring in all but Part II.A and concurring in Part II.A only in the judgment) ("The use of the Due Process Clauses to achieve substantive ends has no support in the language or history of the Constitution. The language speaks of process, not substance. The first time the Supreme Court encountered one of the two due process clauses, it conducted a historical review and concluded that the text was designed only to incorporate some of the basic procedural guarantees of English law. . . . Since [*Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded* (1868)], substantive due process has been the foundation of some of the most unsuccessful inventions in constitutional law. . . . The Supreme Court regularly buries the doctrine, but it just as resolutely refuses to stay dead. . . . Because substantive due process has always been so dependent on the personal feelings of the Justices; because it has no pedigree other than a trail of defunct, little-mourned, and sometimes (as in *Dred Scott*) pernicious doctrines; and because there is no need to conjure up a constitutional doctrine when there is an Amendment directed to this specific subject, we should not employ substantive due process here. Substantive due process is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand. The constitution does not give such power to judges. Whatever the demands of the consciences of the Justices, we ought not instruct randomly selected jurors or the relatively numerous lower federal judiciary to vindicate *their* consciences as well as those of the Justices. . . . [A] 'shocks the conscience' test spurns bright lines. It spurns rules. It is a vague standard—if it can be called a 'standard' at all—inviting decisionmakers to consult their sensibilities rather than objective circumstances. . . .") (citations omitted), *abrogated on other grounds by Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987) (vindicating Judge Easterbrook's concurrence by holding what *Graham* would hold two years later).

[33] *See, e.g.*, syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984) ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled."); *accord* syl. pt. 6, *Carvey v. W. Va. State Bd. of Educ.*, 206 W. Va. 720, 527 S.E.2d 831 (1999); *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999) (cataloguing cases); *cf. Morton v. Mancari*, 417 U.S. 535, 550–51 (1974); *Preiser v. Rodriguez*, 411 U.S. 475, 489–90 (1973).

[34] *See also State v. Clark*, 232 W. Va. 480, 493–94, 752 S.E.2d 907, 920–21 (2013); *State v. Duvernoy*, 156 W. Va. 578, 582, 195 S.E.2d 631, 634 (1973) ("The language of Article III, Section 6 of the West Virginia Constitution is very similar to the Fourth Amendment to the Constitution of the United States.

To not adopt the first rule from *Graham*[35]—which decided only what provisions of the federal Constitution secured the right to be free from excessive force arising in particular settings—would be to breach this longstanding harmony in unnecessary and unwanted ways.

Finally, this Court has already come very close to adopting *Graham*'s first rule. In *Rogers v. Albert*, 208 W. Va. 473, 541 S.E.2d 563 (2000), Rogers sued for a violation of what he claimed to be his state law substantive due process right to prompt presentment.[36] The Court rejected Rogers's argument, saying:

> Rogers argues that [a prior case] equated the right to prompt presentment with the constitutional right to due process set forth in Article III, § 10 of the West Virginia Constitution .... In the present context, however, due process does not extend any further than the constitutional right to avoid unreasonable seizure. As the United States Supreme Court stated in [*Gerstein v. Pugh*, 420 U.S. 103 (1975)], "[t]he Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of persons or property in criminal cases, including the detention of suspects pending trial."

208 W. Va. at 477, 541 S.E.2d at 567.

When he held earlier that West Virginia applies the first rule from *Graham* to the context of Bradley's state-law constitutional excessive force claim (and consequently dismissing Bradley's § 10 claim against the Tropers), Judge Johnston was not the first federal judge to do. Judge Copenhaver, for example, had already done so—citing *Rogers* and *Graham*:

> [Article III, Section 10] is the due process clause of the West Virginia state constitution. . . . In the context of a warrantless arrest

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This Court has traditionally construed Article III, Section 6 in harmony with the Fourth Amendment.") (citations omitted); *State v. Massie*, 95 W. Va. 233, 120 S.E. 514, 515 (1923).

35 West Virginia has already adopted the second rule. *See, e.g.*, *Davis v. Milton Police Dep't*, No. 3:20-CV-0036, 2020 WL 2341238, at *7 (S.D. W. Va. May 11, 2020) (citing *Graham*, *Duvernoy*); *Schoonover v. Clay Cty. Sheriff's Dept.*, No. 2:19-CV-00386, 2020 WL 2573243, at *8 (S.D. W. Va. May 21, 2020); *Krein v. W. Va. State Police*, No. 2:11-CV-00962, 2012 WL 2470015, at *6 (S.D. W. Va. June 27, 2012).

36 208 W. Va. at 474, 541 S.E.2d at 564.

> before sentencing, "due process [under § 10] does not extend any further than the constitutional right to avoid unreasonable seizure." *See Rogers v. Albert*, 541 S.E.2d 563, 567 (W. Va. 2000) (per curiam). In line with the previous discussion in the context of the Fourteenth Amendment, ***all claims that law enforcement officers used excessive force in the course of an arrest should be analyzed under [§ 6], the state counterpart to the Fourth Amendment, rather than under a substantive due process approach.*** *Graham*, 490 U.S. at 395. Consequently, this [§ 10] claim too is dismissed.

Schoonover, 2020 WL 2573243, at *9 (emphasis added).[37]

Accordingly, Petitioners request the Court to affirm what the State's federal courts have held: *i.e.*, that West Virginia law applies the first rule from *Graham* to excessive force State Constitution claims, and thus that *all* claims that law enforcement officers have used (and are using or will use) excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under § 6 and its "reasonableness" standard (and analogously under W. VA. CONST. art. III, § 5 ("§ 5") for claims that excessive force was used to subdue an incarcerated prisoner), rather than a § 10 "substantive due process" approach.[38]

II. *Fields* provides no reason to not adopt *Graham*.

The second certified questions asks:

> [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

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[37] Nor would West Virginia be the first of its sister states to adopt *Graham*. *See, e.g.*, *Randall v. Peaco*, 927 A.2d 83, 89 (Md. Ct. App. 2007) ("Moreover, appellant does not argue that a different test applies to his claim under Article 24, Maryland's analogue to the Fourteenth Amendment, than under Article 26, Maryland's analogue to the Fourth Amendment. Nor could he successfully do so, given that a claim of excessive force brought under Article 24 is analyzed in the same manner as if the claim were brought under Article 26. In both instances, the claim is assessed under Fourth Amendment jurisprudence, rather than notions of substantive due process, precisely like the analysis employed for claims brought under 42 U.S.C. § 1983. *See Graham*, 490 U.S. at 388. . . .") (parallel citations omitted); *accord Cunningham v. Baltimore Cty.*, 232 A.3d 278, 314, *reconsideration denied* (Md. Ct. App. Aug. 26, 2020), *cert. denied*, 471 Md. 268, 241 A.3d 862 (2020).

[38] As discussed in the following section, *Graham* would not be applied to a private cause of action for money damages for a violation of § 6 because there is no such cause of action. It could, however, apply to equitable claims.

no longer allowed to pursue Article III, Section 6 as an avenue for relief?

A. What *Fields* held.

According to Cody Fields, Jackson County Sheriff's Deputy Mellinger used excessive force against Fields during the execution of a warrant. Specifically, Mellinger pointlessly struck Fields with the butt of a shotgun while Fields was trying to comply with Mellinger's command to get on the ground, ultimately seriously injuring Fields.[39]

Fields sued Mellinger, *et al.*, in the United States District Court for the Southern District of West Virginia.[40] Fields claimed violations of § 6, § 10, and W. VA. CONST. art. III, § 17 ("§ 17"); negligence; battery; outrage; § 1983 against Mellinger; § 1983-*Monell* against the County; § 1983 supervisory liability against the sheriff; and § 1985 conspiracy.[41] After the defendants moved for partial dismissal,[42] the district court certified this question: "Does West Virginia recognize a private right of action for monetary damages for violations of [§ 6]?"[43]

The Court first observed that—like all of the sections of Article III (save perhaps W. VA. CONST. art. III, § 9 ("§ 9"), discussed *infra*)—§ 6 contained no express private cause of action for money damages (internally or externally).[44] The Court recognized that its role was "to construe, interpret and apply provisions of the Constitution [and] not add to, distort or ignore the plain mandates thereof."[45]

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39 *Fields*, 851 S.E.2d at 791.

40 851 S.E.2d at 790.

41 *Id.*

42 *Id.* at 791.

43 *Id.* at 792.

44 *Id.*

45 *Id.* ("Patently absent from this provision is any allowance for a private right of action for monetary damages. Thus, we must determine whether a private right of action corresponds with the intent of the drafters and the electorate of our constitution.").

Fields pointed out that twice before, the Court had found a private cause of action for money in a section of Article III—*i.e.*, § 9 and § 10. As for the former, § 9 is the State's Takings Clause. It provides:

> Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: Provided, That when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

W. VA. CONST. art. III, § 9.

The Court recognized that one hundred thirty years earlier, in *Fox v. Baltimore & O.R. Co.*, 34 W. Va. 466, 12 S.E. 757 (1890), it had held that there was a private cause of action for money in § 9.[46] That Court recognized that § 9 was unlike the other sections of Article III, however, because the right injured was the specific right to money—*i.e.*, to "just compensation" for property.[47] Awarding money for a violation of § 9 is therefore more akin to specific performance of the right in question rather than, for example, to an implied private cause of action for money damages as a substitute remedy, as in other torts—that is, the language of § 9 creates (or comes very close to creating) an *express* cause of action, *for money*.

Also counseling in favor of reading § 9 in that manner was that the Court found no other path for the victim to seek the compensation to which he was entitled.[48] To the contrary, the

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46 *See* syl. pts. 1–3, *Fox*.

47 851 S.E.2d at 793.

48 *Id.* (citing syl. pt. 3, *Johnson v. City of Parkersburg*, 16 W. Va. 402 (1880) ("When the Constitution forbids a damage to private property and points out no remedy, and no statute gives a remedy for the invasion of the right of property thus secured, the common law, which gives a remedy for every wrong, will furnish the appropriate action for the redress of such grievances.").

several causes of action available to a person alleging excessive force in the context of an arrest or investigatory stop easily distinguish the circumstances of § 6 from those of § 9.

Mr. Fields also pointed to *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996). The Court, though, quickly rejected Fields's reliance on *Hutchison*. As the Court noted, one could be forgiven for not even being able to find *Hutchison*'s analysis of the issue given that it consists entirely of these two sentences:

> There is no dispute among the parties that a private cause of action exists where state government, or its entities, cause injury to a citizen by denying due process. To suggest otherwise, would make our constitutional guarantees of due process an empty illusion.

198 W. Va. at 150, 479 S.E.2d at 660.

Worse, the first of just two sentences about the issue conceded that the parties had not even raised it, and the second was barely more than platitude—*i.e.*, that, notwithstanding that it somehow was promoted to a syllabus point, it was nevertheless *obiter dicta*. Even worse, the whole issue was entirely irrelevant to the outcome in *Hutchison* itself (which was instead decided on immunity grounds). Finally, as noted *infra*, *Hutchison* is inconsistent with every other court taking up parallel questions. The Court thus "f[ou]nd little guidance from the *Hutchison* opinion to aid . . . in analyzing the certified question."[49]

Next, the *Fields* Court turned to *Harrah v. Leverette*, 165 W. Va. 665, 271 S.E.2d 322 (1980), *superseded by statute on other grounds as recognized by W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).[50] Fields had tried to rely on *Harrah*'s discussion of causes of action for a violation of § 5.[51] The Court, however, said that

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49 851 S.E.2d at 793 (footnote omitted).

50 *Id.* at 794 (cataloguing cases).

51 *Id.*

Fields was trying to wring too much from *Harrah* and instead validated the federal courts that found that *Harrah rejected* an implied cause of action for money for violations of Article III.[52]

Finally, the Court also rejected Fields's reliance on *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), in large part because *Bivens* found that—unlike here—without a federal cause of action for money in a federal excessive force claim against a federal actor, the victim would likely have no remedy.[53] Further, the Supreme Court of the United States is far from alone in expressing its reservations about *Bivens*.[54]

The *Fields* Court thus concluded:

> Clearly, reasonable alternative remedies are available for a violation of Article III, Section 6 of the West Virginia Constitution. This is evidenced in the instant matter by the fact that Mr. Fields has asserted state law claims for negligence in the hiring, retention, and/or supervision of employees; battery; and outrageous conduct/intentional infliction of mental, physical, and emotional distress. He also has asserted federal claims for excessive force under [§ 1983]; a *Monell* claim and supervisory liability under [§ 1983]; and unlawful conspiracy under [§§ 1983 and 1985].

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52 *Id.* at 794–95.

53 *Id.* at 795–97. It is worth noting that *Bivens* was not even a part of federal law until *1971*, nearly 200 years after enactment of the federal Constitution. Thus, the result in *Fields* is hardly surprising given that for so many years, money damages were not believed to be available for violations of the United States Constitution—something that even the enactment of § 1983 did not initially change (and only ever changed as against state actors). Even though § 1983 "came onto the books as § 1 of the Ku Klux Act of April 20, 1871," *Monroe v. Pape*, 365 U.S. 167, 171 (1961), *overruled on other grounds by Monell*, and "[d]espite its promising scope, [§ 1983] languished in relative obscurity until 1961, when the Supreme Court decided [*Monroe*]," *Kaminski v. Coulter*, 865 F.3d 339, 345 (6th Cir. 2017), also close to *200 years after* the Constitution was signed.

54 851 S.E.2d at 796–99; *accord Robinson v. Sherrod*, 631 F.3d 839, 842 (7th Cir. 2011) ("*Bivens* is under a cloud, because it is based on a concept of federal common law no longer in favor in the courts: the concept that for every right conferred by federal law the federal courts can create a remedy above and beyond the remedies created by the Constitution, statutes, or regulations. No more; **even if the alternative remedy is inferior to the *Bivens* remedy (a suit for damages against federal officers), it can be made exclusive.**") (emphasis added). *Bivens* was also different than the situation in *Fields*, because although "special factors" can weigh in favor of finding an implied cause of action, the *Bivens* Court recognized that the availability to Bivens of state-law but not a federal-law claim had *created*, rather than alleviated, the need for a single federal, "in-house" cause of action against federal officers for violating a fed con right. *See, e.g.*, 403 U.S. at 402–10 (Harlan, J., concurring).

> Based upon the foregoing discussion, and because alternate remedies are available for a violation of Article III, Section 6 of the West Virginia Constitution, we now hold that West Virginia does not recognize a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution. Applying this holding to the claims asserted by Mr. Fields, he cannot assert a private action for monetary damages based on a violation of Article III, Section 6 of the West Virginia Constitution because no such cause of action is recognized in this state.

851 S.E.2d at 799 (footnotes omitted).

Ultimately, the Court answered the certified question by saying, "West Virginia does not recognize a private right of action for monetary damages for a violation of Article III, Section 6 of the West Virginia Constitution."[55]

B. *Fields* presents no impediment to adopting *Graham*.

The Court's opinion in *Fields* supplies ample bases to reject the notion that *Fields* somehow counsels against adopting *Graham*.

A vital reason for the result in *Graham*—*i.e.*, that resort to "substantive due process" is disfavored and inappropriate when better (there, more specific) paths exist—is analogous to a vital reason for the result in *Fields*—*i.e.*, that when the drafters of a law decide to

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[55] Syl. pt. 3, *Fields*. As the Court recognized in *Fields*, § 6 is hardly alone in not being the subject of an express or implied cause of action for money damages. *See, e.g.*, *Harper v. C.O. Joseph Barbagallo*, No. 2:14-CV-07529, 2016 WL 5419442, at *13 n.7 (S.D. W. Va. Sept. 27, 2016) (Johnston, J.) (finding that W. VA. CONST. **art. III, § 1** "does not independently give rise to a cause of action, and the Court has located no case suggesting that it does"); *accord Murray v. Matheney*, No. 2:13-CV-15798, 2017 WL 4849113, at *7 (S.D. W. Va. Oct. 26, 2017) (Goodwin, J.) (relying on *Harper*); *see also Woodruff v. Bd. of Trustees of Cabell Huntington Hosp.*, 173 W. Va. 604, 611, 319 S.E.2d 372, 379 (1984) (recognizing that the "inherent rights" referred to in **art. III, § 1** include the ones actually secured by W. VA. CONST. art. III, § 7 and W. VA. CONST. art. III, § 16); *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 750, 310 S.E.2d 675, 682 (1983) (recognizing the same about **art. III, § 1** regarding art. III, §§ 9, 10, and 17); *Rhodes v. King*, No. 2:19-CV-00626, 2020 WL 4607323, at *8 (S.D. W. Va. Aug. 11, 2020) (no cause of action for money damages in W. VA. CONST. **art. III, § 2**); *Billiter v. Jones*, No. 3:19-CV-0288, 2020 WL 118595, at *5 (S.D. W. Va. Jan. 9, 2020) (money damages not available for claims under W. VA. CONST. **art. III, §§ 7 and 16**; and saying about W. VA. CONST. **art. III, § 5** that only injunctive relief is available); *Murray v. Matheney*, No. 2:13-CV-15798, 2017 WL 4849113 (S.D. W. Va. Oct. 26, 2017) (rejecting a claim for money damages for violations of W. VA. CONST. **art. III, § 5**).

omit therefrom an express private cause of action for money damages, it is inappropriate for courts to imply one especially when suitable alternate remedies (there as here, § 1983, tort, equity, *etc.*) exist. As both courts held, neither *Fields*, nor *Graham*, nor *Fields*-plus-*Graham* take anything from a victim of excessive force by the police (or a jailor).

This fact has two results. First, as noted, applying *Graham* after *Fields* does not leave a victim of excessive force by the police with nothing, or even any less for that matter; it leaves him with ample other causes of action—legal and equitable—to remedy the violation of his right to be free from excessive force (including, at least, a § 1983 claim for a violation of the same right but as secured by the Fourth Amendment (as Bradley filed here);[56] battery (as Bradley filed here);[57] negligence (as Bradley filed here);[58] and, in the case of ongoing or future violations, equitable relief (*e.g.*, injunctive relief, an appropriate writ, *etc.*)). Indeed, it is difficult to imagine why Bradley is even pursuing this issue, given that he has already made claims for those alternate causes of action against Petitioners.

Second, it furthers *Graham*'s and *Fields*'s shared goal by referring the victim to *more* specifically applicable rights, causes of action, and thus associated standards. To hold that just because a person does not have a particular implied private cause of action for money to remedy a past violation of § 6, he must be referred *backwards* to a vague substantive due process

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[56] Even though § 6 hypothetically *could* be more protective than the Fourth Amendment, *see, e.g.*, syl. pt. 1, *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995), it is *not*, *see, e.g.*, syl. pt. 2, *Andrews*, *supra*.

[57] If force is not excessive—*i.e.*, if it is objectively reasonable—then it is necessarily also not a battery, and *vice versa*. *See Kaufman v. United States*, No. 1:12-CV-0237, 2014 WL 66639, at *8 (S.D. W. Va. Jan. 8, 2014). Thus, a claim for unconstitutionally excessive force and a claim for battery usually succeed or fail hand-in-hand.

[58] Negligence also requires unreasonableness, *see Strahin v. Cleavenger*, 216 W. Va. 175, 183, 603 S.E.2d 197, 205 (2004), so if force is not excessive—*i.e.*, if it is objectively reasonable—then it is necessarily also not negligence, and *vice versa*. Thus, a claim for unconstitutionally excessive force and a claim for negligence also usually succeed or fail hand-in-hand.

claim, rather than *forwards* to any of the more specifically (or at least as) applicable causes of action and associated standards, would be to stand *Graham* and *Fields* on their heads.

CONCLUSION

Accordingly, Petitioners respectfully request the Court to **ANSWER** both of the United States District Court for the Southern District of West Virginia's certified questions:

> First, **YES**, West Virginia law mirrors the first holding in *Graham* (and thus that § 10 does not secure the right to be free from the use of excessive force by government actors in settings subject to more specific rights (including, *e.g.*, § 6 or § 5); such claims are therefore to be analyzed by the standards governing analysis of claims made for violations of those more specific rights), and
>
> Second, **YES**, this remains true notwithstanding the non-existence of just one of several express or implied private causes of action for money damages arising out of a claim that a government actor used excessive force.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2021, true and accurate copies of the foregoing *Petitioners' Brief* were hand delivered or deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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