No. 20-0183

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CODY RYAN FIELDS,
Plaintiff, Petitioner,

v.

ROSS H. MELLINGER, Individually and in his capacity as a Deputy of the Jackson County Sheriff's Department; TONY BOGGS, Individually and in his capacity as the Sheriff of Jackson County, West Virginia; and the JACKSON COUNTY COMMISSION, doing business as the Jackson County Sheriff's Department.
Defendants, Respondents.

BRIEF OF RESPONDENTS, ROSS H. MELLINGER, TONY BOGGS, AND THE JACKSON COUNTY COMMISSION

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I. INTRODUCTION

This is a brief upon certified question review from the United States District Court for the Southern District of West Virginia, which posed the following Certified Question to this Court:

> Does West Virginia recognize a private right of action for monetary damages for violations of Article III, Section 6 of the West Virginia Constitution?[1]

The Respondents herein urge this Honorable Court to answer the Certified Question in the negative.

II. STATEMENT OF THE CASE

Petitioners adequately set forth the majority of the pertinent facts underlying this matter. Respondents set forth additional facts in order to provide the proper context for the Circuit Court's rulings.

On July 2, 2019, Petitioner, Cody Ryan Fields, filed his Complaint against Respondents, Ross H. Mellinger, Tony Boggs, both individually and in their official capacities, as well as the Jackson County Commission d/b/a Jackson County Sheriff's Department.[2] The basis of his civil action is that during the course of the execution of a search warrant at a residence, he alleges he was subject to excessive force when Respondent Mellinger allegedly struck him in the face with a firearm.[3]

Petitioner asserted state-law claims, including constitutional tort claims arising under Article III, Sections 6, 10, and 17 of the West Virginia Constitution, claims that the Jackson County Commission negligent hired, retained and/or supervised Respondent

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[1] J.A. 48
[2] J.A. 1-10.
[3] J.A. 2.

Mellinger, civil battery and intentional infliction of emotional distress.[4] [5] [6] [7] [8] Plaintiff also asserted claims under 42 U.S.C. §§ 1983 and 1985 for excessive force under the Fourth Amendment, municipal liability, supervisory liability and civil conspiracy claim.[9] [10] [11] [12] [13]

Respondents filed a partial motion to dismiss, in relevant part, the state constitutional claim as (1) claims for money damages where excessive force is alleged are not independently actionable; and (2) that while this Court has recognized a cause of action arising under our state constitution for deprivation of due process under Article III, Section 10, there is no precedent for finding the West Virginia Constitution creates causes of action for money damages for claims of excessive force.[14] [15] [16] As to the second argument, the Respondents argued that because this Court had not recognized a money damages claim except under Article III, Section 10, and because excessive force claims are governed by the Fourth Amendment, as opposed to due process, there could be no liability under Article III, Sections 6 or 10.[17]

Following briefing, the District Court entered its Order of Certification to this Court noting that while Article III, Section 6 "parallels the Fourth Amendment[,]" the issue of whether the West Virginia Constitution gives rise to a private right of action for money damages under this Section is a question of some dispute among West Virginia's federal

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[4] J.A. 5-6.
[5] J.A. 1-10.
[6] J.A. 4-5.
[7] J.A. 5.
[8] J.A. 5.
[9] J.A. 1-10.
[10] J.A. 6-7.
[11] Monell v. Department of Social Services, 436 U.S. 658 (1978).
[12] J.A. 7.
[13] J.A. 7-8.
[14] J.A. 26-28.
[15] J.A. 12-15, 16-34.
[16] J.A. 27-28.
[17] J.A. 27-28

courts."[18] The District Court did not provide an answer to the proposed Certified Question.[19]

III. SUMMARY OF THE ARGUMENT

This Court need not imply a direct cause of action for money damages under Article III, Section 6 of the West Virginia Constitution, especially when the basis for the purported cause of action is excessive force. In Bivens v. Six Unknown Federal Narcotics Agents,[20] the United States Supreme Court authorized a direct cause of action against federal officials under the U.S. Constitution, it did so because of the existence of 42 U.S.C. § 1983, which provides for a general right to sue for violation of the U.S. Constitution. That statute authorizes suits against persons acting under color of state law but did not authorize suits against federal officials. Because of the disparity, the Court in Bivens created an implied right of action against federal officials. West Virginia, however, does not have a state-analogue to §1983.

Moreover, in recent years, the U.S. Supreme Court has repeatedly rejected requests to extend Bivens. Those cases indicate that implied causes of action are unnecessary when alternative remedies are available. West Virginia recognizes common-law torts that provide alternative remedies, including assault and battery; negligent hiring, training, supervision and retention; and false arrest and imprisonment. Thus, as there are alternative remedies already available, several of which were alleged in this case, there is no need to create an implied cause of action under Article III, Section 6 of the West Virginia Constitution.

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[18] J.A. 48.
[19] J.A. 48-52.
[20] Bivens, 403 U.S. 388.

Because the West Virginia Legislature has not enacted a state analogue to §1983, creation of an implied cause of action under the West Virginia Constitution implicates the separation of powers doctrine. Our tripartite form of government requires that each branch refrain from exercising the authority of its sister branches. Creation of a cause of action for state constitutional torts should be undertaken by the branch responsible for weighing the costs and benefits of such a policy change.

Finally, state constitutional tort claims are not permissible against political subdivisions because the West Virginia Governmental Tort Claims and Insurance Reform Act only permits negligence-based claims against political subdivisions and constitutional tort claims in general—and excessive force claims in particular—require an intentional act on the part of an official. While the Tort Claims Act contains an exclusion for claims arising under the United States Constitution, it does not contain such an exclusion for claims arising under the West Virginia Constitution. The West Virginia Legislature could have excluded state constitutional claims from coverage in the Tort Claims Act but chose not to do so.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order entered on April 20, 2020, this Court noted that this matter would be set for oral argument pursuant to Rule 20 during the September 2020 Term of Court. The date of such oral argument has yet to be set.

V. ARGUMENT

There is no legislative authority that gives a plaintiff the ability to recover monetary damages against a political subdivision, or law enforcement officials for an alleged violation of Article III, Section 6 of the West Virginia Constitution. To the contrary, this

Court has implied that constitutional tort actions against political subdivisions are barred by the West Virginia Governmental Tort Claims and Insurance Reform Act.[21]

Additionally, because causes of action and remedies for acts of law enforcement officials already exist in West Virginia, which obviates the need for implying direct causes of action under the West Virginia Constitution. Such causes of action and remedies are more than adequate to provide compensation for plaintiffs who seek relief from law enforcement officials, and recognition of a new species of claims will do nothing except force litigants and the courts to expend their precious time and resources litigating claims which ultimately seek duplicative relief of claims already in existence.

Finally, creation of a new cause of action for alleged violations of Article III, Section 6 would violate the separation of powers doctrine in that the Legislature has not authorized such actions.

A. No Direct Cause of Action Should be Implied Under Article III, Section 6 of the West Virginia Constitution

The District Court certified this question in order to put to rest the issue of whether an implied cause of action exists for claims of violations of Article III, Section 6 of the West Virginia. This Court should join with those states that have refused to recognize an implied cause of action under their respective state constitutions.

State courts across the country have split on whether citizens can bring claims under certain provisions of their state constitutions in the absence of legislative authorization.[22] Courts which have rejected implied causes of action under their

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[21] Syl. Pt. 2, Hutchison v. City of Huntington, 479 S.E.2d 649 (1996).

[22] *See*, Jennifer Freisen, State Constitutional Law: Litigating Individual Rights, Claims and Defenses, § 7.07 (noting that "[s]tate courts are about evenly divided on whether state law should ever recognize an implied cause of action for damages directly under a state constitutional guarantee.").

respective constitutions have based their decisions on separation of powers, application of immunity defenses, tort claims acts, as well as the availability of alternative remedies. This is the approach Respondents urge the Court to adopt and is consistent with the federal district court decisions from both the Southern and Northern Districts have held that money damages are not available for alleged violations of the West Constitution.[23] The states that have recognized direct causes of action under their constitutions have premised their decisions on two primary sources: the United States Supreme Court's Bivens[24] decision, and the Restatement (Second) of Torts § 874A (1979).

1. The Court Should Refuse to Create *Bivens*-type Remedy

Plaintiffs seeking to prosecute an implied cause of action under state constitutions have relied most often on Bivens v. Six Unknown Federal Narcotics Agents.[25] In Bivens, the Supreme Court held that a federal cause of action under the Fourth Amendment existed, with damages recoverable against the federal agents upon proof that the violation occurred.[26] To reach this conclusion, the Court noted that while "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation[,] ... where legal rights have been invaded, and a

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[23] Nutter v. Mellinger, 2020 U.S. Dist. LEXIS 11417, at *17-19 (S.D.W.Va. 2020) (holding that "private plaintiff cannot bring a claim for damages under Article III, § 6 of the West Virginia Constitution when there is not an independent statute authorizing such a cause of action."); Jones v. White, 2018 U.S. Dist. LEXIS 93952, at *19 (N.D.W.Va. 2018) (noting that "the West Virginia Constitution does not contain any provision allowing for monetary damages as a result of alleged state constitutional violations."); Howard v. Ballard, 2015 U.S. Dist. LEXIS 41225, at *10 (S.D.W.Va. 2015) (holding Article III, § 5 does not independently give rise to claims for money damages); McMillion-Tolliver v. Kowalski, 2014 U.S. Dist. LEXIS 44365, at *6 (S.D.W.Va. 2014) (finding that "[w]ithout an independent statute authorizing money damages for violations of the West Virginia Constitution, the plaintiff's claim must fail."); Smoot v. Green, 2013 U.S. Dist. LEXIS 156887, at *12 (S.D. W. Va. 2013) ("[The defendants] assert that Article III of the West Virginia Constitution does not give rise to claims for money damages against them. They are correct.").

[24] Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

[25] Bivens, 403 U.S. 388.

[26] Id. at 395-396.

federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[27]

Of course, at the time Bivens was decided, there was a federal statute, 42 U.S.C. §1983, that existed which provided for a general right to sue for a violation of the Fourth Amendment; however, it did not provide a remedy for violations by federal officials. Thus, the thrust of Bivens is that it simply "expanded the remedy available under Section 1983 to address the wrong done by the federal officers."[28] The Bivens Court expanded the §1983 remedy because there was no other adequate federal legislative or administrative remedy, and there were "no special factors counseling hesitation in the absence of affirmative action by Congress."[29]

In the years since Bivens was decided, the Court has only permitted expansion of the Bivens-type remedy twice: once for action against federal officer for violation of Fifth Amendment for sex discrimination against a congressional employee;[30] and another for an action against federal officer for violation of Eighth Amendment for failure to provide proper medical attention to a federal inmate.[31] However, the Court has since expressed its determination that implied constitutional causes of action are "disfavored."[32]

Post-Bivens cases show that the availability of alternative remedies counsels against implying a cause of action. For instance, in Bush v. Lucas,[33] the Supreme Court declined to create a new non-statutory damages remedy where comprehensive procedural and substantive policies already provided meaningful remedies. There, a

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[27] Id. at 396 (internal citations and quotations omitted).
[28] Jones v. City of Phila., 890 A.2d 1188, 1210 (Pa. Commw. Ct. 2006).
[29] Bivens, 403 U.S. at 396.
[30] Davis v. Passman, 442 U.S. 228 (1979).
[31] Carlson v. Green, 446 U.S. 14 (1980).
[32] Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).
[33] Bush v. Lucas, 462 U.S. 367 (1983).

federal employee alleged he had been demoted for publicly criticizing his employer, in violation of the First Amendment, and sought damages through use of Bivens. The Court refused to create a cause of action, in large part, because of the "elaborate, comprehensive scheme," including administrative and judicial procedures, which were in place to protect federal civil servants.[34] While acknowledging that the available administrative remedies did not "provide complete relief for the plaintiff,"[35] the Court cautioned that:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff.[36]

Importantly, the Supreme Court was "convinced that Congress is in a better position to decide whether or not the public interest would be served by creating [the remedy requested]."[37]

Similarly, in Schweiker v. Chilicky,[38] the Court again refused to extend a Bivens-remedy to Social Security recipients whose benefits had been terminated improperly in violation of the Due Process Clause. In doing so, the Court noted that "the absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the

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[34] Id. at 385.
[35] Id. at 388.
[36] Id.
[37] Id. at 390.
[38] Schweiker v. Chilicky, 462 U.S. 412 (1988).

violation."[39] Thus, the Court rejected the claim that a Bivens remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court.[40]

Several states have determined that the availability of alternative remedies also counsels against implying a state-law Biven-type claim.[41] In St. Luke Hospital v. Staub, the plaintiff brought suit for money damages for violation of the Kentucky Constitution, as well as claims for false imprisonment, false arrest, outrage, and assault and battery.[42] During the appeal, the plaintiff argued that the court should create a Bivens-type action for violations of the Kentucky Constitution.[43] In rejecting the plaintiff's argument, the Kentucky Supreme Court noted that "traditional tort actions" meant that other remedies were available such that the Court did not need to recognize a new species of tort claims.[44]

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[39] Id. at 421-422.
[40] Id. at 425.
[41] State v. Heisey, 271 P.3d 1082 (Alaska 2012) (holding that an alternative remedy may include federal remedies, such as a §1983 claim, even if such remedy is no longer available); Jones v. City of Philadelphia, 890 A.2d 1188, 1212 (Pa. Commw. Ct. 2006) (holding that "[t]he remedy for monetary damages under Section 1983 for violation of the Fourth Amendment is, therefore, an alternative remedy."); Katzberg v. Regents of Univ. of Cal., 58 P.3d 339, 356 (Cal. 2002) (reasoning that the availability of adequate alternative remedies "militates against judicial creation of" a constitutional remedy); Shields v. Gerhart, 658 A.2d 924, 933 (Vt. 1995) ("We have been cautious in creating a private damage remedy even where the Legislature has provided no alternative civil remedy."); Board of County Commissioners v. Sundheim, 926 P.2d 545, 549-53 (Colo. 1996) (holding that alleged state due process violation in context of zoning decision was sufficiently redressable by means of claim under § 1983 and by judicial review of administrative decisions pursuant to state rule of civil procedure); St. Luke Hospital v. Straub, 354 S.W.3d 519 (Ky. 2011) (declining to create a Biven-type action where Plaintiff also allege traditional tort actions, including false imprisonment, false arrest, the tort of outrage, and assault and battery); Cantrell v. Morris, 849 N.E.2d 488, 506 (Ind. 2006) (finding it "unnecessary to find a state constitutional tort" where "state tort law is generally available" even if restricted by a tort claims act); Provens v. Stark Cty. Bd. of Mental Retardation & Developmental Disabilities, 594 N.E.2d 959, 965 (Ohio 1992) (refusing to create a Bivens remedy because plaintiff had other remedies available).
[42] Staub, 354 S.W.3d at 533.
[43] Id. at 536-537.
[44] Id. at 537.

In State v. Heisey, the Alaska Supreme Court addressed the issue of whether a state constitutional tort claim for damages existed for an inmate allegedly injured at the hands of correctional officers.[45] The Court noted that under Bivens, a plaintiff must establish two elements: (1) that alternative remedies do not exist; and (2) that the constitutional violation was flagrant.[46] The Court rejected the plaintiff's argument that §1983 could not be considered as an alternative remedy because it only applied to violations of the federal constitution, reasoning that "federal constitutional claims may provide adequate remedies for state constitutional violations.[47] The Court further noted that "[t]he U.S. Supreme Court held that where state tort law remedies are available, a Bivens action will not be recognized in federal court."[48] The Court further rejected the argument that the Alaska Constitution provided broader protections than its federal counterpart because "an alternative remedy need not be an exact match."[49] The Court also rejected the argument that even if a §1983 is barred or dismissed, it still precluded a state constitutional tort because "[t]he existence of the remedy itself is enough to block a Bivens-type action, even if procedurally that remedy is no longer available."[50]

The Pennsylvania Commonwealth Court also determined that the availability of a §1983 claim counseled against implying a state constitutional tort in Jones v. City of Philadelphia.[51] In Jones, the plaintiff filed a constitutional tort claim under the State's search and seizure provision against defendant officers for the alleged use of excessive

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[45] Heisey, 271 P.3d at 1083-1084.
[46] Id. at 1096.
[47] Id.
[48] Id. at n. 86 (*citing* Corr. Servs. Corp v. Malesko, 534 U.S. 61, 72-74 (2001)).
[49] Id. at 1097.
[50] Id. at 1098.
[51] Jones, 890 A.2d 1188.

force during his arrest.[52] The issue of whether the state constitution provided for money damages against the City was certified to the Commonwealth Court for determination.[53] The Court began its analysis with a review of Bivens and its progeny and determined that "[t]he existence of an apparent alternative remedy is a factor counseling hesitation."[54] While the trial court interpreted the Pennsylvania Constitution as providing broader protections than the Fourth Amendment, the Commonwealth Court found that in excessive force cases, the protections afforded by the state constitution were not broader than the Fourth Amendment and that such "rights are sufficiently protected by the Federal Constitution."[55] Because both the state and federal constitutional provisions govern the same conduct, the Court found that "[t]he remedy for monetary damages under Section 1983 for violation of the Fourth Amendment is ... an alternative remedy."[56] The Court further noted that the adequacy of an alternative remedy "cannot be determined simply by evaluating whether it provides complete relief for the plaintiff[,]" and that "[a]n alternative remedy may be considered adequate even if it does not provide [plaintiff] "a complete remedy."[57] While noting that the plaintiff's §1983 remedy would only be for violations of the federal constitution, the Court "d[id] not believe this remedy should be augmented by the creation of a new judicial remedy for the constitutional violation at issue."[58]

Like many other states, West Virginia's common law provides alternative remedies which counsel against implying a cause of action under Article III, Section 6. West Virginia

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[52] Id. at 1190-11912.
[53] Id. at 1191.
[54] Id. at 1212 (citations and quotations omitted).
[55] Id.
[56] Id.
[57] Id. at 1212-1213.
[58] Id. at 1213 (citations and quotations omitted).

allows claims for false arrest/imprisonment,[59] intentional infliction of emotional distress,[60] assault and battery[61] negligent hiring and retention,[62] negligent training,[63] and negligent supervision.[64]

Moreover, §1983 is, in and of itself, an alternative remedy.[65] While §1983 only applies to alleged violations of the federal constitution, Article III, Section 6 of the West Virginia Constitution "is virtually identical to the Fourth Amendment."[66] And even though "[t]he 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[,]"[67] because of the near identical nature of the two clauses, "[t]his Court has customarily interpreted Article III, § 6 of the West Virginia Constitution in harmony with federal case law construing the Fourth Amendment."[68] Indeed, this Court has permitted a plaintiff who previously asserted a §1983 claim against a law enforcement officer to pursue an independent claim for assault, battery or other common law intentional torts even if those claims arise from the same facts as the §1983 claim.[69]

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[59] Riffe v. Armstrong, 477 S.E.2d 535 (W.Va. 1996).
[60] Syl. Pt. 3, Travis v. Alcon Labs., 504 S.E.2d 419 (W.Va. 1998).
[61] West Virginia Fire & Casualty Co. v. Stanley, 602 S.E.2d 483, 494, 495 (W.Va. 2004) (citations omitted)
[62] State ex. rel. W.Va. State Police v. Taylor, 499 S.E.2d 283, 289 n.7 (W.Va. 1997).
[63] Taylor v. Cabell Huntington Hosp., Inc., 538 S.E.2d 719, 725 (W.Va. 2000).
[64] Id.
[65] Jones, 890 A.2d at 1213; Heisey, 271 P.3d at 1097.
[66] State v. Worley, 369 S.E.2d 706, 712 n.5 (W. Va. 1988).
[67] Syl. Pt. 2, Pauley v. Kelly, 255 S.E.2d 589 (W.Va. 1979).
[68] Rogers v. Albert, 541 S.E.2d 563, 569 (W.Va. 2000).
[69] Neiswonger v. Hennessey, 601 S.E.2d 69 (2004)(holding that collateral estoppel did not bar plaintiff from asserting state law claims, including assault, battery, and intentional infliction of emotional distress, against a police officer despite federal district court's ruling, in a case arising from the same incident, that there was no viable § 1983 excessive force claim because the defendant police officer's use of force was objectively reasonable).

Therefore, because West Virginia currently recognizes common law torts for conduct arising under Article III, Section 6, there is no compelling reason for creation of a Bivens-type remedy under Article III, Section 6.

2. Restatement (Second) of Torts § 874A Should not be Utilized as Support for a *Bivens*-type Money Damages Remedy

In addition to Bivens, litigants seeking to create an implied state constitutional tort action have also relied on Section 874A of the Second Restatement of Torts. Section 874A provides:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.[70]

However, the rationale of Section 874A of the Restatement (Second) similarly does not support creation of a constitutional damages action. Section 874A sets forth a two-pronged test for determining if judicial creation of a direct damages remedy is appropriate: (1) a damages remedy must further the purpose of the legislative provision; and (2) the remedy must be necessary to assure the effectiveness of the provision.

In deciding whether to recognize such a constitutional tort, courts should "look[ ] for the policy behind the legislative provision, attempting to perceive the purpose for which it was enacted, and then, having ascertained that policy or purpose, determin[e] the most appropriate way to carry it out and identify[] the remedy needed to accomplish that result."[71] The Restatement presents six factors that should be considered, including: (1)

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[70] Restatement (Second) of Torts § 874A

[71] Id., comment d.

the nature of the legislative provision; (2) the adequacy of existing remedies; (3) the extent to which the tort action will aid or supplement or interfere with, existing remedies and other means of enforcement; (4) the significance of the purpose that the legislative body is seeking to effectuate; (5) the extent of the change in tort law; and (6) the burden that the new cause of action will place on the judicial machinery.[72]

Thus, although state courts have utilized Section 874A as a basis for implying constitutional tort claims under their respective constitutions, Section 874A is simply a streamlined version of the Bivens decision and its progeny.[73]

Nevertheless, analysis of the Restatement's six factors indicates that creating a Bivens-type action for alleged violations of the West Virginia Constitution is unwarranted. First, West Virginia currently recognizes several common-law torts that provide alternative remedies, such as false arrest/imprisonment, intentional infliction of emotional distress, assault and battery, negligent hiring and retention, negligent training, and negligent supervision. And for claims of excessive force, §1983 provides an adequate remedy as the Fourth Amendment also prohibits the use of unreasonable or excessive force.

Second, recognition of an implied cause of action under Article III, Section 6 would change established tort law. Unlike a Bivens excessive force claim, which was authorized because of the existence of §1983—which provided a general right to sue for constitutional violations—there is no West Virginia statute that already provides for a general right to sue for alleged constitutional violations. Creation of an implied right would

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[72] Id., comment h.

[73] Dorwart v. Caraway, 58 P.3d 128, 135 (Mont. 2002) (noting that "[t]he general principle of Bivens and its progeny is set out clearly in Restatement (Second) of Torts § 874A.")

result in a new breed of tort law for which there is no established body of precedent like which was available under Bivens.

Third, creation of a Bivens-type remedy without establishment of a defined statutory scheme passed by the branch of government best equipped to weigh the policy implications could potentially burden the State and political subdivisions financially. Without a statutory scheme or some description of conduct or omissions that is actionable, government agencies and political subdivisions cannot predict the parameters of such a cause of action. Moreover, creation of a new cause of action will most likely result in a deluge of claims filed in state court that seek to expand a Bivens-type remedy to other constitutional provisions.

In sum, this Court should determine that the current existing remedies are sufficient and decline to expand the available tort claims to recognize an additional and implied cause of action under Article III, Section 6 of the West Virginia Constitution for that which there are ample existing remedies .

B. Recognition of an Implied Cause of Action under Article III, Section 6 Raises Separation of Powers Concerns.

Earlier this year, the U.S. Supreme Court rejected a request to extend Bivens to create a damages remedy for cross-border shootings.[74] The second sentence of the opinion recognized that "the Constitution's separation of powers require[d the Court] to exercise caution before extending Bivens to a new context."[75] Indeed, the separation of powers concerns has been a major reason the Supreme Court has "consistently refused

[74] Hernandez v. Mesa, 140 S.Ct. 735 (2020).
[75] Id. at 739.

to extend Bivens to any new context or new category of defendants."[76] As noted by the Court in Abbasi,

> When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is who should decide whether to provide for a damages remedy, Congress or the courts?
>
> The answer most often will be Congress. When an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them.[77]

Several states have rejected implied causes of action as doing so would violate the separation of powers doctrine.[78] For instance the Jones Court also found that the lack of a Pennsylvania analogue to §1983 "weighs heavily against ... creating a private right of action for monetary damages" because the "decision to create a cause of action for damages for a constitutional violation, in the first instance, is more appropriate for the legislature[.]"[79]

In Moody v. Hicks,[80] the Missouri Eastern Court of Appeals rejected a plaintiff's request that the state recognize an implied state constitutional claim remedy under Missouri's search and seizure provision. The Court noted that a §1983 action was

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[76] Ziglar v. Abbasi, 137 S.Ct. 1843, 1857 (2017) (citations omitted).
[77] Id. (internal citations and quotations omitted).
[78] Lewis v. State, 629 N.W.2d 868, 870 (Mich. 2001) (holding the court could not create a judicial remedy for the violation of the Michigan Constitution because to do so would violate the separation-of-powers doctrine, given its constitution granted the legislature the power to enact laws putting the constitutional provisions into effect); Bandoni v. State, 715 A.2d 580, 595 (R.I. 1998) (relying on a provision in the Rhode Island Constitution concluding, "we are of the opinion that the creation of a remedy in the circumstances presented by this case should be left to the body charged by our Constitution with this responsibility"); Shields v. Gerhart, 658 A.2d 924, 930-933 (Vt. 1995) (holding the plaintiff could not bring a private cause of action seeking money damages for a violation of the Vermont Constitution).
[79] Jones, 890 A.2d at 1213.
[80] Moody v. Hicks, 956 S.W.2d 398 (Mo. Ct. App. 1997)

cognizable because Congress had enacted such legislation and that because the Missouri legislature had not, whether a state constitutional tort cause of action should be permitted "is best left to the discretion of the General Assembly."[81]

Like most states, West Virginia has a constitutional provision reflecting the separation of powers between its three branches of government.[82] Article V, Section 1 provides:

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.[83]

As noted by this Court,

> The separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of Government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed.[84]

Thus, "separation of powers doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them."[85] "[T]he separation of powers doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them."[86] Thus, "[w]here there is a direct and fundamental encroachment by one branch of government into the

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[81] Id. at 402.
[82] West Virginia Const., Art. V, Section 1.
[83] Id.
[84] State ex rel. Workman v. Carmichael, 819 S.E.2d 251, 273 (W.Va. 2018) (citations omitted).
[85] Id. (citations omitted).
[86] Id. (citations omitted).

traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution."[87]

This Court has noted that the "legislative power is the power of the law-making bodies to frame and enact laws. This power covers a very wide scope. Indeed, except where it is limited by the provisions of the State and Federal Constitutions, that power is practically and essentially unlimited."[88] In contrast, the judicial power is

> the power which a regularly constituted court exercises in matters which are brought before it, in the manner prescribed by statute, or established rules of practice of courts, and which matters do not come within the powers granted to the executive, or vested in the legislative department of the Government.[89]

Because of this separation, this Court held, long ago, that

> The legislature has the right to create new causes of action for the recovery of money, but a justice of the peace has not, and when he attempts to create a new cause of action he usurps legislative functions, and, if he illegally extends a certain class of actions within his jurisdiction to include a new cause of action of his own creation, he is guilty of exceeding his legitimate powers.[90]

Indeed, this Court has previously held that "the courts of this state are forbidden by [Article V, Section 1] to exercise legislative authority of any kind."[91] Yet, creation of an implied cause of action under Article III, Section 6 would do just that. The Legislature has not created a statute authorizing claims for money damages for alleged violations of the West Virginia Constitution.

Creation of such a constitutional tort claim should be left to the branch of government better equipped to handle the myriad of policy considerations associated with

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[87] Syl. Pt. 2, Appalachian Power Co. v. Public Serv. Comm'n of West Virginia, 296 S.E.2d 887 (1982).
[88] State v. Huber, 40 S.E.2d 11, 18 (W.Va. 1946).
[89] Id.
[90] Norfolk & W. Ry. v. Pinnacle Coal Co., 30 S.E. 196, 197 (1898).
[91] State ex rel. Cty. Court v. Demus, 135 S.E.2d 352, 355 (W.Va. 1964) (citation omitted).

such a change in the law. The Legislature can (and should) weigh the competing policy issues concomitant with whether claims for money damages for state constitutional torts in West Virginia.

Accordingly, the Respondents respectfully request that this Honorable Court answer the Certified Question in the negative and find that a claim for money damages for alleged violations of Article III, Section 6 does not exist.

C. There is no Right to a Money Damages Claim against a Political Subdivision under Article III, Section 6.

Even if this Court finds that in general a plaintiff may pursue a direct claim under Article III, Section 6, such a claim may not be prosecuted against a political subdivision due to the Legislature's passage of the West Virginia Governmental Tort Claims and Insurance Reform Act.[92]

In Hutchison,[93] this Court noted that "[t]here was no dispute among the parties that a private cause of action exists where the *state government*, or its entities, cause injury to a citizen by denying due process."[94] However, the Court held that any such claim may be barred as against political subdivisions if the Tort Claims Act provided immunity to such entities.[95] The Court reasoned that "[a]s under §1983, a plaintiff must show that there was a constitutional violation, *and that the claim is not barred by an applicable immunity*."[96] Ultimately, the Court issued Syllabus Point 2, which provides:

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[92] West Virginia Code § 29-12A-1, et seq.

[93] Hutchison v. City of Huntington, 479 S.E.2d 649 (W.Va. 1996). In Hutchison, the plaintiff brought a due process claim under Article III, Section 10 for the city's delay in issuing a building permit, as well as a federal due process claim under 42 U.S.C. § 1983. Id. at 657 n. 5. The City sought dismissal of the claims pursuant to the Tort Claims Act, which was rejected by the circuit court, and the case proceeded to trial, which resulted in a verdict in favor of the Plaintiff. Id. at 657. The City appealed the denial of its motion to dismiss the plaintiff's state-law claim. Id.

[94] Id. at 660 (emphasis added).

[95] Id.

[96] Id (emphasis added).

> Unless barred by one of the recognized statutory, constitutional or common law immunities, a private cause of action exists where a municipality or local governmental unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, § 10 of the West Virginia Constitution.

Stated otherwise, a private cause of action exists against a local government unit for violation of the Due Process Clause *only if* a recognized statutory, constitutional, or other common law immunity applies. The same should hold true for any provision of the West Virginia Constitution, including specifically Article III, Section 6.

The purpose of the Tort Claims Act is "to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability."[97] A political subdivision "is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function" except in a few narrow circumstances.[98]

In choosing those circumstances, the Legislature determined that only claims sounding in negligence could be applied to political subdivisions.[99] Further, the Legislature crafted the Tort Claims Act so as to for certain exceptions as to applicability of the Act, such as claims for contractual liability, employment claims or claims arising under the United States Constitution.[100] Absent from those exceptions, however, are claims arising under the West Virginia Constitution.[101] As the Legislature specifically

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[97] West Virginia Code § 29-12A-1.
[98] West Virginia Code § 29-12A-4.
[99] West Virginia Code § 29-12A-4(c).
[100] West Virginia Code § 29-12A-18.
[101] Id.

included certain instances in which the Tort Claims Act does not apply, this leads to the conclusion that the Legislature intended for the Tort Claims Act to apply to any other claim presented against a political subdivision, including claims brought under the West Virginia Constitution.[102]

Given that the Legislature refused to include claims arising under the State Constitution within the types of claim for which the Tort Claims Act should not apply, this Court should not attempt to write into the Tort Claims Act what the Legislature has purposefully omitted.[103]

A claim for excessive force is an requires an "intentional and knowing act" on the part of the officer.[104] However, "claims of intentional and malicious acts are included in the general grant of immunity in W.Va. Code §29-12A-4(b)(1). Only claims of negligence specified in W. Va. Code §29-12A-4(c) can survive immunity from liability under the general grant of immunity in W. Va. Code § 29-12A-4(b)(1)."[105] Thus, a political subdivision is not liable for its employees' intentional malfeasance.[106]

Nor can a claim of negligence supplant an intentional tort. "Conduct that supports a negligence claim can be distinguished from conduct that supports an intentional tort claim by examining the subjective intent of the alleged tortfeasor. Intentional torts, as distinguished from negligent or reckless torts . . . generally require that the actor intend

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[102] Syl. Pt. 3, Manchin v. Dunfee, 327 S.E.2d 710 (W.Va. 1984) ("In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.").

[103] Williamson v. Greene, 490 S.E.2d 23, 28 (W.Va. 1997) ("it is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.") (citation omitted).

[104] Kingsley v. Hendrickson, 576 U.S. 389, 400 (2015).

[105] Zirkle v. Elkins Rd. Pub. Serv. Dist., 655 S.E.2d 155, 160 (W.Va. 2007).

[106] Mallamo v. Town of Rivesville, 477 S.E.2d 525, 533-34 (W.Va. 1996).

the consequences of an act, not simply the act itself."[107] Thus, "a mere allegation of negligence does not turn an intentional tort into negligent conduct."[108]

As excessive force claims are limited to "situations in which the use of force was the result of an intentional and knowing act"[109] and because "claims of intentional ... acts are included in the general grant of immunity"[110] under the Tort Claims Act, the Tort Claims Act precludes excessive force claims under Article III, Section 6.

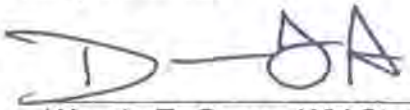
Accordingly, even if the Court concludes that a Bivens-type remedy should be implied under Article III, Section 6 of the West Virginia Constitution, it should also determine that a money damages claim is not cognizable against a political subdivision.

VI. CONCLUSION

In sum, this Court should find that West Virginia's common law provides adequate alternative remedies such that there is no need to create an implied cause of action for money damages under Article III, Section 6 of the West Virginia Constitution. Should the Court determine otherwise, the Court should nevertheless hold that such a cause of action is not permissible against a political subdivision due to the West Virginia Governmental Tort Claims Act.

Respectfully submitted,

ROSS H. MELLINGER, TONY BOGGS, AND THE JACKSON COUNTY COMMISSION
Respondents,



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[107] Weigle v. Pifer, 139 F. Supp. 3d 760, 780 (S.D.W.Va. 2015) (internal citations and quotations omitted).
[108] Id.
[109] Hendrickson, 576 U.S. at 400.
[110] Zirkle, 655 S.E.2d at 160.

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No. 20-0183

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CODY RYAN FIELDS,
Plaintiff, Petitioner,

v.

ROSS H. MELLINGER, Individually and in his capacity as a Deputy of the Jackson County Sheriff's Department; TONY BOGGS, Individually and in his capacity as the Sheriff of Jackson County, West Virginia; and the JACKSON COUNTY COMMISSION, doing business as the Jackson County Sheriff's Department.
Defendants, Respondents.

BRIEF OF RESPONDENTS, ROSS H. MELLINGER, TONY BOGGS, AND THE JACKSON COUNTY COMMISSION

The undersigned, counsel of record for Respondent, does hereby certify on this 26th day of August, 2020, that a true copy of the foregoing " **BRIEF OF RESPONDENTS, ROSS H. MELLINGER, TONY BOGGS, AND THE JACKSON COUNTY COMMISSION**" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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