FILE COPY

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.

DO NOT REMOVE FROM FILE

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

PETITIONERS' REPLY

Michael D. Mullins (W. Va. Bar #7754)
michael.mullins@steptoe-johnson.com
Candace Haley Bunn (W. Va. Bar #11313)
haley.bunn@steptoe-johnson.com
James E. McDaniel (W. Va. Bar #13020)
jim.mcdaniel@steptoe-johnson.com
Robert L. Bailey (W. Va. Bar #8902) (*on brief*)
robert.bailey@steptoe-johnson.com

STEPTOE & JOHNSON PLLC
707 Virginia Street East, 17th Floor
Charleston West Virginia 25301
(304) 353-8000 (voice)
(304) 353-8183 (facsimile)
Counsel for Stepp, Hartley, Starsick, and WVSP

Charles R. Bailey (W. Va. Bar #202)
cbailey@baileywyant.com
John P. Fuller (W. Va. Bar #9113)
jfuller@baileywyant.com
Jeffrey Michael Carder (W. Va. Bar #12725)
jcarder@baileywyant.com

BAILEY & WYANT
P. O. Box 3710
Charleston, WV 25337-3710
(304) 345-4222 (voice)
(304) 343-3133 (facsimile)
Counsel for Hickman and RCSD

TABLE OF CONTENTS

Table of Contents ..... **i**

Table of Authorities ..... **ii**

Analysis **1**

I. Respondent's argument that West Virginia law should (or does) not adopt *Graham v. Connor*, 490 U.S. 386 (1989), is a naked attempt to render *Fields v. Mellinger*, 851 S.E.2d 789 (W. Va. 2020), a dead letter before the Court's ink on the opinion is even dry. 1

II. The supposed differences between federal and state constitutional provisions are wholly inapposite to *this case*. 4

III. Respondent's argument that W. VA. CONST. art. III, § 10 is "self-executing" lacks merit. 7

IV. The Court should reject Respondent's attempt to indulge in judicial activism. 8

Conclusion **9**

TABLE OF AUTHORITIES

Cases

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 2

Fields v. Mellinger,
851 S.E.2d 789 (W. Va. 2020) ..... passim

Graham v. Connor,
490 U.S. 386 (1989) ..... passim

Hammitt v. Stump,
No. 5:18-CV-01214, 2019 WL 4696349 (S.D. W. Va. Sept. 25, 2019) 2

Parkulo v. W. Va. Bd. of Probation,
199 W. Va. 161, 483 S.E.2d 507 (1996) 6

Pruitt v. W. Va. Dep't of Pub. Safety,
222 W. Va. 290, 664 S.E.2d 175 (2008) 6

Rogers v. Albert,
208 W. Va. 473, 541 S.E.2d 563 (2000) 4

Rowland v. Perry,
41 F.3d 167 (4th Cir. 1994) 2

State ex rel. Trent v. Sims,
138 W. Va. 244, 77 S.E.2d 122 (1953) 7

State v. Andrews,
91 W. Va. 720, 114 S.E. 257 (1922) 5

State v. Bruner,
143 W. Va. 755, 105 S.E.2d 140 (1958) 5

State v. Duvernoy,
156 W. Va. 578, 195 S.E.2d 631 (1973) 4

State v. Louk,
237 W. Va. 200, 786 S.E.2d 219 (2016) 9

State v. Smith,
243 W. Va. 470, 844 S.E.2d 711 (2020) 9

Statutes

42 U.S.C. § 1983 .... passim

U.S. CONST. am. IV 4, 5

W. VA. CONST. art. III, § 6 .... 3, 4, 5

W. VA. CONST. art. III, § 10 .... 6, 7

ANALYSIS

I. Respondent's argument that West Virginia law should (or does) not adopt *Graham v. Connor*, 490 U.S. 386 (1989), is a naked attempt to render *Fields v. Mellinger*, 851 S.E.2d 789 (W. Va. 2020), a dead letter before the Court's ink on the opinion is even dry.

Nowhere in his response brief does Respondent actually respond to the many reasons set out in Petitioners' brief for adopting (or recognizing that West Virginia law already has adopted) *Graham*. Instead, Respondent veers off on several unrelated tangents.

As Petitioners predicted, Respondent immediately conflates rights with remedies.[1] *Graham* was about whether federal "substantive due process" (if that exists) protects the right to be free from excessive force during an investigatory stop or arrest. For many reasons (discussed in Petitioners' brief), the Supreme Court of the United States held that there was no such *right*. It did not decide whether, had there been such a right, there would have been a remedy (plainly there would have been, under 42 U.S.C. § 1983). *Fields*, on the other hand, was about whether the State's version of the Fourth Amendment implied a private cause of action for money in the absence of an analog to § 1983 (holding that it did not).

Respondent asserts that Petitioners argue that the Court is "bound" by federal law, and he then argues that it is not.[2] This is a straw man: Petitioners never argued that federal law "binds" this Court in its interpretation of state law. As explained thoroughly in their brief, Petitioners simply point out that there are many very good reasons—some explained in the relevant opinions, and additional ones relevant only to state law—for the Court to *adopt* the relevant federal

---

1 (Respondent's Resp. Br. at 3.)

2 (*See, e.g.*, *id.* at 3 (arguing that "[t]his 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.") and 10 ("This Court is not bound to try and fit the limitations of section 1983 jurisprudence, or the *Graham* rule, ...").)

jurisprudence into West Virginia law. As already demonstrated in Petitioners' opening brief, whether to follow *Graham* has nothing to do with the result in *Fields*.

Respondent argues that *Graham* is inapposite to this case because *Graham* depended on the availability of a § 1983 cause of action for money damages to remedy the violation of the right to reasonable searches and seizures, whereas, Respondent repeatedly alleges, after *Fields* there is no remedy for the violation of the right to reasonable searches and seizures.[3] This is false. In fact, as detailed both in *Fields* and in Petitioners' brief (and below), in addition to the exact same remedy provided by his § 1983 cause of action, Respondent has remedies for the claimed violation of Bernard Cottrell's state-law right to be free from unreasonable force. This includes, for example, the (at least equal) remedies available in a state-law battery claim (something that Respondent admits[4]).

Respondent quotes *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for the proposition that the reach of the Fourth Amendment's excessive force proscription is broader than some states' common law battery proscriptions.[5] As will be discussed more later, that might be true generally, but it is not true in this case, because (like many states) West Virginia has said that the use of force that is constitutionally excessive *is* unreasonable force under the common law meaning of battery.[6] So contrary to Respondent's

---

3 (*Id.* at 3.)

4 (*Id.* at 5.)

5 (*Id.* at 3–4 (citation omitted).)

6 *See, e.g.*, *Hammitt v. Stump*, No. 5:18-CV-01214, 2019 WL 4696349, at *5 (S.D. W. Va. Sept. 25, 2019) ("Although an arresting officer may be 'afforded a privilege that precludes a battery claim' when effecting an arrest, 'force that would otherwise constitute a battery is not privileged if that force is excessive.' . . . ***Whether the Defendant is entitled to the privilege that precludes a battery claim depends on the resolution of the claim of excessive force***.") (emphasis added) (citation omitted); *cf.* *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994) (under materially identical North Carolina state law: "The parallel state law claim of assault and battery is subsumed within the federal excessive force claim and so goes forward as well.").

argument, this hypothetical difference provides no real basis for finding that a West Virginia state law claim for battery is inadequate to remedy the use of excessive force.

Respondent quotes Justice Harlan for the proposition that only money will adequately remedy most unreasonable search or seizure claims (because, *e.g.*, injunction relief would likely come far too late to be effective).[7] This, too, is another straw man, because Petitioners do not argue that such a claimant should always be limited to equitable relief. Indeed, as detailed, money damages remain available under state law to remedy the application of unreasonable force by a police officer. Mr. Cottrell is (technically, his estate and/or statutory beneficiaries are) thus *not* "in the same position that Mr. Bivens found himself in . . . ."[8]

As discussed in detail in Petitioners' brief (and as eluded to above in trying to distinguish *Graham*), Respondent again depends on the same false dilemma that "[a]pplying *Graham* to state constitutional law would leave West Virginians with no civil legal remedy for the violation of fundamental constitutional rights."[9] That is simply false.[10] Respondent's argument that the Court should not apply *Graham* because of *Fields* is incorrect. First, as explained, plaintiffs in claims of excessive force during arrests *will* have a remedy. And second, a substantive

---

7 (Respondent's Resp. Br. at 4–5.)

8 (*Id.* at 5.) Respondent says that "[t]his Court in *Fields* made clear that the contours of federal constitutional jurisprudence do not apply to West Virginia's constitutional analysis[.]" (*Id.* at 5–6.) Petitioners are uncertain what this means, and Respondent did not explain. To whatever extent it means anything in the context of this case, though, it certainly is untrue. The Court never said that federal constitutional jurisprudence has no part to play in this Court's state constitutional analysis. Indeed, the opposite is true: the Court *frequently* adopts federal law in its interpretation of parallel state law.

9 (*Id.* at 6.)

10 *See also Fields*, 851 S.E.2d at 799 ("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 United States Code title 42 section 1983; a *Monell* claim and supervisory liability under United States Code title 42 section 1983; and unlawful conspiracy under United States Code title 42 sections 1983 & 1985.") (footnote omitted).

due process claim arising out of the alleged use of excessive force during an arrest does not *need* a remedy, because the Due Process Clause does not *create that right* in the first place.[11]

II. The supposed differences between federal and state constitutional provisions are wholly inapposite to *this case*.

Respondent argues that having a § 1983 cause of action is not enough because there are differences between the United States Constitution's right to be free from excessive force and the State of West Virginia Constitution's right to be free from excessive force. Petitioners note that (as discussed many times here and in their opening brief) § 1983 is not the only remedy that a West Virginia plaintiff has arising from an allegation that the police used excessive force in the context of an investigatory stop or arrest.

First, Respondent notes that West Virginia *can* make its constitutional protections greater than their federal analogs. In the abstract, and as a general proposition, Respondent is undoubtedly correct: the two separate organic documents are, after all, two separate documents. But that observation has nothing to do with *this case*, because as discussed in Petitioners' brief, in the case of the right to be free from excessive force during an investigatory stop or arrest, West Virginia has *not* chosen to do so.

That is, in the context of the respective search-and-seizure clause rights, the State has held that its excessive force rights track their federal counterparts.[12] And in the context of the

---

[11] Respondent says that the Court should not worry that rejecting *Graham* will leave it with no way to decide a due process-based excessive force claim because before *Graham*, federal courts had developed such jurisprudence. (Respondent's Resp. Br. at 7 n.2.) This argument—strange from a plaintiff who has steadfastly rejected application of federal law to state constitutional questions—misses the point. As Petitioners explained in their opening brief, having two constitutional provisions create *overlapping* rights is fraught with problems.

[12] *See, e.g., Rogers v. Albert*, 208 W. Va. 473, 479, 541 S.E.2d 563, 569 (2000) ("This Court has customarily interpreted Article III, § 6 of the West Virginia Constitution in harmony with federal case law construing the Fourth Amendment.") (citations omitted); *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. This Court has traditionally construed Article III, Section 6 in harmony with the Fourth Amendment.") (citations omitted); *State v.*

respective "substantive due process" rights, that is exactly the question that the Court has (arguably) yet to, but in this case will, answer. Resolution of this question in the context of different rights and circumstances, where perhaps there might be differences between the scopes of the respective federal and state rights and remedies, should be reserved until such a case.[13]

Respondent relies on an article saying that one should look to the federal and state rights' respective languages in order to tell whether there is a difference between those rights.[14] An examination of the respective rights to be free from excessive force easily shows that there is no basis to differentiate the two. Compare:

> The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

W. VA. CONST. art. III, § 6, with:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. am. IV.

Bruner, 143 W. Va. 755, 766, 105 S.E.2d 140, 146 (1958) ("The provisions of the West Virginia Constitution, being substantially the same as the pertinent provisions of the United States Constitution, 'should be given a construction in harmony with the construction of the federal provisions by the Supreme Court of the United States.' ") (citation omitted); *State v. Andrews*, 91 W. Va. 720, 114 S.E. 257, 260 (1922) ("Section 6 of Article 3 of our constitution relating to unreasonable search and seizure is substantially the same as the fourth amendment to the federal constitution .... Th[is] provision[] of our constitution w[as] manifestly taken from the federal amendment[].").

13 Respondent mischaracterizes Petitioners' argument as broader than it is. Petitioners' argument is, as it must be, limited to the facts of this case. Thus, the fact that *Graham* does not require *every* claim of "physically abusive government conduct" must arise under the Fourth or Eighth Amendments (*see* Respondent's Resp. Br. at 6) does not apply here, whether Respondent's claim plainly *is* governed by the State's Fourth Amendment analog—and thus *not* its Due Process Clause.

14 (*Id.* at 8.)

As for "substantive due process," one searches either constitution for a clear textual basis for that right (the main source of debate about whether the right even exists, as noted in Petitioners's brief). But the most likely implicated two respective clauses (the general due process clauses) also do not materially differ. Compare:

> No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

W. VA. CONST. art. III, § 10, with:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. am. V.

Respondent then again goes on to talk about *remedies*, although *Graham* was about whether due process protects a *right* to be free of excessive force in certain settings. Respondent notes that the intent of the Ku Klux Klan Act of 1871 (including § 1983) supports reading several doctrines into that *remedy* provision, like immunities. After taking a passing shot at the doctrine in a footnote,[15] though, Respondent fails to recognize that West Virginia's version of perhaps the most important of those immunities—qualified immunity—is actually *more* protective of "state and local officials"[16] than its federal law counterpart—by, for example, protecting not just individual officers (as is the case with federal immunity) but also agencies (as is the case with West Virginia state immunity).[17]

Second, Respondent says that West Virginia should not adopt *Graham* because "the Supreme Court is limited by federalism in ways that state courts are not."[18] But this entire point

---

15 (*Id.* at 9 n.3.)

16 (*Id.* at 8.)

17 *See, e.g.*, syl. pt. 9, *Parkulo v. W. Va. Bd. of Probation*, 199 W. Va. 161, 483 S.E.2d 507 (1996); *accord Pruitt v. W. Va. Dep't of Pub. Safety*, 222 W. Va. 290, 293, 664 S.E.2d 175, 178 (2008).

18 (*Id.* at 9.)

could only have any conceivable relevance if there were *any* basis for inferring a difference in the scope of the respective rights at issue; as noted, that is not the case *here*. This abstract and general argument has no concrete or specific application to this case. As discussed, the two excessive-force rights are identical, and this case will, for the first time, decide whether the State's due process right should unnecessarily, perhaps even harmfully, overlap its excessive force right in the context of an investigatory stop or arrest. Respondent's argument is circular and ignores the many real reasons to hold that it does not.

III. Respondent's argument that W. VA. CONST. art. III, § 10 is "self-executing" lacks merit.

Respondent argues that Article III, § 10 is "self-executing" and thus "that a private right of action for its violation is warranted."[19] Like Respondent's argument that the Court should take it on itself to correct the West Virginia Legislature's "renegade" decision to not create a state version of § 1983,[20] his entire "self-executing be default" argument squarely contradicts what the Court said in *Fields* (applying it to Article III § 6).

In *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953), the question was whether a provision in the Constitution requiring the establishment of public schools was self-enacting. The case had nothing to do with whether to imply a private cause of action for money damages—the topic *thoroughly* addressed in *Fields*.

Respondent goes on to cite a lot of cases that talk about what "shall" means, but none of them addresses whether the Court should imply a private cause of action for money damages in Article III, § 10 (or whether Article III, § 10 creates a right to be free from excessive force in the context of an investigatory stop or arrest). To the extent that Respondent is arguing

---

19 (*Id.* at 10.) Respondent relies on a professor, for example, who says, "Where there is a right, there should be a remedy." (*Id.* at 13 (indentation and citations omitted).)

20 (*Id.* at 14.)

that the way to read a constitutional provision that is silent on a particular issue is to read it in a plaintiff-friendly way contradicts *Fields*.[21]

Respondent's lengthy discussion of other states recognizing a private cause of action in provisions of their laws is also irrelevant. Respondent provides no relevant details of those states' laws or whether they share this State's implied cause of action jurisprudence.[22]

IV. The Court should reject Respondent's attempt to indulge in judicial activism.

In the last section of his brief, Respondent makes his "ripped from the headlines" argument: Referring to what (with some help from predictable sources) he characterizes as pervasive "civil rights issues in West Virginia," "police misconduct in this state," "distrust and fear of police, police misconduct and objectionable behavior," "policy brutality," "a pattern of discriminatory treatment and petty harassment," and "disproportionate stops and arrests," Respondent accuses "the police" of targeting "impoverished" West Virginians, "poor people, both minority and white," and "minorities and poor people."[23] The only way to fix this state of affairs, Respondent urges, is for the Court to usurp the Legislature's role and create from whole cloth constitutional rights and remedies that appear nowhere in the Constitution.[24] The Court has often said (including in *Fields*) that this is not the role of the judiciary:

> "Although a court might profoundly disagree with a particular statute or may even prefer another outcome, the judiciary is prohibited from substituting its judgment for that of the legislative branch, an action tantamount to improperly assuming the role of legislators."

---

[21] As noted in Petitioners' brief, before § 1983, the United States Constitution had created a *lot* of rights that were not considered remediable by money damages.

[22] *See also*, *Fields*, 851 S.E.2d at 796–99 (extensively cataloguing other states find no need to create a private cause of action for a constitutional violation).

[23] (Respondent's Resp. Br. at 15–16.)

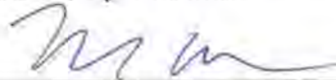
[24] (*Id.*)

State v. Smith, 243 W. Va. 470, 478–79, 844 S.E.2d 711, 719–20 (2020) (footnote omitted). The Legislature's decision to *not* enact a statute is entitled to the same judicial respect. *See, e.g., State v. Louk*, 237 W. Va. 200, 210, 786 S.E.2d 219, 229 (2016) (Benjamin, J., concurring) ("That [conduct that the Legislature never criminalized is not criminal] is the essence of a government and a judicial system based upon the constitution, the rule of law, and the fundamental precept that the policy of this state is the prerogative of the political branches of government—not a handful of judges making decisions behind closed doors.").

CONCLUSION

Petitioners thus respectfully request the Court to **ANSWER** both of the United States District Court for the Southern District of West Virginia's certified questions **YES**.

Petitioners, By Counsel



Michael D. Mullins

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2021, true and accurate copies of the foregoing *Petitioners' Reply* 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:

Bhavani Raveendran ROMANUCCI & BLANDIN Suite 900 321 North Clark Street Chicago, IL 60654 312-458-1000 Fax: 312-458-1004 Email: braveendran@rblaw.net *Counsel for Respondents*	**Nicolette A. Ward** ROMANUCCI & BLANDIN Suite 900 321 North Clark Street Chicago, IL 60654 312-253-8590 Fax: 312-458-1004 Email: nward@rblaw.net *Counsel for Respondents*
Russell A. Williams NEW, TAYLOR & ASSOCIATES 430 Harper Park Drive Beckley, WV 25801 304-250-6017 Fax: 304-250-6012 Email: russell@newtaylorlaw.com *Counsel for Respondents*	**Vincent Joseph Arrigo** ROMANUCCI & BLANDIN Suite 900 321 North Clark Street Chicago, IL 60654 312-253-8630 Fax: 312-458-1004 Email: varrigo@rblaw.net *Counsel for Respondents*

Michael D. Mullins