OVERVIEW OF SECTION 1983 LITIGATION

Basic Principles; Post-*Heck/Wallace* Cases; Local Government Liability; Post-*Deshaney* Substantive Due Process Claims and Post-*Parratt/Hudson* Procedural Due Process Claims

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Author's Note

This outline is arranged under various topic headings that indicate problem areas likely to be encountered in the litigation of section 1983 cases. **The outline is not a substitute for the excellent treatises that exist on section 1983, but is intended as a useful research tool to keep informed of very recent case law and trends in this rapidly developing area.**

Please be advised that I do not use research assistants to prepare these outlines, so that any errors are my own. Each updated outline attempts to remove cases that may no longer be good law or to indicate any negative history of a case where important. **It is important that you KeyCite any case you intend to rely on, especially a district court opinion.**

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the law. *Id.* at 1310, 1313. Therefore, the Court finds in this case that, based upon the rationale of *Manders,* Defendant Day was wearing a 'state hat' at the time of Mr. Mladek's arrest and subsequent detention. The Court further finds that, insofar as Plaintiffs allege that Sheriff Yarbrough is liable for the manner in which Mr. Mladek was treated by Deputy Day, Sheriff Yarbrough was likewise wearing a 'state hat.' Therefore, both Day and Yarbrough are entitled to official immunity under the Eleventh Amendment for any claims brought against them in their official capacity. Moreover, the Court finds that Walton County is likewise entitled to such immunity based upon the rationale expressed in *Manders.* 338 F.3d at 1308-09. Accordingly, Defendant Walton County's motion to dismiss Plaintiff Michael Mladek's Fourth Amendment claim against it is granted. Plaintiff Michael Mladek's Fourth Amendment claims against Deputy Day and Sheriff Yarbrough in their official capacities are likewise dismissed.").

Neville v. Classic Gardens, 141 F. Supp.2d 1377, 1382 (S.D. Ga. 2001) ("Engaging in a prosecutorial function is the act of a *State,* not a county, official. . . . Accordingly, Neville's claims against Higgins in her official capacity, and thus, the county, face dismissal.").

Frazier v. Smith, 12 F. Supp.2d 1362, 1369 (S.D. Ga. 1998) ("Under Georgia law, sheriffs are vested with ultimate authority in employment decisions. . . . There is no evidence before the Court to support the conclusion that Sheriff Smith is an agent of Camden County, or that the County ultimately is liable for his misconduct. Construing the facts in the light most favorable to Plaintiff, the actions brought against Sheriff Smith, in his official capacity, and the Camden County Board of Commissioners are not redundant, and both should proceed.").

IV. GOVERNMENT LIABILITY FOR VIOLATIONS OF DUE PROCESS: THE IMPACT OF *DESHANEY* ON SUBSTANTIVE DUE PROCESS CLAIMS AND *ZINERMON* ON PROCEDURAL DUE PROCESS CLAIMS

The § 1983 remedy is available, whether against an individual or the governmental entity, only when a person acting under color of state law causes another person to be deprived of a federal right secured by the Constitution or laws of the United States. Very often, the most difficult part of a plaintiff's case will be pleading and proving the requisite underlying constitutional violation.

This section surveys two areas where plaintiffs' underlying constitutional claims are based on violations of substantive or procedural due process, where assertions of government liability are common and where the Supreme Court has been active in recent years in defining the content and scope of the underlying right.

A. Liability Based on Failure to Provide Protective Services

While it is generally"s settled that there is no constitutional duty on the part of the state to protect members of the public at large from crime, *see* ***Martinez v. California***, 444 U.S. 277, 284-85 (1980), there has been considerable disagreement among the lower federal courts as to whether

and when a duty to protect may arise by virtue of a "special relationship," outside of the custodial context, between the state and a particular individual or group.

1. *DeShaney v. Winnebago County Dept. of Social Services*

In ***DeShaney v. Winnebago County Dept. of Social Services***, 489 U.S. 189, 109 S. Ct. 998 (1989), a majority of the Supreme Court held that nothing in the due process clause of the Fourteenth Amendment creates an affirmative duty on the part of the state to "protect the life liberty, and property of its citizens against invasion by private actors." 109 S. Ct. at 1003. The Court concluded that "[a]s a general matter,... a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id*. at 1004. *See also* ***Vielma v. Gruler***, No. 18-15162, 2020 WL 1672778, at *4 (11th Cir. Apr. 6, 2020) (not reported) ("Here, Plaintiffs claim that the injured and murdered victims' Fourteenth Amendment substantive due process rights were violated when, upon hearing the gunshots, Officer Gruler failed to immediately reenter the club to attempt to disarm or shoot Mateen. . . . As the district court correctly observed, Plaintiff's entire claim against Officer Gruler boils down to an argument that the Due Process Clause imposes an affirmative duty on police officers to protect individuals from private acts of violence. But that is precisely the argument that the Supreme Court rejected in *DeShaney v. Winnebago County Department of Social Services*, which held that, outside the custodial context, . . . 'a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'"); ***Bennett, ex rel. Irvine v. City of Philadelphia***, 499 F.3d 281, 289, 290 (3rd Cir. 2007) ("If a municipality, state or other public body is to be liable under the Constitution for harm caused by private parties to persons not in custody, the liability would be unlimited. There is no legal doctrine that supports imposition of such liability. Without legislative activity, we are not prepared to hold that a city that fails to respond promptly to a 911 call must pay for the harm that befalls the caller as a result of the failure. The fact is that most 911 calls are answered, that the police use their best efforts in many cases, and that they prevent egregious harm. We have less personal experience with DHS but are willing to assume, for this purpose, that this is also true of DHS social workers, notwithstanding the well-publicized cases of failures in that connection. However, it is not the role of the courts, certainly not the federal courts, to rectify the failures that do happen. That is the responsibility of the citizens of the body politic, who elect the leaders of the executive branch of the respective city, state or municipality. If the public raises its voice and demands accountability, and is willing to use the ballot to support those demands, then change and improvement can and will occur. Unfortunately, it will be too late for Porchia Bennett."); ***Aracena v. Gruler***, No. 618CV932ORL40KRS, 2018 WL 5961040, at *5 (M.D. Fla. Nov. 14, 2018) ("[I]t is clear that Count I against Officer Gruler cannot survive. Since this entire circumstance begins and ends with a private actor, Officer Gruler cannot be sued for violating Plaintiff's due process rights. Indeed, Count I boils down to a claim that Gruler initially absconded and then failed to protect Plaintiff after the attack began. . . . Officer Gruler's failure to protect Plaintiff 'against private violence simply does not constitute a violation of the Due Process Clause.'. . The Pulse shooting was a spontaneous act of violence carried out by 'a thug with no regard for human life.'. . With this, Plaintiff's substantive due process claims fail.")

See also ***Gary B. v. Whitmer***, 957 F.3d 616, 658-59 (6th Cir. 2020), *reh'g en banc granted and opinion vacated,* ___ F.3d ___ (6th Cir. May 19, 2020) ("The dissent compares the right to a basic minimum education to a right to state-provided food, housing, or health care, and claims that *DeShaney* foreclosed any affirmative right to these or other benefits. This is because, our colleague says, *DeShaney* stands for the proposition that '[s]ubstantive due process does not regulate a state's failure to provide public services,' regardless of the context. . . But *DeShaney*—a case in which a child sued the state for failing to stop his father from abusing and seriously injuring him—concerned the state's failure to prevent harm caused by a private actor. . . The dissent's alternative reading—that *DeShaney* forecloses any affirmative obligation of the state under any circumstance, regardless of whether a private harm is at issue—is divorced from the text of that case. *DeShaney* itself couched its holding in this public-private distinction, saying '[a]s a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'. . . Simply put, education is different. As discussed above, . . universal, state-provided public education was nearly ubiquitous at the time the Fourteenth Amendment was adopted, and has only grown since then to be expected as a given by the public. Through this, the state has come to effectively occupy the field in public education, and so is the only practical source of learning for the vast majority of students. We can think of no other area of day-to-day life that is so directly controlled by the state. And with that control must come responsibility, particularly because some minimal education—enough to provide access to literacy—is a prerequisite to a citizen's participation in our political process. *DeShaney* implied such a responsibility, resting its holding on the fact that the state had played no role in creating or worsening the threat of harm the victim faced. . . Thus, even if *DeShaney*'s framework were applied here (despite the lack of a private harm), this Court has recognized substantive due process claims under the state-created danger doctrine. . . While the dissent argues against the right to a basic minimum education by comparing it to a constitutional right to food, a better analogy is a world in which the state took charge of the provision of food to the public, to the exclusion of nearly all private competitors. If the state then left the shelves on all the stores in one city bare, with no compelling governmental reason for this choice, such an action would place the residents of that city in heightened danger no less than the actions of the state in other cases where courts have allowed claims under the Due Process Clause. . . Thus, while the dissent's arguments amount to sound advice for us to proceed with special caution when considering any positive fundamental right, the case law on this issue does not foreclose recognizing the right to a basic minimum education.")

Chief Justice Rehnquist, writing for the majority in *DeShaney*, expressly rejected the argument "that once the State learns that a third party poses a special danger to an identified victim, and indicates its willingness to protect the victim against that danger, a 'special relationship' arises between State and victim, giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection." 109 S.Ct. at 1004 n.4.

DeShaney may be read narrowly to limit any affirmative duty to protect to situations in which "the State takes a person into its custody and holds him there against his will . . . . [t]he

affirmative duty to protect aris[ing] not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id*. at 1005. *See,e.g.,* ***Youngberg v. Romeo***, 457 U.S. 307 (1982) (substantive due process component of Fourteenth Amendment Due Process Clause imposes duty on state to provide for safety and medical needs of involuntarily committed mental patients); ***Estelle v. Gamble***, 429 U.S. 97 (1976) (state has constitutional duty to provide adequate medical care to incarcerated prisoners). *See also* ***Coscia v. Town of Pembroke, Mass.***, 659 F.3d 37, 39, 40 (1st Cir. 2011) ("Like the district judge, we have been apprised of no case recognizing due process liability for suicide based on police conduct except for death during custody, and the defendants have cited one case comparable to this one that found no liability for the reason that the suicide occurred after release. The district court nonetheless decided that a liability claim had been pleaded adequately despite the non-custodial death because a causal relationship (in fact and law) had been plausibly stated between the failure to furnish medical care during the temporary custody and the self-destructive act the next morning. . . . We agree with the district judge that the pleadings raise no claim that the treatment by the police gave rise to a suicidal inclination on the decedent's part when he would otherwise have had none, and nothing in the complaint suggests even in a conclusory way that his self-destructive tendency was intensified by state action, or that anything done or omitted by the police weakened any instinct for self-preservation and made him more dangerous to himself. The causation alleged is not that the absence of medical attention during custody was in any way creative of suicidal vulnerability by working a change in him for the worse, but consists rather of a failure to prevent the consequence of his preexisting suicidal disposition, a failure to intervene in a way that would change him, or his circumstances, for the better in the period after his release. We think this claim of causation leads to a liability beyond what due process imposes, for although the existing law does recognize a custodial duty to take some preventive action, its rationale does not extend official protective responsibility as far as the plaintiff would take it. . . . With the restoration of the detainee's liberty, then, the legal chain of preventive (as distinct from state-created) causation must be taken to have ended. We accordingly hold that in the absence of a risk of harm created or intensified by state action there is no due process liability for harm suffered by a prior detainee after release from custody in circumstances that do not effectively extend any state impediment to exercising self-help or to receiving whatever aid by others may normally be available."); ***Carver v. City of Cincinnati***, 474 F.3d 283, 286 (6th Cir. 2007) ("The mere fact that the police exercise control over an environment is alone insufficient to demonstrate that a person is seized. . . . Here, there was no physical restraint over Carver by the officers, nor did the officers direct any actions toward him. Carver's incapacity, like that of the plaintiff in *Jackson*, was self-induced. The officers did not place a restraint on Carver's personal liberty when they secured the area to conduct an investigation into the death of Smith-Sandusky. Perhaps the officers had probable cause to restrain Carver if they had wanted, but that is not what happened. The custody exception is inapplicable because the officers never restrained Carver's personal liberty in any fashion."); ***Jackson v. Schultz***, 429 F.3d 586, 590, 591 (6th Cir. 2005) ("It is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need. . . . The 'custody exception' does not apply because the decedent was never in custody. The 'custody

exception' triggers a constitutional duty to provide adequate medical care to incarcerated prisoners, those involuntarily committed to mental institutions, foster children, pre-trial detainees, and those under 'other similar restraint of personal liberty.'. . . The overarching prerequisite for custody is an affirmative act by the state that restrains the ability of an individual to act on his own behalf.. . The district court improperly held that moving an unconscious patient into an ambulance is custody. This court's precedent has made clear that *DeShaney's* concept of custody does not extend this far. This court has never held that one merely placed in an ambulance is in custody. . . . Decedent's liberty was 'constrained' by his incapacity, and his incapacity was in no way caused by the defendants. In sum, no set of facts consistent with the allegations shows that the EMTs did anything to restrain the decedent's liberty. Thus, no set of facts consistent with the allegations supports a finding that the EMTs took decedent into custody. Based on the facts alleged, there is no constitutional violation under the custody exception."); ***Hamilton v. Cannon***, 80 F.3d 1525, 1531 n.5 (11th Cir. 1996) ("This Court and others have extended the state custody exception beyond actual incarceration or involuntary institutionalization only when there is some kind of physical restraint by the state that triggers an affirmative constitutional duty of care and protection."); ***Smith v. Myers***, No. 94-3605, 1995 WL 521158, *5 (6th Cir. Sept. 1, 1995) (unpublished) ("[T]his Circuit has held that the state's duty to protect any particular citizen arises only where a 'special relationship' exists between the state and that citizen. [cites omitted] Thus far, we have determined that a 'special relationship' exists only where the state legally restricts the liberty of a person, such as when the state incarcerates someone or involuntary commits a person to a healthcare facility."); ***Foy v. City of Berea***, 58 F.3d 227, 231 (6th Cir. 1995) ("When the state limits an individual's ability to care for himself by, for example, incarceration in a prison or involuntary confinement in a mental hospital, the Constitution does impose an affirmative duty of care and protection. There is no such affirmative duty, however, absent such restraint."); ***Garrett v. Gilless***, 47 F.3d 1168 (Table), 1995 WL 16810, *1 (6th Cir. Jan. 17, 1995) (holding defendants had no duty to provide police protection to victim of domestic violence and her children in absence of special relationship); ***Pinder v. Johnson***, 54 F.3d 1169, 1175 (4th Cir. 1995) (*en banc*) ("Some sort of confinement of the injured party − incarceration, institutionalization, or the like − is needed to trigger the affirmative duty . . . This Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause."); ***Lovins v. Lee***, 53 F.3d 1208, 1210 (11th Cir. 1995) ("Attempting to escape the clear language of *DeShaney*, plaintiff argues that this case fits within the "special relationship" exception to the general rule that the Due Process Clause does not entitle a citizen to be protected from violence at the hands of non-governmental actors. Unfortunately for plaintiff, that exception is limited to circumstances in which there is a special relationship between the government and the victim of violence or mistreatment, a circumstance that is lacking in the present case. Examples of special relationship cases include those involving incarcerated prisoners and involuntarily committed mental patients."); ***Souza v. Pina***, 53 F.3d 423, 426 (1st Cir. 1995) ("Absent the kind of custodial relationship apparently contemplated by the Court [in *DeShaney*], the Due Process Clause does not require the state to protect citizens from 'private violence' in whatever form, including suicide."); ***Ying Jing Gan v. City of New York***, 996 F.2d 522, 534-35 (2d Cir. 1993) (complainant who agreed to identify suspects was owed no duty of protection by City); ***Nobles v. Brown***, 980

F.2d 730 (6th Cir. 1992) (Table) ("[T]he people of Michigan are free to create a system under which the state and its officials would be subjected to liability for failure to accord prison guards reasonable protection against harms inflicted by dangerous prisoners. This court, however, is not free to create such a system by turning the Due Process Clause into a Michigan Tort Claims Act."); ***Salazar v. City of Chicago***, 940 F.2d 233, 237 (7th Cir. 1991) (government has no constitutional duty to provide competent rescue services to people not in its custody); ***Piechowicz v. U.S.***, 885 F.2d 1207, 1215 (4th Cir. 1989) (federal witnesses murdered by hired killer were owed no duty of protection under Fifth Amendment substantive due process where witnesses were not "in custody" of United States); ***de Jesus Benavides v. Santos***, 883 F.2d 385, 388 (5th Cir. 1989) (affirmative duty to protect a prisoner arises from State's restraint on individual's liberty; prison guard injured by prisoner is owed no constitutional duty by the State to protection from inmates' violence); ***Beltran v. City of El Paso,*** 367 F.3d 299, 307 (5th Cir.2004) ("Beltran argues that by encouraging Sonye to stay in the bathroom and telling her that the police were on the way, Amador became the custodian of Sonye's safety. This argument falls outside of the special relationships described by the Supreme Court, which are limited to cases concerning 'incarceration, institutionalization, or other similar restraint of personal liberty.'. . In this case, Amador offered advice to Sonye, but she did not *affirmatively* place Sonye in custody by restraining her in the bathroom."); ***Clarke v. Sweeney,*** 312 F.Supp.2d 277, 296 (D. Conn. 2004) ("As with the state created danger exception to *DeShaney,* the contours of the special relationship exception are not well defined. However, it would not seem to apply when a fact witness to a crime that has already been committed voluntarily approaches the police and makes a statement, and then a subpoena is issued for that witness-even if the police provide the witness with visible police protection that is later withdrawn. Such a circumstance does not constitute a situation where the 'state restrains an individual's freedom to act to protect himself or herself through a restraint on that individual's personal liberty.' Thus, even looking at the facts in a light most favorable to Clarke, the special relationship exception to *DeShaney* is also inapplicable here."); ***Miller v. Hubbard,*** No. NA 022-133-C H/H, 2004 WL 392957, at *5 (S.D. Ind. Feb. 17, 2004) ("In the briefing on the court's order to show cause on the claims against the shooting victim − Officer Dexter − and in the briefing on this summary judgment motion, plaintiff has not yet identified any case law providing support for finding either (1) that jail officials owe a constitutional duty to inmates to prevent them from escaping, or (2) that jail officials have a constitutional duty to prevent escaped prisoners from committing suicide. In general, there is no constitutional duty on the part of the state to protect someone from private violence. . . The Supreme Court in *DeShaney* recognized an exception to this general rule in situations where the state has custody or is 'restraining the individual's freedom to act on his own behalf,' which can trigger a duty to provide for the individual's safety. . But in this case, Miller did not die while he was in custody. He shot himself after shooting Officer Dexter and escaping from custody. No state officials restrained his individual freedom to act when he pulled the trigger."); ***Ramirez v. City of Chicago***, 82 F. Supp.2d 836, 839 (N.D. Ill. 1999) ("The paramedics cite *DeShaney* . . . for the proposition that there is no federal constitutional duty of care where the plaintiff is not in custody or control of the state actor. The paramedics argue that because Mr. Ramirez was not in their custody but that of the Chicago Police Department, they did not 'suddenly acquire a duty to treat a man who was not in their custody,' an argument of breathtaking cynicism.

I agree with the plaintiffs, however, that the paramedics, public employees who were dispatched specifically to aid Mr. Ramirez, 'suddenly acquired' a constitutional obligation to aid him when the police defendants, also public employees, took him into custody on behalf of the City of Chicago, and he was injured in the process. Chicago Fire Department paramedics have a duty to aid persons who are injured while in custody of the Chicago Police, or indeed, the Cook County Sheriff or the Illinois State Police. State action cannot be diluted by being dispersed over several departments.").

See also ***Lipscomb v. Simmons***, 962 F.2d 1374, 1379 (9th Cir. 1992) (*en banc*) ("In our view, custody cases such as *DeShaney* and *Youngberg* stand for the proposition that the government has an affirmative obligation to facilitate the exercise of constitutional rights by those in its custody only when the circumstances of the custodial relationship directly prevent individual exercise of those rights."); ***Harris v. District of Columbia***, 932 F.2d 10 (D.C. Cir. 1991) (suggesting that plaintiff who died of drug overdose while in police custody was owed no constitutional duty by police to refrain from deliberate indifference to his medical needs, where plaintiff "had not been formally committed, either by conviction, involuntary commitment, or arrest, to the charge of the District. . . .").

In ***Shaw by Strain v. Strackhouse***, 920 F.2d 1135 (3d Cir. 1990), a profoundly retarded resident of a state mental institution, brought a § 1983 action against state employees, asserting a failure to protect him from abuse and sexual assault. On appeals from a grant of summary judgment in favor of defendants, the Third Circuit addressed the standard of care owed by state officials to those in their custody, and determined that the standard might vary depending upon the nature of the physical custody involved. *Id*. at 1144.

The court concluded that while a deliberate indifference standard governed the liability of the nonprofessional employee-defendants, "the ***Youngberg*** professional judgment standard should have been applied to the primary care professionals, supervisors and administrators named as defendants." *Id*. at 1139.

In the court's opinion, professional judgment is a relatively deferential standard which, like recklessness and gross negligence, would fall somewhere between simple negligence and intentional misconduct. *Id*. at 1146. The plaintiff's burden is somewhat greater when trying to establish deliberate indifference than when trying to establish a failure to exercise professional judgment. *Id*. at 1150. *But see* ***Collignon v. Milwaukee County***, 163 F.3d 982, 988-89 (7th Cir. 1998) (comparing deliberate indifference and professional judgment standards, concluding that "[i]n the context of a claim for inadequate medical care, the professional judgment standard requires essentially the same analysis as the Eighth Amendment standard."). *See also* ***Mitchell v. Kallas***, 895 F.3d 492, 501 (7th Cir. 2018) ("Dr. Kallas claimed that DOC had an unwritten rule that an inmate may start hormone therapy only if she has *six* months left on her sentence, and he denied her request on that basis. He later explained in an affidavit that this period was intended to allow time to figure out the proper hormone dosage while monitoring both physical and

psychological side effects. The first problem is that this requirement appears nowhere in DOC's written policy on gender dysphoria. This conspicuous absence from DOC's freshly-minted policy raises the factual question whether DOC actually had such a practice. Moreover, the question remains whether Dr. Kallas and the Committee exercised medical judgment in applying the policy to Mitchell's request. Neither professional disagreement nor medical malpractice constitutes deliberate indifference. . . Thus, if the trier of fact finds that there was such a policy and that Dr. Kallas and the Committee had a medical basis for deciding not to start Mitchell's hormone treatments, then Dr. Kallas will not be liable. If the factfinder alternatively concludes that there was no such policy, or that Dr. Kallas failed to assess whether application of the policy was appropriate in Mitchell's case, then it would follow that he did not exercise his medical judgment and was deliberately indifferent. 'The denial of hormone therapy based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the Eighth Amendment.'"); ***Battista v. Clarke***, 645 F.3d 449, 453-55 (1st Cir. 2011) ("Both the *Farmer* and *Youngberg* tests leave ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources. . . . It has been fifteen years since Battista first asked for treatment, and for ten years, health professionals have been recommending hormone therapy as a necessary part of the treatment. When during the delay Battista sought to mutilate herself, the Department could be said to have known that Battista was in 'substantial risk of serious harm.'. . But the question remains whether the withholding of hormone therapy was 'wanton' or outside the bounds of 'reasonable professional judgement.' Medical 'need' in real life is an elastic term: security considerations also matter at prisons or civil counterparts, and administrators have to balance conflicting demands. The known risk of harm is not conclusive: so long as the balancing judgments are within the realm of reason and made in good faith, the officials' actions are not 'deliberate indifference,'. . .or beyond 'reasonable professional' limits. . . . Here, despite much early resistance, . . . hormone therapy for GID is now provided in some cases in Massachusetts prisons. The defendants point to this to establish their good faith; Battista, to show that providing her the therapy would be consistent with security needs. Both positions are overstated. Hormone therapy has not been welcomed by the Department, but both the Treatment Center's internal environment and Battista herself arguably presented added risks. . . .In the end, there is enough in this record to support the district court's conclusion that 'deliberate indifference' has been established − or an unreasonable professional judgment exercised − even though it does not rest on any established sinister motive or 'purpose' to do harm. Rather, the Department's action is undercut by a composite of delays, poor explanations, missteps, changes in position and rigidities − common enough in bureaucratic regimes but here taken to an extreme. This, at least, is how the district court saw it, and it had a reasonable basis for that judgment.).

Compare ***Doe 4 by and through Lopez v. Shenandoah Valley Juvenile Center Comm'n***, 985 F.3d 327, 339-44 (4th Cir. 2020) ("Appellants urge us to apply *Youngberg*'s standard of professional judgment. In *Youngberg*, the Supreme Court considered the Fourteenth Amendment protections guaranteed to a mentally disabled person involuntarily committed to a state institution. The plaintiff claimed that the institution failed to provide safe conditions of confinement, unduly

restricted his physical freedom, and failed to adequately train him in necessary skills. . . *Youngberg* held that 'liability may be imposed only when the decision by the professional' represents a 'substantial departure from accepted professional judgment.'. . In *Patten*, this Court applied the *Youngberg* standard to an involuntarily committed psychiatric patient's claim of inadequate medical care. We concluded that there are 'sufficient differences' between 'pre-trial detainees' and 'involuntarily committed psychiatric patients' to justify the application of *Youngberg*'s professional judgment standard for the latter. [court sets out differences] Applying the same analysis, we hold that the *Youngberg* standard governs this case. The statutory and regulatory scheme governing unaccompanied children expressly states that these children are held to give them care. . . .The Commission argues that this Court should (as the trial court did) apply the standard of deliberate indifference used when considering claims of inadequate medical care raised by pretrial detainees. . . Under this standard, a plaintiff must prove: (1) that the detainee had an objectively serious medical need; and (2) that the official subjectively knew of the need and disregarded it. . . The Commission further argues that *Patten*'s reasoning counsels against applying *Youngberg* here. First, the Commission claims that children are placed in SVJC primarily for security reasons, not for treatment. . . But this argument presents a false binary. In *Youngberg*, the plaintiff was likewise institutionalized because his mother could not 'control his violence.'. . Yet, the need to institutionalize the plaintiff for security reasons did not undermine the fact that he also needed to be committed for treatment. The Supreme Court explained that 'the purpose of respondent's commitment was to provide reasonable care *and* safety'—making plain that the two purposes are not mutually exclusive. . . . Next, the Commission argues that *Youngberg* does not apply because SVJC is a juvenile detention center, not a hospital or therapeutic setting. . . But the nature of the facility is not dispositive. In *Matherly v. Andrews*, we applied the *Youngberg* standard to a person involuntarily committed to a prison for a program designed to treat his dangerousness as a sexual offender. . . The nature of the facility is secondary to the reason a person is confined in it. . . . Finally, the Commission asks this Court to follow other circuits that have treated immigrant detainees as equivalent to pretrial detainees, applying the deliberate indifference standard. . . But those cases all dealt with adults detained for enforcement proceedings such as removal. . . None dealt with unaccompanied immigrant children, whom the Government holds for the purpose of providing care. . . Notably, neither the Commission nor the district court grapple with the fact that this case is about children. The Supreme Court has long recognized that children are psychologically and developmentally different from adults, so much so that in the context of sentencing, 'children are constitutionally different.'. . . Accordingly, we hold that a facility caring for an unaccompanied child fails to provide a constitutionally adequate level of mental health care if it substantially departs from accepted professional standards. To be clear, this standard requires more than negligence. . . . The evidence must show 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.'. . Under this standard, courts do not determine the 'correct' or 'most appropriate' medical decision. . . 'Instead, the proper inquiry is whether the decision was so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one.'. . By applying this standard, a court 'defers to the necessarily subjective aspects of the decisional process of institutional medical professionals and accords those decisions

the presumption of validity due them.'. . Nonetheless, a decision earns this deference only if it reflects an actual exercise of medical judgment. . . We have not yet explained the precise difference between the standards of professional judgment and deliberate indifference. . . But one difference between the two standards is that *Youngberg* does not require proof of subjective intent. . . Thus, the standard of professional judgment presents a lower standard of culpability compared to the Eighth Amendment standard for deliberate indifference. . . . To apply *Youngberg* to a claim of inadequate medical care, then, a court must do more than determine that some treatment has been provided—it must determine whether the treatment provided is adequate to address a person's needs under a relevant standard of professional judgment.") *with* ***Doe 4 by and through Lopez v. Shenandoah Valley Juvenile Center Comm'n***, 985 F.3d 327, 347-48, 351-52 (4th Cir. 2020) (Wilkinson, J., dissenting) ("We judges should stick to what we are good at: applying precedent, interpreting statutes, and exercising traditional equitable powers. Today's case features an invitation to try our hand at institutional governance and to do something we are utterly unqualified to do—determine what constitutes acceptable mental health care. I respect the majority's sincere and humane concerns. But it is staring at a host of unintended consequences. And under what rock is hidden its holding's relationship to law, I have no idea. . . . By adopting the more intrusive professional judgment standard, the majority also creates a circuit split. *See A.M. v. Luzerne Cty. Med. Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004). After discussing the realities of the institutional context and recognizing the need for deference, the Third Circuit adopted a deliberate indifference standard for claims by juvenile detainees. . . Under this standard, only reckless disregard of a serious medical need is actionable. . . . Other courts have likewise concluded that the deliberate indifference test governs claims of inadequate medical care by juveniles detained for non-rehabilitative purposes. The majority begrudgingly acknowledges that the weight of out-of-circuit authority is against it, failing to cite a single case finding the professional judgment standard applicable in a similar case. . . For example, recognizing that substantive due process doctrine has traditionally been cabined to bar only behavior that 'shocks the conscience,' the Third Circuit has adopted the deliberate indifference test to evaluate claims by juvenile detainees. . . By concluding otherwise the majority, as noted, needlessly creates a circuit split.")

See also ***Davis v. Wessel***, 792 F.3d 793, 797-802 (7th Cir. 2015) ("Wessel and Lay argue that they are entitled to a new trial because the district court erroneously instructed the jury on the elements necessary for Davis to prevail, and this error caused them prejudice. They contend that the court's instructions allowed the jury to hold them liable without any finding of intent. Before the district court, they primarily advocated for the intent standard governing Eighth Amendment claims, and they proposed jury instructions stating that liability depended on the jury finding that Wessel and Lay acted 'maliciously and sadistically' to harm Davis. . . Davis objected to their proposed instructions on the basis that such intent was not required to prove his claims, and the district court agreed with Davis.). . . . We think it should have been adequately clear to Wessel and Lay at trial that they were defending against due process claims of 'freedom from unreasonable restraints,' as recognized by *Youngberg,* 457 U.S. at 321. . . .In Davis's case, if the jury believed that the guards simply did not consider the issue of whether to remove Davis's hand restraints before he used the restroom, then the guards cannot be liable under the Due Process Clause. For

example, the jury may have disbelieved Davis's uncorroborated testimony that he requested that the restraints be removed while he was in the courtroom and just prior to using the restroom. Or the jury may have believed the guards' testimony indicating that they would never laugh at a detainee using the restroom and they thought a detainee such as Davis could successfully navigate the restroom process with the restraints attached. In either case, the jury may have nonetheless awarded compensatory damages based upon the district court's instruction because they thought making a relatively old, frail, and diminutive detainee such as Davis use the restroom in hand restraints 'was excessive in relation to [legitimate security] purposes.' Indeed, this scenario would explain the jury's decision to award a relatively small amount of compensatory damages while declining to award any punitive damages; the latter decision indicates that the jury did not find that either guard's conduct was, in the words of the punitive damages instruction, 'malicious or in reckless disregard of Plaintiff's rights.' In short, the jury may well have found Wessel and Lay liable for being negligent or making an accidental mistake, and that is constitutionally insufficient. . . We find that the district court's elements instruction failed to properly state the law. No other instruction clarified the issue or otherwise rectified the error. And as we have discussed, Wessel and Lay were prejudiced because the jury was likely to have been misled or confused. A new trial is required. . . In an effort to salvage the verdict, Davis argues that Wessel and Lay have failed to preserve any argument regarding any intent standard other than the Eighth Amendment's 'malicious and sadistic' standard. . . . Throughout the case (including on appeal), Wessel and Lay argued that the Eighth Amendment's 'malicious and sadistic' intent standard should apply. However, they also argued to the district court during the instructions conference, 'in any event, both the Seventh Circuit and U.S. Supreme Court ha [ve] consistently required *mens rea* of some sort.' In their motion for new trial, they said the district court's instructions 'allowed the jury to return a verdict for Plaintiff without a finding of *mens rea.*' In both instances, they called the district court's attention to the Supreme Court's decision in *Lewis.* It is clear that Wessel and Lay consistently advocated for *some* level of intent to be shown, which is the same argument raised on appeal. We find that Wessel and Lay adequately preserved their objections regarding the lack of any intent requirement in the district court's jury instructions."); ***Lanman v. Hinson***, 529 F.3d 673, 681, 682, 684 (6th Cir. 2008) ("The Fourth Amendment is inapplicable here because defendants did not 'seize' Lanman when they bodily restrained him. By requesting voluntary admission to Kalamazoo Psychiatric Hospital, Lanman consented to defendants providing him medical treatment. Defendants physically restrained Lanman to prevent him from harming himself or others and to administer medication to calm him down. . . . We find that the appropriate source for Lanman's excessive force claim is the Fourteenth Amendment, which provides him, as a patient of a state care institution, with the constitutional right recognized in *Youngberg* to freedom from undue bodily restraint in the course of his treatment. Basing this right in substantive due process, rather than the Fourth Amendment, allows for balancing the individual's liberty interest against the State's asserted reasons for restraining the individual's liberty while in its care. It also gives proper deference to the decisions of institutional professionals concerning medical treatment. . . . While the actions of professional decisionmakers, defined as 'person[s] competent, whether by education training or experience, to make the particular decision at issue,' *Youngberg*, 457 U.S. at 323 n. 30, are held to this professional judgment standard, the defendant resident care aides are

non-professional employees and are held only to a deliberate indifference standard."); ***Estate of Porter by Nelson v. State of Illinois***, 36 F.3d 684, 688 (7th Cir. 1994) ("In determining whether an involuntarily committed patient's right to reasonable safety has been violated, courts may only 'make certain that professional judgment in fact was exercised.'"); ***Yvonne L. v. New Mexico Department of Human Services***, 959 F.2d 883, 893-94 (10th Cir. 1992) (adopting professional judgment standard, rather than deliberate indifference, in foster care setting); ***Clark v. Donahue***, 885 F. Supp. 1164, 1168 (S.D. Ind. 1995) (finding the reasoning of ***Shaw by Strain*** to be persuasive, holding nonprofessional employees subject to deliberate indifference standard); ***Wendy H. v. City of Philadelphia***, 849 F. Supp. 367, 368-69 (E.D. Pa. 1994) (holding minimum standards of "professional judgment" as "standard of care owed to a child in foster care by a city worker responsible for supervising the foster home placement and welfare of the child . . . ."). *Accord* ***K.H. v. Morgan***, 914 F.2d 846 (7th Cir. 1990); ***T.M. by and through Cox v. Carson***, 93 F. Supp.2d 1179, 1187 (D. Wyo. 2000).

2. "Getting Around" *DeShaney*

Plaintiffs have been successful in avoiding dismissals under ***DeShaney*** where the case has been presented as one of the following: (a) **"special relationship" or custody case,** (b) **"state-created-danger" case,** (c) **entitlement case, or** (d) **equal protection case.**

a. "special relationship" or custody cases

In ***Horton v. Flenory***, 889 F.2d 454 (3d Cir. 1989), plaintiff's decedent died as a result of a severe beating administered by the owner of a private club who was investigating a burglary of the club. The City of New Kensington had an official, written "hands-off" policy with respect to incidents occurring in private clubs. *Id*. at 456. The owner of the club in question was an ex-police officer. He called the police in connection with the reported burglary. The officer who responded ignored pleas of the employee/suspect to provide protection from the club owner, indicating to both the club owner and the employee that the owner was free to conduct and continue his interrogation. *Id*. at 458. The suspect was beaten to death.

The Court of Appeals affirmed the judgment denying defendants' motion for a j.n.o.v., reasoning that when the police officer affirmed the right of the club owner to detain and question the suspect, the interrogation became "custodial." Furthermore, through the city's delegation of traditional police functions to a private actor, the club owner could be viewed as a state actor.

Thus, the court concluded that when the state is involved, as either a custodian or as an actor, ***DeShaney*** is not controlling. *Id*. at 457. *Accord* ***Nishiyama v. Dickson County***, 814 F.2d 277 (6th Cir. 1987) (prisoner allowed to operate police vehicle unsupervised was clothed with state authority and became *de facto* state actor). *See also* ***Sanders v. Bd. Of County Commissioners of Jefferson County,*** 192 F. Supp.2d 1094, 1119 (D. Colo. 2001) ("Based on Plaintiff's complaint, it is reasonable to infer that from approximately 12:30 p.m. to 4:00 p.m., the Command Defendants acted affirmatively to restrain the freedom of the occupants of Science Room 3, including Dave

Sanders, to act on their own behalf. Thus, pursuant to *DeShaney* and *Armijo,* the Command Defendants entered into a special relationship with Dave Sanders during that time giving rise to a constitutional duty to protect and provide care. Therefore, I conclude Ms. Sanders has properly asserted in Claim Two a violation of the Fourteenth Amendment right to substantive due process under the special relationship doctrine."); ***Culberson v. Doan***, 125 F. Supp.2d 252, 270 (S.D. Ohio 2000) ("If Plaintiffs' facts are viewed in a favorable light, it is also reasonable to conclude that, because Chief Payton had 'complete control' of the potential crime scene, he also had 'constructive and functional' possession, control or custody of Carrie's body. By potentially abandoning that control, custody or possession to her murderer and the Baker Family, we conclude that Chief Payton's actions may have violated Plaintiffs' substantive due process.").

See also ***Sexton v. Cernuto***, No. 21-1120, 2021 WL 5176953, at *5-8 (6th Cir. Nov. 8, 2021) ("Our cases analyzing whether a special relationship exists do not squarely address whether a work program for probationers is custodial in a way that could create such relationships. . . . The work program, however, placed far more restrictions on Sexton's liberty and her ability to care for herself than did the compulsory education laws or involuntary medical care that this court has previously analyzed. Through the probation work program, the state retained authority to physically confine Sexton, even if her liberty as a probationer was greater than that she would have had in prison. That Sexton could leave the work program at the end of the day is not dispositive. . . . The Redford court ordered Sexton to participate in the work program. The program placed further restrictions on her personal liberty: cell phone use was prohibited; she was required to attend the program, wear a yellow vest, and follow Dunn's and Cernuto's orders; she was ordered to ride in state-owned vehicles; and she was taken to and from various worksites. Underlying these restrictions was the threat of incarceration should disobedience be found to violate her probation. These restrictions are sufficient to show a state 'threat of force,'. . . and a restraint on Sexton's ability to provide for her own reasonable safety[.] . . . Looking to *DeShaney*, the restrictions on Sexton's physical movement and personal liberty during her time in the work program were sufficient to create a special relationship between Cernuto and Sexton. . . . Cernuto concludes with the argument that 'the "special relationship" exception has traditionally been used to impose constitutional liability on the State for the actions of a private party.' He asserts that even if he had a duty to Sexton through a special relationship, that duty to protect applies only to *private* acts of violence, not those of a state actor like Dunn. Cernuto points to language in our opinions specifying that the *DeShaney* exceptions are a means to hold public officials liable 'for private acts of violence.'. . The district court, however, correctly analyzed this private acts issue only in the context of the state created danger exception to *DeShaney*, explaining that while '[i]t is not clear why the distinction between state and private actors exists in the Sixth Circuit,' it was nevertheless necessary to find the state created danger exception inapplicable on that ground. . . Cernuto's argument that the special relationship exception is also limited to protecting against private acts of violence would require an extension of our case law. As shown by the district court's analysis, it is our line of cases on the *state created danger exception*—not the special relationship exception—that includes the requirement that the state must expose the plaintiff 'to private acts of violence.' . . First, case law provides reasons not to apply this distinction to the special relationship exception.

Enforcing the distinction between state and private actors does not necessarily follow from *DeShaney*. There, the question before the Court was whether state entities or agents had an obligation to protect a child from an abusive parent. . . The Court did not address violence from a state actor because the violence in that case was by a parent, not a state actor. . . And although *DeShaney* analyzed the duty to protect against private acts of violence, its holding includes the much broader proposition that 'when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety.'. . To require that the violence complained of be private would significantly diminish this responsibility. Second, the special relationship exception and the state created danger exception arise from different relationships, and that difference supports treating the two exceptions as distinct. The state created danger exception, as the Second Circuit has explained, 'arises from the relationship between the state and the private assailant.'. . In contrast, the special relationship exception, by definition, concerns the 'relationship between the state and a particular victim.'. . Paying greater attention to whether the harm arose from a state or private actor in the special relationship analysis would, therefore, introduce a distinction unrelated to the relationship from which the state obligation arises. In keeping with this logic, we have thus far limited the discussion of this apparent distinction between state and private violence to the state created danger exception. . . Analyses of the duty to protect arising from special relationships do not appear to evaluate any public-private harm distinction, and Cernuto points to no cases in which this court or any other has explicitly held that the special relationship exception cannot apply when a state actor is the source of the victim's injury. In evaluating the exceptions to the general rule against a duty to protect, existing precedent and the rationale upon which such cases are based do not support extending the 'private violence' requirement to the special relationship exception. Because the work program placed significant limits on Sexton's personal liberties, she had a special relationship with Cernuto. Therefore, Cernuto had a duty to protect Sexton from harm while she was participating in the work program. When viewing the facts in the light most favorable to Sexton, a reasonable jury could find that Cernuto failed to protect Sexton from the sexual assaults. The district court did not err in reaching this conclusion. . . As *Stemler* indicates, it was clearly established that given Cernuto's degree of control over Sexton, he had a duty to protect her from harm.")

Some courts have linked the affirmative duty to protect to a requirement that the plaintiff be *involuntarily* in custody. *See, e.g.,* ***Brown v. City of New York***, 786 F. App'x 289, ___ (2d Cir. 2019) ("Brown failed to allege facts showing that Defendants deprived Brown of her liberty. Brown argues that the Defendants established a special relationship by mandating that homeless individuals, like Brown, enter a shelter during inclement weather. New York State laws and regulations, however, do not require clients to remain in homeless shelters. While they require the City to take steps to move individuals into shelters, the City cannot force individuals to stay. . . . Furthermore, once Brown elected to remain in a homeless shelter, she was required to abide by the shelter rules; she cannot establish a special relationship by claiming that the shelter's rules were too restrictive. Second, Brown's reliance on *Soc'y for Good Will* is unpersuasive. That case -- decided five years before the Supreme Court decided *DeShaney* -- is not applicable here. In two

decisions following *Soc'y for Good Will*, this Court has distinguished that case and clarified the due process rights protected after *DeShaney*. . . Therefore, this Court has generally 'focused on involuntary custody' in analyzing the special relationship exception. . . Because Brown failed to allege facts showing she was involuntarily held in custody, Brown failed to establish a special relationship."); ***Campbell v. State of Washington Dept. of Social and Health Services***, 671 F.3d 837, 843-47 (9th Cir. 2011) ("Campbell alleges that SOLA careworkers took four affirmative acts, each of which 'imposed on [Justine's] freedom to act [for herself],' *DeShaney,* 489 U.S. at 200, and converted her voluntary custody into involuntary custody. These liberty-restricting acts were SOLA's (1) placing locks on the doors of Justine's home to control her ability to leave; (2) maintaining control over which SOLA home Justine lived in after 1995; (3) maintaining control over Justine's transportation, diet, and wardrobe; and (4) maintaining control over how and when Justine bathed. Even accepting Campbell's version of the facts, these state actions did not convert Justine's voluntary custody into involuntary custody. . . . As the district court noted, what Campbell alleges were Defendants' liberty-restraining acts were merely part of SOLA's efforts to 'ensure[ ] Justine's day-to-day safety and care.' The state's performance of the very acts for which an individual voluntarily enters state care does not transform the custodial relationship into an involuntary one. For similar reasons, we reject Campbell's argument that Justine's mental abilities rendered her under the control of the state. . . . Accordingly, we hold that no special relationship had been created here and that the special relationship exception does not allow Defendants to be held liable under § 1983. . . . Our decisions in *Patel* and *Johnson* and the Supreme Court's decision in *DeShaney* compel the outcome here. Although Defendant Pate was the SOLA manager responsible for coordinating Justine's care, including the annual updating of Justine's PSP, and Defendants Mitchell and McGenty were responsible for monitoring Justine on a daily basis, none of them acted affirmatively to place Justine in the way of a danger they had created. . . . Accordingly, we hold that Defendants did not create the situation − Justine's impairments or her routine bath − that resulted in Justine's death. Their acts were not affirmative acts akin to those found in cases where we recognized a state-created danger."); ***U.S. v. Tennessee***, 615 F.3d 646, 655 (6th Cir. 2010) ("The State argues that the original judgment is no longer good law in the wake of *DeShaney* and its progeny, which the State maintains has been significantly clarified over time. Specifically, the State maintains that a circuit split existed in the early 1990s regarding whether states owed *Youngberg* rights to residents that resided voluntarily in their care. But, the State argues that these circuits have now reached a consensus that states do not owe *Youngberg* rights to MR residents who have been voluntarily placed into state care by a parent or other legal representative. It further asserts that every published circuit court decision to consider this matter post-*DeShaney* has determined that involuntary confinement is required to implicate residents' *Youngberg* rights. . . In making this claim, however, the State misconstrues the relevant question before this court. Our *Rufo* analysis is limited to whether the State can meet its initial burden of pointing to 'new court decisions or statutes that make legal what once had been illegal.' . . Although the parties dispute the holding and relevance of each of these cases, they all agree that these cases are not rulings of the Supreme Court or the Sixth Circuit. In fact, a published decision of this circuit has recently stated that the Sixth Circuit has not weighed in on this purported circuit split: 'At this time, we do not need to decide whether the State owes the same affirmative

constitutional duties of care and protection to its voluntarily admitted residents as it owes to its involuntarily committed residents under *Youngberg.*' *Lanman v. Hinson,* 529 F.3d 673, 681 n. 1 (6th Cir.2008). Likewise, the Supreme Court has not squarely addressed this issue. Therefore, although these cases from other circuits could potentially be persuasive if this case were before us in another context, they cannot, either individually or collectively, satisfy the State's initial burden."); ***Lanman v. Hinson***, 529 F.3d 673, 682 n.1(6th Cir. 2008) ("The district court found the involuntariness argument determinative by reading *DeShaney* to mean that the Constitution only imposes a duty on the State to assume responsibility for the safety of an individual when it has 'take[n] a person into its custody and holds him there against his will.'. . But *DeShaney* decided only that the State is not responsible for the actions of third-party private actors against individuals unless it had imposed restraints on the individuals' liberty to render them unable to care for themselves. . . . This is unlike the present case in which Plaintiff alleges that the State, through the affirmative acts of Defendants, infringed on Lanman's substantive due process right in freedom from undue restraint while in the State's custody. His status as voluntary or involuntary is irrelevant as to his constitutional right to be free from the State depriving him of liberty without due process. At this time, we do not need to decide whether the State owes the same affirmative constitutional duties of care and protection to its voluntarily admitted residents as it owes to its involuntarily committed residents under *Youngberg*. In an unpublished disposition, however, a panel of this Court held that because the plaintiff had been voluntarily admitted to the state mental hospital, the State's constitutional duty to protect those it renders helpless by confinement was not triggered. *Higgs v. Latham*, No. 91-5273, 1991 WL 21646, at *4 (6th Cir. Oct. 24, 1991) (unpublished). Our sister circuits are split on this issue."); ***Torisky ex rel. Torisky v. Schweiker***, 446 F.3d 438, 445, 446-48 (3d Cir. 2006) ("In the instant case, the District Court erred in concluding that the voluntary nature of one's custody and continued confinement does not impact the availability of the rights to care and protection mandated by *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Youngberg* dealt with an involuntarily committed inmate, and *Fialkowski* holds that the same principles do not apply to individuals who are free to leave state custody 'if they wish[ ].'. . . We conclude that appellants go too far, however, when they insist that a court commitment to state custody is a necessary characteristic of a deprivation of liberty sufficient to trigger *Youngberg's* protections. . . . The existing case law supports the District Court's approach of looking beyond the label of an individual's confinement to ascertain whether the state has deprived an individual of liberty in such a way as to trigger *Youngberg*'s protections. . . . Count V of the complaint alleges that each plaintiff was in state custody and was injured physically and psychologically in the course, and as a result, of a transfer to an inappropriate institution. It further alleges that the plaintiffs were separated from their guardians and loved ones by a police blockade, and were transferred '[a]gainst their will,' and that '[p]hysical and psychological force was utilized by state employees ... in the course of the transfer.'. . . We conclude that plaintiffs may be able to prove facts consistent with these allegations that would establish a deprivation of liberty and a violation of *Youngberg*'s duty of care and protection."); ***Christiansen v. City of Tulsa***, 332 F.3d 1270, 1281(10th Cir. 2005) ("[T]he TPD's quarantine neither involuntarily restrained Christiansen nor limited his freedom to act on his own behalf. Thus, no special relationship or attendant affirmative duty to protect Christiansen arose under *Armijo* and *Uhlrig.*"); ***DeAnzona v. City and***

County of Denver, 222 F.3d 1229, 1234 (10th Cir. 2000) ("A plaintiff must show involuntary restraint by the government to have a claim under a special relationship theory, if there is no custodial relationship there can be no constitutional duty."); ***Santamorena v. Georgia Military College***, 147 F.3d 1337, 1341 & n.10 (11th Cir. 1998) (noting in context of qualified immunity that "some preexisting case law may have particularly suggested to Defendants (or to be more precise, to every reasonable school official standing in Defendants' place) that no duty would arise in a voluntary situation, despite representations by Defendants that protection would be provided." Also noting that "only restraints of freedom imposed by the State, not by a student's parents, can give rise to a constitutional duty requiring the State to protect that student."); ***Randolph v. Cervantes***, 130 F.3d 727, 730-31 (5th Cir. 1997) ("[T]he mere fact that Randolph's mental condition may have made her functionally dependant on Pine Belt and Cervantes does not transform her voluntary tenancy at Pine Hill Apartments into an involuntary confinement creating a 'special relationship.'. . In this case, the defendants never took the affirmative step of restraining Randolph's liberty so that she was rendered unable to care for herself, and the defendants never held her involuntarily or against her will. Accordingly, a 'special relationship' did not exist between Randolph and the defendants."); ***Suffolk Parents of Handicapped Adult v. Wingate***, 101 F.3d 818, 824 (2d Cir. 1996) ("In sum, the plaintiffs here, like the plaintiffs in *Brooks*, are not involuntarily institutionalized. The plaintiffs here have no entitlement under New York law to TCF funding from either Suffolk County or the State Defendants. . . Nor can they claim any such entitlement from any of the defendants under the Due Process Clause of the Fourteenth Amendment."); ***Brooks v. Giuliani***, 84 F.3d 1454, 1466-67 (2d Cir. 1996) ("Plaintiffs here are under no state-imposed restraint. The whole effort of the guardians, here and in state court, has been to prolong the involvement of the City and the State in the funding of institutional placements as to which the City and the State have washed their hands. *DeShaney* therefore subverts the district court's conclusion that the State Defendants had assumed "by word and by deed," . . . a duty to provide plaintiffs a smooth and orderly transition to in-state care, including continuous full funding of out-of-state care prior to their transfer. *DeShaney* flatly rejected as the sole ground for a due process right an expressed intent to provide assistance, or even a failed initiative to do so. . . . Therefore, the injunction cannot be premised on a duty to 'exercise professional judgment' under *Youngberg* and *Society for Good Will*, because there is no such duty here."); ***Walton v. Alexander***, 44 F.3d 1297, 1304 (5th Cir. 1995) (*en banc*) ("Recurring throughout [the] cases that we have decided since *DeShaney* is the iteration of the principle that if the person claiming the right of state protection is voluntarily within the care or custody of a state agency, he has no substantive due process right to the state's protection from harm inflicted by third party non-state actors. We thus conclude that *DeShaney* stands for the proposition that the state creates a "special relationship" with a person only when the person is involuntarily taken into state custody and held against his will through the affirmative power of the state . . . ."); ***Wilson v. Formigoni***, 42 F.3d 1060, 1067 (7th Cir. 1994) (Wilson does not complain that she was held at [Mental Health Center] against her will, and thus cannot maintain that the state did not do enough to ensure her safety while she was committed there."); ***Monahan v. Dorchester Counseling Center, Inc.***, 961 F.2d 987, 993 (1st Cir. 1992) ("Because the state did not commit [plaintiff] involuntarily, it did not take an 'affirmative act' of restraining his liberty, an act which may trigger a corresponding duty to assume special

responsibility for his protection."); ***Higgs v. Latham***, 946 F.2d 895 (6th Cir. 1991) (text in WESTLAW) (If district court was correct in concluding that plaintiff was a voluntary patient at state hospital, then she had no constitutionally based right of action against any defendants under § 1983); ***Fialkowski v. Greenwich Home for Children, Inc.***, 921 F.2d 459, 465 (3d Cir. 1990) (state acquires an affirmative duty under the Fourteenth Amendment to provide safe conditions only where mentally retarded person is taken into custody without his consent); ***Milburn v. Anne Arundel County Dept. of Social Services***, 871 F.2d 474, 476-78 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989) (where child was voluntarily placed by parents in a foster home, court found ***DeShaney*** directly controlling; state had no constitutional duty to protect child against private violence); ***Colbert v. District of Columbia***, 5 F.Supp.3d 44, (D.D.C. 2013) ("While puzzled by the finding in *Harris* that an incapacitated person, in handcuffs and held in a police van, was not 'involuntarily' in police custody, this Court is bound by D.C. Circuit precedent. In light of *Butera,* which recently relied on *Harris* and its very narrow construction of 'custody,' this Court is bound to a narrow interpretation of 'custody' for the purpose of triggering a constitutional duty of care. Therefore, in line with the First, Second, Third, Fifth, and Ninth Circuits and their interpretation of the Supreme Court's decision in *DeShaney,* this Court finds that only involuntary commitment triggers the District's constitutional duty of care to protect an individual from harm caused by non-state actors. The facts alleged here—that KC was a 'ward' of the District, that she was intellectually disabled, unable to attend to her own daily needs, and *encouraged* to have nonconsensual sex with other residents and men she met on a one time basis—do not assert that she was involuntarily committed to District custody, giving rise to a constitutional to prevent harm to her from third persons. The Court is mindful that whether KC's confinement was voluntary or involuntary is question of fact, not of formality. . . Further, a commitment that was initially voluntary 'may, over time, take on the character of an involuntary one.'. .The threshold question in the present case is whether KC was committed to the custody of the District voluntarily or involuntarily. . . Ms. Colbert alleges that KC was a 'ward' but does not assert facts sufficient to show that KC was 'involuntarily' committed to the custody of the District. Count VI, alleging a constitutional violation under § 1983, will be dismissed without prejudice."); ***Estate of Emmons v. Peet***, 950 F. Supp. 15, 18, 19 (D.Me. 1996) ("For Emmons to have had the substantive due process right to receive adequate medical care ... he must have been an involuntary patient at AMHI who would have been barred from leaving AMHI upon request. . . . The Court is aware of the fact that there may be some circumstances when a patient is labeled voluntary for administrative purposes but is in fact involuntary by virtue of his inability to leave the hospital upon request. Plaintiffs, however, have not raised sufficient facts from which a reasonable factfinder could determine that Emmons was not free to leave AMHI upon request."); ***Bushey v. Derboven***, 946 F. Supp. 96, 99 (D.Me. 1996) ("The sole fact that Dobson was admitted ostensibly as a voluntary patient on the admission form is not determinative. The voluntary or involuntary status of the patient must be determined by the underlying facts. The admission form, in and of itself, is not determinative. Consequently, Dobson may have had the substantive due process right to receive adequate medical care under *Youngberg* and *DeShaney*."); ***K.L. v. Edgar***, 941 F. Supp. 706, 716 (N.D. Ill. 1996) ("When the state discharges patients, it gives up its custody of them. At that point, the state's obligations under *Youngberg* to provide plaintiffs with safe conditions of confinement and freedom from

unnecessary bodily restraints end. Moreover, simply because the state once provided plaintiffs with shelter and care does not bind it always to provide them with shelter and care."); ***Duval v. Cabinet for Human Resources***, 920 F. Supp. 111, 114 (E.D. Ky. 1996) ("In contrast to the constitutional protection afforded to individuals who are involuntarily committed to a state mental health facility, patients who have voluntarily placed themselves in such a facility are not afforded the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."); ***Martin v. Voinovich***, 840 F. Supp. 1175, 1207 (S.D. Ohio 1993) (In a class action brought on behalf of people in Ohio with mental retardation or other developmental disabilities, the court concluded "that only those members of the plaintiffs' class who are involuntarily institutionalized may assert a *Youngberg* claim."); ***Rogers v. City of Port Huron***, 833 F. Supp. 1212, 1217 (E.D. Mich. 1993) ("[I]f a person's attendance at an event or area is voluntary, ... , and that person was not physically placed there by the state, the person cannot be considered to be in 'functional custody.'"); ***Jordan v. State of Texas***, 738 F. Supp. 258, 259 (M.D. Tenn. 1990) (mentally retarded child, *voluntarily* committed to state institution, had no substantive due process right to safe conditions).

See also ***Johnson v. Rimmer***, 936 F.3d 695, 707 n.44 (7th Cir. 2019) ("Dr. Macherey and Nurse George argue that we need not consider whether the evidence establishes the special relationship exception to *DeShaney*'s general rule. According to Dr. Macherey and Nurse George, Mr. Johnson voluntarily committed himself to MHC and, therefore, the special relationship exception is inapplicable here. Courts generally agree that individuals who voluntarily admit themselves to a state-run mental health facility do not have substantive due process rights simply because they are in the state's custody. . . We have not addressed directly the extent to which the voluntariness of one's committal to the state's custody bears on due process rights under *DeShaney*. Like the district court, we do not need to determine whether a voluntary commitment can be de facto involuntary for the purposes of the Due Process Clause or whether Mr. Johnson's commitment was functionally involuntary. As we will discuss later, even if Mr. Johnson has due process rights under the special relationship exception, he cannot show that Dr. Macherey and Nurse George deprived him of those rights."); ***Kennedy v. Schafer***, 71 F.3d 292, 294 (8th Cir. 1995) ("[W]e agree with the District Court that defendants are entitled to the defense of qualified immunity if Kathleen is properly classified as a voluntary patient. We need not and do not decide whether *Parwatikar's* holding in favor of voluntary patients' due-process rights remains good law. We do decide that an action for damages brought by a voluntary patient is subject to a qualified-immunity defense." Case remanded for determination of whether patient's voluntary status had become "involuntary" prior to her suicide). *Kennedy* was distinguished by the court in ***Shelton v. Arkansas Dept. of Human Services***, 677 F.3d 837, 842, 843 (8th Cir. 2012) ("[A]pplying *Kennedy* to the present facts, we may assume without deciding that the governing Arkansas statutes could operate like the Missouri statutes in *Kennedy* and, in limited situations, serve to convert a patient from voluntary status to involuntary status. We may also assume without deciding that the underlying facts could support a substantive due process claim in the event there existed a constitutional-level duty of care. . . Even making these assumptions, Appellant's case fails on three independent grounds. First, because no duty could have arisen prior to the defendants'

discovery of Brenda, and because Brenda was wholly incapacitated prior to that time solely by her own actions, it is factually incorrect to assert that, after defendants found Brenda unconscious in her room, she posed some sort of additional risk of self harm. . . .Second, we are simply unwilling to extend *Kennedy* into the context of split-second, emergency-care decisionmaking as urged by Appellant. . . .Finally, even if we were to view the present case as a potentially reasonable setting for the expansion of *Kennedy,* no such rule could have been deemed 'clearly established' at the time of the events alleged in the complaint. . . As such, all defendants would be entitled to qualified immunity on the federal constitutional claims.")

But see ***Charles v. Orange County***, 925 F.3d 73, 80-85 (2d Cir. 2019) ("Plaintiffs filed a complaint . . . on July 12, 2016, asserting violations of the Fourteenth Amendment. They claim that substantive due process requires that civil detainees be afforded adequate medical care during their detention, and that their medical care should have included discharge planning, because of their serious mental illnesses. They allege that discharge planning is regarded by medical and psychological professionals as an essential part of mental health care, especially in institutional settings, where it is necessary to mitigate the risks of interrupted treatment while patients transition from treatment within the institution to other sources of treatment. Plaintiffs contend that by failing to provide them with discharge planning, Defendants were deliberately indifferent to the risk that Plaintiffs would relapse upon release and face mental decompensation and other serious health consequences. On January 30, 2017, Defendants moved to dismiss the entire Complaint for failure to state a claim. Defendants argued that there is no established substantive due process right to the post-release measures inherent in discharge plans. On their view, the government's duty of care ends the instant the inmate walks through the prison gates and into the civilian world, because that is when the inmate's ability to secure medication or care on his own behalf is restored. . . . Because the district court construed Plaintiffs' allegations as regarding deliberate indifference to post-custody medical care, rather than deliberate indifference to needed in-custody medical care, the district court applied the wrong standard in determining whether Plaintiffs adequately pled a Fourteenth Amendment violation. We therefore vacate the district court's dismissal of the Complaint and remand for further proceedings. . . . Plaintiffs argue that the deprivation of care that they allege in fact occurred *during* their detention, because discharge planning occurs before release from custody. Their argument is consistent with the Complaint, which clearly purports to allege an in-custody deprivation of care. Whether Plaintiffs' claim for deprivation of discharge planning, which negatively affected them after their release from custody, can be considered a claim for in-custody deprivation of care is an important question in this case. This distinction matters because the duties state actors owe to individuals differ depending on whether the complainant was in the state's custody. As a general matter, the state is under no constitutional duty to provide substantive services to free persons within its borders. . . But when a person is involuntarily held in state custody, and thus wholly dependent upon the state, the state takes on an affirmative duty to provide for his or her 'safety and general well-being.'. . This 'special relationship exception' imposes a duty on the state in recognition of 'the limitation which [the state] has imposed on [the person's] freedom to act on his own behalf.'. . . When the state is deliberately indifferent to the medical needs of a person it has taken into custody, it violates the

Eighth Amendment's prohibition on cruel and unusual punishment. . . The Supreme Court subsequently extended the protections for prisoners established in *Estelle* to civil detainees under the Due Process Clause of the Fourteenth Amendment, reasoning that persons in civil detention deserve at least as much protection as those who are criminally incarcerated. . . The Ninth Circuit has extended the reasoning of *Estelle* and *DeShaney* beyond the moment of release from custody, holding in *Wakefield v. Thompson*, 177 F.3d 1160, 1164 (9th Cir. 1999), that the state owes an affirmative duty to provide an outgoing prisoner requiring medication with a 'supply sufficient to ensure that he has that medication available during the period of time reasonably necessary to permit him to consult a doctor and obtain a new supply.' The Ninth Circuit based this holding on a matter of common sense: 'that a prisoner's ability to secure medication "on his own behalf" is not necessarily restored the instant he walks through the prison gates and into the civilian world.'. . This Court, however, has never held that the state's duties to an inmate or detainee extend beyond their release. . . . Plaintiffs' theory raises a legal question of first impression in this Circuit: whether a claim of constitutional entitlement to discharge planning, the alleged inadequacy of which causes post-release harm, can be considered a claim to in-custody care cognizable under the 'special relationship' exception. Discharge planning is fundamentally different from other measures or types of care to which detainees may be entitled while in custody, in that its entire purpose is to prevent post-release harm. Given the reality that the tangible harm Plaintiffs suffered was a direct result of their lack of medication and medical records *after* release from custody, the District Court understandably construed the Complaint as asserting 'a right to post-release measures inherent in discharge planning.'. . Nevertheless, discharge planning is not so different from other measures the state takes in providing care to those in its custody as to be categorically beyond the reach of the 'special relationship' exception. If discharge planning is to occur at all, it must, by definition, occur prior to release from custody. Whether the three components of discharge planning that Plaintiffs identify are an 'essential part' of mental healthcare, as Plaintiffs allege, is a factual matter that may be proven at a later stage of litigation by expert testimony. If discharge planning is essential to providing care for mentally ill individuals, the rationale for the 'special relationship' exception applies to this need no less than the need for other types of care. . . . In this case, furthermore, it cannot be said that when the County released Plaintiffs, it 'placed [them] in no worse position than that in which [they] would have been had it not acted at all ...'. . . That the harmful consequences of a lack of discharge planning occur after release from custody does not remove discharge planning from the purview of the 'special relationship' exception. . . . Thus, taking Plaintiffs' allegations as true and drawing all reasonable inferences in their favor, we find that Plaintiffs have plausibly alleged that discharge planning is an essential part of in-custody care. We conclude that despite the forward-looking nature of discharge planning, a claim for damages caused by the lack of it can be considered a claim for deprivation of in-custody care for purposes of the 'special relationship' exception. It will be for Plaintiffs to prove to a fact-finder, on remand, that the care they complain of is the type that should have been provided to them during their detention."); ***Harvey v. D.C.***, 798 F.3d 1042, 1051 (D.C. Cir. 2015) ("[T]he District argues that once Suggs left Forest Haven and moved into a private home, it was no longer in a special relationship with him. It argues that while living in the group home operated by Symbral, Suggs was in the 'least restrictive conditions necessary to achieve the purposes of habilitation,' D.C.Code

§ 7–1305.03, such that it no longer deprived Suggs of his liberty in a manner giving rise to a special relationship. We disagree. . . . [T]he fact that Suggs was held in the least restrictive setting does not negate the involuntary nature of his commitment or the District's duty under *Youngberg* to ensure he received adequate medical care."); ***Campbell v. State of Washington Dept. of Social and Health Services***, 671 F.3d 837, 848-51 (9th Cir. 2011) (B. Fletcher, J., dissenting) ("By ordering Justine to take a bath without direct supervision, defendants McGenty and Mitchell committed an affirmative act that increased Justine's likelihood of succumbing to the dangers inherent in her physical condition. . . . Simply put, Justine would not have been in the bath unsupervised at the moment of her death had defendants not ordered her to be there. . . Given that state employees instructed Justine to take a bath and then failed to take even basic precautions necessary to mitigate the risk, the danger creation exception applies. . . . Theoretically, Justine's participation in SOLA was voluntary. . . . But even if initial enrollment in SOLA was voluntary, a jury could conclude that Justine's participation in SOLA became de facto involuntary. . . .A reasonable jury could conclude that Justine was in involuntary custody because the state (1) advocated for and arranged the SOLA placement while Justine was a ward of the state; (2) monitored and controlled every aspect of Justine's daily life; (3) prevented Justine from leaving SOLA; and (4) failed to inform Justine of her ability to terminate her custodial relationship. Because a jury could reasonably conclude that the state exercised involuntary custody over Justine, the trial court should not have concluded that there was no special relationship and no affirmative obligation to protect Justine's constitutional rights."); ***Smith v. District of Columbia***, 413 F.3d 86, 94-97 (D.C. Cir. 2005) ("For starters, the District's legal custody over Tron is a good indicator that it had a duty to look after him. Because the District, rather than Tron's family, had primary legal control over him, the District had legal responsibility for his daily care. . . The District downplays the significance of this point, but our case law recognizes the relevance of formal indicia in assessing whether custody attaches for *DeShaney* purposes. . . . Just as important, the District's control over Tron restrained his liberty against his will. An adjudicated delinquent placed at ESA by a restrictive court order, Tron had to participate in the program. To be sure, Tron had more freedom than a prisoner − subject to ESA rules, he could come and go, and take ESA-approved weekend home visits. ESA's failure to crack down on Tron's curfew violations also left him with a longer leash than he was formally entitled to under the program's rules. But such flexibility hardly amounts to freedom from state restraints. Tron had to live at Queenstown Apartments. He had no choice. He risked punishment, including the possibility of returning to Oak Hill, when he failed to obey ESA restrictions on how and where he spent his time. . . . [W]here the government assumes full responsibility for a child by stripping control from the family and placing the child in a government-controlled setting, the government has a duty not to treat the child with deliberate indifference. . . . [W]e see no reason to treat Tron differently because he was a juvenile delinquent rather than a foster child. . . . Unhappy with the foster-child analogy, the District urges us to look instead to decisions holding that public schoolchildren, despite compulsory education laws, are not in state custody for *DeShaney* purposes. . . . At least on the surface, we see some tension between the foster care and public school cases. Both involve state constriction of a child's liberty − the child must live with the foster parents and the child must receive schooling − yet only the former triggers *DeShaney* custody. Courts have typically distinguished these cases by treating

the custody analysis as an all-or-nothing inquiry: the government has either assumed primary responsibility for controlling and caring for a child (and thus, as in the foster care context, the child is always in government custody) or it has assumed only limited responsibilities for parts of the day (and thus, as in the school cases, the child is never in government custody). . . . But we need not explore the ins and outs of this issue. . . . The District served as Tron's legal custodian and primary caregiver. It placed him in a program that constrained his liberty by limiting, among other things, where he lived and what he could do. Indeed, Tron was murdered while subject to these constraints − at Queenstown Apartments, at night, and during curfew. For *DeShaney* purposes, then, Tron remained in District custody, and if the District was indeed deliberately indifferent to his welfare in a way that led to his murder, then the District committed a constitutional violation − the issue to which we now turn."); ***Camp v. Gregory***, 67 F.3d 1286, 1296 (7th Cir. 1995) ("We are unwilling to decree that simply because Camp, as opposed to the state, initiated the transfer of guardianship, under no set of facts could a state official be liable for a subsequent deprivation of due process."); ***Walton v. Alexander***, 44 F.3d 1297, 1308-09 (5th Cir. 1995) (Parker, Robert. M., J., joined by Politz, C.J., and Stewart, J., concurring specially) ("The majority's holding that custody must be 'involuntary' and 'against [a person's] will' is so restrictive that it precludes any type of custody short of incarceration or institutionalization giving rise to the duty of protection. In effect, the majority has confined the duty of protection to the circumstances found in *Estelle* and *Youngberg*. Such a narrow application of this duty clearly was not contemplated in *DeShaney*. . . .The question is not so much how the individual got into state custody, but to what extent the State exercises dominion and control over that individual."); ***Johnson v. Grinberg***, No. Civ.A. 98CV10662-RGS, 1999 WL 1072645, at *5 (D. Mass. July 2, 1999) (not reported) ("Whether or not Johnson was a custodial patient at the time of the alleged assault is a matter of some significance. . . . Johnson argues that under *DeShaney* and *Zinermon* . . . the DMH was constitutionally obligated to tend to her medical needs. . . . The problem with the argument is plaintiff's misconception (shared by defendants) that the question of custody is in some way definitively answered by an inquiry into Johnson's competence. The one is not necessarily a function of the other. A person may be incompetent and not necessarily in custody, or in custody and be perfectly competent. Here plaintiff may well have been in custody, or its functional equivalent, whatever form she signed. But this is not an issue that can be decided by her competency alone (although it is certainly relevant)."); ***Buffington v. Baltimore County, Maryland***, 913 F.2d 113, 119 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1106 (1991) (refusing to find that affirmative duty owed to someone in custody turns on either the reason for taking custody or on whether a state or private actor brought the need for custody to the state's attention); ***McMahon v. Tompkins County***, No. 95-CV-1134(RSP/GJD), 1998 WL 187421, *3 (N.D.N.Y. Apr. 14, 1998) (unreported) ("Unlike the situation in *DeShaney*, where the abused child was always in the care of the biological parent, the Department removed the Payne girls from their biological parents' home and controlled their access to their biological parents. While in foster care, the Payne girls had a constitutional right to protection from harm. . . Defendants attempt to avoid this outcome by arguing that the Payne girls were not involuntarily placed in foster care because their court-appointed attorney requested their placement in foster care. . . I reject this argument. To reach the result advocated by defendants would create an alarming precedent in

which children involuntarily placed in foster care would be entitled to the full panoply of due process rights, while those voluntarily placed would not. This result is neither acceptable nor constitutionally sound."); ***Brown, by Brown v. Kennedy Kreiger Institute***, 997 F. Supp. 661, 668 (D.Md. 1998) ("It is specious to suggest that Jake, who is severely mentally retarded, could walk out of a KKI home on his own at any time. Moreover, even if Jake could be considered to be technically a 'voluntary' resident of KKI's homes, the jury could reasonably find from the evidence that because of his incompetence, he was a 'de facto involuntary' resident."); ***Miracle v. Spooner***, 978 F. Supp. 1161, 1169-70 (N.D. Ga. 1997) ("Without the protection of the state, a child who is in foster care is at the mercy of the foster parents whether or not its natural parents consented to the placement of the child into foster care. From the child's point of view, foster care will always constitute involuntary custody because the state does not give the child an alternative to the foster home the state has chosen. Accordingly, the Court finds that the state's duty of care recognized in *Taylor* applies in this case notwithstanding the parents's consent to placement of the children into foster care."); ***Ringuette v. City of Fall River***, 888 F. Supp. 258, 268 (D. Mass. 1995) ("This court concludes that the state has a duty under the constitution to protect persons who are taken into protective custody because of incapacitation and who lack the capacity to give knowing, intelligent and voluntary consent to protective custody."); ***Connecticut Traumatic Brain Injury Ass'n v. Hogan***, 161 F.R.D. 8, 10 (D. Conn. 1995) ("The issue is not whether individuals placed in state institutions are within the custody of the State, but once there, with the state in complete control of the environment, whether "voluntarily" placed patients are constitutionally entitled to a level of basic rights. . . . *Deshaney* does not address a situation, as here, in which the State has agreed to provide care for completely dependent individuals. Once the State has accepted this responsibility, and the individual is physically in state custody, it has also agreed to provide an environment that is consistent with and does not transgress the individuals' basic rights. . . . The mechanism which brought the individuals to the various facilities, whether considered "voluntary" or "involuntary," is not controlling; 'in either case they are entitled to safe conditions and freedom from undue restraint.' [cite omitted]"); ***Clark v. Donahue***, 885 F. Supp. 1159, 1162 (S.D. Ind. 1995) (recognizing that several courts have held that "institutionalization which originated voluntarily may at some point involve restraint of personal liberty sufficient to trigger the protections of the due process clause."); ***McNamara v. Dukakis***, 1990 WL 235439 (D. Mass. Dec. 27, 1990) (not reported) (court refused to treat outpatient recipients of mental health care as in "constructive custody," viewed those in community residences as comparable to state-placed foster children, and accepted expert testimony as to the status of "unconditional voluntary patients," suggesting "little practical difference between voluntarily and involuntarily committed patients as to their ability to act on their own behalf.").

See also ***Campbell v. Washington,*** No. C08-0983-JCC, 2009 WL 2985481, at *5 (W.D. Wash. Sept. 14, 2009) ([Collecting cases from circuits] "On balance, these cases suggest that, depending on the facts and circumstances of the case, a voluntarily committed patient can become a *de facto* involuntary patient if her freedom was − or, in some circuits, could have been − curtailed by the power of the State. . . . The State only acquires an affirmative constitutional obligation to provide a safe environment to a developmentally disabled individual when the State prevents that

individual from leaving its custody. Justine was neither barred from leaving, nor is there any evidence to suggest that she could have been so barred under Washington law. Involuntary detention in a residential treatment facility is generally prohibited in this state. . . . Plaintiff has presented no evidence, and indeed has not argued, that the state could have involuntarily committed her under Washington law."); ***Estate of Cassara v. State of Illinois***, 853 F. Supp. 273, 279 (N.D. Ill. 1994) ("[T]his court holds that voluntary institutionalization may involve a restraint of personal liberty sufficient to trigger the due process clause. . . . The right to leave . . . does not guaranty the power to leave."); ***United States v. Commonwealth of Pennsylvania***, 832 F. Supp. 122, 125 (E.D. Pa. 1993) ("[T]his court rejects defendants' argument that voluntarily confined patients are not entitled to the constitutional right to treatment and care by virtue of the 'voluntariness' of their initial confinement. Where there is an instance of state-propounded curtailment of liberty, due process standards must be upheld. In this case, the constitutional right to treatment or habilitation extends to both involuntarily and voluntarily confined residents alike."); ***Halderman v. Pennhurst State School and Hospital***, 834 F. Supp. 757, 761-62 (E.D. Pa. 1993) (*DeShaney* supported finding that residents of Pennhurst were involuntary where "the Commonwealth defendants had affirmatively acted in accepting the residents ... and in depriving them of their constitutional right to minimally adequate habilitation....").

At least two circuits have suggested that the concept of "in custody" for *DeShaney* purposes of triggering an affirmative duty to protect entails more than a "simple criminal arrest." *See* ***Gladden v. Richbourg***, 759 F.3d 960, 965 (8th Cir. 2014) ("Police officers have a constitutional duty to ensure the safety and well-being of those in their custody. . . 'Custody' in this context must be something more than an individual's reasonable belief that he is not free to leave, as is the case under the Fourth Amendment. *See Estate of Stevens v. City of Green Bay,* 105 F.3d 1169, 1175 (7th Cir.1997). Rather, custody is effected for purposes of the Fourteenth Amendment only when the state 'so restrains an individual's liberty that it renders him unable to care for himself.'. .Gladden's brief ride in the back of Richbourg's squad car does not satisfy this high standard."); ***Estate of Stevens v. City of Green Bay***, 105 F.3d 1169, 1175 (7th Cir. 1997) ("In this case, the district court, magistrate judge, and the estate assumed, without citation to authority, that Fourth Amendment criminal case law correctly elucidates the phrase 'in custody.' Given the authority expressly relied upon by the Supreme Court when it recognized this constitutional duty, we are not at all sure this is correct. The Supreme Court's express rationale in *DeShaney* for recognizing a constitutional duty does not match the circumstances of a simple criminal arrest . . . . This rationale on its face requires more than a person riding in the back seat of an unlocked police car for a few minutes."). *See also* ***Schoenfield v. City of Toledo,*** 223 F.Supp.2d 925, 930 (N.D. Ohio 2002) ("In the instant action, decedent did not come to harm through Defendants' actions. This is not an instance in which the Defendants selected an individual from the public at large and placed him in a position of danger. Defendants did not place decedent at the K Mart or at the hotel room. Defendants did not release decedent into greater harm than that in which they found him, nor was decedent in detention, characterized as 'custody' or otherwise, when he committed suicide. The harm to decedent, while perhaps identifiable by Defendants, was not created by Defendants. Nor was decedent's liberty constrained by Defendants so as to eviscerate his own freedom of choice or

ability to care for himself. Ultimately, Plaintiff's attempt to characterize the instant investigatory traffic stop as a type of 'custody' giving rise to the alleged constitutional rights and/or obligations of medical care, hospitalization, incarceration, and/or continued detention is unpersuasive in light of *DeShaney* and the Supreme Court's repeated reluctance to further 'expand the concept of substantive due process.'").

But see ***Williams for the Estate of Burns v. City of Georgetown, Ky.,*** No. 18-6182, 2019 WL 2244719, at * (6th Cir. May 24, 2019) (not reported) (Merritt, J., dissenting) ("I agree that the officers did not act with 'deliberate indifference' to Burns' medical needs during the roadside stop of his vehicle because they called paramedics to the scene, but I part ways with the majority about whether plaintiff has adequately alleged that defendants were 'deliberately indifferent' to Burns' welfare when they left him alone at night at a McDonald's in a strange city knowing that he appeared impaired in some way. The complaint adequately alleges that their decision led to Burns wandering out in the roadway and getting killed by a passing vehicle. When the police take an individual into custody—into their control—substantive due process prevents them from intentionally or recklessly injuring the individual, whether that individual has been temporarily seized by an officer or is more permanently housed in a prison. . . Where an arrestee suffers injury at the hands of a private party while detained by the state, 'a constitutional claim arises when the injury occurred as a result of the state's deliberate indifference to the risk of such an injury.'. . Under these principles, the relevant question that should be examined is whether Burns was so obviously impaired when in the officers' custody that the officers acted with deliberate indifference in leaving him unsupervised in the middle of the night in a strange town to await a ride home. Instead, the question the majority asks is whether Burns was safer before the state action than he was after it. . . This is not the correct question because it sets up a false equivalency—as though the police had only a binary choice between putting him back in his car to drive home or bringing him to the McDonald's. Multiple other options were available, including taking Burns into custody to await a family member. The question also reveals the weakness in the argument because the comparison essentially concedes that the officers likely believed that Burns was too impaired to drive. . . . Taken in the light most favorable to plaintiff, the allegations could support a finding that Burns was in a 'custodial relationship' with officers when he was killed, and his death was caused by the officers' deliberate indifference to his medical condition and their decision to drop him off alone at the McDonald's. A number of factual questions exist about the officers' states of mind that evening, and their knowledge of what happened to Burns that led to his death on a highway miles away from where he was pulled over several hours previously. Even under the circumstances of this case as we know them now, at the motion-to-dismiss stage, a jury could find that the officers increased the risk of harm faced by Burns. The complaint alleges sufficient information to demonstrate that the officers assumed a custodial duty to Burns to avoid acting with deliberate indifference to his safety to survive a motion to dismiss. The law is sufficiently established that a reasonable officer would know not to leave an impaired person alone at night in a strange place. Plaintiff could discover evidence that at least creates a question of fact as to whether the officers violated this duty by acting with deliberate indifference when they dropped Burns off at McDonald's in a strange town late at night. At bottom, this is a case about responsible

police action. Once police are involved, they cannot act with indifference to the welfare of the person before them."); ***Family Serv. Ass'n ex rel. Coil v. Wells Twp.***, 783 F.3d 600, 606 (6th Cir. 2015) ("The record in this case permits a reasonable inference of deliberate indifference. Officer Kamerer took Coil into custody. He then left him facedown, pepper-sprayed and handcuffed, in the middle of a lane open to traffic. Why he felt the need to leave him in the middle of the street in such a state is difficult to fathom. The area was dark. Coil wore dark clothing. Kamerer had not turned his police car's regular or flashing lights on. If Coil remained there for any appreciable amount of time, the risk that Coil might get struck by a passing car was painfully obvious. And the 911 dispatch recordings show a two-minute gap between when Kamerer radioed that he had both men 'chemically restrained' and when he called for an ambulance, which occurred 'immediately' after the car struck him and Coil. . . During that window Kamerer faced no threat, and common experience and common sense suggested a strong likelihood that a car might pass—and its driver would not be able to see Coil."); ***Jacobs v. Ramirez***, 400 F.3d 105, 107 (2d Cir. 2005) ("Having agreed to parole Jacobs to the home to which he sought to be paroled, the state assumed the very limited duty of ensuring that it did not require him to remain in a place that turned out, at least according to his allegations, to be uninhabitable. Because we think that Jacobs has stated a claim under Section 1983 with respect to the state's decision to parole him to allegedly unsuitable housing and its alleged refusal to allow him to move, we reverse the district court's dismissal of that portion of his complaint and remand this case for further proceedings with respect thereto."); ***Davis v. Brady***, 143 F.3d 1021, 1027 (6th Cir. 1998) ("When a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, he must demonstrate, first, that the defendants owed him a duty not to subject him to danger and, second, that the defendants violated this duty by exhibiting deliberate indifference to the plaintiff's well-being. In this case, the taking of Davis into custody triggered the defendant officers' duty to protect Davis. There is sufficient evidence in the record to demonstrate that the defendant officers violated this duty when they exhibited deliberate indifference to Davis's well-being by abandoning him, in his inebriated state, on an unfamiliar, dark, and busy highway."); ***Stemler v. City of Florence***, 126 F.3d 856, 868 (6th Cir. 1997) ("In the present case, Black was rendered unable to protect herself by virtue of both the threat of arrest and her physical placement in the truck by the officers. Unlike *Foy*, Black never had the opportunity to make a voluntary choice to continue driving with Kritis beyond the span of time that the police had in effect ordered her to do so; her fatal accident occurred about five minutes after the truck left the police stop. Furthermore, unlike *Walton*, Black was in the custody of the defendant officers in the sense that they had affirmatively acted to deprive her of her liberty, rather than merely negligently refused to act to protect her. . . In sum, neither *Foy* nor *Walton* did anything to alter the clear and simple rule that state actors owe a duty of care to those individuals of whom they deprive their liberty, and a reasonable jury could conclude that the officers had deprived Black of her liberty by placing her in the truck or by threatening her with an arrest that would have been unwarranted under Kentucky law.").

See also ***Smith v. City of Greensboro***, No. 1:19CV386, 2020 WL 1452114, at *15 (M.D.N.C. Mar. 25, 2020) ("Here, the complaint's allegations show that Smith's personal liberty was sufficiently restrained during the relevant time period to place him in 'custody.' Although he

was not under arrest, . . . Smith lay prone on the ground, hands and feet tied together behind his back, with at least four officers and both paramedics surrounding him[.] . . Simply put, Plaintiffs have sufficiently alleged that Smith was in 'custody,' as 'an affirmative act by the state'—tackling him to the ground and restraining him with a hobble—completely extinguished his ability to 'act on his own behalf.'. .In a related argument, the Paramedics contend that, even if Smith was in 'custody,' they were under no affirmative duty to provide him with medical care because he was in *the Officer's* custody, not theirs. . . The Court is not moved by this reasoning. According to the complaint, the Paramedics were the sole government medical team dispatched to aid Smith. . . There may be some instances in which the jurisdictional differences between Guilford County and the City of Greensboro matter with respect to a duty to intervene. However, in this case, where it appears that the Officers themselves called upon the Paramedics to render medical care, any distinction between the two governmental employers becomes much less meaningful. . . The pleadings sufficiently allege that Smith was in custody, and that the Paramedics were the government employees called upon to provide medical care during that time. That they worked for the county, rather than the city, is unimportant.")

(i) public school cases

Some courts have used a functional custody rationale to justify the imposition of a constitutional duty to protect upon school officials.

See e.g., ***Martin v. Brame***, No. 96-5526, 1997 WL 163533 (6th Cir. Apr. 7, 1997) (unpublished) (assuming, without deciding, that child in residential school for the deaf was owed an affirmative duty of protection from sexual assault by other student, but affirming grant of summary judgment for defendants because of lack of any facts from which jury could find deliberate indifference on part of school officials); ***Nabozny v. Podlesny***, 92 F.3d 446, 459 n.13 (7th Cir. 1996) ("[I]n some cases schools arguably serve as temporary custodians of children, limiting parent's ability to care for children, or children's ability to care for themselves. . . . It may be, therefore, that in some cases a school is in a custodial relationship with its students."); ***Johnson v. Dallas Independent School District***, 38 F.3d 198, 208 (5th Cir. 1994) (Goldberg, J., dissenting) ("*DeShaney* does not foreclose the possibility of some obligation to protect students from violence in public schools."); ***Walton v. City of Southfield***, 995 F.2d 1331, 1337 (6th Cir. 1993) ("Although *DeShaney* focuses on conditions during incarceration, an 'other similar restraint' is not necessarily limited to incarceration. The Supreme Court found a deprivation of personal security in a non-incarceration context in *Ingraham v. Wright* [cite omitted], where the Court held that while in school, junior high school students had a protected liberty interest in personal security. [cite omitted] However, *Ingraham* may turn on the fact that public school students are compelled by state law to attend school and are not permitted to withdraw from situations posing the risk of personal injury."); ***Black v. Indiana Area School District***, 985 F.2d 707, 715 (3d Cir. 1993) (Scirica, J., concurring) ("Denying these § 1983 claims . . . ignores the practical realities of this case-the necessity for small school districts to contract out bus service, the reliance of families in rural areas upon school buses, and the defenselessness of young girls riding a school bus. When

claims like these fall through the cracks, § 1983 seems less than the powerful tool to vindicate constitutional rights it was designed to be."); ***Maldonado v. Josey***, 975 F.2d 727, 735 (10th Cir. 1992) (Seymour, J., concurring) ("In my judgment, the Fourteenth Amendment requires that we recognize some affirmative duty on the part of public school teachers to protect students who are in the total care of the school during the period of their compulsory attendance."), *cert. denied*, 113 S. Ct. 1266 (1993); ***D.R. v. Middle Bucks Area Vocational Technical School***, 972 F.2d 1364, 1377 (3d Cir. 1992) (Sloviter, C.J., dissenting) ("I would hold, that the state compulsion that students attend school, the status of most students as minors whose judgment is not fully mature, the discretion extended by the state to schools to control student behavior, and the pervasive control exercised by the schools over their students during the period of time they are in school, combine to create the type of special relationship which imposes a constitutional duty on the schools to protect the liberty interests of students while they are in the state's functional custody."), *cert. denied*, 113 S. Ct. 1045 (1993); *.,* ***Lichtler v. County of Orange***, 813 F. Supp. 1054, 1056 (S.D.N.Y. 1993) ("A state imposing compulsory attendance upon school children must take reasonable steps to protect those required to attend from foreseeable risks of personal injury or death."); ***Pagano by Pagano v. Massapequa Public Schools***, 714 F. Supp. 641, 642-43 (E.D.N.Y. 1989) (elementary school students required to attend school were owed some duty of care by defendants to prevent physical and verbal abuse by other students).

See also ***Johnson v. Dallas Independent School District***, 38 F.3d 198, 203 n.7 (5th Cir. 1994):

> The argument against holding that public schools have 'custody,' at least for some purposes of protecting their physical well-being, appears to derive less from logic than from a pragmatic desire to limit their legal liability. As has been shown, students must attend school and may not leave without permission. To say that student attendance is voluntary because parents may elect to home-school their children or send them to a private school is lamentably, for most parents, a myth. [cite omitted] To intimate that parents retain effective responsibility for their children's well-being when the school alone makes critical decisions regarding student safety and discipline is inaccurate. To suggest that parents somehow are in a better position than the schools to protect their children from the ravages of weapons smuggled onto campus during the school day is cruelly irrational. To hope that students who are unarmed can protect themselves from the depredation of armed criminals in their midst is ridiculous. That parents yield so much of their children's care into the hands of public school officials may well be argued to place upon the officials an obligation to protect students at least from certain kinds of foreseeably dangerous harm during regular school hours. The author of this opinion dissented in *Doe v. Taylor ISD*, [cite omitted]. In suggesting that the 'special relationship' theory of *DeShaney* may logically apply to public schools governed by compulsory attendance laws, I do not retreat from my reticence to expand the

> scope of constitutional claims, yet I feel compelled to observe the deficiencies of governing circuit caselaw.

Morrow v. Balaski, 719 F.3d 160, 188, 202 (3d Cir. 2013) (en banc) (Fuentes, J., with whom Judges Jordan, Vanaskie, and Nygaard join, and with whom Judge Ambro joins as to part I, dissenting) ("Reconsidering the coercive power that the State exercises over students, and the ways in which the State may restrict a student and his or her parents' ability to protect that student from harm, we would conclude, like Judge Becker in *Middle Bucks,* that a special relationship may exist under certain narrow circumstances. . . .It cannot be denied that schools both create and regulate the conditions to which students are subject during the school day. When a State interrupts even temporarily the provision of care by a parent to a child, steps into the shoes of that parent, and restricts the ability of the child to defend herself from a specific threat, the State ought to be seen as incurring a narrow, concomitant responsibility to act as one would expect the child's parents to act: to protect the child from that danger. The School's explicit refusal to do so should give us more pause than it does today. Moreover, when a school official chooses not to remove a student who has committed violent acts against another student, despite policies that call for such removal, that official has surely placed the victim in a worse position than if the disciplinary policy had run its ordinary course. And when a school creates an atmosphere in which serious violence is tolerated and brings no consequence, it acts in a manner that renders all students more vulnerable."); ***Doe ex rel Magee v. Covington County School Dist. ex rel Keys,*** 675 F.3d 849, 886 (5th Cir. 2012) (en banc) (Weiner, J., joined by Dennis, J., dissenting) ("Any case involving the rape of a child is, of course, a terrible one, so why is this case so shocking? Part of the special horror of this case is the appalling way in which Jane's parents' state-mandated trust in public school officials for the care and safety of their very young child was rewarded. In a case such as this, in which the alleged actions of state officials 'shock the conscience,'. . . the proper remedy is not merely to compensate the victim in tort, but, additionally, to compensate all of us with a constitutional remedy under 42 U.S.C. § 1983, which is intended 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'").

Note the dicta in Justice Scalia's opinion in ***Vernonia School District 47J v. Acton***, 115 S. Ct. 2386, 2392 (U.S. 1995):

> While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect,' *see* [*DeShaney*], we have acknowledged that for many purposes 'school authorities ac[t] in loco parentis,' [cite omitted], with the power and indeed the duty to 'inculcate the habits and manners of civility.'

See also ***Hasenfus v. LaJeunesse***, 175 F.3d 68, 72 (1st Cir. 1999) ("[W]e are loath to conclude now and forever that inaction by a school toward a pupil could never give rise to a due process violation. From a commonsense vantage, Jamie is not just like a prisoner in custody who

may be owed broad (but far from absolute) 'duty to protect.' But neither is she just like the young child in *DeShaney* who was at home in his father's custody and merely subject to visits by busy social workers who neglected to intervene. For limited purposes and for a portion of the day, students are entrusted by their parents to control and supervision of teachers in situations where − at least as to very young children − they are manifestly unable to look after themselves. Thus, when *Vernonia* says that the schools do not 'as a general matter' have a constitutional 'duty to protect,' perhaps in narrow circumstances there might be a 'specific' duty. . . . Yet even if we assume arguendo that in narrow circumstances the Supreme Court might find a due process obligation of the school or school employees to render aid to a student in peril − and *Vernonia* invites some caution − it would require pungent facts. The basic due process constraint, where substance and not procedure is involved, is against behavior so extreme as to 'shock the conscience.' . . . Outside of a few narrow categories, like the safeguarding of prisoners who have been wholly disabled from self-protection, this means conduct that is truly outrageous, uncivilized, and intolerable. . . . The outcome here would be no different under the more plaintiff-friendly standard developed in prison cases. Even under this standard, courts have been very reluctant to find prison guards liable for failing to prevent suicides unless confronted with specific imminent threats."); ***Morgan v. Town of Lexington, MA***, 823 F.3d 737, 744 (1st Cir. 2016) (" An alleged failure of the school to be effective in stopping bullying by other students is not action by the state to create or increase the danger. These routine acts of school discipline, truancy enforcement, and administrator-parent conferences are not the vehicle for a substantive due process constitutional claim. . . . Moreover, viewing these acts as inaction does not help Morgan's argument. *See Hasenfus,* 175 F.3d at 72. The alleged acts in Morgan's complaints here simply do not approach the threshold of a state-created danger. . . *See Rivera,* 402 F.3d at 35 (collecting this circuit's cases finding no actionable set of facts). As such, Morgan's claim fails."); ***Thomas v. Town of Chelmsford***, 267 F.Supp.3d 279, ___ (D. Mass. 2017) ("In short, the First Circuit has suggested that a public school may have an affirmative duty to protect a student in narrow circumstances where the school has actual knowledge that the student is in clear, obvious, and present peril. Even allowing for that narrow exception, the Camp Robindel incident does not qualify. The plaintiffs argue that the school was negligent in leaving students unsupervised when it knew that students had been bullied at previous camps, and it knew that Matthew had previously been bullied by particular students who were also at the camp. But the Camp Robindel incident was not a situation in which school officials knew that students were physically violating Matthew with a broomstick and yet failed to intervene—a situation that might fall into the narrow exception that the First Circuit described in *Hasenfus*. The school's knowledge of the possibility that Matthew might be subjected to more minor levels of bullying (such as urinating in his cleats without his knowledge) falls short of what is necessary to establish a *DeShaney* 'special relationship' affirmative constitutional duty on the school."); ***Morgan v. Driscoll,*** No. CIV.A. 9810766RWZ, 2002 WL 15695, at *4 (D. Mass. Jan.3, 2002) (not reported) ("The vast majority of federal courts have held that schools do not maintain a sufficiently 'custodial special relationship' with their students to give rise to a duty to protect them against injury from third parties. . . While the First Circuit has been disinclined to accept this broad notion that schools have no duty to protect students from the harmful acts of third parties, it has nonetheless recognized that a school has no general duty to

protect students, and might only have a 'specific duty' to protect a student in situations where inaction and failure to protect the student would be 'truly outrageous, uncivilized, and intolerable' under the circumstances.' [citing *Hasenfus v. LaJeunesse*]); ***Willhauck v. Town of Mansfield,*** 164 F. Supp.2d 127, 133 (D. Mass. 2001) (noting that "[t]he First Circuit has yet to establish a firm rule. It has, however, expressed its reluctance to follow its sister circuits in holding without qualification that public schools owe their students no constitutional duty to protect.").

See also ***MGJ, et al. v. School District Of Philadelphia***, No. CV 17-318, 2017 WL 2277276, at *9 (E.D. Pa. May 25, 2017) ("In the school context, students' freedom of movement is subject to the control of school officials. In exercising this authority to control student movement, school officials are reasonably expected to place students in situations where they will not be subject to obvious dangers. This is the status quo. District employees Ms. Lynch, Ms. Langston, and Ms. Roseman allegedly disrupted this status quo by placing MGJ in the same room as her known assailant. These defendants knew MGJ endured sexual harassment in the past at the hands of the assailant. . . They placed MGJ in the same room with the assailant, without adequate supervision, despite knowing the assailant had sexually harassed MGJ in the past. In this context, allowing MGJ to be in the same room as her assailant without supervision is akin to allowing a student to leave the school with a stranger. These allegations are sufficient to show the individual District Defendants affirmatively misused their authority to control student movement. MGJ accordingly pleads a violation of her constitutional right to support her failure to train or supervise claim.")

The majority view rejects the functional custody approach in school cases. *See, e.g.,* ***L.S., ex rel. Hernandez v. Peterson***, 982 F.3d 1323, 1329-30 (11th Cir. 2020) ("Ordinarily there are no custodial relationships in the public-school system, even if officials are aware of potential dangers or have expressed an intent to provide aid on school grounds. . . The students' efforts to avoid this rule are unavailing. They argue that even if there is no custodial relationship 'as a general matter,'. . . their appeal presents an exception. . . But *Nix* forecloses that argument. . . And even if we could contemplate exceptions, there is no reason to do so here. The students identify just one fact that differentiates this appeal from our precedents—the presence of armed school-safety officers—but the students fail to explain how the presence of these officers converts a non-custodial relationship into a custodial one. The officers' presence on school grounds, whether by itself or in combination with truancy and compulsory attendance laws, does not restrain students' freedom to act in a way that is comparable to incarceration or institutional confinement. . . Because the students were not in custody at school, they were not in a custodial relationship with the officials."); ***Doe v. Columbia-Brazoria ISD***, 855 F.3d 681, 688-89 (5th Cir. 2017) ("In this case, Doe's claim does not arise from the abuse itself because no state actor committed it. . . Instead, there must have been some specific and actionable deficiency on the part of the District that allowed the abuse to occur. . . The case from which the special-relationship requirement was drawn stated that 'nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.'. . A complainant and the state have that relationship only 'when the State takes a person into its custody and holds him there against his

will[.]'. . . The relationship exists 'when the state incarcerates a prisoner,' 'involuntarily commits someone to an institution,' or places a child in foster care. . . Notably, 'a public school does not have a special relationship with a student that would require the school to protect the student from harm at the hands of a private actor.'. . . .[I]n *Covington*, we declined to adopt the exception as the law of this Circuit. . . Subsequent panels have 'repeatedly noted' the unavailability of the theory. . . Finally, Doe failed to analyze the theory in a meaningful way in his opening brief. The argument is thus forfeited. . In summary, Doe's claims are not based on the private conduct of his assailant but on the District's shortcomings in monitoring the students, training the teachers, and establishing a reporting system for sexual assault. '[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'. . That leaves Doe with only the special-relationship theory, having forfeited the possibility of a state-created-danger argument. There was no special relationship between the plaintiff and the state. Doe has thus failed to prove a constitutional violation. The Section 1983 claims were properly dismissed."); ***K.B. v. Waddle***, 764 F.3d 821, 824 (8th Cir. 2014) ("K.B. was not in state custody when she voluntarily participated in the Center's after-school program. There is no evidence that K.B. or S.H. were even under the supervision of any of the officials or their agencies at the time of the assault at the public pool."); ***Morrow v. Balaski***, 719 F.3d 160, 170, 171 (3d Cir. 2013) (en banc) ("[E]very other Circuit Court of Appeals that has considered this issue in a precedential opinion has rejected the argument that a special relationship generally exists between public schools and their students. [collecting cases] Accordingly, the Supreme Court's *dictum* in *Vernonia* as well as the consensus from our sister Circuit Courts of Appeals both reinforce our conclusion that public schools, as a general matter, do not have a *constitutional* duty to protect students from private actors. We know of nothing that has occurred in the twenty years since we decided *Middle Bucks* that would undermine this conclusion. . . . In holding that public schools do not generally have a constitutional duty to protect students from private actors and that the allegations here are not sufficient to establish a special relationship, we do not foreclose the possibility of a special relationship arising between a *particular* school and *particular* students under certain unique and narrow circumstances. However, any such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators as part of the school's traditional *in loco parentis* authority or compulsory attendance laws."); ***Doe ex rel Magee v. Covington County School Dist. ex rel Keys,*** 675 F.3d 849, 857-66 (5th Cir. 2012) (en banc) ("We reaffirm, then, decades of binding precedent: a public school does not have a *DeShaney* special relationship with its students requiring the school to ensure the students' safety from private actors. Public schools do not take students into custody and hold them there against their will in the same way that a state takes prisoners, involuntarily committed mental health patients, and foster children into its custody. . . Without a special relationship, a public school has no *constitutional* duty to ensure that its students are safe from private violence. That is not to say that schools have absolutely no duty to ensure that students are safe during the school day. Schools may have such a duty by virtue of a state's tort or other laws. However, '[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.'. . . No matter the age of the child, parents are the primary providers of food, clothing, shelter, medical

care, and reasonable safety for their minor children. Thus, school children are returned to their parents' care at the end of each day, and are able to seek assistance from their families on a daily basis, unlike those who are incarcerated or involuntarily committed. . . . Because we find no special relationship, we do not address whether the school's alleged actions in releasing Jane to Keyes amounted to 'deliberate indifference.'. . . Without a special relationship, the school had no constitutional duty to protect Jane from private actors such as Keyes, and the question of its alleged deliberate indifference is simply immaterial. Having concluded that the school had no special relationship with Jane that imposed on the school a constitutional duty to protect her from private harm, we now turn to the Does' remaining theories of liability. . . . We decline to use this en banc opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory. . . . We conclude that the Does' allegations do not support a claim under the state-created danger theory, even if that theory were viable in this circuit."); ***Patel v. Kent School Dist***., 648 F.3d 965, 973, 974 (9th Cir. 2011) ("Although we have not yet applied *DeShaney* to the context of compulsory school attendance, every one of our sister circuits to consider the issue has rejected Patel's argument. At least seven circuits have held that compulsory school attendance alone is insufficient to invoke the special-relationship exception. [collecting cases] Our sister circuits have reasoned that, unlike incarceration or institutionalization, compulsory school attendance does not restrict a student's liberty such that neither the student nor the parents can attend to the student's basic needs. . . Even when school attendance is mandatory, the parents − not the state − remain the student's primary caretakers. . . Going a step further, most of these circuits have expressly held that combining *in loco parentis* duties with compulsory school attendance still does not create a 'special relationship.'. . These decisions have emphasized that a state-law obligation does not necessarily create a duty of care under the Fourteenth Amendment. . . . Applying this bedrock principle, our sister circuits uniformly hold that requiring school attendance does not sufficiently restrict a student's liberty under *DeShaney* to transform the school's *in loco parentis* duties into a constitutional obligation. . . . To the extent Patel argues we should distinguish this case because the IEP obligated KHS to guard against A.H.'s special vulnerabilities, *DeShaney* suggests otherwise. . . . [W]hile the IEP may significantly strengthen Patel's state-law negligence claims, it does not give rise to a constitutional duty."); ***Lee v. Pine Bluff School District,*** 472 F.3d 1026, 1031 (8th Cir. 2007) ("As with compulsory public school attendance in *Dorothy J.*, we cannot say that voluntary participation in an out-of-town extracurricular activity is analogous to confinement in a prison or mental institution, such that the Constitution imposes on state officials an affirmative duty to care for individuals who are participating in the event."); ***Priester v. Lowndes County,*** 354 F.3d 414, 422 (5th Cir.2004) ("[B]ecause no special relationship exists between a school district and its students during a school-sponsored football practice held outside of the time during which students are required to attend school for non-voluntary activities, the district court did not err in finding no requisite state action under section 1983."); ***Nix v. Franklin County School District,*** 311 F.3d 1373, 1378 (11th Cir. 2002) ("From the cases just discussed, two principles emerge: (1) generally, those individuals not in state custody will have no due-process claim for unsafe conditions; and (2) specifically, in a classroom setting, courts have not allowed due-process liability for deliberate indifference, and, moreover, will only allow recovery for intentional conduct under limited circumstances.

Examining the Nixes' case in light of those concepts, we conclude that allegations of 'deliberate indifference' do not, in this fact situation, 'shock the conscience' in a way that gives rise to a due-process violation."); ***Shrum v. Kluck,*** 249 F.3d 773, 781 (8th Cir. 2001) ("[S]chool districts are not susceptible to this state-created danger theory of § 1983 liability, because there is no constitutional duty of care for school districts, as 'state-mandated school attendance does not entail so restrictive a custodial relationship as to impose a duty upon the state.' *Dorothy J. v. Little Rock Sch. Dist.,* 7 F.3d 729, 732 (8th Cir.1993). Consequently, public schools do not have a duty to protect schoolchildren from private violence."); ***DeAnzona v. City and County of Denver***, 222 F.3d 1229, 1234 (10th Cir. 2000) ("The Tenth Circuit has held repeatedly that because schools do not provide for a child's basic needs, schoolchildren do not have a special relationship with the government. . . . Where the parents are still the primary care givers for the child there is no special relationship and no due process violation."); ***Soper v. Hoben***, 195 F.3d 845, 853 (6th Cir. 1999) (no special relationship created by compulsory school attendance); ***Wyke v. Polk County School Board***, 129 F.3d 560, 569 (11th Cir. 1997) ("Wyke first submits that, because Shawn was a minor child in the custody of the school pursuant to Florida's compulsory school attendance laws, the school had a constitutional duty to protect him from harming himself. We explicitly reject that contention. Compulsory school attendance laws alone are not a 'restraint of personal liberty' sufficient to give rise to an affirmative duty of protection."); ***Doe v. Hillsboro Independent School District***, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc) ("We join every circuit court that has considered the issue in holding that compulsory school attendance, in Texas to attend seven hours of programmed education on each school day, does not create the custodial relationship envisioned by *DeShaney*. The restrictions imposed by attendance laws upon students and their parents are not analogous to the restraints of prisons and mental institutions. The custody is intermittent and the student returns home each day. Parents remain the primary source for the basic needs of their children."); ***Doe v. Claiborne County***, 103 F.3d 495, 510 (6th Cir. 1996) ("Although, clearly, a school system has an unmistakable duty to create and maintain a safe environment for its students as a matter of common law, its in loco parentis status or a state's compulsory attendance laws do not sufficiently 'restrain' students to raise a school's common law obligation to the rank of a constitutional duty."); ***Nabozny v. Podlesny***, 92 F.3d 458-59 (7th Cir. 1996) ("However untenable it may be to suggest that under the Fourteenth Amendment a state can force a student to attend a school when school officials know that the student will be placed at risk of bodily harm, our court has concluded that local school administrations have no affirmative substantive due process duty to protect students."); ***Seamons v. Snow***, 84 F.3d 1226, 1236 (10th Cir. 1996) ("Compulsory attendance laws for public schools . . . do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school. . . . The school district in this case did not limit Brian's freedom to act on his own behalf, and therefore, no special relationship arose triggering a constitutional obligation to protect Brian from other students."); ***Sargi v. Kent City Board of Education***, 70 F.3d 907, 911 (6th Cir. 1995) ("Although we have not addressed the question of whether compulsory attendance laws create a special relationship between school districts and their students that gives rise to an affirmative duty on the part of the school district to protect its students, a number of other circuits have held that they do not in the factual situations they have reviewed. [*citing* cases] . . . . We find that the reasons given in these

cases for the absence of such a duty in the classroom where school attendance is mandatory are even more compelling in the context of a student's presence on a school bus. While on the school bus, decedent was even less affected by state restraints than she was in school. . . . Therefore, we hold that there was no special relationship between decedent and the school district that gave rise to a constitutional duty on the part of the Board to protect her from the consequences of a seizure while she was on the school bus. We do not hold that school districts have no duty of protection of students in other situations not before us. The nature and extent of such duties will have to be decided case by case."); ***Wright v. Lovin***, 32 F.3d 538, 540 (11th Cir. 1994) ("To date, every federal circuit court of appeal to address the question of whether compulsory school attendance laws create the necessary custodial relationship between school and student to give rise to a constitutional duty to protect students from harm by non-state actors has rejected the existence of any such duty. [citing cases] . . . . Because Daniel's attendance at summer school was voluntary and not compulsory, we need not, and do not, decide whether mandatory school attendance laws impose a constitutional duty on schools to protect students from injury by third parties. However, we find that the reasons given by our sister circuits for the absence of such a duty when school attendance is mandatory are even more compelling when school attendance is voluntary. Therefore, we hold that Daniel's voluntary school attendance did not create a custodial relationship between himself and the school sufficient to give rise to a constitutional duty of protection."); ***Graham v. Independent School District***, 22 F.3d 991, 994 (10th Cir. 1994) ("[W]e have clearly held compulsory school attendance laws do not spawn an affirmative duty to protect under the Fourteenth Amendment. [footnote omitted] Nonetheless, plaintiffs urge *Maldonado's* holding does not foreclose the existence of a constitutional tort where a student is the victim of a foreseeable assault. . . . We hold foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship."); ***Dorothy J. v. Little Rock School District***, 7 F.3d 729, 732 (8th Cir. 1993) (agreeing with Third, Seventh and Tenth Circuits that "state-mandated school attendance does not entail so restrictive a custodial relationship as to impose upon the State the same duty to protect it owes to prison inmates . . . or to the involuntarily institutionalized."); ***Black v. Indiana Area School District***, 985 F.2d 707, 714 (3d Cir. 1993) (where neither state compulsory attendance law nor any other state rule required children to ride school bus driven by private independent contractor, and where plaintiffs were not deprived of any avenue of assistance that would have been available absent state involvement, School Superintendent had no affirmative duty to protect six, seven and eight year old girls from acts of sexual molestation committed by bus driver.); ***Maldonado v. Josey***, 975 F.2d 727, 732 (10th Cir. 1992) ("compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school."), *cert. denied*, 113 S. Ct. 1266 (1993); ***D.R. v. Middle Bucks Area Vocational Technical School***, 972 F.2d 1364, 1372 (3d Cir. 1992) (*en banc*) ("[T]he school defendants' authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in ***DeShaney*** . . . ."), *cert. denied*, 113 S. Ct. 1045 (1993); ***J.O. v. Alton Community Unit School Dist. 11***, 909 F.2d 267, 272-73 (7th Cir. 1990) ("School children are not like mental patients and prisoners such that the state has an affirmative duty to protect them.").

See also ***Lansberry, on behalf of Estate of W.J.L. v. Altoona Area School Dist.***, 356 F.Supp.3d 486, ___ & n.12 (W.D. Pa. 2018) ("Courts within the Third Circuit have confronted *Monell* claims in the context of student-on-student school bullying and have consistently found that the plaintiffs failed to allege the violation of a constitutional right. [collecting cases] The Third Circuit has held that there was no constitutional violation where a plaintiff brought a *Monell* claim against a school district for failing to prevent student-on-student bullying. . . . In *Morrow*, the Third Circuit held that 'public schools, as a general matter, do not have a *constitutional* duty to protect students from private actors,' including other students. . . Although *Morrow* did not involve a *Monell* claim, the Third Circuit in *Bridges* [*ex rel. D.B. v. Scranton Sch. Dist.*, 644 F. App'x 172 (3d Cir. 2016)] held that its en banc decision in *Morrow* precluded the plaintiffs in *Bridges* from pleading the requisite constitutional violation. . . . Courts within other circuits have reached the same conclusion when dealing with *Monell* claims involving student-on-student bullying. [collecting cases] In these cases, courts have found that school officials did not violate the students' right to bodily integrity under the Fourteenth Amendment of the Constitution by failing to prevent student-on-student bullying or violence.[12] [fn. 12: During the Court's research on *Monell* claims in the school bullying context, the Court only uncovered two district court decisions where a *Monell* claim was allowed to proceed based on a school's alleged violation of a student's constitutional right to bodily integrity by failing to prevent student-on-student bullying. *See Lewis v. Blue Springs Sch. Dist.*, No 4:17-cv-538, 2017 WL 5011893 (W.D. Mo. Nov. 2, 2017); *T.Y. v. Shawnee Mission Sch. Dist. USD 512,* No. 17-2589-DDC-GEB, 2018 WL 2722501, at *10 (D. Kan. June 6, 2018) (citing *Lewis).* In *Lewis,* the court found that the school was on notice of a bullying problem and that the school district 'failed to properly train its employees in effective ways to respond to and prevent bullying.'. . The court in *Lewis* also noted that 'empirical research has shown for the past 20 years that severe, ongoing, targeted bullying in schools is pervasive and routinely results in clinical depression, suicidal thoughts, and suicide among its targeted victims. Anti-bullying policies and law, when complied with, have been proven to reduce and prevent such bullying.'. . The court there ultimately concluded that the school's 'failure to train and supervise ... deprived [the student] of his rights, including his right to bodily integrity, to be secure and to be left alone, to his life, and his rights to substantive due process.'. . The Court firstly notes that the Eighth Circuit, in which the Western District of Missouri lies, has a different standard for failure-to-train *Monell* claims. Second, the Court notes that the court in *Lewis* did not thoroughly analyze the underlying constitutional violation before allowing the student-plaintiff's *Monell* claim to proceed. The same distinctions apply to the *T.Y.* case.] Put differently, the cases are in agreement that students do not have a constitutional right to be free from bullying and harassment from other students. Here, the Court is obligated to reach the same conclusion — Lansberry's Second Amended Complaint does not sufficiently allege the violation of a constitutional right. Lansberry only alleges that AASD officials were deliberately indifferent to W.J.L.'s right to bodily integrity by failing to prevent other students from bullying W.J.L. The Court recognizes that the bullying W.J.L. was subjected to at AASD was appalling and that it created a truly dreadful experience for W.J.L. at Altoona Junior High School. The Court further recognizes that school bullying is a pervasive problem nationally and the possibility that bullying might eventually result, as it did

here, in tragic harm to the bullied student. And finally, the Court recognizes that AASD officials have consistently failed to stop bullying and therefore allowed a toxic bullying environment to flourish. If that situation was recognized as a constitutional violation then the ruling of this Court would be contrary to the result of this case. However, harm caused by student-on-student bullying is not a constitutional harm that *Monell* protects against. Regardless their obligations under school policy and the common sense proposition and public expectation that school officials should keep students safe from known risks, AASD officials had no recognized constitutional obligation to protect W.J.L. from his peers. The Fourteenth Amendment right to bodily integrity protects individuals against harm caused by state actors, and not harm caused by third parties. Here, Lansberry does not allege that AASD officials directly violated W.J.L.'s right to bodily integrity. Rather, Lansberry alleges that AASD officials failed to prevent third parties — W.J.L.'s classmates— from violating W.J.L.'s right to bodily integrity. And while the persistent bullying ultimately resulted in W.J.L.'s deciding to take his own life, Lansberry does not allege that any AASD official played a direct role in this tragic decision, or that any AASD official had notice that W.J.L. planned to harm himself. Therefore, AASD officials' failure to intervene before W.J.L.'s suicide does not establish that those same officials violated W.J.L.'s constitutional right to bodily integrity by failing to protect W.J.L. from bullying at school. Moreover, because at least some of the bullying occurred after school and through electronic means, it is not clear that AASD officials would have been able to prevent the bullying completely, even if they had exercised extreme diligence in enforcing Altoona Junior High School's anti-bullying policy. Lansberry alleges that a portion of the bullying occurred 'off school property while on his walk to his Father's residence and through social media.'. . In his investigation, Detective Worling found messages where other students at Altoona Junior High School sent harassing messages to W.J.L.'s iPhone and iPad. . . These messages could have been sent to W.J.L.'s iPhone and iPad after school hours. Thus, it is not clear that AASD officials could have completely prevented the W.J.L.'s bullying, and the harm that it ultimately caused, even if they had aggressively enforced the school's anti-bullying policies. Accordingly, the Court is obligated to find that Lansberry does not sufficiently allege the violation of a constitutional right. The Court is sensitive to the tragic situation that the Lansberry family has been forced to endure and strongly condemns the repeated failure of AASD officials to prevent bullying in the time leading up to W.J.L.'s death. The Court also believes that bullied students and their families should have some recourse against school officials who fail to create a safe learning environment and repeatedly fail to protect students from known dangers. However, prior case law does not allow bullied students and their families to hold school officials accountable through constitutional litigation in the federal courts. . . Therefore, the Court is obligated to dismiss Lansberry's *Monell* claim."); ***L.S. v. Peterson***, No. 18-CV-61577, 2018 WL 6573124, at *5 (S.D. Fla. Dec. 13, 2018) ("Plaintiffs suggest that the essential nature of a public school's role and control over its students requires that schools provide protection and safety for their students. However, the suggestion that school attendance equates to the level of custody implicating a constitutional obligation to protect has been expressly rejected by the Eleventh Circuit. . . .Therefore, even assuming that Defendants intentionally disregarded warnings about Cruz, Plaintiffs' § 1983 claim fails because they cannot assert the violation of a constitutional right. *See Aracena v. Gruler*, --- F. Supp. 3d ---, 2018 WL 5961040, at *5 (M.D. Fla. Nov. 14,

2018) (finding no due process rights implicated in officer's response to Pulse nightclub shooting because the entire circumstance began and ended with a private actor)."); ***Pope v. Trotwood-Madison City School District Bd of Educ.,*** 162 F.Supp.2d 803, 810 (S.D. Ohio 2001) ("[T]he Court concludes that the facts alleged in the Plaintiff's Complaint fail to demonstrate a violation of Lamar Pope's substantive due process rights. Lamar Pope was not deprived of his liberty when he voluntarily elected to play basketball during the open-gym tryout. Consequently, the Fourteenth Amendment did not impose upon the Defendants an obligation to assure his safety. . . . Pope's status as a student does nothing to change this conclusion."); ***Oldham v. Cincinnati Public Schools***, 118 F. Supp.2d 867, 875 (S.D. Ohio 2000) ("Although, clearly a school system has an unmistakable duty to create and maintain a safe environment for its students as a matter of common law, its in loco parentis status or a State's compulsory attendance laws do not sufficiently 'restrain' students in a manner that would raise a school's common law obligation to the rank of a constitutional duty toward its students.").

See also ***Stevens v. Umsted***, 131 F.3d 697, 702-03 (7th Cir. 1997) ("Since *DeShaney*, we have found several situations that entail a degree of restraint on an individual's personal liberty that make them sufficiently similar to the situations of incarceration and institutionalization, thereby creating a constitutional duty to protect. . . .In reliance on *K.H., through Murphy*, and *Camp*, Stevens argues that Umsted had a constitutional duty to protect Bradley because he was in state custody or because the state exercised 'de facto custody' over him. However, Bradley's situation is distinguishable from these cases. First and foremost, Bradley was not taken into custody by the state. Quite the contrary, he was voluntarily admitted to the ISVI [Illinois School for the Visually Impaired], either on the application of his school district or directly by his parents, but in either instance it was with the signed consent of his parents. Additionally, the state never became the legal guardian of Bradley, and his father retained legal custody of him. . . Although Bradley could not have packed his bags and left the school on his own volition, Stevens, as Bradley's parent and guardian, could have requested that Bradley be discharged at any time. . . . [W]e need not decide the relevancy of voluntariness in this case, because the state did not have custody of Bradley. Therefore, as Bradley was not in state custody, the complaint fails to allege facts sufficient to outline the existence of a state duty to protect him from private actors under the 'custody' exception as outlined in *DeShaney* and its progeny."); ***Walton v. Alexander***, 44 F.3d 1297, 1305 (5th Cir. 1995) (*en banc*) (where attendance at school was voluntary and there was a right to leave at will, child's "status as a resident student [did not place] him within the narrow class of persons who are entitled to claim from the state a constitutional duty of protection from harm at the hands of private parties."); ***Spivey v. Elliott***, 29 F.3d 1522, 1525 (11th Cir. 1994) (finding duty owed to eight-year-old, hearing impaired residential student in Georgia School of the Deaf; "It is plaintiff's status as a residential student that distinguishes his circumstance from that of the student-plaintiffs in [other cited cases]. Each of those cases involved a day school situation where the students attended school for a set number of hours and returned home to the supervision of their parents and the protection of their homes at the end of the day. Thus, it was still the children's parents who had ultimate control of their basic needs on a daily basis. [Plaintiff] could not go home at the end of the day. [Plaintiff] had only the State upon which to rely for his

food, shelter, and safety during the school week."), *opinion withdrawn*, 41 F.3d 1497, 1499 (11th Cir. 1995) ("[I]n the interest of efficiency and collegiality on this Court, where there are differing views as to the substantive right, this panel has chosen to withdraw all of its prior opinion which relates to whether the complaint alleges a constitutional right so that the opinion will serve as no precedent on that issue. The opinion is fully reaffirmed, however, on the holding that there was no constitutional duty clearly established at the time of the sexual assault, so the defendant officials were properly entitled to qualified immunity."); ***Johnson v. Dallas Independent School District***, 38 F.3d 198, 203 (5th Cir. 1994) ("While a persuasive argument can be made for applying a *DeShaney* 'special relationship' in some measure to public school students who are forced by compulsory education laws to attend school and have no choice among public schools, even under such a legal regime the appellant's claim would not succeed. Andrew Gaston's death is attributable to the fortuity that an armed, violent non-student trespassed on campus. There can be no liability of state actors for this random criminal act unless the fourteenth amendment were to make the schools virtual guarantors of student safety − a rule never yet adopted even for those in society, such as prisoners or the mentally ill or handicapped, who are the beneficiaries of a 'special relationship' with the state.").

See also ***Doe ex rel Magee v. Covington County School Dist. ex rel Keys,*** 675 F.3d 849, 874, 875 (5th Cir. 2012) (en banc) (Higgenson, J., concurring in the judgment) ("To summarize, Section 1983 should be construed literally. Literal application of Section 1983 would narrow only to government custody the *DeShaney* 'special relationship' theory of actionable inaction, as explicitly stated by the late Chief Justice Rehnquist, and literal application of Section 1983 would reduce only to statutory elements the amorphous 'state-created danger' theory we have not endorsed. At the same time, literal application of Section 1983 would (1) acknowledge that the statute protects not just against government persons who subject citizens to a constitutional deprivation but also against government persons who cause citizens to be subjected to such deprivations; (2) avoid government persons (courts) from immunizing other government persons (state or local officials) from liability for wrongdoing which electors, through Congress, have made actionable and which non-government persons (jurors) should resolve; and (3) would apply Section 1983's syntax to comprehend the rare but tragic set of grey zone cases where government persons, intentionally or recklessly or through deliberate indifference, cause, consistent with *Martinez,* a victim to be subjected by a third person to a rights deprivation. Having made the above statutory observation—urging narrowed liability on extra-statutory theories emanating from dicta in *DeShaney,* but recognizing liability for government persons who non-negligently cause in time and circumstance citizens to be subjected to constitutional injury actually inflicted by others—I nonetheless conclude that the instant complaint, put alongside the plain language of Section 1983, is not congruent enough to survive summary dismissal. Instead of setting forth a facially plausible charge of government recklessness or indifference or intentionality in the release of Jane that caused her to be subjected to her injury, the complaint's preliminary statement (paragraph 1), statement of facts (paragraphs 2–7), and above all its '[b]ut for' allegation in its 'action for deprivation of civil rights' (paragraphs 20–25), focus exclusively on the opposite, namely the education defendants' alleged policy of inaction, giving school officials who check out children

discretion to verify or not to verify the identification of receiving adults. That contention describes liability non-causally, which is the extra-statutory theory of liability recognized by the Supreme Court to apply only in custodial settings.")

See also ***Levin v. Harleston***, 966 F.2d 85, 90 (2d Cir. 1992) (City College had no constitutional duty to protect Professor from student disruptions and demonstrations); ***Philadelphia Police and Fire Association for Handicapped Children v. City of Philadelphia***, 874 F.2d 156, 166-168 (3d Cir. 1989) (rejecting argument that mentally retarded persons living at home were in "constructive custody" of state and therefore owed an affirmative duty of care under substantive due process); ***Was v. Young***, 796 F. Supp. 1041 (E.D. Mich. 1992) (functional custody concept did not apply to plaintiffs who were attacked by private citizens when they attended fireworks display co-sponsored by City).

See also ***Stoneking v. Bradford Area School District***, 882 F.2d 720, 723 (3d Cir. 1989) (***Stoneking II***) (op. on remand), *cert. denied*, 493 U.S. 1044 (1990) ("Arguably, our earlier discussion noting that 'students are in what may be viewed as functional custody of the school authorities' during their presence at school because they are required to attend under Pennsylvania law...is not inconsistent with the ***DeShaney*** opinion.").

The court in ***Stoneking II*** recognized, however, that the situation in that case was very different from ***DeShaney*** because the injury (sexual molestation) to the plaintiff resulted from the conduct of a state employee, not a private actor. *Id*. at 724. *See also* ***Rhodes v. Michigan***, 10 F.4th 665, 684 (6th Cir. 2021) ("We agree with the district court that the state-created-danger doctrine does not apply where a state actor directly causes the plaintiff's asserted injury. . . Applying the state-created-danger doctrine in cases like this one, where a state actor directly causes the plaintiff's injury, would divorce the doctrine from its precedential roots. . . . [T]he state-created-danger doctrine tells us when a state actor can be held accountable for harms caused by some external force but does not provide a vehicle for the plaintiff to hold state actors accountable for injuries suffered as a direct result of state action. . . Because Rhodes is seeking to hold Jones and McPherson accountable for their actions that directly caused her injuries, her state-created-danger claim must fail."); ***Lanman v. Hinson***, 529 F.3d 673, 682-83 (6th Cir. 2008) ("The district court relied on *DeShaney* . . .for the proposition that it was the involuntary nature of the individual's confinement that invoked the Fourteenth Amendment's protections in *Youngberg* and *Terrance*. . . .Therefore, it held, because Lanman voluntarily committed himself to Kalamazoo Regional Psychiatric Hospital ("KPH") by signing an admission application, and was theoretically free to leave at any time, he was not owed any duties under the Fourteenth Amendment. We disagree. *DeShaney* does not address a situation in which the State itself, by the affirmative acts of its agents, infringes on an individual's constitutionally protected liberty interests. The Court in *DeShaney* recognized that the protections of the Due Process Clause may be triggered when the State affirmatively acts and subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement. . . Likewise, the Due Process Clause would protect a voluntarily confined individual from deprivations of liberty by state actors that

exceed those authorized by his consent to treatment. The mechanism which brought the individuals to the various facilities, whether considered 'voluntary' or 'involuntary,' is not controlling; in either case they are entitled to freedom from undue restraint at the hands of the State under the Fourteenth Amendment.").

See also ***Doe v. Taylor Independent School District***, 15 F. 3d 443, 454 (5th Cir. 1994) (*en banc*) ("A supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes that: (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and (3) such failure caused a constitutional injury to the student."), *cert. denied,* 115 S. Ct. 70 (1994); ***C.M. v. Southeast Delco School District***, 828 F. Supp. 1179, 1189 (E.D. Pa. 1993) ("[T]he affirmative-duty line should be drawn at state action. That is, in light of *Stoneking* and *D.R.*, *DeShaney* stands only for the proposition that states have no affirmative duty to protect people from private actors, rather than the broader proposition that states have no duty to protect people from actors who are the state's own."); ***Waechter v. School District No. 14-030***, 773 F. Supp. 1005, 1009 & n.5 (W.D. Mich. 1991) (child was in custodial relationship with teacher).

But see ***Doe v. Rains County Independent School District***, 66 F.3d 1402, 1410 (5th Cir. 1995) ("That a supervisory school official may be held liable under § 1983 for breaching his state-law duty to stop or prevent child abuse thus does not compel the conclusion that a nonsupervisory teacher is responsible for breaching a state-law duty to report the abuse."). ***Accord Doe v. Claiborne County***, 103 F.3d 495, 512 (6th Cir. 1996) (concluding that "to state a claim for a failure to act when the alleged wrongdoer is not a supervisory government official, a plaintiff must separately establish the 'color of law' requirement of section 1983 by identifying some cognizable duty that state or federal law imposes upon the alleged 'enactor.' In the absence of a duty there is no section 1983 liability because the failure to act cannot be said to have occurred under color of law.").

See also ***Torres-Rivera v. O'Neill-Cancel***, 406 F.3d 43, 51 (1st Cir. 2005) ("As *Martinez* explains, the *DeShaney* substantive due process rule . . . does not apply where it is an on-duty police officer acting under color of law whose violence causes the injury."); ***Martinez-Rodriguez v. Colon-Pizarro***, 54 F.3d 980, 986 (1st Cir. 1995) ("[W]hen an on-duty police officer witnesses violence, the existence vel non of a constitutional duty to intervene will most often hinge on whether he is witnessing private violence or violence attributable to state action."), *cert. denied*, 116 S.Ct. 515 (1995); ***D.T. by M.T. v. Independent School District No. 16***, 894 F.2d 1176, 1192 (10th Cir. 1990)(School District not liable for child molestation committed by teacher, where teacher not acting under color of state law), *cert. denied*, 498 U.S. 879 (1990); ***Doe v. Sabine Parish School Board***, 24 F. Supp.2d 655, 664 (W.D. La. 1998) ("[A] district court should be

reluctant when addressing sensitive constitutional issues to read appellate decisions in an overly broad fashion. The language in *Becerra* and the *Doe v. Hillsboro* concurrence should, accordingly, be limited to the facts of those cases to the extent that they are controlling law. Both cases involved situations where the school employed an abuser who just happened to not be engaged in state action at the actual moment of the abuse. Subjecting school officials to liability for deliberate indifference to the acts of its employees, whether committed on or off duty, is at least one step away from subjecting officials to liability for failure to supervise purely private persons who harm a student.").

(ii) foster care cases

The Court in ***DeShaney*** expressed no view on whether an affirmative duty to protect might arise in the situation where a state removes a child from "free society" and places him in a **foster home**. The majority acknowledged that such a situation might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *Id*. at 1006 n.9.

See e.g., ***Tamas v. Department of Social & Health Services***, 630 F.3d 833, 844-46 (9th Cir. 2010) ("[P]rior to Fabregas' adoption of Monica, various Appellants affirmatively created the particular danger that exposed Monica to harm. Despite referrals reporting Fabregas' physical and sexual abuse, Kleinhein, Loeffler and Drake approved Fabregas' foster-care licenses, paving the way for Fabregas to continue abusing Monica after her adoption. The state's approval of Monica's foster care and adoption by Fabregas created a danger of molestation that Monica would not have faced had the state adequately protected her as a result of the referrals. . . .Therefore, we conclude that Monica's liberty interest continued after her adoption under the danger-creation exception to the general rule that state actors are not liable for failure to protect members of the public. . . . In the specific context of cases involving foster care, the Fifth, Sixth, and Eighth Circuits have held that deliberate indifference is established if an 'official [was] both aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed] and [the official] ... also dr[e]w the inference.' [citing cases] . . . . The Second, Third, Fourth, Seventh, Tenth, and Eleventh Circuits have each phrased the deliberate indifference test along the same lines. [citing cases] We are persuaded by our precedent and cases from other circuits analyzing the issue, that the deliberate indifference standard, as applied to foster children, requires a showing of an objectively substantial risk of harm and a showing that the officials were subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and that either the official actually drew that inference or that a reasonable official would have been compelled to draw that inference. . . We also conclude that the subjective component may be inferred 'from the fact that the risk of harm is obvious.'"); ***Doe ex rel. Johnson v. South Carolina Dept. of Social Services***, 597 F.3d 163, 175-77 (4th Cir. 2010) ("We now hold that when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing 'some responsibility for [the child's] safety and general well-being.'. . Such responsibility, in turn, includes a duty not to make a foster care placement that is deliberately

indifferent to the child's right to personal safety and security. . . . [U]nlike the children in *DeShaney, Milburn* and *Weller,* Jane was clearly within the custody and control of the state social services department when foster care placement decisions were made. Accordingly, the state officials responsible for those decisions had a corresponding duty to refrain from placing her in a known, dangerous environment in deliberate indifference to her right to personal safety and security. We affirm the grant of summary judgment, however, under the second prong of the qualified immunity inquiry. Although our precedents do not foreclose a foster child's claim that her substantive due process right to personal safety and security is violated by a foster care placement made in deliberate indifference to a known danger, such a right was not clearly established in this circuit at the time Thompson made her placement decisions regarding Jane. In determining whether there has been a violation of a constitutional right, we must identify the right 'at a high level of particularity.'. . . Here, when the placement decisions were made, there was no authority from the Supreme Court or this circuit that would have put Thompson on fair notice that her actions violated Jane's substantive due process rights. On the contrary, given the precedents that did exist in our circuit on the issue of affirmative state protection of foster children, we think it quite reasonable for jurists and officials to have believed that we would have answered the *DeShaney* question in the negative and foreclosed the existence of such a right. In sum, because it would not have been apparent to a reasonable social worker in Thompson's position that her actions violated the Fourteenth Amendment, she is entitled to qualified immunity."); ***Burton v. Richmond,*** 370 F.3d 723, 728 (8th Cir. 2004) ("Here, DFS never had custody of the plaintiffs, nor can it fairly be said that DFS had control of them. Nor did defendants have a duty to protect plaintiffs under the state-created danger theory. The danger in this case − the placement in the Huffman home − was created by Rhonda and Jean's agreement as to the best custodial arrangement for the family. Neither DFS nor the individual defendants took an active role in creating this placement; they merely helped the family get recognition from the juvenile court of the changed custodial arrangement. The placement was made by the court upon recommendation from the juvenile officer and did not result directly from any action taken by either appellant. Recommending to the juvenile officer the placement agreed to by the plaintiffs' aunt and grandmother was not sufficient to create a duty to protect the children while in the placement."); ***Nicini v. Morra***, 212 F.3d 798, 807, 808 (3d Cir. 2000) ("After *DeShaney*, many of our sister courts of appeals held that foster children have a substantive due process right to be free from harm at the hands of state-regulated foster parents. [citing cases] These courts have accepted the analogy between persons the state places in foster care and those it incarcerates or institutionalizes. . . .We have suggested, although never directly held, that state actors owe a duty to children placed in foster care. . . . We now hold that when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983."); ***Doe v. New York City Dept. of Soc. Services***, 649 F.2d 134, 141-42 (2d Cir. 1981), *cert. denied sub. nom.* ***Catholic Home Bureau v. Doe***, 464 U.S. 864 (1983); ***Taylor by and through Walker v. Ledbetter***, 818 F.2d 791, 797 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989) (affirmative duty under substantive due process to

provide protection and supervision created by virtue of "special relationship" between state and child placed in foster home).

See also ***D.C. by Cabelka v. County of San Diego***, No. 18-CV-13-WQH-MSB, 2020 WL 1674583, at *12, *14 (S.D. Cal. Apr. 6, 2020) ("The Court has determined that the Minor Plaintiffs have sufficiently alleged that the Social Worker Defendants violated the Minor Plaintiffs' substantive due process rights at this stage in the proceedings. 'It is beyond dispute' that at the time of the Social Worker Defendants' alleged conduct, 'state officials could be held liable where they affirmatively and with deliberate indifference placed an individual in danger she would not otherwise have faced.'"); ***R.F.J. v. Florida Department of Children and Families***, No. 3:15-CV-1184-J-32JBT, 2019 WL 3207334, at *4–7 (M.D. Fla. July 16, 2019) ("Brady and Perry argue that substantive due process is not implicated here because the children were not in foster care. . . They advocate a bright line rule that whenever the state places a child with a relative without first taking custody, the Fourteenth Amendment is not implicated. It follows, according to Brady and Perry, that because the children were never taken into state custody, Brady and Perry could not have violated their rights. . . The Court is unpersuaded. Children do not need to be placed into foster care for a constitutional duty to arise—it is sufficient if the state affirmatively places the children with a person of the state's choosing and restrains the children's freedom to act on their own behalf. . . Thus, Brady and Perry's claim that Swearingen, the grandmother, was 'in no sense a state actor,'. . . is inapposite. Although, Swearingen was not a state actor in the same way a licensed foster parent might be, she was nonetheless the 'person[ ] the state ha[d] chosen' to care for the children. . . If state officials affirmatively act to remove children and place them with an individual the state officials have chosen, they cannot avoid their obligation to ensure reasonably safe living conditions simply because the person chosen is not a state-licensed foster parent. . . . Of course, young children cannot provide food, clothes, or shelter for themselves. Thus, a reasonable government official might ask: under what circumstances does placing young children with relatives restrict the children's freedom to act on their own behalf? The answer is when the state chooses someone different to care for the children. Here, the children's parents left them with Peoples and Woods. Had Brady and Perry allowed Peoples and Woods to continue to care for the children, there likely would be no state action— *DeShaney* would control. But that is not what happened. Instead, Brady exerted his power on behalf of the state and 'directed placement of the Children with Swearingen at a new location.'. . This action imposed on the state the obligation to ensure the children's reasonable safety. . . .Unlike, the county's actions in *DeShaney*, Brady and Perry's actions put the children in a worse position than if they had not acted at all. . . Thus, taking the facts alleged in the light most favorable to Plaintiffs, the children had a constitutional right to be placed in reasonably safe living conditions."); ***Ray v. Foltz***, 354 F.Supp.2d 1309, 1319, 1320, 1322, 1323 (M.D. Fla. 2005) ("In summary, Plaintiffs allege that Foltz (along with Defendants Deborah Jones and Corley)knowing that the Cumberbatches had not completed the required training or the extensive application process, knowing that Mrs. Cumberbatch was secretive and unwilling to allow open conversations between the Department and her own children, knowing that no investigation had been done to support a conclusion that the home was safe for foster children, and knowing that the Cumberbatches had been twice reported to the Florida Abuse

Hotline-recommended the Cumberbatch home be licensed for one child, and thereafter, upon placement of four foster children in the home within days of licensure, sought a waiver of the licensed capacity restrictions. After placement of R.M., Foltz allegedly became aware that a Department employee described Mrs. Cumberbatch as 'one of the worst parents we have' and removed a child from the home; yet, he took no action and engaged in no investigation. Further, despite the knowledge that the home was far overcapacity, Foltz failed to perform required overcapacity visits. It is clear to this Court that such allegations. taken as true, state a claim for deliberately failing to learn of the significant risk of serious harm to R.M. that was created when Foltz recommended the rubber-stamped licensure of the Cumberbatch home and re-licensure of the Joyner home and when Foltz ignored subsequent signs that the homes were unsafe. . . . Defendants point to these allegations and seemingly argue that they are insufficient because at the most they establish a failure to follow Department procedures and guidelines. The Court does not share in Defendants' interpretation. Instead, these allegations concern Defendants' decision to rubber-stamp a family for licensure without engaging in any meaningful investigation as to the safety of the home. This Court refuses to find that by performing no investigation of foster parents and merely issuing licenses to them, Department employees can successfully insulate themselves from liability by asserting that they were unaware of the dangerousness of a situation. In essence, Plaintiffs allege that Deborah Jones and Corley actively and deliberately chose not to learn of the risk of abuse. The fact that this is evidenced by their failure to follow Department guidelines and rules does not necessitate a finding that such failures are insufficient to support a § 1983 claim. Instead, the Court believes that the Eleventh Circuit's comments in *Ray* concerning failures of Department employees to follow procedures as being insufficient to state a § 1983 claim apply when a plaintiff attempts to argue that such failures result in a *per se* constitutional violation and a § 1983 claim. . . Such is not what Plaintiffs allege. Instead, the failures to follow procedures are merely evidence of their intention to ignore the dangers associated with placing children in a given home. This Court finds that a knowing failure to investigate a prospective foster home (or continue to monitor), if proven, evidences a deliberate indifference to the welfare of a child on the part of the responsible Department official, and the resulting injury must be actionable. Any other finding entirely eviscerates the mission of foster placements- to ensure the safety of children- and the constitutional protections afforded foster children."); ***T.M. by and through Cox v. Carson***, 93 F. Supp.2d 1179, 1187 (D. Wyo. 2000) ("The Supreme Court decision in *Youngberg,* our decision in *Milonas* [*v. Williams*, 691 F.2d 931 (10th Cir.1982)], and the Second Circuit decision in *Doe* all were decided before August 1985. We are convinced that these cases clearly alerted persons in the positions of defendants that children in the custody of a state had a constitutional right to be reasonably safe from harm; and that if the persons responsible place children in a foster home or institution that they know or suspect to be dangerous to the children they incur liability if the harm occurs.").

The Fifth Circuit has recognized that a "special relationship" is created when the state removes a child from her natural home and places her under state supervision. ***Griffith v. Johnston***, 899 F.2d 1427, 1439 (5th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1040 (1990). Likewise, the Sixth Circuit has held that "due process extends the right to be free from the infliction of

unnecessary harm to children in state-regulated foster homes." ***Meador v. Cabinet for Human Resources***, 902 F.2d 474, 476 (6th Cir. 1990), *cert. denied*, 498 U.S. 867 (1990). Because qualified immunity was not raised in the court below, the Court of Appeals did not address the question in ***Meador***. *See also* ***Reed v. Knox County Dep't of Human Services***, 968 F. Supp. 1212, 1217 (S.D. Ohio 1997) (noting "circumstances of a foster child who is in the custody of the state differ from those of a child who is in the custody of its natural parents.").

In ***Eugene D. By and Through Olivia D. v. Karman***, 889 F.2d 701 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990), plaintiff claimed that social workers were deliberately indifferent to serious medical and developmental needs of a child placed in a state-licensed foster home. The court disposed of the case on qualified immunity grounds since, at the time of the challenged conduct, it was not clearly established that the state had an affirmative duty to protect children placed in state-licensed foster homes. *Id*. at 711.

In ***Doe v. Bobbitt***, 881 F.2d 510 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990), the Seventh Circuit reversed a denial of summary judgment for the defendant on the grounds of qualified immunity. The question was whether it was clearly established in 1984, the time of the challenged conduct, that state officials would violate a child's constitutional rights by placing that child in a foster home where the child would be at risk of violence by private individuals.

The court concluded that in 1984, only the Second Circuit had recognized such a constitutional right, *See* ***Doe***, *supra*, and that "the decision in ***Doe*** depended upon an absolutely novel analogy between incarceration and placement in a foster home, an analogy that has yet to be endorsed by either the Supreme Court or the Seventh Circuit." *Id*. at 511-12.

In ***K.H. v. Morgan***, 914 F.2d 846 (7th Cir. 1990), the court cited both ***Doe v. New York City Dept. of Social Services***, *supra*, and ***Milburn***, *infra*, approvingly and distinguished ***Bobbitt*** as a case where custody was awarded to a relative. *Id*. at 852-53. *See also* ***S.S., by and through Jervis v. McMullen***, 225 F.3d 960, 962, 963 (8th Cir. 2000) (en banc) ("[I]n returning S.S. to her father, the state did not increase the danger of significant harm to S.S.: It merely placed her back into the situation from which it had originally retrieved her. . . . In other words, the complaint contains no allegations that would justify a conclusion that by returning S.S. to her father the state created greater risks to her than the ones to which she was originally exposed. . . . We are mindful that drawing a distinction between exposing a child to a dangerous environment and returning her to an equally dangerous one may seem to some to be gratuitous. . . . While the state did do something here, or at least in the present procedural posture we assume that it did, in the peculiar circumstances of this case the state's act is the same as if it had done nothing.").

But see ***Reed v. Palmer***, 906 F.3d 540, 551-53 (7th Cir. 2018) ("Plaintiffs have plausibly alleged their constitutional rights were violated at Copper Lake when they were placed in isolation 'without justification.' On the face of plaintiffs' complaints alone, Palmer has not shown he is entitled to qualified immunity. This case involves the added wrinkle that plaintiffs were housed in Wisconsin, not in Iowa. In other words, Palmer was not one of the Copper Lake officials placing

plaintiffs in isolation. Rather, plaintiffs allege Palmer only contracted with Wisconsin to send juveniles to Copper Lake and later 'received' and 'monitored' reports regarding the juveniles sent there. According to the district court, this made the claims against Palmer 'completely different' from other cases where the defendants 'actually controlled and operated the institution in which the abuse had occurred and "oversaw the use of the isolation cells in which [the] plaintiff was confined."'. . In the district court's view, no law clearly establishes what the Constitution requires of an official in Palmer's unique posture. Palmer's additional degree of separation is a distinguishing feature of this litigation, but at the motion to dismiss stage, our conclusion does not change. Under *DeShaney v. Winnebago County Department of Social Services*, it is clearly established that the Due Process Clause 'forbids the State itself to deprive individuals of life, liberty, or property without "due process of law,"' but does not 'impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.'. . It is equally established, however, that an exception to the *DeShaney* principle arises 'if the state has a "special relationship" with a person, that is, if the state has custody of a person, thus cutting off alternate avenues of aid.'. . In such cases, the State 'assumes at least a rudimentary duty of safekeeping.'. .On multiple occasions, we have applied the 'special relationship' exception to cases where 'the State removes a child from her natural parents.'. . Thus, 'once a state removes a child from her parents' custody,' it assumes a duty of safekeeping' due to the restraints it places on the liberty of the child. . . Such a duty is violated when the State 'place[s] a child in custody with foster parents it knows are incompetent or dangerous.'. . This case differs from *Berman* and *Waubanascum*; plaintiffs were placed at an out-of-state institution, not a private foster care home. Nevertheless, in *K.H.*, we defined the relevant constitutional right as 'the right of a child in state custody not to be handed over by state officers to a foster parent *or other custodian, private or public* whom the state knows or suspects to be a child abuser.'. . This language encompasses Palmer's alleged role here. . . Allegations against Palmer are not limited to his role in signing the contract that led to plaintiffs' placement at Copper Lake: Plaintiffs further allege that Palmer retained custody and received reports detailing their excessive isolation, yet took no steps to remove them from the facility and was deliberately indifferent in doing so. The district court critiqued plaintiffs' failure to 'provide any details' about the reports Palmer allegedly received or what his alleged monitoring entailed. However, as noted above, plaintiffs do not need to provide such details to cross the 'plausibility' threshold at this stage: they need only include enough facts in their complaint 'to present a story that holds together.'. . Construing the well-pleaded facts and reasonable inferences in plaintiffs' favor, as we must, it can be reasonably inferred that Palmer had custody of plaintiffs while they were at Copper Lake and that he had the knowledge, responsibility, and influence to request removal of plaintiffs from the facility."); ***T.D. v. Patton***, 868 F.3d 1209, 1212-13 (10th Cir. 2017) ("We agree with the district court that Ms. Patton violated T.D.'s substantive due process right by knowingly placing T.D. in a position of danger and knowingly increasing T.D.'s vulnerability to danger. . . She recommended to the juvenile court that T.D. be placed and remain in Mr. Duerson's temporary custody despite her admitted concerns about T.D.'s safety in the home, her knowledge of Mr. Duerson's criminal history that included a conviction for attempted sexual assault against a minor in his care, and notice of evidence that Mr. Duerson was potentially abusing T.D. She failed to inform the juvenile court about her concerns and knowledge of Mr.

Duerson's criminal history and made her affirmative recommendations out of fear of being fired. . . . Ms. Patton acted recklessly and in conscious disregard of a known and substantial risk that T.D. would suffer serious, immediate, and proximate harm in his father's home. Her conduct, taken as a whole, shocks the conscience and thus amounts to a substantive due process violation under the Fourteenth Amendment. Based on the facts and legal determination in this court's *Currier* decision, a reasonable official in Ms. Patton's shoes would have understood she was violating T.D.'s constitutional rights. In both *Currier* and here, county social workers removed children from their mothers' homes and placed them in their fathers' homes, where the children were abused. The social workers in both cases failed to alert the juvenile court of relevant facts undermining the fathers' fitness as caretakers and recommended that the fathers assume custody of the children—despite being on notice that the fathers' homes were places of danger. And, in both cases, the social workers failed to investigate whether the fathers were abusing their children, despite being on notice of evidence suggesting abuse. Ms. Patton's conduct sufficiently resembles the conduct we held unconstitutional in *Currier* such that a reasonable official in her position would have known that her actions violated T.D.'s clearly established right. She was therefore not entitled to qualified immunity."); ***Currier v. Doran***, 242 F.3d 905, 919 (10th Cir. 2001) ("When the state affirmatively acts to remove a child from the custody of one parent and then places the child with another parent, *DeShaney* does not foreclose constitutional liability."); ***Ford v. Johnson***, 899 F. Supp. 227, 233 (W.D. Pa. 1995) ("The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations."). *Compare* ***Estate of B.I.C. v. Gillen***, 761 F.3d 1099, 1107 (10th Cir. 2014) ("Like Sentell in *Currier,* Defendant did not place Brook with Mr. Coons and Ms. Wells, so she had no duty to rescue Brook from that custody. The estate argues that this inaction amounted to action because it was motivated by ill-will. But *Currier* does not support this argument, and the estate cites no authority for the proposition that inaction can be treated as action because of the nonactor's ill-will.").

In ***K.H.***, the court denied qualified immunity to the extent the complaint asserted a "prima facie right not to be placed with a foster parent who the state's caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child." 914 F.2d at 853. The court noted the limitations of the right it was recognizing as clearly established by ***Youngberg***. Child welfare workers and their supervisors face damages liability under § 1983, "[o]nly if without justification based either on financial constraints or on considerations of professional judgment," they place children with foster parents known to be dangerous or unfit." *Id.* at 854.

See also ***P.C. v. McLaughlin***, 913 F.2d 1033, 1043 (2d Cir. 1990) (recognizing that good-faith immunity will bar liability in action for damages against government professional in personal capacity if professional was unable to meet normal professional standards as a result of budgetary constraints); ***Taahira W. v. Travis***, 908 F. Supp. 533, 543 (N.D. Ill. 1995) ("[T]he court holds that a plaintiff may survive a motion to dismiss where she sufficiently pleads that a state official, charged with an affirmative duty to provide for the care of a foster child, is personally liable for

abusing professional judgment when placing a ward into a known or suspected abusive foster environment.").

While Judges Posner and Wood refused to recognize as clearly established "the distinct right not to be shifted among foster homes 'too frequently'," 914 F.2d at 853, Judge Coffey would have held that ***Youngberg***, *supra*, clearly established an obligation on the part of the state to exercise reasonable professional judgment in the placement, care and supervision of children who are in the state's custody. *Id*. at 854-55, 865 (Coffey, J., concurring in part and dissenting in part).

The Seventh Circuit has recognized that "when a DCFS caseworker places a child in a home knowing that his caretaker cannot provide reasonable supervision, and the failure to provide that degree of supervision and care results in injury to the child outside of the home, it might be appropriate . . . for the caseworker to be held liable for a deprivation of liberty." ***Camp v. Gregory***, 67 F.3d 1286, 1297 (7th Cir. 1995).

The court stressed that liability would be confined to "a very narrow range of cases." *Id.* at *12. Liability would be appropriate only where (1) the caseworker failed to exercise bona fide professional judgment, (2) the caretaker failed to exercise a reasonable degree of supervision, (3) the resulting injury was foreseeable to the caseworker, and (4) there was a sufficient causal link between the lack of reasonable supervision and the resulting injury. *Id.*

See also ***Lewis v. Anderson,*** 308 F.3d 768, 773, 775, 776 (7th Cir. 2002) ("The standard articulated in *K.H.* does not take the next step and impose some kind of duty of inquiry in these cases. If we are to follow *K.H.,* therefore, the DHSS officials cannot be held liable on the basis of facts they did not actually know or suspect, even if they might have learned about disqualifying information if they had conducted a more thorough inquiry. In order to survive summary judgment, the plaintiffs needed to put forth a case that the DHSS defendants actually knew of or suspected the existence of child abuse in the prospective adoptive family. . . . If state actors are to be held liable for the abuse perpetrated by a screened foster parent, under *K.H.* the plaintiffs must present evidence that the state officials knew or suspected that abuse was occurring or likely.").

Compare ***Forrester v. Bass***, 397 F.3d 1047, 1058 (8th Cir. 2005) ("Even if Forrester could establish a sufficient causal connection between state action and the ensuing private acts of violence, his substantive due process claims still must fail because Forrester cannot demonstrate the requisite degree of offensive conduct or deliberate disregard by Johnson and Rosa necessary to establish substantive due process violations. . . The dreadful abuse suffered by the Bass children was egregious. But private parties, not state actors, inflicted the severe physical abuse that killed Larry and Gary. While we do not condone any official negligence contributing to this tragic case, we conclude Johnson and Rosa did not engage in official conduct so egregious or outrageous as to shock the contemporary conscience. . . The record does not portray Johnson as an apathetic or dilatory social worker who saw and ignored wanton child abuse. Based upon what transpired inside the Bass home on August 17, 1999, Johnson's failure to conduct an investigation, to contact law

enforcement, and to verify the whereabouts of the boys, while erroneous, and maybe naive in retrospect, cannot be considered conscience-shocking.") *with* ***J.H. v. Johnson,*** 346 F.3d 788, 792, 793 (7th Cir. 2003) ("The standard set forth in *K.H.* and *Lewis* differs from the 'deliberate indifference' standard only in the sense that it can be satisfied by proof of a state actor's knowledge *or suspicion* of the risk of harm, rather than just knowledge. Both standards are subjective. Though we have described the burden of proof for plaintiffs asserting § 1983 claims against state child welfare employees as 'stringent' and acknowledged that often the underlying facts of cases like this 'portray a sad course of events,' we nevertheless continue to require plaintiffs to demonstrate that the individual defendants had specific 'knowledge or suspicion' of the risk of sexual abuse facing the children in order to hold defendants liable under § 1983. . . . The plaintiffs vigorously argue that the appropriate standard for analyzing this case is the 'professional judgment' standard as articulated in *Youngberg v. Romeo* . . . . A bonafide professional judgment may shield the state's caseworkers and supervisors who acted despite knowledge of a risky placement from liability, but whether such a professional judgment was exercised is not the threshold determination. Knowledge or suspicion that a foster parent is a probable child abuser remains the legal yardstick for measuring the culpability of state actors in § 1983 cases like this one.").

In ***Yvonne L. v. New Mexico Department of Human Services***, 959 F.2d 883, 893 (10th Cir. 1992), the court, in denying qualified immunity to the defendant officials, determined that it was clearly established in 1985 that "children in the custody of a state had a constitutional right to be reasonably safe from harm; and that if the persons responsible place children in a foster home or institution that they know or suspect to be dangerous to the children they incur liability if the harm occurs." *See also* ***Schwartz v. Booker***, 702 F.3d 573, 581-83, 585 (10th Cir. 2012) ("Booker and Peagler present two distinct, but similar, arguments as support for their assertion that the special relationship doctrine does not presently apply: First, they argue that neither of them personally participated in the placement of Chandler and, therefore, did not deprive Chandler of his liberty; and, second, they argue that only JCDHS had a special relationship with Chandler because it was the state agency that initially placed Chandler in Jon Phillips's home. . . .[T]the legal framework for this doctrine does not support limiting the scope of the special relationship doctrine to only those individuals involved in a child's initial placement. In similar custodial relationships, such as involuntary commitment, a state actor's liability for violation of a patient's constitutional right does not turn on whether she participated in the actual confinement or placement of the individual in the institution. . . . Booker and Peagler urge that a placement-participation requirement is necessary to prevent imposition of 'reverse respondeat superior' liability on all state DHS employees. Again, they miss the point. The special relationship between the State and the foster child is a necessary predicate to imposition of liability under this doctrine, but is not sufficient to establish liability. Before any state official may be held liable, her conduct must satisfy the elements outlined in *Yvonne L.:* She must have known of the asserted danger or failed to exercise professional judgment and such conduct must have a causal connection to the ultimate injury incurred; moreover, her conduct must shock the conscience. . . .This involuntary, custodial relationship with the State imposes a continuing constitutional duty on state custodial officials to safeguard individuals in the State's care. Consequently, we are persuaded that plaintiffs

sufficiently pled a custodial relationship between the State and Chandler to potentially hold Booker and Peagler individually liable under the special relationship doctrine.").

But see ***Matthews v. Bergdorf***, 889 F.3d 1136, 1146-47 (10th Cir. 2018) ("[A] child while in Oklahoma foster care has the 'special relationship' with the State necessary to give rise to an antecedent duty on the part of the State to protect him or her. But a child alleged to be adopted, living with an adult pursuant to a guardianship, or 'just living' with an adult is not in the custody of the State and, unlike a foster child, does not have a special relationship with the State. An adopted child is in the custody of his or her adoptive parents. Similarly, a child living in Oklahoma pursuant to a court-ordered guardianship is in the custody of his or her guardian. . . . Lastly, we need cite no authority for the proposition that a child 'just living' with an adult is not in the State's custody. Under none of the latter three scenarios does the Constitution permit us to say that ODHS caseworkers may be held responsible pursuant to the special relationship exception for harm the Matthews inflicted upon their victims. Rather, the special relationship exception has no application in these situations, and so far as the exception is concerned, the Fourteenth Amendment has nothing to say about the caseworkers' liability."); ***Gutteridge v. Oklahoma***, 878 F.3d 1233, 1239, 1241, 1246 (10th Cir. 2018) ("[A]s the district court pointed out, it appears this court requires more than a state official's mere failure to exercise professional judgment; instead, to sustain a claim under the special-relationship doctrine, a plaintiff must demonstrate that the defendant 'abdicated her professional duty *sufficient to shock the conscience*.'. . Here, the district court concluded that the individual defendants were '[no] more than negligent' in placing D.C. with LeBarre. . . And it reasoned that they were 'at most reckless or negligent' in their dealings with Funk. . . Thus, the district court ruled, the individual defendants' conduct doesn't 'shock the conscience' and therefore can't form the basis of a special-relationship claim. . . . Taken together, *Johnson*, *J.W.*, and *Schwartz* indicate that a plaintiff must separately demonstrate the conscience-shocking nature of a defendant's conduct in order to mount a successful special-relationship claim. We remain bound by these decisions. . . Accordingly, we hold that the district court didn't err in requiring Gutteridge to show both that (1) the individual defendants failed to exercise professional judgment; and (2) their actions shock the conscience. . . . The facts of this case are undeniably tragic. But we cannot say the individual defendants' conduct—even assuming it amounts to an abdication of professional duty—is so 'outrageous[ ]' as to be 'truly conscience shocking.' *Schwartz*, 702 F.3d at 586 (quoting *Armijo*, 159 F.3d at 1262). Accordingly, we agree with the district court that the individual defendants are entitled to qualified immunity. And we therefore affirm its order granting summary judgment to them on Gutteridge's § 1983 claim."); ***Dahn v. Amedei***, 867 F.3d 1178, 1186-91 & n.12 (10th Cir. 2017) ("The question here is whether a foster child in the custody of one state can, after being placed by a private adoption agency with a foster father in a different state, establish a special custodial relationship with that second state when the second state takes on the duties to investigate evidence suggesting abuse. . . . We decide here only whether Dahn can show that his special relationship with Amedei and Cramer was clearly established under existing law. . . . We do not resolve whether Dahn established a special relationship with Amedei and Cramer; we address only whether that relationship was clearly established under existing precedent. Even if Dahn had a special custodial relationship with Amedei and Cramer—employees

of Colorado—*Schwartz* doesn't clearly establish this relationship based on our facts. Here, Dahn was in Oklahoma's custody up until his adoption. The district court extended *Schwartz* in finding that Dahn sufficiently alleged a special relationship with Amedei and Cramer.[8] [Fn 8 Because we conclude under the facts of this case that clearly established law did not create a special relationship between Dahn and the caseworkers, we need not and do not address the remaining factors of his claim. For this reason, we do not comment on whether Amedei and Cramer violated Dahn's constitutional rights under the Fourteenth Amendment's Due Process Clause by failing to exercise their professional judgment.] Whether or not he was correct to do so, the law up to that point did not clearly establish the requisite special relationship. In *Schwartz*, a young foster child, Chandler, died at the hands of his abusive foster family. . . Chandler's biological parents alleged under § 1983 that employees of the Denver County Department of Human Services (DCDHS) violated, among other laws, Chandler's Fourteenth Amendment substantive-due-process rights. . . The employees claimed that they had no special relationship with Chandler because a different county had placed him in foster care. . . We concluded that the special-relationship doctrine extends beyond the employees in the county that initially placed a child in foster care and reaches county employees actually exercising custody over the child. . . .We also noted that even though the Jefferson County Department of Human Services (JCDHS) initially placed Chandler into foster care, its doing so made him dependent on the state for his basic human needs, not just that one department. . . .Here, Dahn asks us to affirm the district court's extension of *Schwartz* to his claim and hold that even though Oklahoma placed him in foster care and Adoption Alliance monitored his placement, Colorado exercised custody over him because he lived there and because Colorado employees investigated his school's suspected-abuse reports. . . . [T]he second prong of the qualified-immunity analysis determines the outcome of this case. *Schwartz* is the closest case to ours, but no court has extended it so far. In certain circumstances, it would be reasonable and even logical to extend the special-relationship doctrine across state lines as well as county lines, as in *Schwartz*, but our case law doesn't clearly establish this extension. . . . Here, Oklahoma and Colorado are two separate sovereigns. So, Amedei and Cramer argue, it is not enough that Dahn was a ward of *a* state. To overcome qualified immunity and survive their motion to dismiss, Dahn had to allege sufficient facts to show that he had a special relationship with the state whose employees he alleged knew of the danger to him or failed to exercise professional judgment. We can't deem it clearly established under *Schwartz* that a state employee's investigating reports of abuse of a child is enough to create a special custodial relationship with that child. . . .Though *DeShaney* is factually distinct from Dahn's case, it illustrates that the Supreme Court is wary of finding a special relationship whenever a social worker responds to child-abuse reports. So *DeShaney* supports the conclusion that the law doesn't clearly permit extending the special-relationship doctrine to Dahn's circumstances—at least not yet. In sum, the special-relationship doctrine extends beyond just those actors who placed Dahn in Lovato's custody; it includes all state officials in the state with whom he had a special relationship. But, for now, the law doesn't clearly extend constitutional liability under the special-relationship doctrine to employees of a state that didn't deprive Dahn of his liberty or supply his basic needs, even though they were social workers in the county where he resided. . . We note, however, that Amedei and Cramer owed *some* duty to Dahn, and this duty might very well expose them to tort liability. . . .*Schwartz* would not

notify Amedei and Cramer that their failure to protect Dahn under the factual circumstances of this case would violate Dahn's Fourteenth Amendment substantive-due-process rights under the special-relationship doctrine. Thus, even accepting all of Dahn's factual allegations as true, Dahn presents no clearly established law creating a special, custodial relationship between him and Colorado or its employees, and therefore the district court should have awarded Amedei and Cramer qualified immunity on Dahn's special-relationship claims against them.[12] [fn12: Because we conclude, based on this case's facts, that Dahn has failed to show clearly established law creating a special relationship between him, Amedei and Cramer, we decline to address whether the special-relationship doctrine could ever cross state borders. We also decline to address the other element of such claims, which is whether Amedei and Cramer acted in an unprofessional and conscience-shocking manner.]")

See also ***Angela R. v. Clinton***, 999 F.2d 320, 323-24 (8th Cir. 1993) (observing that "class members who are foster children in the State's custody have stronger constitutional claims than abused or neglected children who have not been placed in foster care."); ***Norfleet v. Arkansas Department of Human Services***, 989 F.2d 289, 293 (8th Cir. 1993) ("Cases from this and other circuits clearly demonstrate that imprisonment is not the only custodial relationship in which the state must safeguard an individual's civil rights. In foster care, a child loses his freedom and ability to make decisions about his own welfare, and must rely on the state to take care of his needs." (footnote omitted)); ***Eric L. v. Bird***, 848 F. Supp. 303, 307 (D.N.H. 1994) ("This court finds persuasive the principles adopted in other circuits extending *Youngberg* to the foster care context.").

But see ***D.W. v. Rogers***, 113 F.3d 1214, 1218 (11th Cir. 1997) ("Our recent decision in *Wooten* . . . indicates that the state's affirmative obligation to render services to an individual depends not on whether the state has legal custody of that person, but on whether the state has physically confined or restrained the person."); ***White v. Chambliss***, 112 F.3d 731, 737 (4th Cir. 1997) ("Nothing in *Milburn* limited its application to situations where parents had voluntarily placed their children in foster care, and *Milburn* was not interpreted as being so limited in subsequent Fourth Circuit cases. . . . Given the state of this circuit's law on the issue and the absence of controlling Supreme Court authority, we cannot say that a right to affirmative state protection for children placed in foster care was clearly established at the time of Keena's death."); ***Wooten v. Campbell***, 49 F.3d 696, 699-701 (11th Cir. 1995) (finding no "substantive due process right is implicated where a public agency is awarded legal custody of a child, but does not control that child's physical custody except to arrange court-ordered visitation with the non-custodial parent."); ***A.S., by and through Blalock v. Tellus***, 22 F. Supp.2d 1217, 1221 (D. Kan. 1998) ("This case lies somewhere between *DeShaney* and *Yvonne L.* In this case, the state had legal custody of the plaintiff, but physical custody remained with her mother. The questions before the court, then, are whether this situation constitutes a special relationship entitling A.S. to state protection from harm by third parties and, if so, whether this right was clearly established in 1988 and 1989, when the alleged abuse occurred, so as to defeat the defense of qualified immunity. The court concludes that legal custody without physical custody is insufficient to create a 'special

relationship.'. . . This court agrees with the court's analysis in *Wooten*. The Tenth Circuit has stressed that it is the state's taking and holding a person against her will which creates a special relationship. . . In that situation, the person is not able to care for her own needs or, in the case of a child, the state prevents the parent from taking care of the child's needs. However, where the state merely has legal custody, the parent who retains physical custody has the power to protect the child from harm."); ***Cooper by and through Cotturo v. Montgomery County Office of Children and Youth***, No. 93-3137, 1993 WL 477084, *6 (E.D. Pa. Nov. 16, 1993) (not reported) (foster child's "death caused by being fatally hit by a pick up truck eleventh months after being placed in her foster home is too remote a consequence of any action OCY took or did not take to find OCY liable. . . .").

In ***L.J. by and through Darr v. Massinga***, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989), a pre-***DeShaney*** case, present and former foster children brought a § 1983 action, claiming that as a result of maladministration of Maryland's federally-funded foster care program, they were subjected to physical and sexual abuse and medical neglect.

The court avoided decision on the issue of whether there is a constitutional duty to protect and supervise with respect to children placed in foster homes. Instead, the court disposed of the case by holding that the Adoption Assistance and Child Welfare Act of 1980 imposes supervisory duties on states administering the program, and that the plaintiffs had federal statutory rights which could be enforced under section 1983. *Id*. at 122-23.

But see ***Suter v. Artist M.***, 112 S. Ct. 1360 (1992) (provision of Adoption Assistance and Child Welfare Act of 1980 which requires "reasonable efforts . . . be made (") prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . . ." does not create a right enforceable under the Act itself or through section 1983.).

NOTE: Congress responded to *Suter* by passing an amendment to the Social Security Act which provides that in all pending and future actions

> brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.* . . . but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) [42 U.S.C. § 671(a)(15)] of the Act is not enforceable in a private right of action.

42 U.S.C. 1320a-2 (amended October 20, 1994).

Thus, while the holding of *Suter* with respect to the "reasonable efforts" provision remains good law with respect to the particular provision of the statute involved in that case, "the amendment overrules the general theory in *Suter* that the only private right of action available under a statute requiring a state plan is an action against the state for not having that plan." ***Jeanine B. v. Thompson***, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995). *See also* ***Henry A v. Willden***, 2012 WL 1561030 (9th Cir. May 4, 2012). *But see* ***White v. Chambliss***, 112 F.3d 731, 739 (4th Cir. 1997) (holding that "*Suter* thus forecloses the argument that section 671(a)(10) of the AACWA provides the source for an enforceable right through section 1983.").

(iii) public housing/workplace

In ***Dawson v. Milwaukee***, 930 F.2d 1283 (7th Cir. 1991), Judge Easterbrook rejected plaintiff's argument that his presence in publicly subsidized housing was the functional equivalent of being in custody, thereby creating a constitutional duty on the part of the Housing Authority to protect him from harm at the hands of private actors. In refusing to equate "subsidy with custody," Judge Easterbrook relied on pre-***DeShaney*** precedent from the Seventh Circuit holding that the due process clause does not guarantee safety in the public workplace. *Id*. at 1285. *Accord* ***Washington v. District of Columbia***, 802 F.2d 1478 (D.C. Cir. 1986); ***McClary v. O'Hare***, 786 F.2d 83 (2d Cir. 1986); ***Rankin v. Wichita Falls***, 762 F.2d 444 (5th Cir. 1985). *See also* ***D.M. ex rel. Ray v. Philadelphia Hous. Auth.,*** 613 F. App'x 187, 190-91 (3d Cir. 2015) ("While the PHA subsidized the Property and was allegedly 'aware of the dangers that [Plaintiff] faced ..., it played no part in their creation, nor did it do anything to render [Plaintiff] any more vulnerable to them.' *DeShaney,* 489 U.S. at 201. In short, Plaintiff's allegations fail to show 'that [the PHA] created the danger' Plaintiff faced while living in the Property."); ***Henry v. City of Erie***, 728 F.3d 275, 285, 286 & n.9 (3d Cir. 2013) ("Although the cause of the fire is not known at this stage of the litigation, plaintiffs do not allege that defendants caused the fire or increased the apartment's susceptibility to fire. Nor do plaintiffs contend that defendants failed to install a smoke detector and a fire escape on the third floor of Richardson's apartment. Plaintiffs' allegations against defendants are a step further removed: plaintiffs contend that defendants should have compelled or induced the landlord/owners to install a fire escape and smoke detector (or induced Richardson to live elsewhere), either by not approving the apartment for the Section 8 housing program and/or by terminating the subsidy payments that allowed Richardson to continue to live there. Unfortunately for plaintiffs, their reasoning proves too much. Plaintiffs' complaint makes clear it was the owners' responsibility—not defendants'—to install a smoke detector and fire escape. The regulations cited by plaintiffs confirm the owner is required to maintain the unit in accordance with the Housing Quality Standards. . . Assuming, as we must, that a smoke detector and fire escape could have prevented decedents' deaths, the responsibility (and capability) to install these safety features did not rest with defendants. . . .Under our state-created danger jurisprudence, we cannot find that defendants' failings amount to a state-created danger. We decline to expand the state-created danger doctrine—a narrow exception to the general rule that the state has no duty to protect its citizens from private harms—to embrace this case. . . . We are not aware of a case in which a circuit court extended liability under the state-created danger doctrine to licensing-type

activities. Nor have plaintiffs cited such a case. . . . Accordingly, we will reverse the order of the District Court denying qualified immunity to Horan and Angelotti and remand for proceedings consistent with this opinion.")

The Supreme Court has held that "the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace . . . ." ***Collins v. City of Harker Heights, Tex.***, 112 S. Ct. 1061, 1071 (1992).

See also ***Callahan v. North Carolina Dep't of Public Safety***, 18 F.4th 142, 147-49 (4th Cir. 2021) ("Since *Pinder*, 'we have never issued a published opinion recognizing a successful state-created danger claim.'. . In the cases that have followed, we have repeatedly recognized 'the state-created danger doctrine is narrowly drawn, and the bar for what constitutes an "affirmative act" is high.'. . . According to the complaint, '[d]efendants' actions in placing Sergeant Callahan in a dangerous situation with inadequate staffing based on lack of trained and experienced officers to support her consciously disregarded a substantial and great risk of serious harm which was obvious, apparent, and grave.' . . Callahan adds that '[d]efendants were also aware of, or should have been aware of, the imminent threat posed by Inmate Wissink.'. . Callahan argues that these allegations satisfy the pleading requirement for a state-created danger claim. He insists he has alleged the affirmative acts that our precedent requires. More specifically, Callahan argues that the defendants knew about the risks, 'had an affirmative duty to avoid them, and instead affirmatively acted to keep Inmate Wissink [in Callahan's unit] while assigning too few and untrained staff.'. . He also contends that he alleged that the '[d]efendants affirmatively sent Sgt. Callahan, and her coworkers, into [that unit] on April 27 with full knowledge' of two risks—the risk posed by Wissink and the risk of understaffing and improper training. . . According to Callahan, these are affirmative acts that, if accepted as true, would give rise to a state-created danger claim. Callahan's argument, however, misses the point. The question is not how Callahan characterizes the allegations. It is not enough to reframe a failure to protect against a danger into an affirmative act. As we noted in *Doe*, 'inaction can often be artfully recharacterized as "action,"' but we must 'resist the temptation to inject this alternate framework into omission cases.'. . The critical questions are: What is the pertinent danger, and did the state create it? Callahan's allegations make clear that the danger was Wissink, and none of the defendants created that danger. The staffing and training decisions may reflect a failure to adequately respond to the danger posed by Wissink. But under our precedent, such failures do not support a state-created danger claim. They are neither the 'immediate interactions' with the plaintiff called for in *Doe* nor the 'direct cause' of the injuries required by *Graves.* These choices are simply too far down the causal chain of events to result in liability under the Due Process Clause. And without allegations that, if accepted as true, meet these legal requirements, the complaint does not plausibly state a § 1983 substantive due process claim under the state-created danger theory. The Due Process Clause does not convert state-law tort claims into constitutional violations actionable under § 1983. Our precedent is clear: Callahan's allegations do not plausibly state a claim for a state-created danger. . . This case involves tragic circumstances, but it does not involve a due process violation. Callahan failed to meet the pleading requirements for a substantive due process claim. 'In cases like this, it is always easy to second-

guess. Tragic circumstances only sharpen our hindsight, and it is tempting to express our sense of outrage at the failure' of the prison staff to protect Sergeant Callahan from a dangerous inmate. . . However, to hold that Callahan's allegations amount to a plausible substantive due process claim would go against our precedent and constitutionalize a state tort claim. That we refuse to do."); ***Rhodes v. Michigan***, 10 F.4th 665, 686 (6th Cir. 2021) (Thapar, J., dissenting in part) ("No one disputes that Kelly Rhodes was seriously injured. And the record suggests the defendants were at fault. That is why we have state tort law—so people can recover for the injuries they suffer at someone else's hand. And recover Rhodes did: She settled her state tort claims for $50,000 in damages plus the ability to obtain reimbursements for medical expenses related to her head injury. Yet the majority holds that Rhodes's status as an inmate entitles her to special rights. The majority finds this entitlement in the Eighth Amendment's Punishments Clause. But the Eighth Amendment is not a glorified tort statue. *Ramirez v. Guadarrama*, 2 F.4th 506, 512 (5th Cir. 2021) (Oldham, J., concurring in the denial of rehearing en banc). Nor is it a 'National Code of Prison Regulation.'. . To make out a claim of unconstitutional punishment based on prison conditions, Rhodes needed to show—at a minimum—that the state exposed her to compulsory, involuntary danger. She can't clear this bar because she voluntarily worked in the laundry detail. . . . By reviving Rhodes's Eighth Amendment claim, the majority stretches the Punishments Clause beyond precedent and far beyond its original meaning. Because precedent and history agree that Rhodes's accident was not a punishment, I dissent in part."); ***Nelson v. City of Chicago***, 992 F.3d 599, 605 (7th Cir. 2021) ("Here, the danger was created by an armed robber, not by the government, so it is not covered by the doctrine. . . Under the state-created-danger theory, whether Sergeant Bucki was deliberately indifferent to risks to Officer Nelson is irrelevant. 'Disregarding a known risk to a public employee does not violate the Constitution whether or not the risk comes to pass.' [collecting cases brought by public employees asserting state-created-danger claims]"); ***Russett v. State of Arizona***, No. 17-15709, 2020 WL 236767, at *2 (9th Cir. Jan. 15, 2020) (not reported) ("Although Appellees underscore that the plaintiff in *Grubbs* was employed by a correctional facility, she was employed as a nurse, not a corrections officer. This distinction is key because, unlike nurses, the primary responsibility of corrections officers is to constantly supervise and closely interact with violent inmates. Further, this court emphasized in *Grubbs* that the defendants led the plaintiff 'to believe that she would not be required to work alone with violent sex offenders.'. . Neither this court nor the Supreme Court has ever held that a prison employee whose essential duties involve monitoring inmates can assert a substantive due process claim when he is assaulted by an inmate he was tasked with supervising. We have never before recognized a state-created danger cause of action on facts analogous to the ones asserted by Appellees. Thus, it was not clearly established that Appellants' conduct of assigning corrections officers to work with inmates under dangerous conditions would have violated Appellees' due process rights and we reverse the district court's denial of qualified immunity."); ***In re U.S. Office of Personnel Management Data Security Breach Litigation***, 928 F.3d 42, 75 (D.C. Cir. 2019) ("Like the sanitation worker in *Collins*—and the prison guards in *Williams* and *Washington*—NTEU [National Treasury Employees Union] Plaintiffs 'voluntarily' sought and 'accepted' an 'offer of [government] employment.' *Collins*, 503 U.S. at 128. In doing so, they voluntarily submitted personal information 'as part of a background investigation.'. . In no sense, then, did the

government compel NTEU Plaintiffs to seek government employment; it therefore bore no constitutional duty under the Due Process Clause to protect them from the risks associated with applying for such positions. With no triggering deprivation of liberty or property to speak of, there arose no constitutional governmental duty to 'provide [NTEU Plaintiffs] with certain minimal levels of safety and security,' *Collins*, 503 U.S. at 127—physical or digital."); ***Kulkay v. Roy***, 847 F.3d 637, 645 ("[T]he absence of safety equipment or procedures and an awareness of similar injuries fail to show the Faribault officials were deliberately indifferent to the risk of harm posed to Kulkay by the beam saw. Moreover, we join other circuits in concluding that state and federal safety regulations do not establish a standard for Eighth Amendment violations. *See, e.g.*, *Franklin v. Kan. Dep't of Corr.*, 160 F. App'x 730, 736 (10th Cir. 2005) (unpublished); *French v. Owens*, 777 F.2d 1250, 1257 (7th Cir. 1985). The mere existence of state and federal safety regulations does not charge prison officials with knowledge of potentially unsafe conditions in their facility. The Faribault officials' actions as to potential safety precautions in the workshop at most amount to negligence. But mere negligence is insufficient to state a claim under the Eighth Amendment. Cruel and unusual punishment does not result whenever a prison official may be to blame for an inmate's injuries."); ***Pauluk v. Savage***, 836 F.3d 1117, 1118-19, 1123-26 (9th Cir. 2016) ("This case lies at the intersection of two lines of authority—on the one hand, the state-created danger doctrine under which constitutional due process claims may be brought; on the other, the Supreme Court's decision in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), declining to find a general due process right to a safe workplace. We hold that *Collins* does not bar Plaintiffs' due process claim. Plaintiffs have stated a claim under the state-created danger doctrine, notwithstanding the fact that the danger at issue is a physical condition in the workplace. However, we reverse the district court's denial of summary judgment as to Wojcik and Savage, on the ground that the due process right asserted by Plaintiffs was not clearly established at the time of the violation. . . . The threshold question before us is whether Plaintiffs' claim under the state-created danger doctrine is foreclosed by *Collins*. We conclude that it is not. . . .Other courts agree that *Collins* does not foreclose application of the state-created danger exception in workplace safety cases. . . . To prevail on a state-created danger due process claim, a plaintiff must show more than merely a failure to create or maintain a safe work environment. First, a plaintiff must show that the state engaged in 'affirmative conduct' that placed him or her in danger. . . .Second, the state actor must have acted with 'deliberate indifference' to a 'known or obvious danger.'. . .Plaintiffs' evidence, if true, satisfies both elements of a state-created danger claim. First, Pauluk's 2003 transfer back to Shadow Lane was 'affirmative' conduct. Pauluk clearly did not want to return to Shadow Lane and was transferred 'involuntarily.' There is sufficient evidence in the record that either or both Wojcik and Savage were sufficiently involved in the decision to transfer that a reasonable jury could conclude they should bear some responsibility for that transfer. . . .Second, construing the facts in the light most favorable to Plaintiffs, Wojcik and Savage acted with deliberate indifference in exposing Pauluk to a known and obvious danger. Plaintiffs presented evidence that Wojcik and Savage were both aware of the CCHD's long and tortured history of pervasive mold problems in multiple buildings, including the Shadow Lane facility. . . .The core question in this appeal is whether *Collins* bars the application of the state-created danger doctrine in cases where the danger is a physical condition in the workplace. Because *Wood* did not involve

a dangerous workplace, it does not speak to this question. *Grubbs I* presents a closer analogy to this case. However, as recounted above, the danger in *Grubbs I* was a human actor who posed a known threat. In contrast, Pauluk was not harmed by a human agent, but rather by a physical condition in the building where he worked. This case is factually very similar to *Collins*, where, as here, the danger was a physical danger in the workplace. For the reasons given above, we conclude that Plaintiffs have stated a claim despite the fact that Pauluk's injury was caused by physical conditions in the workplace. But, because the Supreme Court in *Collins* declined to find a due process violation in a case with very similar facts, we cannot say that Wojcik and Savage were 'on notice' that their conduct was unlawful under clearly established law."); ***Pauluk v. Savage***, 836 F.3d 1117, 1126 (9th Cir. 2016) (Murgia, J., concurring in part and dissenting in part) ("I fully agree with the opinion's analysis as to the scope of this court's jurisdiction to review the district court's denial of summary judgment on qualified immunity grounds, and with its conclusion that the district court erred in denying qualified immunity to Wojcik and Savage. However, even accepting as true the plaintiffs' version of events, *see Behrens v. Pelletier*, 516 U.S. 299, 313 (1996), I respectfully disagree that the plaintiffs have presented a cognizable claim that Wojcik and Savage affirmatively acted with deliberate indifference to Pauluk's substantive due process rights under the state-created danger doctrine."); ***Pauluk v. Savage***, 836 F.3d 1117, 1132-34 (9th Cir. 2016) (Noonan, J., dissenting) ("Today, the majority holds that the state-created danger doctrine—a theory of constitutional harm whose contours have been 'clearly established' by at least nine published opinions of this court over the course of two decades—is no longer sufficiently 'clear' in light of a single case which addresses an unrelated legal theory. I respectfully dissent. . . .No basis exists to distinguish this case from *Wood*, *Kennedy*, or any other published opinion of this court upholding the applicability of the state-created danger doctrine. I would affirm the district court's denial of summary judgment. I therefore concur with the majority's conclusion that, viewing the facts in the light most favorable to plaintiffs, they have shown a violation of the Fourteenth Amendment under the state created danger doctrine. . . .Pauluk's case therefore presents the precise facts that the *Collins* Court deemed were inapplicable to its analysis and holding. Accordingly, *Collins* does not counsel against affirming the district court here. Indeed, the majority appears to concede that *Collins* is distinguishable, but concludes that even assuming Pauluk has stated a constitutional violation, the factual circumstances of this case are simply too similar to the facts of *Collins* for the defendants to have been ' "on notice" that their conduct was unlawful under clearly established law.'. . The law governing the state-created danger doctrine is 'clearly established' by the controlling precedent discussed above such that 'any reasonable official in [defendants'] shoes would have understood that [they were] violating it.' *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765 (2015) (citations omitted). Indeed, in light of these cases, the constitutional question has been 'placed...beyond debate.'. . A case which presents some factual similarities but lacks any legal nexus to the state-created danger doctrine cannot revive that debate, nor can it serve to convolute what this court has defined with pellucid clarity. *Collins* does not control here. Accordingly, I dissent.").

See also ***Herrera v. Los Angeles Unified School District***, 18 F.4th 1156, 1160-62 (9th Cir. 2021) ("Because Erick was not detained at the time of his death and his parents' § 1983 claim arises out

of Lopez's alleged failure to protect their son, their claim is a non-detainee failure-to-protect claim. We therefore apply a purely subjective standard, consistent with our precedent, requiring the plaintiff to show that the state actor recognized an unreasonable risk and actually intended to expose the plaintiff to such risk. . . Two justifications could be raised in favor or applying a purely subjective standard in failure-to-protect claims brought by non-detained plaintiffs, but neither is persuasive. First, failure-to-protect claims do not include the kind of affirmative action involved in an excessive force claim. But this is also the case for detainee failure-to-protect claims, to which we apply the objective standard. . . Second, the government does not have an obligation to provide food, medical care, and safety to those not in its custody. Even so, *Castro*'s 'significant reasons' to extend the objective standard apply regardless of that obligation. . . Absent our precedent in *Dent, Martinez*, and *Pauluk*, we may have been inclined to interpret *Kingsley* and *Castro* to require Plaintiffs to show (1) that Lopez made an intentional decision to allow Erick to be exposed to the risk posed by the pool without Lopez's supervision, and (2) it was objectively unreasonable to expose Erick to that risk. This formulation of the failure-to-protect test would mirror the logic of *Kingsley* and *Castro*, which looks to whether the defendant intended the physical consequences of his actions and applies the objective deliberate indifference standard only to evaluate whether the action taken, considering what was known to the defendant at the time, was reasonable. . . But because, post-*Kingsley* and post-*Castro*, we have continued to apply a purely subjective deliberate indifference test to non-detainee failure-to-protect claims, we also do so here. . . . Plaintiffs provide no evidence that Lopez knew of an immediate threat to Erick after he watched him enter the locker room area. Even assuming Lopez knew that Erick had asthma and could not swim, and lost sight of Erick while he was in the pool earlier that afternoon, the parties agree that Lopez saw Erick enter the locker room area. Like the teacher in *Patel*, Lopez waited outside the locker room to protect Erick's privacy and foster his independence. It was during that time, when Lopez could not have subjectively expected any immediate danger, that Erick drowned. Under our deliberate indifference analysis, Plaintiffs must proffer facts suggesting that Lopez subjectively recognized the relevant risk that Erick could drown while in the pool area. . . Plaintiffs failed to do so: Lopez had no 'actual knowledge or willful blindness of impending harm,'. . . because he believed that Erick was still in the locker room. He was subjectively unaware that Erick was exposed to the dangers of the pool and therefore cannot be liable for his death."); ***Estate of Her v. Hoeppner***, 939 F.3d 872, 876-77 (7th Cir. 2019) ("In the end, the Estate's argument boils down to the remarkable assertion that a municipal swimming pond is by its nature a state-created danger. That proposition, if adopted, would turn every tort injury at a public pond or pool into a constitutional violation. Federal constitutional claims involving public playgrounds and practice fields wouldn't be far behind. Indeed, the Estate's preferred result 'would potentially set up a federal question whenever an accident happens during activities sponsored by the state.' *Waybright v. Frederick County*, 528 F.3d 199, 208 (4th Cir. 2008). But the Fourteenth Amendment doesn't displace state tort law by transforming accidents at public facilities into federal constitutional claims. . .Perhaps aware that its broad position is untenable, the Estate falls back on a narrower argument that the defendants *increased* a danger to Swannie. But this theory is no stronger because there's no evidence that the defendants actively 'did something that turned a potential danger into an actual one.'. . The Estate argues that the City failed to take proper safety precautions, like dredging the

bottom of the pond, and the lifeguards failed to comply with the park's 'mandatory' rules involving small children. And it emphasizes evidence that the pond was especially crowded on the afternoon in question, and at one point a lifeguard admitting to being 'overwhelmed' by the number of swimmers. But we've explained that *DeShaney* draws an 'essential distinction between *endangering* and *failing to protect*.'. . The former may amount to a constitutional violation if other facts are present; the latter is simple negligence. . . . That Swannie slipped beneath the surface without being noticed by *anyone*—lifeguard, family member, or anybody else at the pond—reflects the heartbreaking reality of childhood drownings. But it's not evidence that the defendants took affirmative steps that created or increased a danger to Swannie.The Estate's difficulty articulating a theory of the case that might situate this claim within the law of state-created dangers reflects the fundamental problem with its position: this is at most a negligence claim."); ***Hernandez v. Ridley***, 734 F.3d 1254, 1262 & n.6 (10th Cir. 2013) ("By seeking to impose liability on Ridley and Henderson, Hernandez is asking us to be the 'Monday morning quarterback' with respect to requiring Duit to perform according to the contract. It is beyond our charge to second-guess 'a rational decision making process that takes account of competing social, political, and economic forces.'. . Here, those forces are nearly palpable. At a minimum, consideration must be given to safety of the public and construction crews, project costs, inconvenience to the travelling public, and the need to assure adequate traffic flow during construction. We focus particularly on the last consideration, adequate traffic flow during construction, because it so dramatically illustrates the need for judicial restraint. The increased dangers of night driving are generally known, as are the increased risks presented as traffic volumes increase, particularly in confined areas. But actually balancing the relative risks and benefits is a challenging task, going well beyond what is generally known or assumed, particularly when even more considerations are in play. A critic's post hoc analysis is no substitute for real time rational decisions. . . . Although Ridley and Henderson were not Jose Jr. and Salvador's direct employers, Hernandez's allegations are akin to claims made against government employers alleging a right to work in a reasonably safe environment. But the Supreme Court has declined to extend substantive due process protection to safe working conditions."); ***Slaughter v. Mayor and City Council of Baltimore***, 682 F.3d 317, 322, 323 (4th Cir. 2012) ("[I]n the voluntary employment context, the plaintiffs have not alleged arbitrary (in the constitutional sense) or conscience-shocking conduct because they did not assert that the Fire Department *intended to harm* Wilson, as would be necessary to establish a substantive due process violation. . . .It is true that in this case, as it was in *Waybright,* the Baltimore City Fire Department created the danger. But this fact does not satisfy any element of the standard that the Supreme Court has articulated for showing a substantive due process violation with respect to a government employee. . . For these reasons, we hold that the Baltimore City Fire Department's constitutional liability in this case turns on whether it *intended to harm* the new recruits."); ***Slaughter v. Mayor and City Council of Baltimore***, 682 F.3d 317, 326 (4th Cir. 2012) (Wynn, J., concurring in the result) ("Following *Collins* and *Waybright,* I agree with affirming the district court's decision to dismiss on the narrow grounds that there is no duty on municipalities to 'provide certain minimal levels of safety and security in the workplace,' *Collins,* 503 U .S. at 130, that 'failure to train or to warn ... employees [is] not arbitrary in a constitutional sense,' *id.,* and that, as a result, the petitioner's factual allegations are not 'arbitrary' or 'shocking to the conscience' in

a 'constitutional sense.'. . But, in affirming the district court, we should also recognize that government employees are not categorically excluded from claiming deliberate indifference as a basis for Due Process claims."); ***Fields v. Abbott***, 652 F.3d 886, 891-94 (8th Cir. 2011) ("In this case, the Miller County individual defendants acted under circumstances in which actual deliberation was arguably practicable because of Fields's allegations that (1) they had been made aware, based on her previous injuries from the same drunk-tank door, that the door was dangerous, and (2) they were previously informed that the jail was understaffed. . .We will thus apply that standard here. In this case, the district court concluded that whether the Miller County individual defendants' conduct is conscience shocking 'is a close question,' but ultimately held that a reasonable jury could find that they acted with conscience-shocking deliberate indifference. . . . Here, none of the Miller County individual defendants made any representations to Fields regarding the types of inmates that she would be dealing with or the safety of her workplace. And unlike L.W., Fields was aware of the potentially dangerous conditions to which she was subject because she had previously complained about, among other things, both the interior handle on the drunk-tank door and the understaffing of the jail. The conduct that Fields complains of here is simply not comparable to the defendants' conscience-shocking actions in *Grubbs*. . . . In this case, Fields asserts that the Miller County individual defendants knew of the dangers that the jail posed, but even with that knowledge neglected to make the jail safer. She alleges that several deficiencies at the jail led to her injuries, including its understaffing, the interior-mounted door handle, an alleged failure to follow the procedures for classifying inmates, an alleged lack of training, and the jail's acceptance of inmates from other counties. Fields argues that the Miller County individual defendants 'were aware of facts from which an inference might have been drawn that a substantial risk of serious harm existed.'. . True enough, Sheriff Abbott testified at his deposition that he knew that the Miller County Jail was understaffed and that he was aware that Fields had complained about the interior-mounted door handle. But even if we assume, as we must for present purposes, that all of the Miller County individual defendants were aware of the facts from which an inference about the jail's possible dangers could be drawn, Fields has presented insufficient evidence to 'show that any of [these defendants] actually drew such an inference.'. . Fields, after all, was equally aware of the two most potentially dangerous conditions-the jail's understaffing and the interior-mounted door handle-and the Miller County individual defendants would have had no reason to believe that Fields would not take these conditions into account in her interactions with the inmates. Moreover, there is no proof in the record that the conditions that Fields complains of were so inherently dangerous that the injuries she sustained were highly likely to occur. . . .This evidence, taken in the light most favorable to Fields, might cause a jury to find that Sheriff Abbott was grossly negligent in failing to address the staffing concerns associated with the jail and in not removing the interior-mounted door handle. Even gross negligence, however, cannot support a § 1983 claim alleging a violation of the Due Process Clause. . . . Because we conclude that the Miller County individual defendants did not violate Fields's substantive due process rights, we need not address the other prong of the qualified-immunity analysis; namely, whether the substantive due process right that Fields asserts was clearly established when the events in this case took place."); ***Hunt v. Sycamore Community School Dist. Bd. of Educ***., 542 F.3d 529, 537, 538, 543, 544 (6th Cir. 2008) ("While it has not proved impossible for government employees to establish

arbitrariness of their employer, such claims have, for the most part, not succeeded in this Circuit. In a state-created danger case in which public employees prevailed against their employer, we determined that police had a due process claim against the City for endangering them by releasing information that would make it easier for third persons to harm them. [citing *Kallstrom*] In contrast, in other cases in which the harm to a government employee was inflicted by third persons, we have held that there was no state-created danger. . . . We believe the more exact standard, announced in *Lewellen*, is that *in order to succeed on a § 1983 claim in a non-custodial setting, a plaintiff must prove either intentional injury or 'arbitrary conduct intentionally designed to punish someone* − e.g., giving a worker a particularly dangerous assignment in retaliation for a political speech ... or because of his or her gender.' Or, as stated in *Stemler*, . . .a plaintiff must prove 'conscience shocking' behavior. . . . Our review of *Lewis* and our own substantive due process cases indicates that where the governmental actor does not intentionally harm the victim or invidiously discriminate against him, conduct endangering the victim will not shock the conscience if the victim has voluntarily undertaken public employment involving the kind of risk at issue and the risk results from the governmental actor's attempt to carry out its mandatory duties to the public. This holds true even where the governmental actor is not forced to act in a crisis, but has time to deliberate. In order to comply with the Individuals with Disabilities Education Act, the school district is, of course, obliged to provide a free appropriate public education to children with disabilities, 20 U.S.C. § 1412(a)(1)."); ***Waybright v. Frederick County, MD***, 528 F.3d 199, 207, 208 (4th Cir. 2008) ("Here, plaintiffs argue, the training session should qualify as a state-created danger because a state actor, Coombe, 'used his authority to create an opportunity for danger that otherwise would not have existed,' and thereby knowingly put Waybright in harm's way. . .To apply the state-created danger theory in this context, however, would run afoul of the Supreme Court's unanimous decision in *Collins*, . . . which held that due process does not impose a duty on municipalities to provide their employees with a safe workplace or warn them against risks of harm (though state tort law may). The case is right on point, for plaintiffs' state-created danger claim, in essence, is that Coombe created an unsafe workplace that caused a prospective employee harm. And while we recognize that *Collins* involved a municipal rather than an individual defendant, the case speaks decisively to the situation here. . . . by finding a state-created danger here, we might well inject federal authority into public school playground incidents, football (or even ballet) practice sessions, and class field trips, not to mention training sessions for government jobs that require some degree of physical fitness."); ***Lombardi v. Whitman***, 485 F.3d 73, 79, 80, 82, 83 (2d Cir. 2007) ("[T]o the extent the plaintiffs here allege that the defendants had an affirmative duty to prevent them from suffering exposure to environmental contaminants, their claims must fail. They cannot rely on the EPA's failure to instruct workers to wear particular equipment, its failure to explain the exact limitations of its knowledge of the health effects of the airborne substances that were present, or its failure to explain the limitations of its testing technologies. But the complaint goes further; it alleges that defendants' affirmative assurances that the air in Lower Manhattan was safe to breathe created a false sense of security that induced site workers to forgo protective measures, thereby creating a danger where otherwise one would not have existed.. . . . The plaintiffs allege no 'special relationship' between them and federal officials. . . They plead that their reliance on the government's misrepresentations induced them to forgo available

safeguards, and thus characterize the harm as a state created danger. . . . . The plaintiffs do not allege that the defendants acted with an evil intent to harm; but they argue that the defendants' deliberate indifference shocks the conscience because the defendants made their decisions in an 'unhurried' fashion with 'hours, days, weeks and even months to contemplate, deliberate, discuss and decide what to do and say about the health hazards posed to thousands of people who were coming onto and working at Ground Zero.' . . . . The decisions alleged were made by the defendants over a period of time rather than in the rush of a car chase; but the decisions cannot on that account be fairly characterized as 'unhurried' or leisured. . . . Accepting as we must the allegation that the defendants made the wrong decision by disclosing information they knew to be inaccurate, and that this had tragic consequences for the plaintiffs, we conclude that a poor choice made by an executive official between or among the harms risked by the available options is not conscience-shocking merely because for some persons it resulted in grave consequences that a correct decision could have avoided. . . . When great harm is likely to befall someone no matter what a government official does, the allocation of risk may be a burden on the conscience of the one who must make such decisions, but does not shock the contemporary conscience. . . . These principles apply notwithstanding the great service rendered by those who repaired New York, the heroism of those who entered the site when it was unstable and on fire, and the serious health consequences that are plausibly alleged in the complaint. . . . Because the conduct at issue here does not shock the conscience, there was no constitutional violation. We therefore need not decide whether the conduct alleged violated law that was then clearly established, or whether any special factors counsel hesitation in the recognition of a *Bivens* action against the defendants."); ***Witkowski v. Milwaukee County***, 480 F.3d 511, 513, 514 (7th Cir. 2007) ("[S]omeone who chooses to enter a snake pit or a lion's den for compensation cannot complain. Powerful evidence shows that higher wages compensate people whose jobs are risky. . . That evidence is not what undercuts Witkowski's claim, however; what is dispositive against him is the fact that he is a volunteer rather than a conscript. The state did not force him into a position of danger.This is not to say that public employees are beyond the Constitution's protection. Suppose Witkowski had alleged that Milwaukee County exposed him to extra risks because he had campaigned against the County's political leaders or because of his race. Such allegations would state a legally sufficient claim under the first amendment or the equal protection clause of the fourteenth. . . That is not Witkowski's theory, however. He invokes only the due process cause, the domain of *Collins*, *DeShaney*, and *Walker*. Allowing Ball into court without the stunbelt imperiled everyone there: judge, jurors, and spectators were at more risk than Witkowski, who could have protected himself (and everyone else) had he kept control of his weapon. All Witkowski meant by alleging that Gunn and Halstead acted intentionally or recklessly is that they knew about Ball's willingness and desire to wreak havoc, not that they had some ulterior motive for wanting Witkowski dead or wounded. Disregarding a known risk to a public employee does not violate the Constitution whether or not the risk comes to pass."); ***Kaucher v. County of Bucks***, 455 F.3d 418, 435, 436 (3d Cir. 2006) ("The Kauchers have not alleged an affirmative, culpable act on the part of defendants sufficient to implicate the state created danger doctrine. Nor have they alleged conscience-shocking conduct on the part of defendants that could transform a workplace safety claim into a substantive due process claim. At base, the Kauchers contend defendants failed to provide a working environment

free from risk of infection − a claim precluded by *Collins*. . . .We conclude the Kauchers' claims relate to a failure to remedy conditions at the jail. The Kauchers allege defendants failed to prevent MRSA from spreading through the jail, took insufficient action to protect the jail's corrections officers from contracting an infection, and failed to warn and educate corrections officers in infection prevention. Despite their attempts to characterize defendants' actions as affirmatively creating dangerous conditions, they allege a failure to act to prevent dangerous conditions. Under *Collins*, this claim must fail."); ***Estate of Phillips v. District of Columbia***,455 F.3d 397, 407, 408 (D.C. Cir. 2006) ("As in *Washington*, Edwards's deliberate indifference may have increased the Firefighters' exposure to risk, but the risk itself − injury or death suffered in a fire − is inherent in their profession. As both *Washington* and *FOP* make clear, the District is not constitutionally obliged by the Due Process Clause to protect public employees from inherent job-related risks. . . . The Firefighters point to a recent case of ours, *Smith v. District of Columbia*, 413 F.3d 86 (D.C.Cir.2005), as a holding counter to our bright-line application of the custody requirement. . . . Emphasizing the *Smith* victim's relative freedom of movement yet restricted place of residence (similar to the restraints the D.C.Code provisions allegedly placed on them), the Firefighters claim that *Smith* supports their contention that a heightened obligation can exist absent custody. But in *Smith* we found that the District had a heightened obligation because its *in loco parentis* status significantly restrained the victim's liberty. . . . The restrictions on his liberty − imposed on him by the District − are plainly distinguishable from those restrictions the D.C.Code imposes on the Firefighters' liberty − restrictions voluntarily assumed by the Firefighters as conditions of employment by the Department."); ***Moore v. Guthrie***, 438 F.3d 1036, 1042, 1043 (10th Cir. 2006) (10th Cir. 2006) ("We have identified the 'classic' danger creation case to be *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), where police officers impounded the plaintiff's car and abandoned her in the middle of the night in a high crime area where she was raped. . . This is a narrow exception, . . . which applies only when a state actor 'affirmatively acts to create, or increases a plaintiff's vulnerability to, danger from private violence,' *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir.2001). It does not apply when the injury occurs due to the action of another state actor. In the instant case, since Plaintiff was injured by a Simunition bullet fired by a fellow police officer and not a private third party, the danger creation doctrine is inapplicable. Plaintiff also contends that he has sufficiently pleaded a violation of his right to bodily integrity under the 'special relationship' doctrine. The special relationship doctrine is another exception to the general principle that government actors are not responsible for private acts of violence. . . As just discussed, however, because this case does not involve a private act of violence by a third party, this theory is also inapplicable to the facts alleged by Plaintiff. More importantly, we have specifically held that the special relationship doctrine is not triggered in an employment relationship, which is presumed consensual. . . Last, it should be noted that, even if either the danger creation or special relationship theory were applicable, it would not relieve Plaintiff of his duty to allege actions that shock the conscience. As required under the second prong to defeat a qualified immunity defense, Plaintiff argues that his violated right was clearly established at the time of his injury. . . . Although Plaintiff does not need to find a case with an identical factual situation, he still must show legal authority which makes it 'apparent' that 'in the light of pre-existing law' a reasonable official, in Chief Guthrie's position, would have known that having

police officers wear riot helmets rather than Simunition face masks would violate their substantive due process right of bodily integrity. . . First, as discussed earlier, the Supreme Court has only recognized a right to bodily integrity under the Fourteenth Amendment in very limited circumstances, not including working in a safe environment. Second, courts have declined to find a violation of substantive due process in circumstances similar to, or more shocking than, that alleged by Plaintiff. Therefore, we cannot say that it was clearly established that Chief Guthrie and the City of Evans violated Plaintiff's constitutional right to bodily integrity by requiring him to wear his riot helmet during training."); ***Young v. City of Providence***, 404 F.3d 4, 27 (1st Cir. 2005) ("The district court is correct in saying that the issue is not whether Cornel's death was caused by his own lack of proper training in identifying himself or otherwise in conducting himself while off-duty. . . *Collins* establishes that a city worker has no constitutional right at all to adequate training; thus, there can be no independent claim of constitutional violation separate from Solitro's use of excessive force."); ***Fraternal Order of Police Department of Corrections Labor Committee v. Williams***, 375 F.3d 1141, 1144 & n.3, 1145 (D.C. Cir. 2004)(relying on *Collins* to reject Union's claim that its members have "a substantive due process right that would compel the District ... to hire additional employees to staff the [D.C.] Jail in order to address what, they assert, is an unreasonably dangerous workplace."); ***McKinney v. Irving Independent School District,*** 309 F.3d 308, 314 (5th Cir. 2002) ("As the district court recognized, there is no doubt that the McKinneys described a dangerous working environment in their pleadings-that of uncontrolled and disruptive special-education students on a moving school bus in heavy traffic. They do not, however, allege any facts showing that defendants took any affirmative action to increase the risk over the dangers inherent in this working environment. . . . McKinney faced nothing more than the ordinary risks of driving the school bus that transported the special-education students to and from Gilbert. The McKinneys' real complaint is that defendants did not take an affirmative step, namely, provide a bus monitor to supervise the students or other safeguards for McKinney's protection while driving the bus. We hold that the due process clause did not require that defendants place a monitor on the school bus."); ***Sperle v. Michigan Dep't of Corrections,*** 297 F.3d 483, 492-93 (6th Cir. 2002) ("The key factor in custodial environments and other situations where deliberate indifference renders state actors liable for substantive due process violations is the ability of the officials to consider their actions in an unhurried, deliberative manner. . . . Tammy Sperle worked in a 'custodial setting,' an environment where the defendants had the opportunity to design the security precautions at the HVMF and to respond to any general dangers that existed. We therefore conclude that the 'deliberate-indifference' standard is an appropriate one for evaluating her § 1983 claim. . . . Even if the individual defendants could have made the working conditions safer for Tammy Sperle by providing PPDs to school building employees, adding extra security guards, or insuring greater supervision of Herndon, they did not act in an arbitrary manner that 'shocks the conscience' or that indicates any intent to injure her. . . . Our conclusion does not change when we apply the deliberate-indifference standard. 'Deliberate indifference has been equated with subjective recklessness, and requires the § 1983 plaintiff to show that the state Aofficial knows of and disregards an excessive risk to [the victim's] health or safety.'"); ***White v. Lemacks***, 183 F.3d 1253, 1257 (11th Cir. 1999) ("*Collins* makes it clear that the fact a government employee would risk losing her job if she did not submit to unsafe job conditions does not convert a voluntary

employment relationship into a custodial relationship, and therefore does not entitle the employee to constitutional protection from workplace hazards, one of which can be harm caused by third parties. . . . Thus, *Collins* directly conflicts with and overrules the part of *Cornelius* [*v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)] holding that a government employment relationship, in and of itself, is a 'special relationship' giving rise to a constitutional duty to protect individuals from harm by third parties. As a result, the part of *Cornelius* adopting, or perpetuating, a 'special relationship' doctrine that guarantees government employees constitutional protection from unreasonable risks of harm in the workplace is no longer good law."); ***Wallace v. Adkins***, 115 F.3d 427, 429 (7th Cir. 1997) ("Unlike a prisoner, a person involuntarily committed to a mental institution, or a child placed by state authorities in a foster home, Wallace was free to walk out the door any time he wanted. This may seem to pose a harsh choice for prison guards, but the consequences of the opposite rule for prison administration generally would be even more unacceptable. . . . We therefore hold that prison guards ordered to stay at their posts are not in the kind of custodial setting required to create a special relationship for 14th Amendment substantive due process purposes."); ***Liebson v. New Mexico Corrections Dep't***, 73 F.3d 274, 276 (10th Cir. 1996) (librarian assigned to provide library services to inmates housed in maximum security unit of the New Mexico State Penitentiary was not in state's custody or held against her will; employment relationship was "completely voluntary."); ***Skinner v. City of Miami***, 62 F.3d 344, 348 n.2 (11th Cir. 1995) (in case involving hazing incident by firefighters, court determined that the "record does not support the dissent's implication that the City committed any deliberate acts to injure [plaintiff]. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls short of demonstrating that the City violated a substantive constitutional right."); ***Lewellen v. Metropolitan Government of Nashville***, 34 F.3d 345 (6th Cir. 1994) (workman accidentally injured on school construction project has no substantive due process claim); ***Figueroa v. United States***, 7 F.3d 1405, 1413 (9th Cir. 1993) ("While we acknowledge that a broader understanding of deprivation of liberty may have emerged later . . .in 1987 there was no clearly established constitutional right not to be placed in a position of danger by a government employer absent some sort of governmental restriction on an individual's physical freedom to act to avert potential harm."); ***Walls v. City of Detroit***, 993 F.2d 1548 (6th Cir. 1993) (Table, Text in Westlaw) ("Plaintiff's artful attempt to recast his complaint in terms distinguishable from *City of Harker Heights* is unavailing, because it misunderstands one of the central tenets of the Supreme Court's holding in that case: the Constitution does not guarantee police officers and other municipal employees a workplace free of unreasonable risks of harm."); ***Searles v. SEPTA***, 990 F.2d 789, 792 (3d Cir. 1993) (rejecting plaintiff's argument "that the Constitution imposes a duty on a municipal transit authority to provide its passengers with minimal levels of safety and security during transportation."); ***Golthy v. Alabama,*** 287 F.Supp.2d 1259, 1265, 1266 (M.D. Ala. 2003) ("The court has been pointed to no, and is not aware of any, cases which stand for the proposition that either equal protection or § 1981 impose a duty in the employment relationship to protect from threats of violence by third parties.. . . The Plaintiff in this case is not asserting. . .that the Individual Defendants violated Freddie Golthy Jr.'s rights because they allowed for the creation of a racially hostile environment which impacted the terms and conditions of his employment.

Instead, they are asserting that the Individual Defendants violated Freddie Golthy Jr.'s rights because they did not prevent a racially-based assault. Under *DeShaney* and *White,* such conduct by the Individual Defendants does not violate the constitution."); ***Pahler v. City of Wilkes-Barre,*** 207 F. Supp.2d 341, 349, 351 (M.D. Pa. 2001) ("Regardless of the degree of culpability that should be applied, the defendants contend that the 'state created danger' theory does not apply to law enforcement officers who are injured while performing duties associated with their employment. . . . The court agrees. . . . Drawing on the legal principles set forth in *Collins, Rutherford*, and *Hartman*, it is concluded that the 'state created danger' theory, arising out of the substantive due process clause of the Fourteenth Amendment, is inapplicable to law enforcement personnel who are injured during the course of their employment."), *aff'd ,* 31 F. App'x 69, 71 (3d Cir. Mar. 12, 2002) (on grounds that even if state created danger doctrine applied to police officers injured on job, conduct of defendants could not be shown to be Aconscience-shocking"); ***Cerka v. Salt Lake County***, 988 F. Supp. 1420, 1424 (D. Utah 1997) ("In the case at bar. . . defendants did not increase plaintiff's vulnerability to the jail's conditions by misrepresenting the risks in the jail. To the contrary, plaintiff and other employees were advised of the Health Department's concerns about the jail's potential sewer and air problems and possible health threats. In addition, unlike *L.W.*, plaintiff is not attempting to recover damages for injuries resulting from actions of a third party. . . . [W]e are not confronted with an intentional government act deliberately calculated to injure plaintiff. The Supreme Court has consistently held that due process is only violated by intentional acts of government officials, not by negligence or carelessness. . . . Based on the principles of *Collins, Lewellen, Daniels,* and *Uhlrig* this Court holds that plaintiff does not have a substantive life, liberty, or property due process claim. There is no constitutionally protected interest in a safe work environment under *Collins* and its progeny."), *aff'd*, 172 F.3d 878 (10th Cir. 1999); ***Rutherford v. City of Newport News***, 919 F. Supp. 885, 895 (E.D. Va. 1996) (rejecting claim "that police officials owe an affirmative duty, based on the Constitution, to ensure that police officers dispatched on dangerous operations are specially trained, fully prepared, and adequately supported in undertaking such a mission."), *aff'd*, 107 F.3d 867 (Table), (4th Cir. 1997); ***Hartman v. Bachert***, 880 F. Supp. 342, 351-52 (E.D. Pa. 1995) (state has no constitutional obligation to protect deputy sheriff from dangers inherent in occupation).

See also ***Benzman v. Whitman***, 523 F.3d 119, 127, 128 (2d Cir. 2008) ("We recently ruled that a claim similar to the Plaintiffs' did not allege the denial of a right to substantive due process. *See Lombardi v. Whitman*, 485 F.3d 73 (2d Cir.2007). The claim in *Lombardi* was brought against Whitman by emergency responders to the ground zero site in the immediate aftermath of the terrorist attack and by workers at the site in the weeks thereafter. Like the Plaintiffs here, they claimed that many of the same statements at issue here violated their right to substantive due process by assuring them that it was safe to work at the site where they were subject to the same dangers from contaminated air alleged in the pending case. We rejected the claim, primarily on the ground that, absent an allegation of intent to harm, a viable substantive due process violation could not be asserted against government officials, who, in the aftermath of an unprecedented disaster, were obliged to make operational decisions in a context where they were subject to competing considerations. . . The Plaintiffs here seek to distinguish *Lombardi* on the ground that the

considerations favoring prompt appearance at ground zero by first responders and other workers in order to minimize loss of life and injury and to clear debris find no analogue in the decision of Whitman to assure area residents that it was safe to return. We agree that the considerations weighing upon Government officials in the two cases differ. While it was obviously important to have the *Lombardi* plaintiffs at ground zero promptly even if health risks would be encountered, the balance of competing governmental interests faced in reassuring people that it was safe to return to their homes and offices was materially different from that faced in *Lombardi*. A flaw in the Plaintiffs' claim, however, is that, from the face of their complaint, it is apparent that Whitman did face a choice between competing considerations, although not the stark choice between telling a deliberate falsehood about health risks and issuing an accurate warning about them. As the Complaint alleges, quoting a report from the EPA's Office of Inspector General, the White House Council on Environmental Quality ("CEQ") ' Ainfluenced, through the collaboration process, the information that EPA communicated to the public through its early press releases when it convinced EPA to add reassuring statements and delete cautionary ones.''. . The realistic choice for Whitman was either to accept the White House guidance and reassure the public or disregard the CEQ's views in communicating with the public. A choice of that sort implicates precisely the competing governmental considerations that *Lombardi* recognized would preclude a valid claim of denial of substantive due process in the absence of an allegation that the Government official acted with intent to harm. Moreover, although the reasons to encourage the return of workers to the site promptly were undoubtedly weightier than any concern to encourage the return of residents to homes and offices, Whitman was subject to an array of competing considerations of the sort identified in *Lombardi*. . . Whether or not Whitman's resolution of such competing considerations was wise, indeed, even if her agency's overall performance was as deficient as the Plaintiffs allege, she has not engaged in conduct that 'shocks the conscience' in the sense necessary to create constitutional liability for damages to thousands of people under the substantive component of the Due Process Clause.").

But see ***Hawkins v. Holloway,*** 316 F.3d 777, 787 (8th Cir. 2003) ("The Supreme Court recognized in *Collins v. City of Harker Heights* that substantive due process does not protect municipal employees from the unreasonable risk of harm in the workplace. . . But the sheriff's alleged conduct cannot be characterized as an unreasonable risk incident to one's service as an employee in a sheriff's department. Instead, the facts demonstrate that the sheriff deliberately abused his power by threatening deadly force as a means of oppressing those employed in his department, thus elevating his conduct to the arbitrary and conscience shocking behavior prohibited by substantive due process."); ***Sherwood v. Oklahoma County,*** No. 01-6194, 2002 WL 1472197, at *6 (10th Cir. July 10, 2002) (not published) ("Concern about Plaintiff's and the inmates' welfare was not only possible, but one would think obligatory, given Defendants' position of authority over Plaintiff and the undisputed information given to Defendants about the serious safety and health hazards posed by the planned painting. Hence, the facts and circumstances presented to the Court evidence the possibility that a reasonable jury could find Defendants' behavior was egregious, outrageous and recklessly indifferent to the serious consequences imposed on Plaintiff. . . . With time to make an unhurried judgment and with

accurate information outlining the applicable regulations and attendant risks and dangers involved with the proposed painting operation, Defendants placed their desire to paint old vehicles . . . over the health, safety, and welfare of Plaintiff. Such arbitrary action pursued without any reasonable justification makes the Defendants' deliberate indifference to the rights, health and welfare of the Plaintiff actionable."); ***Eddy v. Virgin Islands Water and Power Authority,*** 256 F.3d 204, 212, 213 (3rd Cir. 2001) ("Unlike the defendants, we do not read this passage or anything else in *Collins* to mean that the plaintiff in that case would not have stated a substantive due process claim if she had alleged conduct on the part of the city that satisfied the demanding shocks the conscience test. Rather, we understand *Collins* to mean that the allegations in that case did not rise to the conscience-shocking level and that the Due Process Clause does not reach a public employer's ordinary breach of its duty of care relative to its employees."); ***Jensen v. City of Oxnard***, 145 F.3d 1078, 1083-84 (9th Cir. 1998) ("Employing *Collins*, Oxnard argues that Officer Jensen could not have had any of his rights violated because he was injured while performing his duties as a police officer. We reject this argument and Oxnard's attempt to turn this into a safe workplace case. Although this case is similar to the safe workplace cases in that they both concern individuals who 'voluntarily accepted ... an offer of employment,'... this case is different in one significant way − the nature of the injury alleged.... While the safe workplace cases concern the failure of the state adequately to train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee."); ***Briscoe v. Potter,*** 355 F.Supp.2d 30, 44-47 (D.D.C. 2004) ("[T]aking the allegations in Plaintiffs' complaint as true, Defendants did not simply 'stand by and do nothing' once it became known that the Brentwood facility was contaminated with anthrax. Defendants are alleged to have engaged in a series of actions which intentionally misled Plaintiffs into believing the facility was safe and prevented them from acting to preserve their own safety. Giving Plaintiffs the benefit of crediting the complaint allegations and all reasonable inferences therefrom, they have sufficiently alleged that Defendants took the requisite affirmative actions to trigger liability under the State Endangerment Theory to withstand dismissal on the pleadings . . .If the facts are as alleged, the conduct of USPS managers would appear commendable for their dedication to getting the mail out but deplorable for not recognizing the potential human risk involved. Just as in *Butera* and *Phillips,* these alleged actions demonstrated a gross disregard for a dangerous situation in which 'actual deliberation [was] practical.' . . It is alleged that Defendants 'had been put on notice of the serious consequences that could result' from Plaintiffs' exposure to anthrax yet, despite such knowledge, Defendants engaged in a campaign of misinformation designed to keep the employees at work. . . . The Court therefore finds that Plaintiffs have sufficiently alleged that Defendants' conduct amounted to deliberate indifference, which violated their substantive due-process rights under the State Endangerment theory. . . . Defendants' reliance on cases such as *Collins* and *Washington* to support their proposition that 'the Astate endangerment' theory of *Butera* cannot be applied to the plaintiffs' allegations concerning a federal workplace,' . . . is misguided. . . . Unlike the plaintiffs in *Washington,*. . .Plaintiffs here are not seeking constitutional redress based on Defendants' failure to protect them from a hazard that was 'inherent' in their occupation. While it is true that Defendants did not force Plaintiffs to become postal workers, potential exposure to anthrax is not a danger that one would reasonably

anticipate when accepting employment at a post office. . . Although the *Washington* court severely limited the extent to which government employers can be held constitutionally liable for injuries sustained by their employees, the Supreme Court's subsequent decision in *Collins* flatly rejected the notion that a government employee can never assert a substantive due-process claim against the government. . . Thus, the Court finds that the relevant case law does not preclude Plaintiffs' substantive due-process claims under the State-Endangerment theory.").

In ***Uhlrig v. Harder***, 64 F.3d 567 (10th Cir.1995), a therapist at a state mental hospital was killed by a criminally insane patient who, because of budgetary constraints, was housed with the general population. The court held that to state a claim for damages based on a state-created danger in the workplace:

> Plaintiff must demonstrate that (1) Uhlrig was a member of a limited and specifically definable group; (2) Defendants' conduct put Uhlrig and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

64 F.3d at 574. *See also* ***Estate of Johnson v. Weber***, 785 F.3d 267, 273 (8th Cir. 2015) ("The murder perpetrated on Ronald Johnson shocks the conscience of this Court; however, the record does not demonstrate it was deliberate indifference to not consider Robert and Berget extremely dangerous before the murder of Ronald Johnson. We need not decide whether allowing an extremely dangerous inmate to reside in general population with the opportunity to murder shocks the conscience, because the histories of Robert and Berget do not support deliberate indifference in failing to consider them highly dangerous. Even with vague notice of a planned escape attempt, the defendants were not deliberately indifferent in failing to place Robert and Berget in maximum security. No prior escape attempts included violence and none had been successful after 1987."); ***Martinez v. Uphoff,*** 265 F.3d 1130 (10th Cir. 2001) (rejecting state-created danger theory in case where prison guard was killed by escaping inmates); ***Poe v. Wyandotte County,*** No. 99-2273-JWL, 2002 WL 57257, at *8 (D.Kan. Jan. 9, 2002) (not reported) (Reviewing Tenth Circuit cases involving employees in prison context and concluding A*Liebson, Maine* and *Martinez* illustrate that generalized claims pertaining to unsatisfactory work conditions will not suffice for a danger creation theory claim because they do not meet the shock the conscience standard.")

See also ***L.W. v. Grubbs*** **(L.W. II)**, 92 F.3d 894, 900 (9th Cir. 1996):

> We conclude that in order to establish Section 1983 liability in an action against a state official for an injury to a prison employee caused by an inmate, the plaintiff must show that the state official participated in creating a dangerous condition, and acted with deliberate indifference to the known or obvious danger in subjecting the plaintiff to it. Only if the state official was deliberately indifferent does the analysis

> then proceed further to decide whether the conduct amounts to a constitutional violation. We have not added a requirement that the conscience of the federal judiciary be shocked by deliberate indifference, because the use of such subjective epithets as "gross" "reckless" and "shocking" sheds more heat than light on the thought processes courts must undertake in cases of this kind. Deliberate indifference to a known, or so obvious as to imply knowledge of, danger, by a supervisor who participated in creating the danger, is enough. Less is not enough.

b. state-created-danger cases

In ***Archie v. City of Racine***, 847 F.2d 1211 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989), a pre-***DeShaney*** decision, the Seventh Circuit concluded that there is no constitutional duty under the due process clause to provide effective rescue services. 847 F.2d at 1220. The court expressly rejected the concept of a constitutional duty flowing from some sort of "special relationship" outside of the custodial context, and carefully set out the contexts in which the state might be found to have a duty to protect under the Due Process Clause.

"When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When the state cuts off sources of private aid, it must provide replacement protection." *Id*. at 1223, distinguishing ***White v. Rochford***, 592 F.2d 381, 382-84 (7th Cir. 1979) (police had affirmative duty to protect children left abandoned in car on busy freeway after police arrested children's uncle).

See ***Bowers v. DeVito***, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him... it is as much an active tortfeasor as if it had thrown him into a snake pit.").

The state-created-danger basis for finding a duty to protect on the part of the state appears to remain intact after ***Deshaney***. *See, e.g.,* ***Mears v. Connolly***, 24 F.4th 880, 884-86 (3d Cir. 2022) ("The District Court found that Nurse Oglesby had not affirmatively acted to create a danger and that June had not suffered 'foreseeable and fairly direct' harm as a result. . . . On both points, it erred. By leaving the room during June's visit, Nurse Oglesby may have facilitated Brenden's assault. . . . Nurse Oglesby was the head of Brenden's nursing team. While under her care, his mental health had 'deteriorated significantly,' and he had 'bec[o]me progressively more psychotic.'. . Just three days before June's visit, he was 'acting bizarrely' and attacked another patient. . . These facts would have put her on notice of the serious threat Brenden posed to his mother. Indeed, she repeatedly complained to June about Brenden's behavior.The District Court found otherwise because Brenden had not attacked *June* before. But that focus is too narrow. . . . Nurse Oglesby's behavior resembles that of police officers who stopped a drunk couple, separated them, and then let the wife wander off alone. *Kneipp v. Tedder*, 95 F.3d 1199, 1209 (3d Cir. 1996). It was a cold January night, just above freezing. . . The wife fell, was knocked out, and froze. . . The police, we held, had acted affirmatively and 'made [her] more vulnerable to harm.'. . Nurse Oglesby's conduct had a similar effect on June. Nurse Oglesby assumed care but then

withdrew it, leaving June alone in a more dangerous position. . .Our holding is narrow. If June had knowingly agreed to an unsupervised visit, the result would likely be different. But on the facts alleged, Nurse Oglesby's departure deprived her of the freedom to avoid an unsupervised visit or to take other precautions. June has thus pleaded an affirmative act that put her in danger. . .June does not plead that Dr. Young took any affirmative act; his assurances do not count. But Nurse Oglesby may be liable for putting June in danger by withdrawing her supervision. So we will reverse in part and remand to let the District Court finish analyzing the other elements of June's state-created-danger claim against Nurse Oglesby."); ***Irish v. Fowler (Irish II)***, 979 F.3d 65, 67, 73-76 (1st Cir. 2020), *cert. denied,* 142 S. Ct. 74 (2021) ("In this opinion, we hold on these facts that a viable substantive due process state-created danger claim has been presented against two Maine State Police ("MSP") officers, and that it was error to grant the officers qualified immunity. Under the state-created danger substantive due process doctrine, officers may be held liable for failing to protect plaintiffs from danger created or enhanced by their affirmative acts. In doing so, we for the first time join nine other circuits in holding such a theory of substantive due process liability is viable. . . . The circuits that recognize the doctrine uniformly require that the defendant affirmatively acted to create or exacerbate a danger to a specific individual or class of people. . . Each circuit requires that the defendant's acts be highly culpable and go beyond mere negligence. . . The plaintiff also must show a causal connection between the defendant's acts and the harm. . . This circuit has repeatedly outlined the core elements of the state-created danger doctrine as they have been articulated in other circuits. This court has stated that in order to be liable under the state-created danger doctrine, the defendant must 'affirmatively act[ ] to increase the threat to an individual of third-party private harm.'. . A government official must actually have created or escalated the danger to the plaintiff and the plaintiff cannot have 'voluntarily assume[d] those risks.'. . The danger cannot be 'to the general public,' it must be 'specific' in some 'meaningful sense' to the plaintiff. . . The official's acts must cause the plaintiff's injury. . . The defendant's actions must 'shock the conscience,' and where a state actor had the 'opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice to "shock the conscience."'. . To show deliberate indifference, the plaintiff 'must, at a bare minimum, demonstrate that [the defendant] actually knew of a substantial risk of serious harm ... and disregarded that risk.'. . In evaluating whether the defendant's actions shocked the conscience, we also consider whether the defendants violated state law or proper police procedures and training. . . .We now state the necessary components for the viability of such a claim. In order to make out a state-created danger claim in the First Circuit, the plaintiff must establish:

(1) that a state actor or state actors affirmatively acted to create or enhance a danger to the plaintiff;
(2) that the act or acts created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public;
(3) that the act or acts caused the plaintiff's harm; and
(4) that the state actor's conduct, when viewed in total, shocks the conscience.

(i) Where officials have the opportunity to make unhurried judgments, deliberate indifference may shock the conscience, particularly where the state official performs multiple acts of indifference to a rising risk of acute and severe danger. To show deliberate indifference, the plaintiff must, at a bare minimum, demonstrate that the defendant actually knew of a substantial risk of serious harm

and disregarded that risk.
(ii) Where state actors must act in a matter of seconds or minutes, a higher level of culpability is required. . . . The defendants next argue that the officers' violations of state law and MSP policy cannot serve as the basis of a state-created danger claim. That is not the plaintiffs' argument. The plaintiffs' argument is that these violations are, at the very least, relevant to determining the conscience-shocking nature of the defendants' conduct and the qualified immunity inquiry. The plaintiffs' position is well based on our prior opinions of which the defendant officers had notice."); ***Lipman v. Budish***, 974 F.3d 726, 742, 746-47 (6th Cir. 2020) ("In this case, Plaintiffs say that their claims fit within both of *DeShaney*'s exceptions, and so the county and its employees should be held responsible for the events leading to Ta'Naejah's death. First, they argue that the county had custody over Ta'Naejah, both during her hospitalization and in the month immediately before she died. Second, even if the county did not have custody over Ta'Naejah, the caseworkers' decision to repeatedly interview her in the presence of Crump and Owens significantly increased her risk of abuse, and so their claims can proceed under the state-created danger doctrine. Plaintiffs arguments about the custody exception fail. Even assuming that Ta'Naejah was ever in state custody during the period at issue in the complaint, her injuries all occurred outside of that custody when she was returned to Crump and Owens, and under *DeShaney* itself, the act of returning a child to her earlier situation of parental custody cannot give rise to constitutional liability. But Plaintiffs' state-created danger argument is better supported by our case law. Drawing all reasonable inferences in their favor, the decision to repeatedly interview Ta'Naejah in front of her abusers was an affirmative act that increased her risk of private violence, and so can support a claim under the Due Process Clause. Because multiple caseworkers all interviewed Ta'Naejah in the presence of her abusers, and because the right to avoid state-created danger is clearly established in this circuit, Plaintiffs have successfully pleaded a *Monell* claim against the county based on a custom of constitutional violations, and the individual caseworkers are not entitled to qualified immunity at the current stage of this case. . . . That interviewing Ta'Naejah in front of her alleged abusers and asking about the source of her injuries increased her risk of further abuse is . . . a reasonable inference. Not only is this plausible (or at least not implausible) from a common-sense perspective, . . . but this belief is reflected in the state's and county's written policies prohibiting such interviews wherever possible[.] . . Defendants do not argue that the risk to Ta'Naejah was not increased by their actions. Instead, they say that the requirement to privately interview Ta'Naejah cannot give rise to a constitutional duty, and even if it could, the state-created danger exception does not extend to cases where the state only created a motive for private violence, as opposed to a heightened means for violence. For the reasons that follow, both of these arguments fail. First, the fact that a duty exists under state law or regulations does not mean it cannot simultaneously exist under the Constitution. At a fundamental level, the right at issue here is the right articulated in *Youngberg* and before: the right to personal security, perhaps the pinnacle of an individual's interests in life and liberty. . . Such a right is separate and apart from any state regulation or policy, and the adoption of such a policy—reflecting the importance of these interests—cannot serve to demote them from constitutional status. . . . At bottom, the type of state-created danger alleged by Plaintiffs is highly analogous to the danger in *Kallstrom* and *Nelson*: the state took some action that increased the chances that a private actor would cause the plaintiff

harm. This is enough to show an affirmative act under the doctrine. To be sure, Defendants may ultimately prevail on this issue at summary judgment or at trial, such as by showing that there was no feasible alternative to interviewing Ta'Naejah in Crump's and Owens's presence, or by showing that her risk was not increased when compared to not interviewing Ta'Naejah at all. But taking the allegations in the complaint as true, and drawing all reasonable inferences in Plaintiffs' favor, compels the conclusion that Plaintiffs have adequately alleged a claim based on state-created danger, and the district court erred in finding otherwise."); ***Hernandez v. City of San Jose***, 897 F.3d 1125, 1134, 1138-39 (9th Cir. 2018) ("Just as in *Wood*, *Penilla*, *Munger*, and *Kennedy*, on the facts alleged, the Officers' affirmative acts created a danger the Rally Attendees otherwise would not have faced. Being attacked by anti-Trump protesters was only a possibility when the Attendees arrived at the Rally. The Officers greatly increased that risk of violence when they shepherded and directed the Attendees towards the unruly mob waiting outside the Convention Center. . . . Here, the Attendees allege the Officers shepherded them into a violent crowd of protesters and actively prevented them from reaching safety. The Officers continued to implement this plan even while witnessing the violence firsthand, and even though they knew the mob had attacked Trump supporters at the Convention Center earlier that evening, and that similar, violent encounters had occurred in other cities. Viewed in the light most favorable to the Attendees, these allegations establish 'with obvious clarity' that the Officers increased the danger to the Attendees and acted with deliberate indifference to that danger, pursuant to the state-created danger doctrine. . . We therefore hold 'that the operative complaint alleges facts that allow us "to draw the reasonable inference that the [Officers are] liable for the misconduct alleged,"'. . and that the district court properly denied the Officers qualified immunity at this stage of the proceedings.); ***Matthews v. Bergdorf***, 889 F.3d 1136, 1152-53 (10th Cir. 2018) ("Plaintiffs state a cause of action against caseworkers Feather and Schraad-Dahn under the state-created danger exception. This leaves us with the question of whether the law surrounding the state-created danger exception as applied to the alleged facts was clearly established at the time of the two caseworkers' purported malfeasance. To show the law was clearly established, 'the plaintiff does not have to show the specific action at issue had been held unlawful;' rather the alleged unlawful 'conduct must have been apparent in light of preexisting law.'. . In 2001, we held a state caseworker could be held liable under the state-created danger exception for instructing a mother to stop making abuse allegations against the children's father. . . We reasoned that by actively discouraging the mother from reporting suspected wrongdoing, the caseworker increased the children's vulnerability to their father's abuse. . .We see little distinction between the affirmative act of instructing an individual to cease reporting evidence of abuse as occurred in *Currier* and the affirmative act of warning an individual so that the latter might cover up evidence of abuse as alleged here. . . Both acts effectively impede access to protective services, and perhaps additional sources of assistance, otherwise available to the victims. . . After we decided *Currier* in 2001, the law was well established in the Tenth Circuit such that a reasonable caseworker cognizant of the law would have understood the following: A caseworker's affirmative actions allegedly designed to shield and protect the Matthews in light of repeated child abuse and neglect referrals could give rise to constitutional liability under the state-created danger exception. Thus, the district court properly denied caseworker Feather's and Schraad-Dahn's defense of qualified immunity on this particular

claim. For the reasons stated, however, the district court erred in denying the remaining named caseworkers qualified immunity on Plaintiffs' state-created danger claims. . . . Today we have pronounced no new law; we have done nothing more than apply binding precedent. To allow Plaintiff's complaint to proceed on claims that have no basis in constitutional jurisprudence would thwart the aims of qualified immunity and impose excessive discovery costs on Defendants absent legal justification."); ***Nelson v. City of Madison Heights***, 845 F.3d 695, 701-03 (6th Cir. 2017) ("Officer Wolowiec suggests that it was Hilliard's decision to continue to engage in prostitution that led to her demise. However, a reasonable jury could find that Hilliard's prostitution was merely the means by which her murderers chose to lure her, not an act that led to her death. Further, a reasonable jury could find that Officer Wolowiec's act of disclosing Hillard's name to the drug dealer's companion 'substantially increas[ed] the likelihood that a private actor would deprive' her of her liberty interest in personal security. . . The district court in this case relied on *Kallstrom* to determine that summary judgment was inappropriate. In *Kallstrom*, the city released private information from undercover police officers' files, including, *inter alia*, addresses, family members' information, and social security numbers, to a criminal defense attorney who then shared it with his clients who were violent gang members. . . This court held that 'while the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts.'. .Additionally, we stated: '[l]iability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence.'. . 'However, because many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a constitutional tort under § 1983 to show "special danger" in the absence of a special relationship between the state and either the victim or the private tortfeaser.'. . 'The victim faces "special danger" where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large.'. . *"The state must have known or clearly should have known that its actions specifically endangered an individual."*. . (emphasis added). In *Kallstrom*, this court held that the state's actions of disclosing the undercover officers' information placed them and their family members in 'special danger' by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security. . . We reasoned that, '[a]nonymity is essential to the safety of undercover officers' investigating gang activity, 'especially where the gang has demonstrated a propensity for violence.'. . Similarly, Officer Wolowiec's act of disclosing Hilliard's identity to the very individual the state was supposed to protect that identity from placed Hilliard in special danger by increasing the likelihood that the private actor would deprive her of her liberty interest in personal security. . . .Like the district court, we must view the evidence in the light most favorable to Nelson. Doing so requires the conclusion that Officer Wolowiec acted with deliberate indifference when he disclosed Hilliard's identity. The evidence shows that neither he nor Hilliard knew much about Raqib other than he was a drug dealer. The evidence also reflects that Officer Wolowiec believed that Raqib could be dangerous because he removed Hilliard from the room in case Raqib showed up. The evidence shows no necessity for Officer Wolowiec to disclose Hilliard's identity during the thirty-minute window between the traffic stop and the disclosure of Hilliard's identity to Clark. Thus, a

reasonable jury could find that Officer Wolowiec acted with deliberate indifference when he told Raqib's companion that Hilliard set up Raqib. Accordingly, the district court properly denied Officer Wolowiec's summary judgment motion because a reasonable jury could find that, under the state created danger theory of liability, he engaged in affirmative acts that increased Hilliard's risk of exposure to private acts of violence, which deprived Hilliard of her clearly established Due Process right to personal security and bodily integrity."); ***L.R. v. School District of Philadelphia***, 836 F.3d 235, 244-47 (3d Cir. 2016) ("The state is responsible for the safety of very young children unable to care for themselves. Indeed, it is a responsibility the state undertakes when young children are left in its care. When Littlejohn surrendered that responsibility by releasing Jane to an unidentified adult, thereby terminating her access to the school's care, he affirmatively misused his authority just as culpably as the officers in *Kneipp* misused theirs. . . .The Fifth Circuit [in *Doe ex rel Magee v. Covington County School District*] concluded that, even assuming it recognized a state-created danger theory (to date it has not officially adopted this doctrine), the allegations failed because the complaint did 'not allege that the school knew about an immediate danger to [the student's] safety.'. . By contrast, we are comfortable concluding that Littlejohn's conduct in releasing Jane to an adult who failed to identify herself demonstrated a 'conscious disregard of a substantial risk of serious harm.'"); ***King ex rel. King v. East St. Louis School Dist. 189***, 496 F.3d 812, 817, 818 (7th Cir. 2007) ("A fair reading of the decisions of this circuit and those of our sister circuits governing the state-created danger doctrine reveal the following three principles that must govern our analysis. . . First, in order for the Due Process Clause to impose upon a state the duty to protect its citizens, the state, by its affirmative acts, must create or increase a danger faced by an individual. . . . Second, the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual. . . Third, because the right to protection against state-created dangers is derived from the substantive component of the Due Process Clause, the state's failure to protect the individual must shock the conscience."); ***Kennedy v. City of Ridgefield,*** 439 F.3d 1055, 1065 (9th Cir. 2006) ("Viewing the facts in the light most favorable to Kennedy, we find that, if accepted as true, they are sufficient to establish that Shields acted deliberately and indifferently to the danger he was creating. Kennedy warned Shields repeatedly about Burns and requested that Shields notify her first so she could protect her family. With knowledge of Burns's propensity for violence and of Kennedy's fear, and despite his promise to Kennedy to the contrary, Shields nevertheless notified Burns first. . . . Then, after notifying Burns, Shields allegedly reassured the visibly frightened Kennedy of increased security which was either never provided or plainly ineffective. Given the danger created by Shields that the Kennedys faced, we find such alleged, capricious behavior sufficient evidence of deliberate indifference."), *reh'g en banc denied,* 440 F.3d 1091 (9th Cir. 2006); ***Pena v. DePrisco***, 432 F.3d 98, 108-12 (2d Cir. 2005) ("We have been joined by a majority of our sister circuits in recognizing that a state created danger can be the basis of a substantive due process violation, . . . but in various courts the term 'state created danger' can refer to a wide range of disparate fact patterns. For example, courts have used the 'state created danger' label to describe the state's duty to protect a person from private violence when the state itself has placed that person at risk. . . . This sort of state-created-danger case seems to rely on the existence of a special relationship between the state and the victim. Some courts have, indeed, incorporated the 'special relationship'

criterion as a prerequisite to liability. . . We, by contrast, treat special relationships and state created dangers as separate and distinct theories of liability. . . . Our distinction between these categories of cases suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant. To paraphrase *Bowers*, . . . the police officers in *Dwares* did not bring the victim to the snakes; they let loose the snakes upon the victim. In applying our 'state created danger' principle, we have sought to tread a fine line between conduct that is 'passive' as in *DeShaney* and that which is 'affirmative' as in *Dwares*. . . . It is clear from the cases, we think, that to the extent that the plaintiffs allege merely that the individual defendants failed to intercede on the day of the accident, their complaints do not involve sufficient affirmative acts to violate substantive due process rights. Similarly, to the extent that the plaintiffs allege that Grey's supervisors 'stood by and did nothing' to punish Grey's previous misconduct, we think those allegations are also inadequate to state a substantive due process claim. . . A failure to interfere when misconduct takes place, and no more, is not sufficient to amount to a state created danger. . . . As the plaintiffs' counsel recognized at oral argument before us, the key question is whether the individual defendants told, or otherwise communicated to, Officer Grey that he could drink excessively and drive while intoxicated without fear of punishment. The plaintiffs argue that a reasonable factfinder could infer that the defendants' behavior constituted an implicit prior assurance to Grey that he could drink and drive with impunity. We agree that to the extent that fellow police officers and some supervisors participated in or condoned Grey's behavior, and even − in Healy's case − invited Grey to drive after drinking heavily, it could be inferred by a reasonable juror that those defendants, by their actions, implicitly but affirmatively condoned Grey's behavior and indicated to Grey that he would not be disciplined for his conduct. . . . We conclude that when, as the plaintiffs allege, state officials communicate to a private person that he or she will not be arrested, punished, or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty or property of others, those officials can be held liable under section 1983 for injury caused by the misconduct under *Dwares*. This is so even though none of the defendants are alleged to have communicated the approval explicitly. . . We emphasize that the type of claim we understand the plaintiffs to assert is based on more than a failure to prevent misbehavior and to reprimand or punish the miscreants. The plaintiffs assert that prior assurances of impunity were actually, albeit implicitly, communicated."); ***Caldwell v. City of Louisville,*** No. 03-5342, 2004 WL 2829026, at *8, *9 (6th Cir. Dec. 9, 2004) (not published) ("Under the circumstances which have been placed upon the record, it is our judgment that Christy Caldwell can succeed in establishing that Lett was deliberately indifferent to the risks and dangers that her daughter faced during the mid-months of 2002. The record establishes that the County Attorney called Lett immediately after the State court reissued a warrant for Mills' arrest on September 13th. Her refusal to act upon the warrant and the City's existing internal law enforcement practices and policies resulted in a six day delay in its execution. In refusing to act upon the arrest warrant, Lett demonstrated neither mere negligence nor an actual intent to bring about a specific harm upon Rebecca. Thus, her culpability would appear to fall within the 'middle range,' and require this Court to determine if she was deliberately indifferent under the circumstances. Clearly, Lett had several days in which to fully consider and reflect upon her decision not to serve the warrant on

Mills. The evidence also indicates that she was aware of facts from which a reasonable inference could be drawn that Rebecca faced a substantial risk of serious harm. The evidence also suggests that Lett's failure or refusal to process the warrant in a timely manner stemmed from an animus toward Rebecca who had (1) refused to provide the LPD authorities with any semblance of cooperation in dealing with a potentially dangerous situation, and (2) filed allegations of police misconduct against her. In the face of a real danger about which Lett knew or should have known, her adamant refusal to serve the warrant or have it served upon Mills by another law enforcement official clearly equates to the kind of deliberate indifference which is forbidden by the Constitution. Having found the existence of a 'State-created danger' and of deliberate indifference by a State actor, we conclude that Christy Caldwell has asserted a viable claim for a violation of her daughter's constitutional right to substantive due process."); ***Kneipp v. Tedder***, 95 F.3d 1199, 1208 (3d Cir. 1996) ("In the 1995 case of *Mark v. Borough of Hatboro*, . . .we suggested a test for applying the state-created danger theory. We found that cases predicating constitutional liability on a state-created danger theory have four common elements: 1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. 51 F.3d at 1152."); ***Bank of Illinois v. Over***, 65 F.3d 76, 78 (7th Cir. 1995) ("If the defendants' employees knowingly placed Heather in a position of danger, they would not be shielded from liability by the decision in *DeShaney*. All that *DeShaney* and the cases following it . . . hold is that the Constitution does not impose a legally enforceable duty on state officers to protect people from private violence. If the officers are complicit in the violence, they are liable."); ***Losinski v. County of Trempealeau***, 946 F.2d 544 (7th Cir. 1991) ("The essence of the Court's exception in *DeShaney* is state creation of dangers faced or involuntary subjection to known risks."); ***Ayala v. Mohave County, Ariz***., No. CV-07-8105-PHX-NVW, 2008 WL 4849963, at *4, *5, *7 (D. Ariz. Nov. 7, 2008) ("To conclude that Shamblin's danger was of his own making would require one to ignore several of the most salient facts in this case. Shamblin did not choose to walk along the highway in complete darkness; he repeatedly pleaded with the Officers for a ride. Nor was his walking on the pavement a volitional act; it was dark, he was heavily drunk, and it was a long way to town. A reasonable inference is that conditions in the dirt on the side of the road were so unfavorable or difficult to discern in the dark that he was naturally impelled to the surer footing of the roadway. Construing the facts and drawing all reasonable inferences in favor of Ayala, a reasonable juror could conclude that the Officers' actions, not Shamblin's independent choices, exposed him to a danger that he otherwise would not have faced. . . . The evidence can support a jury verdict that the Officers were deliberately indifferent to the known or obvious consequences of their actions − a collision that killed Shamblin. . . . No reasonable officer would believe that the law permits the abandonment of a person known to have been drinking along the shoulder of an extremely dark highway, miles from the next safe haven. The Officers are not immune from this suit."); ***Was v. Young***, 796 F. Supp. 1041, 1048 (E.D. Mich. 1992) ("Although *DeShaney* made clear that there is no general special relationship doctrine, . . . some lower federal courts have held the state accountable for a victim's injuries even though the victim was not in state custody, where the state has created a danger to the victim."); ***Matican v. City of New York***,

424 F.Supp.2d 497, 505, 506 (E.D.N.Y. 2006) ("In *Pena*, the Second Circuit noted in *dicta* that '[o]ur distinction between [the two exceptions to *DeShaney*] suggests that "special relationship" liability arises from the relationship between the state and a particular victim, whereas Astate created danger' liability arises from the relationship between the state and the private assailant,' 432 F.3d at 109; here, there is no evidence of a relationship between the officers and Delvalle. The Court, however, takes this aspect of *Pena* simply as a passing recognition that many of the circuit's prior state-created danger cases involved a connection between the governmental actor and the private assailant. The Court does not read *Pena* as establishing such a relationship as a *sine qua non* of state-created danger liability; governmental actors may put an individual in harm's way even in the absence of a connection to a private assailant, and the present case is an example. . . Thus, that there is no evidence of a relationship between the defendants and Delvalle is of no consequence. Another aspect of *Pena* provides more significant guidance. *Pena* reiterates that the state-created danger exception applies only when the governmental actor's conduct can be fairly characterized as 'affirmative,' as opposed to 'passive. . . . If Matican claimed only that the officers had failed to follow up on, and apprise him of, Delvalle's violent nature and release from jail, his claim would fall squarely on the 'passive' side of the line. . . Matican's claims are not so limited, however; he also claims that the officers executed the sting operation in such a way that Delvalle learned that Matican had set him up. Such conduct falls on the 'affirmative' side of the line because, taking the facts in the light most favorable to Matican, it 'assisted in creating or increasing the danger to the victim.'. . . Although the officers' handling of the sting operation can be considered a state-created danger, it does not rise to the level of a substantive due-process violation because, even taking the facts in the light most favorable to Matican, their conduct does not 'shock the conscience.' There is no indication that the officers intentionally exposed Matican to Delvalle's assault. Moreover, although the officers had time to plan the operation, it cannot be concluded that they were deliberately indifferent to Matican's safety in making those plans.").

Compare ***Welch v. City of Biddeford***, 12 F.4th 70, 75-77 (1st Cir. 2021) ("The plaintiffs present several arguments that various acts taken by Officers Wolterbeek and Dexter were affirmative acts that enhanced the danger to them. . . We affirm the district court's decision that Officer Wolterbeek took no affirmative act that enhanced the danger to the plaintiffs. We see no evidence in the record that any of Officer Wolterbeek's actions increased any danger to the plaintiffs. The plaintiffs also do not explain how any of Officer Wolterbeek's actions, on their own, could give rise to a state-created danger claim. Officers are not liable under § 1983 for the actions of other officers. . . As to Officer Dexter, we are disinclined given the changes in the law to ourselves decide the merits of the substantive due process claim. As previously stated, the parties did not have the benefit of *Irish II* in conducting their discovery and presenting evidence in this case. Nor did the district court have the benefit of that opinion, which clarified this circuit's law and now must be applied. *Irish II* is pertinent in at least three important senses and all three lead us to conclude that a remand is appropriate here. . . . First, *Irish II* established that the first prong of the state-created danger claim is whether a state actor's affirmative act 'created or enhanced' a danger to the plaintiffs. . . Without the benefit of our decision, the district court held, contrary to *Irish II*, that under the state-created danger doctrine an affirmative act must 'greatly' enhance

the danger to the plaintiffs, rather than simply 'enhance' the danger. . . Second, *Irish II* recognized that, '[w]here officials have the opportunity to make unhurried judgments, deliberate indifference may shock the conscience, particularly where the state official performs multiple acts of indifference to a rising risk of acute and severe danger.'. . This holding may bear on both the parties' argument and the district court's analysis. Finally, *Irish II* established the relevance of state and national policing policies to the state-created danger analysis. It explained that '[a] defendant's adherence to proper police procedure bears on all prongs of the qualified immunity analysis,' including whether an officer's conduct shocked the conscience and whether a reasonable officer 'would have believed that his conduct violated the Constitution.'. . The parties have presented little evidence as to police standards and training in handling disputes between neighbors or landlords and tenants. . . Such evidence may well be important to the disposition of the case. For example, officers are sometimes required to do more than Officer Dexter did here when credible death threats are made in a domestic violence context. . . There may be an analogous duty in cases such as this one. We make no determination as to whether the plaintiffs may prevail on any of the prongs of the *Irish II* state-created danger test. Indeed, it would be premature to reach the 'shocks the conscience' prong, as we here address only the district court's error in evaluating the danger-enhancing prong. Nor do we suggest that an officer leaving the scene on different facts would amount to or contribute to an affirmative act that created or enhanced the danger to others. Our narrow decision to remand, however, is consonant with the rulings of other federal courts in state-created danger cases. . . . In these circumstances, it is fairer to all concerned to remand to the district court in light of this opinion. This decision makes no new law and does not expand the state-created danger doctrine; it is simply a remand for consideration of the factors identified above. We make no factual findings, and our holding is based on legal error under *Irish II*. The district court may in its discretion permit additional discovery in light of the clarification provided by *Irish II*. The district court should address on remand whether Officer Dexter is entitled to qualified immunity and may choose to address the second step of the qualified immunity inquiry before addressing whether Officer Dexter violated the plaintiffs' substantive due process rights under the state-created danger doctrine.") *with* ***Welch v. City of Biddeford***, 12 F.4th 70, 78-81 (1st Cir. 2021) (Kayatta, J., dissenting) ("A layperson reading the facts of this case as portrayed in the majority opinion could easily conclude that as a matter of good police practice, Officer Dexter should have arrested Pak for criminal threatening (assuming that he could discount Johnson's statement that he felt harassed, but not really threatened). . . And if the people of Maine wish to render law enforcement officers personally liable for failing to make arrests in situations like this one, they may so provide as a matter of state law. . . As the Supreme Court has made clear, however, an officer's failure to arrest does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. . . . By vacating the judgment, the majority suggests that perhaps a jury could hold Officer Dexter liable -- not for failing to arrest, but for affirmatively doing something that increased the likelihood that Pak would kill. But this 'state-created danger' exception only works if what the officer did, other than failing to arrest Pak, is 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'. . . By vacating the judgment, the majority suggests that perhaps a jury could hold Officer Dexter liable -- not for failing to arrest, but for affirmatively doing something that increased

the likelihood that Pak would kill. But this 'state-created danger' exception only works if what the officer did, other than failing to arrest Pak, is 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'. . . Aside from detailing certain facts, such as Officer Dexter's failure to arrest, that could potentially support a negligence suit but not a federal claim, the majority never really says what specific facts might be found on remand and how those facts could change the result of the district court's opinion. To the contrary, my colleagues seem to hold their own opinion with pinched noses and at arm's length. So why remand a case that we already know can go nowhere under current legal standards, creating false hope for the plaintiffs? The majority cites two justifications. First, the majority alleges that *Irish v. Fowler* . . . supposedly 'clarified this circuit's law.' But the whole point of *Irish II* was that the law regarding the state-created danger doctrine was already so 'clearly established' that qualified immunity was inapplicable. . . Second, the majority notes that in describing the exception for state-created dangers, the district court asked whether Officer Dexter's actions 'greatly increas[ed] the danger' rather than whether they 'enhanc[ed] the danger.' But this difference in terminology could only matter if a jury could reasonably find that Officer Dexter engaged in affirmative conduct that both enhanced the danger and was shocking to the conscience. And as I have explained, even the majority avoids saying that Dexter's conduct could be found to have shocked the conscience. If, on remand, the district court reads the majority opinion carefully, it will note that the opinion does not actually preclude the district court from rewording its summary of the applicable enhancement standard and re-entering its order of dismissal. Should the district court so proceed, perhaps no great harm will be done, even if nothing is gained beyond a display of understandable sympathy for the victims. But there is a chance that courts -- including the district court -- will read the majority opinion otherwise. They might sensibly think that no appellate court would remand this case unless, on the present record, it thought that a judgment for plaintiffs was somehow possible. And litigants or potential litigants in other cases in which officers fail to arrest someone will cite this case as watering down the 'shock the conscience' test to a form of relabeled negligence. Such an outcome is contrary to existing law. As the Supreme Court said in *DeShaney*: 'The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to [act], they likely would have been met with charges of improper [behavior], charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.'. . The same point applies here. I must therefore respectfully dissent. Officer Dexter took no affirmative act that could conceivably be said to shock the conscience as that standard is defined in *Lewis*. And whether he should be held personally liable for not doing more is not a concern of the Due Process Clause.")

See also ***Patrick v. Great Valley School Dist***., 296 F. App'x 258, ___ (3rd Cir. 2008) ("Coach Brown's decision to match Rosenberg with a much heavier teammate for live wrestling did not occur in a time-constrained or 'hyperpressurized' environment, and thus culpability should be assessed under the deliberate indifference standard. According to wrestling expert Ken Chertow's testimony, the pairing of Rosenberg, a young and inexperienced wrestler, with a much heavier partner for live wrestling amounted to an unreasonably dangerous practice. Plaintiffs have

also introduced evidence suggesting that, despite the risks, Coach Brown matched Rosenberg with his heavier teammate because he wanted to provide the heavier wrestler with a practice partner and there were no wrestlers of comparable weight present at the practice at issue. Finally, Plaintiffs presented evidence that Coach Brown engaged in similar conduct on more than one occasion, providing, at the very least, circumstantial evidence of deliberate indifference. . . .Without deciding the issue, we hold that a rational jury could find that Coach Brown's conduct exhibited a level of culpability that shocks the conscience. Because the District Court rested its holding solely on Plaintiffs' failure to satisfy the culpability element of their state-created danger claim, we need not reach the question of whether Plaintiffs have raised a genuine issue of material fact with respect to the remaining three elements."); ***Rivas v. City of Passaic,*** 365 F.3d 181, 202, 203 (3d Cir. 2004) (Ambro, J., concurring in part) ("Judge Garth has noted the most important of the recent modifications to the *Kneipp* test, which involved its second prong: in light of the Supreme Court's decision in *County of Sacramento v. Lewis* . . . a state actor will be liable only for conduct that 'shocks the conscience'; it is no longer enough that she or he has acted in 'willful disregard' of the plaintiff's safety. . . This modification, however, is not the only one. In *Morse v. Lower Merion School District,* 132 F.3d 902 (3d Cir.1997), we reconsidered the third prong of the *Kneipp* test and suggested that there may be a 'relationship' between the state and the plaintiff merely because the plaintiff was a foreseeable victim, either individually or as a member of a discrete class. . . Moreover, we have written 'third party' out of the fourth prong of the test. We recently noted, 'The fourth element's reference to a 'third party's crime' arises from the doctrine's origin as an exception to the general rule that the state does not have a general affirmative obligation to protect its citizens from the violent acts of private individuals. The courts, however, have not limited the doctrine to cases where third parties caused the harm....' *Estate of Smith v. Marasco,* 318 F.3d 497, 506 (3d Cir.2003) . . . . In light of these substantial modifications to the *Kneipp* test, *Kneipp* as shorthand is a misnomer. To be sure, Judge Garth has mentioned the relevant refinements and considered this case by reference to the adapted rubric. I nonetheless believe that continuing to cite the *Kneipp* test as 'good law,' as Judge Garth does, minimizes the extent to which the law of state-created danger in our Circuit has changed. And while the changes to the third and fourth prongs have expanded the state-created danger doctrine, the substitution of 'shocks the conscience' for 'willful disregard' is a significant limitation. In this context, our continued adherence to *Kneipp,* if only in name, colors plaintiffs' perception of their burden and tempts them to allege constitutional violations where none exist."); ***L.W. v. Grubbs*** **(L.W. I)**, 974 F.2d 119, 120-21 (9th Cir. 1992) (plaintiff, a registered nurse, stated a constitutional claim against defendant correctional officers, where defendants knew inmate was violent sex offender, likely to assault plaintiff if alone with her, yet defendants intentionally assigned inmate to work alone with plaintiff in clinic), *cert. denied*, 113 S. Ct. 2442 (1993).

See also ***Martinez v. City of Clovis***, 943 F.3d 1260, 1270, 1272-77 (9th Cir. 2019) ("'Even in difficult cases, our court tends "to address both prongs of qualified immunity where the 'two-step procedure promotes the development of constitutional precedent' in an area where this court's guidance is ... needed."'. . Because guidance is necessary to promote the development of constitutional precedent in this area, we elect to begin with the first part of

the qualified immunity inquiry. . . . [T]he record . . . reveals that Hershberger told Pennington about Martinez's testimony relating to his prior abuse, and also stated that Martinez was not 'the right girl' for him. A reasonable jury could find that Hershberger's disclosure provoked Pennington, and that her disparaging comments emboldened Pennington to believe that he could further abuse Martinez, including by retaliating against her for her testimony, with impunity. The causal link between Hershberger's affirmative conduct and the abuse Martinez suffered that night is supported by Martinez's testimony that Pennington asked Martinez what she had told the officer while he was hitting her. That Martinez was already in danger from Pennington does not obviate a state-created danger when the state actor enhanced the risks. . . Because a reasonable jury could infer that Martinez was placed in greater danger after Hershberger disclosed Martinez's complaint and made comments to Pennington that conveyed contempt for Martinez, the first requirement of the state-created danger doctrine is satisfied. . . . .Viewing the record in the light most favorable to Martinez, a jury could reasonably find that Sanders's positive remarks about the Penningtons placed Martinez in greater danger. The positive remarks were communicated against the backdrop that Sanders knew that Pennington was an officer and that there was probable cause to arrest. . . which the jury could infer Pennington, as a police officer, understood. A reasonable jury could find that Pennington felt emboldened to continue his abuse with impunity. In fact, the following day, Pennington abused Martinez yet again. Under these circumstances, the first requirement of the state-created danger doctrine is satisfied. . . . Given the foreseeability of future domestic abuse here, a reasonable jury could find that disclosing a report of abuse while engaging in disparaging small talk with Pennington, and/or positively remarking on his family while ordering other officers not to make an arrest despite the presence of probable cause, constitutes deliberate indifference to a known or obvious danger. . .That Pennington was already under investigation by the Clovis PD for allegations of abuse against an ex-girlfriend also suggests that future abuse was a known or obvious danger. By ignoring the risk created by Pennington's violent tendencies, the officers acted with deliberate indifference toward the risk of future abuse. We hold that a reasonable jury could find that Hershberger and Sanders violated Martinez's due process right to liberty by affirmatively increasing the known and obvious danger Martinez faced. . . .We next turn to the question whether, at the time of the challenged conduct, the law was sufficiently well defined that every reasonable officer in the officers' shoes would have known that their conduct violated Martinez's right to due process. We conclude it was not. Qualified immunity therefore applies. . . . .To deny immunity, we must conclude that every reasonable official would have understood, beyond debate, that the conduct was a violation of a constitutional right. . . We begin by looking to binding precedent from the Supreme Court or our court. . . Without binding precedent, 'we look to whatever decisional law is available ... including decisions of state courts, other circuits, and district courts.'. . The precedent must be ' "controlling'—from the Ninth Circuit or the Supreme Court—or otherwise be embraced by a "consensus" of courts outside the relevant jurisdiction.'. . . Without binding precedent from our court or the Supreme Court, we may look to decisions from the other circuits. . . But we cannot rely on *Okin*, because it has not been 'embraced by a "consensus" of courts.'. . Notably, the Seventh Circuit has stated that *Okin* may be 'in tension with' *DeShaney* and the Supreme Court's decision in *Town of Castle Rock v. Gonzales*[.] . . In light of this muddled legal terrain, we cannot hold that 'every reasonable official would have understood ... beyond debate,'

that the officers' conduct here violated Martinez's right to due process. . .Hershberger and Sanders are entitled to qualified immunity because the due process right conferred in the context before us was not clearly established. Although the application of the state-created danger doctrine to this context was not apparent to every reasonable officer at the time the conduct occurred, we now establish the contours of the due process protections afforded victims of domestic violence in situations like this one. . . Significantly, 'it is the facts' of this case 'that clearly establish what the law is' going forward. . .We hold today that the state-created danger doctrine applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity. Similarly, we hold that the state-created danger doctrine applies when an officer praises an abuser in the abuser's presence after the abuser has been protected from arrest, in a manner that communicates to the abuser that the abuser may continue abusing the victim with impunity. . . Going forward, the law in this circuit will be clearly established that such conduct is unconstitutional.")

See also ***Seidle v. Neptune Township***, No. CV174428MASLHG, 2021 WL 1720867, at *10-11 (D.N.J. May 1, 2021) ("[T]he Court notes that the Prosecutor Defendants and the Neptune Township Police Department officials are differently situated. In its previous opinion, the Court held that 'the Neptune Defendants allowing Seidle to *retain* his weapon did not put Tamara in a worse situation than had they not acted at all.' . . In the Motion now before the Court, however, the question is whether Plaintiffs have plausibly alleged that the Prosecutor Defendants' decision to *rearm* Seidle with his service weapon placed Tamara in a more vulnerable position than if they had not acted to rearm him. The latter allegation against the Prosecutor Defendants, who were the ultimate decision makers as to whether Seidle would be rearmed, constitutes an affirmative act. The former allegation against Neptune Township Police Department officials is a failure to act that does not allege a state created danger claim. . . Construing the facts alleged in the TAC as true and in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have adequately alleged that the Prosecutor Defendants affirmatively used [their] authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. . . . In light of Seidle's alleged history of domestic violence, excessive force complaints, and psychological issues, Plaintiffs' allegation that the Prosecutor Defendants placed Tamara in a worse position than if they had not acted to rearm Seidle is plausible. Accordingly, Plaintiffs are entitled to discovery on their state-created danger claim."); ***Alcis v. Sch. Dist. of Philadelphia***, No. CV 16-1684, 2016 WL 7209938, at *5–6 (E.D. Pa. Dec. 13, 2016) ("The Court concludes that Ms. Furley's action in taking Alain and Benjamin to the bathroom was an affirmative use of her authority that created a danger to Alain. While the setting in this case is a middle school, not a kindergarten classroom such as in *L.R.*, plaintiffs allege that, like the students in *L.R.*, Alain and Benjamin were restricted in their movement outside of the classroom—they went to the bathroom under the supervision of a teacher. . . Like the teacher in *L.R.*, Ms. Furley had the authority to supervise students on trips to the bathroom, and she used this authority to escort Alain and Benjamin to the bathroom at the same time while she remained outside, rather than requiring that only one student use the bathroom at a time. Ms. Furley's actions are distinguishable from those

of the school officials in *Morrow v. Balaski*, 719 F.3d 160 (3d Cir. 2013), and *Brown v. School District of Philadelphia*, 456 Fed. Appx. 88 (3d Cir. 2011), two cases cited by defendants in support of their Motion. . . In *Morrow*, two students sued the school district under § 1983 for failing to protect them from harassment and physical assault by another student. . . The Third Circuit found that the school district was not liable for permitting the student accused of harassment to return to school after a suspension—despite contrary school policy—because allowing the return was 'passive inaction' rather than an affirmative act. . .In *Brown*, the Third Circuit similarly found no affirmative act by the school district where a special-education student was not provided with one-on-one supervision as promised and the student was sexually assaulted by other students at school. . . In each case, school officials did not intervene to change the environment encountered by the plaintiff students. . . Plaintiffs do not allege that Ms. Furley violated Alain's constitutional rights by not intervening during the assault; rather, plaintiffs allege that by escorting the two boys to the bathroom together, and allowing them to be in the bathroom together and unsupervised, Ms. Furley created the situation in which Alain was exposed to harm. Because plaintiffs have alleged facts to support each element of a state-created danger claim, the Court concludes that plaintiffs have sufficiently pled that a constitutional violation occurred, the first requirement for a *Monell* claim. The Court need not determine whether qualified immunity would apply to Ms. Furley because she is not a party to this case."); ***Kingsmill v. Szewczak***, 117 F. Supp. 3d 657 (E.D. Pa. 2015) ("Although the parties did not identify, and we were unable to locate, a case with a cognate claim and a constellation of factual averments, this is the type of case where the alleged conduct is outrageous enough, and the broad contours of the constitutional right sufficiently well-known, that Officer Szewczak was on notice that his conduct violated Kingsmill's constitutional rights. Officer Szewczak lured Kingsmill away from a physical altercation, engaged him in conversation, and then watched as Brown hit Kingsmill in the face with a steel pipe. Officer Szewczak reacted by telling Brown to flee the scene, declining to make a police report, and refusing to render assistance to the injured Kingsmill. . .Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . . Although this particular scenario does not appear to have been considered by our Court of Appeals, the conduct alleged is not the type qualified immunity protects. *Any* reasonable officer at the time of this incident—February 9, 2014—would have known that he had a duty not to place an individual at greater risk of injury from a physical assault by hailing him away from the altercation and then declining to intervene. A reasonable officer would have known that he had a duty not to command such an individual to comply with a directive, so that compliance would increase the risk of harm to him. This is not a case where the 'most that can be said of the state functionaries in this case is that they stood by and did nothing when ... circumstances dictated a more active role for them.'. . . Officer Szewczak exercised his authority to command Kingsmill to disengage from a physical altercation, and, as a result of Kingsmill's compliance, Brown was able to attack him from behind. Officer Szewczak's failure to warn Kingsmill that Brown was approaching from behind might appear more akin to the inaction that prior courts have found insufficient to ground liability under a state-created danger theory. But Officer Szewczak did not just fail to warn: his initial hail and interference with the assault in this circumstance placed Kingsmill at risk of additional serious injury. After placing Kingsmill in greater danger than he had been before, the officer did not bother to warn him of

Brown's oncoming assault. Nor is this a case where the exercise of a state actor's discretion did not increase the danger. . . To be sure, Officer Szewczak was not obligated to protect either Kingsmill or Brown, and his knowledge of their altercation was not sufficient to create an affirmative duty to act. But once Officer Szewczak chose to call Kingsmill to his patrol car, and chose to continue their conversation despite Brown's approach, pipe in hand, he put Kingsmill in greater danger of the assault from Brown. . . . Officer Szewczak may not have placed Kingsmill in the physical confrontation with Brown, but observing Kingsmill in such a snake pit, he made it worse by hailing him and commanding him to disengage, leaving him vulnerable to Brown's attack from behind. Such conduct is sufficiently outrageous that a reasonable officer would have known that doing so could violate Kingsmill's constitutional rights. We find that Kingsmill's right to be free from state-created danger in this particular factual circumstance was clearly established when this incident took place in February of 2014, when this incident took place. Officer Szewczak is therefore not entitled to qualified immunity."); ***Moeck v. Pleasant Valley Sch. Dist.,*** 983 F. Supp. 2d 516, 528 (M.D. Pa. 2013) ("With regard to the four factors necessary to establish a state-created danger, the defendants only challenge one. They assert that the Defendant Getz's actions did not shock the conscience. We disagree. A factfinder could find that Getz acted in such a manner as to shock the conscience. He set up this wrestling practice with a large student, known to lose his temper, with someone who was seventy pounds lighter. He cajoled the plaintiff to continue wrestling the student who outweighed him by seventy pounds even after plaintiff was initially injured. Such conduct may shock the conscience. Accordingly, we find that the plaintiff has made sufficient allegations to support the state-created danger claim against Defendant Getz.").

But see ***Barefield v. Hillman***, No. 20-6002, 2021 WL 3079693, at *3-4 (6th Cir. July 21, 2021) (not reported) ("Barefield alleged claims under both the 'special relationship' and 'state-created-danger' exceptions, but only the latter is at issue in this appeal. . . . In finding that the state's 'affirmative act' of placing T.H. into a Level 1 foster home instead of a Level 3 facility increased the risk that T.H. would be harmed by a third party, the district court analyzed whether T.H. would have been safer at a Level 3 facility than a Level 1 foster home. Under our precedents, this is not the appropriate comparison; rather, the proper comparison is with T.H.'s position before state intervention. . . . Under *Cartwright*, the relevant question is whether T.H. was safer before state intervention than after it—not whether he was safer in one state foster-care placement than another. Thus, the district court should have asked whether T.H. was safer from the risks of gang violence before he was placed into state custody, when he was living with his mother, than when he was living in Welbeck's foster home. Or, alternatively, whether he was safer when he was at large after escaping the VYA than he was in Welbeck's foster home. Either way, Barefield's claim falls short. Barefield does not argue that T.H. was safer in her custody (or living on the streets while at large) than in state custody, and indeed alleges that when T.H. was living with her, he often 'ran away for extended periods of time and associated with gang members.'. . Barefield also does not dispute that T.H. was originally placed into state custody because a court found him to be dependent and neglected. Under these facts, no reasonable juror could find that T.H. was safer before he was in state custody or when he was at large after escaping the VYA than he was in Welbeck's Level 1 foster home. . . Accordingly, there is no genuine issue of fact regarding whether

an affirmative act of the state created or increased the risk that T.H. would be harmed by gang violence. . . Barefield responds that the state has a heightened duty to prevent harm to foster children, which includes a duty to ensure that they are prevented from doing harm to themselves, and that T.H. was effectively in DCS custody the entire time. . . One of our sister circuits held that the state may be liable for a substantive-due-process violation if it places a child into a foster home that it knows is unable to adequately supervise the child. *Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995). But *Camp* analogized the state's duty to ensure a foster parent is capable of adequately supervising a child to the state's duty to ensure a child will not be harmed by state foster parents. *See id.* at 1293–97. And we have held that the well-established line of cases dealing with abusive foster homes falls under the special-relationship exception to *DeShaney* and not the state-created-danger exception. . . Barefield's arguments in this regard are therefore not pertinent to a state-created-danger claim."); ***Jane Doe v. Jackson Local Sch. Dist. Bd. of Educ.***, 954 F.3d 925, 932-37 (6th Cir. 2020) ("We have. . . carved out an exception to *DeShaney*'s rule that a state has no constitutional duty to protect individuals who are not in its custody. When rejecting the due-process claim, *DeShaney* described the case's facts as follows: 'While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.'. . We have used this sentence to adopt a 'state-created-danger theory' of substantive due process, and have gradually molded that theory into a three-part test. . . An official must initially take an 'affirmative act ... that either create[s] or increase[s] the risk that the plaintiff [will] be exposed to private acts of violence.'. . Next, this risk of private harm must rise to the level of a 'special danger' to a specific victim that exceeds the general risk of harm the public faces from the private actor. . . Last, when exacerbating this risk of harm, the official must act with a sufficiently culpable mental state. . . We can resolve this case on the third 'culpability' element alone. Our decisions have described this element in different ways. Sometimes we have said that a public official either 'must have known or clearly should have known that [the official's] actions specifically endangered an individual.'. . Other times we have said that a public official must have 'acted with the requisite culpability to establish a substantive due process violation[.]'. . .Which test applies? The latter one more accurately articulates current law. . . . Since *Lewis*, we have recognized that the culpability standard that applies to state actors who indirectly allow a private party to inflict harm should not be lower than the culpability standard that applies to state actors who directly inflict that harm themselves. . . . Our court has imported this deliberate-indifference standard into the state-created-danger context, at least when officials have '"the opportunity for reflection and unhurried judgments."'. . The standard has two parts. An official must 'be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'. . 'Having drawn the inference,' the official next must 'act or fail to act in a manner demonstrating "reckless or callous indifference" toward the individual's rights.'. . .Measured against these standards, the Does have not created a genuine dispute of material fact over the culpability element of our state-created-danger test. . . .As will often be the case in retrospect, Waltman and Singleton also could have done more when implementing this discipline. Singleton could have ensured that C.T. stayed in his assigned seat. And Waltman could have followed up with Singleton about the discipline. At most, however, the failure to take these additional precautions suggests negligence, which falls

well short of establishing the required 'callous disregard for the safety' of Minor Doe. . . . While C.T.'s sexual assault of Minor Doe undoubtedly shocks the conscience, the school employees' responses to C.T.'s earlier actions do not. And it is their conduct that is at issue here."); ***Cook v. Hopkins***, 795 F. App'x 906, ___ (5th Cir. 2019) ("It's true that Deanna might have a viable claim for violation of her due process rights if this circuit recognized the 'state-created danger theory,' which can make the state liable under § 1983 if 'it created or exacerbated the danger' of private violence against an individual. . . Plaintiffs rely heavily on an out-of-circuit opinion, *Okin v. Village of Cornwall-on-Hudson Police Department*, in which the Second Circuit held that the state-created danger theory gave rise to a substantive due process violation where 'police conduct ... encourage[d] a private citizen to engage in domestic violence, by fostering the belief that his intentionally violent behavior [would] not be confronted by arrest, punishment, or police interference.'. . But, as the district court explained, this circuit does not recognize the state-created danger theory, and we decline to do so today, despite Plaintiffs' urging that '[t]his is that case.'. . In sum, the district court did not err in dismissing Plaintiffs' due process claims against Defendants."); ***Turner v. Thomas***, 930 F.3d 640, 644-47 (4th Cir. 2019) ("Before us is Turner's claim that Thomas and Flaherty violated his substantive due process rights by ordering officers at the rally not to intervene in violence among protesters. In general, a defendant's mere failure to act does not give rise to liability for a due process violation. . . Turner seeks to avoid that rule by invoking the state-created danger exception, under which state actors may be liable for failing to protect injured parties from dangers which the state actors either created or enhanced. . . But it was not clearly established at the time of the rally that failing to intervene in violence among the protesters would violate any particular protester's due process rights. Accordingly, we agree with the district court that Thomas and Flaherty are entitled to qualified immunity, and we affirm the dismissal of Turner's complaint. . . . [W]e must determine whether, at the time of the rally, there existed legal authority giving Thomas and Flaherty fair warning that ordering officers not to intervene in violence among protesters would implicate the state-created danger doctrine and amount to a violation of protesters' due process rights. . . . Following *Pinder*'s narrow reading of the state-created danger doctrine, we have never issued a published opinion recognizing a successful state-created danger claim. Rather, our precedent on the issue has emphasized the doctrine's limited reach and the exactingness of the affirmative-conduct standard. . . . Against this background, we conclude that it was not clearly established at the time of the rally that ordering officers *not* to intervene in private violence between protesters was an affirmative act within the meaning of the state-created danger doctrine. Our precedent sets an exactingly high bar for what constitutes affirmative conduct sufficient to invoke the state-created danger doctrine. Turner has put forth no facts suggesting that a stand-down order crosses the line from inaction to action when the state conduct in *Pinder* and *Doe* did not. Acting under *Pinder*'s teaching that state actors may not be held liable for 'st[anding] by and d[oing] nothing when suspicious circumstances dictated a more active role for them,' Thomas and Flaherty could have reasonably concluded that a stand-down order violated no constitutional right. . . Accordingly, Turner has not alleged a violation of clearly established law, and Thomas and Flaherty are entitled to qualified immunity."); ***Matthews v. Bergdorf***, 889 F.3d 1136, 1150 (10th Cir. 2018) ("[T]he state-created danger exception has no application if Plaintiffs' claims are based on the mere failure of ODHS caseworkers to respond to

a referral by removing Plaintiffs from the Matthews' home and placing them in a safe environment. Such claims of inaction, no matter how prolific, are 'insufficient as a matter of law to result in liability' under the state-created danger exception. . . A state-created danger necessarily involves affirmative conduct on the part of a state actor in placing a plaintiff in danger of private violence. . .In addition to adequately pleading affirmative conduct and private violence as part and parcel of any claim arising under the state-created danger exception, a plaintiff must also adequately allege the following: (1) the state actor created the danger or increased the plaintiff's vulnerability to the danger in some way, (2) plaintiff was a member of a limited and specifically definable group, (3) the state actor's conduct put plaintiff at substantial risk of serious, immediate, and proximate harm, (4) the risk was obvious or known, (5) the state actor acted recklessly in conscious disregard of the risk, and (6) such conduct, when viewed in total, was conscience shocking."); ***Wilson-Trattner v. Campbell***, 863 F.3d 589, 594-96 (7th Cir. 2017) ("[E]ven if the appellees' failure to intervene ultimately increased the danger to Wilson-Trattner by indirectly emboldening Roeger to continue to mistreat her, that would not distinguish her case from *DeShaney*. There state officials did not remove a child from an abuser's care despite numerous obvious indications of abuse over a period of about two years. . . The abuse accordingly continued unabated, ultimately resulting in severe brain damage to the child. . .The Supreme Court nevertheless concluded that the inaction of state officials was insufficient to support a claim under the state-created danger doctrine. . . That holding is equally applicable here. The Supreme Court subsequently reaffirmed this principle in *Town of Castle Rock v. Gonzales*, in which it held that there is no due process right to have another arrested for one's own protection. . . . In sum, we find no evidence that any of the appellees created or increased a danger to Wilson-Trattner. Mere indifference or inaction in the face of private violence cannot support a substantive due process claim under *DeShaney* and *Castle Rock*. Further, Wilson-Trattner's theory that Hancock County officers increased a danger to her by implicitly condoning violence against her is both questionable in light of *DeShaney* and *Castle Rock* and unsupported by the facts. As such, the district court correctly granted summary judgment on the Plaintiff's substantive due process claim."); ***Enger v. Arnold***, 862 F.3d 571, 576 (6th Cir. 2017) ("T.F.'s death was a tragedy. Although we are appalled by the sinister acts that led to his death, it was Engler's role, as T.F.'s representative, to present us with all of the facts that support his constitutional claim against Arnold. Plaintiffs who seek to hold state officials constitutionally liable on a 'failure-to-protect' claim face a high burden under *DeShaney*. . . Engler's complaint falls far short. An assertion of a failure to act does not support a state-created-danger theory, and we may not presume facts not presented. . . Because Engler's complaint fails to state sufficient facts to support his substantive due-process claim, we affirm the district court's dismissal of this claim."); ***Estate of Reat v. Rodriguez***, 824 F.3d 960, 964-67 (10th Cir. 2016) (*amending and superceding opinion on den'l of reh'g en banc*) ("Because there are cases where we can more readily decide the law was not clearly established before reaching the more difficult question of whether there has been a constitutional violation, we may exercise discretion in deciding which prong to address first. . . This is such a case. . . .At the most general level, the parties agree that the state-created danger doctrine is clearly established in this circuit. . . .Though the elements of the state-created danger test are clearly established, it also must be clear to which fact scenarios and government actors we apply the test, and what types of conduct are 'conscience shocking' under

the sixth factor. . . .Here, Reat's Estate alleges Rodriguez violated the Fourteenth Amendment by knowingly sending the victims, who had called 911 to report an assault, back into the path of their armed attackers. It contends Rodriguez knew the attackers last had been seen speeding northward on Sheridan Boulevard only minutes earlier, yet he instructed Pal to stop on that road. He then told Pal to pull over and activate his hazard lights at a location nineteen blocks north of the place of the assault. Even after Rodriguez knew the attackers had brandished a gun, he did not suggest that Pal relocate to a less conspicuous place, nor did he send police protection. The district court held 'these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of plaintiffs' substantive due process rights under the state-created danger theory.'. . For a number of reasons, we conclude Rodriguez's conduct does not violate the clearly defined contours of the state-created danger doctrine. First, Reat's Estate cannot point to a Supreme Court or Tenth Circuit case involving misconduct by 911 operators. . . . In all of [the] cases where we found it appropriate to apply the doctrine of state-created danger, the victims were unable to care for themselves or had had limitations imposed on their freedom by state actors. . . .Rodriguez is unlike any of the defendants in our state-created danger cases. Rodriguez was not a police officer, firefighter, or other similar first responder. . . As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, 'limited in some way the liberty of a citizen to act on his own behalf.' . . Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. Unlike children in school or under the care of social workers, Reat and his companions were not incapable of acting in their own interest at the time of the shooting. Though the state-created danger doctrine itself may be clearly established, it is far from clear that it applies to Rodriguez's conduct in this particular situation. In sum, all cases cited by Reat's Estate 'are simply too factually distinct to speak clearly to the specific circumstances here.' *Mullenix*, 136 S. Ct. at 312. No reasonable 911 operator could have known that these actions would have resulted in liability under the Fourteenth Amendment."), *cert. denied,* 137 S. Ct. 1434 (2017); ***Montgomery v. City of Ames***, 829 F.3d 968, 973 (8th Cir. 2016) ("Montgomery has not established that McPherson or employees of the Center created a new danger to Montgomery or increased the danger that Bailey posed to Montgomery, because the danger to Montgomery existed before Bailey resided at the Center and would have continued to exist thereafter. Allowing Bailey to visit the Hy-Vee did not create a greater risk to Montgomery than what she would have faced if Bailey had never been assigned to the Center in the first place. . . That Bailey was able to leave the Center during the evening of September 28 simply placed Montgomery back in the same situation that she occupied before Bailey was in custody or resided at the halfway house. Montgomery was not an institutionalized person to whom the State owed a duty, *cf. Youngberg v. Romeo*, 457 U.S. 307, 317 (1982), and the Supreme Court has rejected the notion that a State has an affirmative duty, enforceable through the Due Process Clause, to protect an identified victim when it knows that a person in custody poses a special danger to that victim. . . Montgomery has not presented evidence comparable to the allegations in *Wells v. Walker*, 852

F.2d 368, 371 (8th Cir. 1988), where state officials took action under state law to provide post-release transportation for a prisoner, used a citizen's store as the closest commercial transportation pick-up point, and thus affirmatively placed the citizen in a 'unique, confrontational encounter' with a person known to have exhibited violent propensities."); ***Stiles ex rel. D.S. v. Grainger Cty., Tenn.,*** 819 F.3d 834, 855 (6th Cir. 2016) ("Most of the actions Plaintiffs identify are not affirmative acts. Failing to punish students, failing to enforce the law, failing to enforce school policy, and failing to refer assaults to McGinnis are plainly omissions rather than affirmative acts. As for the remaining actions Plaintiffs cite—blaming DS and Stiles, and misleading Plaintiffs to believe Defendants would help DS—Plaintiffs offer no explanation or evidence of how these actions increased DS's exposure to peer harassment. At most, these acts returned DS to a preexisting situation of danger. Nothing suggests DS 'was safer before' Defendants' accusatory statements and promises to help him than he was afterwards. . . As a result, Plaintiffs' due process claim cannot prevail under a state-created danger theory."); ***Doe v. Rosa***, 795 F.3d 429, 439, 442 (4th Cir. 2015) ("Under the narrow limits set by *DeShaney* and *Pinder,* to establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission. Put another way, 'state actors may not disclaim liability when they themselves throw others to the lions,' but that does not 'entitle persons who rely on promises of aid to some greater degree of protection from lions at large.'. . . Given the clear rule under *DeShaney* and *Pinder,* we conclude that the Does cannot make a § 1983 state-created danger claim against Rosa. As the district court found in granting summary judgment, the Does' claim fails because they 'cannot demonstrate that [Rosa] created or substantially enhanced the danger which resulted in [their] tragic abuse at the hands of ReVille.'. . ReVille began abusing the Does in 2005 and 2006, two years before Rosa could have been aware through the Camper Doe complaint that he was a pedophile. Quite simply, Rosa 'could not have created a danger that already existed.'. .Nor did Rosa create or increase the risk of the Does' abuse specifically during the early summer months of 2007, as the Does posit. As horrific as the abuse of the Does by ReVille was, nothing transpired between them and ReVille in the summer of 2007 that had not been ongoing for two years unrelated to any action by Rosa. As *DeShaney* makes clear, allowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger. . . .For the foregoing reasons, the state-created danger doctrine does not impose liability on Rosa for ReVille's ongoing abuse of the Does. While Rosa's undisputed failure to act brought dishonor to him and The Citadel, it did not create a constitutional cause of action. . . Rosa's alleged conduct neither created nor increased the danger ReVille already posed to the Does, and in any event, did not constitute cognizable affirmative acts with respect to ReVille's abuse of the Does."); ***Doe v. Vill. of Arlington Heights***, 782 F.3d 911, 918 (7th Cir. 2015) ("This case is not sufficiently similar to those cases in which we have applied the state-created danger exception; it is more like *Windle* and cases in which the exception was inapplicable. Del Boccio did not create the danger to Doe, nor did he do anything to make the danger to her worse. When he left Doe with the three young males, he left her just as he found her, 'plac [ing] [her] in no worse position than that in which [s]he would have been had [he] not acted at all.'. . Not even the allegations that Del Boccio called off Officer Spoerry (or falsely reported to dispatch that the subjects were gone)

created or increased the danger to Doe. Had Del Boccio not called off Officer Spoerry or falsely reported to dispatch, we have no way of knowing what would have happened. Officer Spoerry might have failed at protecting Doe. . .This contrasts with *Ross v. United States,* 910 F.2d 1422, 1424–25 (7th Cir.1990), where competent rescuers were on the scene with rescue equipment and ready to begin their efforts to rescue a drowning boy when the police arrived and ordered them to cease their efforts because county policy prohibited civilian rescue attempts. A sheriff's deputy advised the rescuers that he would arrest them upon their entry into the water and even placed his boat so as to prevent their dive. . . About thirty minutes after the boy had fallen into the water, the authorized divers arrived and pulled him out of the water. . . He died the next day. . . We held that plaintiff sufficiently alleged a constitutional injury. . . Significantly, in *Ross* the chances of a successful rescue were high, and there was a direct connection between the deputy's actions and the boy's drowning. Here, we can only speculate whether Del Boccio made Doe worse off, whether by calling off Officer Spoerry or falsely reporting to dispatch. This is not a case in which Doe was safe, or even considerably safer, before Del Boccio acted. His alleged conduct did not turn a potential danger into an actual one; Doe was in actual danger already. Therefore, Del Boccio had no constitutional duty to protect her. But even if calling off Officer Spoerry violated Doe's constitutional rights, it was not clearly established and Del Boccio nonetheless would be entitled to qualified immunity."); ***Estate of Lance v. Lewisville Independent School Dist***., 743 F.3d 982, 1001, 1002 (5th Cir. 2014) ("The *en banc* court in *Covington* also recognized that 'we have never explicitly adopted the state-created danger theory,' and 'decline[d] to use th[e] *en banc* opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory.'. . Nevertheless, the *en banc* court applied the state-created danger framework to plaintiffs' claim and concluded that plaintiffs' 'allegations do not support a claim under the state-created danger theory, even if that theory were viable in this circuit.'. . In light of *Covington's* express decision not to recognize the state-created danger theory our court has repeatedly noted its unavailability . . .Taking the view most favorable to the Lances-assuming that state-created danger is a viable theory-the evidence does not create a genuine issue of material fact."); ***Estate of C.A. v. Castro***, 547 F. App'x 621, 626, 627 (5th Cir. 2013) ("The Agwuokes ask this court to use this case to expressly adopt the state-created danger theory of liability, claiming it 'is a natural extension of both the text and purpose of Section 1983 and of Supreme Court precedent. And this is the appropriate case to adopt it.' But 'this Court has consistently refused to adopt the state-created danger theory.'. . Contrary to the Agwuokes' assertion, the district court did not hold that the state-created danger doctrine was 'not viable' in the Fifth Circuit. Rather, it evaluated the doctrine, noted that the circuit has yet to adopt the theory, and concluded that 'the present case would not appear to provide the right vehicle for the Fifth Circuit to adopt the state-created danger doctrine' because '[t]he plaintiffs would fail to satisfy one or more of the necessary elements suggested in *Covington.'* We agree. Even assuming this court recognized the theory of liability, the Agwuokes failed to raise a question of material fact on each element of a § 1983 claim against HISD premised on the state-created danger theory of liability. . . . The Agwuokes fail to establish that C.A. was a known victim, and thus do not make out a prima facie case under the state-created danger theory of liability. As a result, we follow the lead of the en banc court in *Covington* and 'decline to use this ... opportunity to adopt the state-created danger theory in this case because the

allegations would not support such a theory.'"); ***Morrow v. Balaski***, 719 F.3d 160, 178 (3d Cir. 2013) (en banc) ("We are not persuaded by the Morrows' argument that the Defendants affirmatively created or enhanced a danger to Brittany and Emily by suspending Anderson and then allowing her to return to school when the suspension ended. . . .While the Morrows make much of the fact that Defendants' failure to expel Anderson after she was adjudicated 'guilty of a crime' may have been contrary to a school policy mandating expulsion in such circumstances, we decline to hold that a school's alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here."); ***Slade v. Board of School Directors of City of Milwaukee***, 702 F.3d 1027, 1033 (7th Cir. 2012) ("Some cases say or assume that due process is violated in a case in which the state endangers a person only if the state's action 'shocks the conscience.'. . . It's not a very illuminating expression, and we don't know what it adds to recklessness. Reckless indifference to a child's safety would doubtless shock the conscience, but *County of Sacramento v. Lewis* . . . says that negligence doesn't. References to 'shocks the conscience' illustrate the tendency of some courts to 'complexify' analysis in this class of cases needlessly, as it seems to us. We have already indicated our unhappiness with the use of 'affirmative act' and 'shocks the conscience' as touchstones of liability. Neither are we happy with the suggestion in *Phillips v. County of Allegheny* . . . —a suggestion in tension with *County of Sacramento v. Lewis*—that due process can be violated by 'gross negligence or arbitrariness that indeed shocks the conscience.'. . And we get little out of the test suggested for cases of this sort in *Currier v. Doran* . . . (and earlier Tenth Circuit cases on which it relies) . . . . Shouldn't it be enough to say that it violates the due process clause for a government employee acting within the scope of his employment to commit a reckless act that by gratuitously endangering a person results in an injury to that person? Are there not virtues in simplicity, even in law? With our simple formula (which incidentally dispenses with the jargony term 'deliberate indifference'), all that remains in doubt is the choice between the civil and criminal standards of recklessness—between the known versus the merely obvious risk—but that difference as we have said has little practical significance in a litigation and none in this litigation."); ***Cutlip v. City of Toledo***, No. 10–4350, 2012 WL 2580818, at *7-*9 (6th Cir. July 5, 2012) (not reported) ("[A] situation where the victim committed suicide does not fit neatly into the state-created-danger doctrine. . . This Circuit has never found liability under the state-created-danger doctrine where the victim committed suicide, and indeed, although a number of courts have considered the state-created-danger doctrine within the context of suicide, the primary cases that have found or seriously entertained liability have involved the suicide of minors where school officials or police were in some way responsible. . . Nearly all cases that considered the state-created-danger doctrine in the context of suicide have rejected liability on the merits, finding in most cases that the municipality did not create the danger—i.e., the self-destructive impulse—through an affirmative act, and in the balance of cases that the state agents did not act with deliberate indifference or in a way that shocked the conscience. . .The rarity of *Deshaney* liability for suicides can be partially attributed to the high standard of proof in state-created-danger cases, but it is also uniquely difficult to assign constitutional liability to the government when the non-custodial victim harms himself. As a general principle, people cannot violate their own constitutional rights, and where a person makes a free and affirmative choice to end his life, the responsibility for his actions remains with him. That a state official somehow

contributed to a person's decision to commit suicide does not transform the victim into the state's agent of his own destruction. . .Given that the Supreme Court 'has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended,' the 'doctrine of judicial self-restraint' cautions us not to automatically extend the state-created-danger exception to suicide, particularly because the Supreme Court has been largely silent on this doctrine. . .Despite our reservations about the applicability of the state-created-danger doctrine to suicide cases, because there is some question in this case about whether Rocky intentionally committed suicide or whether he involuntarily pulled the trigger after the police detonated the flash-bang device, we will accept Cutlip's version of this factual dispute and proceed to apply the state-created-danger doctrine to determine whether the City can be liable under § 1983. In order to show a constitutional violation pursuant to the state-created-danger doctrine, we must find each of the following elements: (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff. *Estate of Smithers v. City of Flint,* 602 F.3d 758, 763 (6th Cir.2010) (citing *Reynolds,* 438 F.3d at 690). The only prong at issue is whether an 'affirmative act' by the police officers increased the risk that Rocky would kill himself; there is no debate that Rocky was specifically at risk and that the police officers knew that he was at risk. Crucially, the police officers' affirmative acts must be made with deliberate indifference, which this Circuit has 'equated with subjective recklessness.'. . . The one affirmative action identified by Cutlip that could have legitimately increased the danger to Rocky was detonating the flash-bang device and initiating the forced entry into Rocky's bedroom. But the record does not support a finding of deliberate indifference on the part of the police officers. . . . Because we do not find any genuine, material, disputed issue of fact and because the police did not display conscious indifference to Rocky's life, we believe that summary judgment is appropriate in this case. The police did not violate Rocky's constitutional rights, and without an underlying constitutional violation, the City is not liable under § 1983."); ***Gray v. University of Colorado Hosp. Authority***, 672 F.3d 909, 927-30 (10th Cir. 2012) ("We conclude our analysis of Plaintiffs' danger creation claim by pointing out its most glaring defect. We have observed throughout this opinion that a precondition to our application of the state-created danger theory is an act of 'private violence.' Quite simply, the complaint does not allege this indispensable precondition. Instead, the complaint alleges that the immediate or direct cause of decedent's death was negligence on the part of state actors. . . .The state-created danger theory indulges the legal fiction that an act of private violence may deprive the victim of this constitutional guarantee. Before the fiction may operate, however, a state actor must create the danger or render the victim more vulnerable to the danger that occasions the deprivation of life, liberty, or property. The *danger* that the state actor creates or enhances must be differentiated from the *harm* that the private party inflicts. Under the state-created danger theory, a constitutional deprivation is *dependent* on a private act that deprives the victim of life, liberty, or property, even though private action itself is never cognizable under § 1983. The state actor's affirmative act creating the danger or rendering the victim more vulnerable to it does *not* constitute a constitutional deprivation. The Due Process

Clause does not provide an individual the right to be free from state-created dangers in a vacuum. This is because 'an increased risk is not *itself* a deprivation of life, liberty, or property.'. . A 'would-be' victim who averts the danger, and thus the harm, may not claim the denial of a constitutional right to be free from state-created dangers. That would be nonsensical. Although the State may incur a constitutional duty to protect the victim from harm its conduct has rendered more likely, the victim has suffered no constitutional deprivation if the victim is not harmed. . . .But not just any private act will suffice. The private act must be a violent one. . . . The view that a private party must act with some degree of deliberateness before a victim's harm is actionable under the state-created danger theory is sound. This is because the harm associated with a negligent act is never constitutionally cognizable under the Due Process Clause. . . . Reason dictates that if state actors are not answerable under § 1983 for their *own* negligent acts, they are not answerable under § 1983 where a private party's underlying negligent act is directly responsible for the harm. The rationale is simple: The victim has not suffered a constitutional deprivation in either case. . . . Plaintiffs' complaint plainly alleges that those individuals in the EMU responsible for monitoring decedent were 'employees and/or agents' of Defendant hospital acting 'under color of state law.' Plaintiffs' complaint also plainly alleges those individuals are responsible for 'negligently causing' decedent's death. A precondition to our application of the state-created danger theory is 'private violence.' The conduct Plaintiffs allege to be directly responsible for decedent's death is neither private nor violent. Accordingly, because the state-created danger theory of constitutional liability has no role to play in a proper resolution of Plaintiffs' grievance, the judgment of the district court is AFFIRMED."); ***Estate of Smithers ex rel. Norris v. City of Flint***, 602 F.3d 758, 764 (6th Cir. 2010) ("Plaintiffs here argue that the officers engaged in an affirmative act that created a danger when they released Washington from custody on the trespassing charge rather than holding her at least overnight on a domestic violence charge, creating an illusion of safety for plaintiffs. They suggest that the officers' decision to release Washington operated as an approval of her threats. However, while this action may have been ill-advised, the officers' failure to hold Washington did not constitute an affirmative act. The officers exercised their discretion in arresting Washington for trespassing, rather than for domestic violence, for which they are protected under *Castle Rock.* Thus, the officers' first affirmative act had the effect of protecting Washington's eventual victims, at least for a short period of time. Their second affirmative act, releasing Washington from custody, did not 'create'" or 'increase' the danger to plaintiffs. The officers did not require or encourage plaintiffs to remain in the unlocked house or suggest that Washington would be held for 20 hours so as to imply that plaintiffs would be safe. Their actions did not constitute an approval of Washington's threats any more than the return of the children in *DeShaney* or *Bukowski* encouraged that those children should be further harmed. As in those cases, these events were tragic; however, the officers' actions could not have been interpreted by a reasonable juror to have created or increased the danger to plaintiffs."); ***Sandage v. Board of Com'rs of Vanderburgh County***, 548 F.3d 595, 599, 600 (7th Cir. 2008) ("The first principle is thus the key one, and its requirement of 'affirmative acts' distinguishes our case from *Monfils*. We add only that 'create or increase' must not be interpreted so broadly as to erase the essential distinction between endangering and failing to protect. If all that were required was a causal relation between inaction and harm, the rule of *DeShaney* would be undone, . . . since, had it not been for the state's inaction

in *DeShaney*, there would have been no injury. The three cases that the opinion in *King* cites for the proposition that the state must by its 'affirmative acts ... create or increase' the danger to the victim − *Windle v. City of Marion*, 321 F.3d 658 (7th Cir.2003); *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir.2006), and *Monfils* − are either cases, like this one, of inaction by law enforcement personnel (*Windle* and *Bright*), so that there was no liability, or a case (*Monfils*) in which law enforcement personnel were responsible for the danger. When courts speak of the state's 'increasing' the danger of private violence, they mean the state did something that turned a potential danger into an actual one, rather than that it just stood by and did nothing to prevent private violence. That was *Monfils*; it is not this case; and after *Castle Rock* a broken promise − the essential act of which both the plaintiff in that case and the present plaintiffs complain (though there was more in *Monfils* − the handing over of the tape to the murderer) − may very well not be enough."); ***Walter v. Pike County, Pa.***, 544 F.3d 182, 195, 196 (3d Cir. 2008) ("If a state-created danger claim cannot be predicated on a failure to arrest, neither can it be predicated on a failure to provide protection. . . . And if an assurance of well-being despite the presence of a threat is not a sufficiently affirmative act, neither is the mere failure to warn of a threat. . . . Here, the District Court held that a jury could reasonably find that the defendants affirmatively used their authority in 2001, by 'allowing Michael Walter to become involved in eliciting a confession from Joseph Stacy,' . . . and could reasonably find that the defendants were deliberately indifferent in 2002 in their 'failure to warn the Walter family of Joseph Stacy's menacing behavior....'. . . But for the reasons we have articulated above, these findings would not amount to a constitutional violation-they would not establish that the defendants committed a *culpable* act, only that they acted in 2001 and then, months later, shocked the conscience through inaction."); ***Barber v. Overton***, 496 F.3d 449, 456, 457 (6th Cir. 2007) ("We belabor the discussion of *Kallstrom* to emphasize what it did *not* do: It did not create a broad right protecting plaintiffs' personal information. Rather, *Kallstrom* created a narrowly tailored right, limited to circumstances where the information disclosed was particularly sensitive and the persons to whom it was disclosed were particularly dangerous *vis-a-vis the plaintiffs.* We cannot conclude that social security numbers and birth dates are tantamount to the sensitive information disclosed in *Kallstrom.* The court's careful footnote in that case, instructing the district court on remand, should put that to rest. If mere disclosure of social security numbers were sufficient then there was no need for the remand. In addition, *Kallstrom* did not restrict any private information from disclosure to anyone in any circumstances, but rather only *certain* restricted information when the plaintiffs had a reason to fear retaliation from persons to whom it was disclosed. In light of our narrow reading of the substantive due process right to non-disclosure privacy, we conclude that the release of the social security numbers was not sensitive enough nor the threat of retaliation apparent enough to warrant constitutional protection here. . . First, scary though it may be, the diligent miscreant who wishes to exact vengeance can locate a person with limited information. Plaintiffs' names, general whereabouts (near the IMAX facility), and approximate ages were already known to these prisoners. While the social security numbers and birth dates might have pinpointed the residence of a particular plaintiff, there are other methods of learning where persons reside; several hours in a car or several telephone calls might well provide the very same information. Voter registration records, county property records, and a plethora of other publically available sources exist through

which persons can discover the residency of an individual and prisoners' accomplices have as ready access to them as any other citizen. The plaintiffs do not allege that this information allowed the prisoners to discover information that they would have been unable to otherwise. Therefore, this information does not rise to the level of sensitivity we found constitutionally significant in *Kallstrom*."); ***Draw v. City of Lincoln Park***, 491 F.3d 550, 554, 556 (6th Cir. 2007) ("As an initial matter, we first consider whether the instant case is distinguishable from our decision in *Jones* because the Plaintiffs-Appellants' claim here is predicated on a different theory of liability. As noted above, the Plaintiffs-Appellants say that the district court erred in failing to evaluate their § 1983 claim under a 'direct injury' theory of liability rather than according to the 'state created danger' doctrine. . . . Here, the defendant officers' conduct was irresponsible. However, no evidence in the record indicates the officers intended to cause any harm through their actions or otherwise acted in a manner sufficient to transform wrongful behavior into unconstitutional conduct. . . . Here, even if the Court construes the defendant officers' conduct as conspiratorial, there is no evidence that the goal of the purported conspiracy − the facilitation of an illegal drag race − was in and of itself unconstitutional. Although violative of Michigan law, drag racing does not implicate constitutional concerns. Second, the Plaintiffs-Appellants' direct-injury argument ignores the fact that otherwise impermissible police conduct must truly be extraordinary in nature to qualify as 'conscience shocking.' . . . Here, the defendant officers stupidly encouraged third parties to engage in tortious conduct. Without question, such conduct showed incredibly poor judgment. However, the conduct in question does not meet the high threshold set out in *Lewis*. Accordingly, we find that the Plaintiffs-Appellants' claims are unsupportable under a direct-injury theory of liability."); ***Ye v. United States***, 484 F.3d 634, 639-41 (3d Cir. 2007) ("The three necessary conditions to satisfy the fourth element of a state-created danger claim are that: (1) a state actor exercised his or her authority, (2) the state actor took an affirmative action, and (3) this act created a danger to the citizen or rendered the citizen more vulnerable to danger than if the state had not acted at all. . . . Dr. Kim argues that an assurance or misrepresentation, without more, cannot constitute an 'affirmative' act for purposes of the state-created danger inquiry. This Court has never expressly addressed this issue. We hold that a mere assurance cannot form the basis of a state-created danger claim. . . .Although the *DeShaney* Court did not hold that words alone could not rise to the level of affirmative act that works a deprivation of liberty, the Supreme Court did provide two examples, incarceration and institutionalization, to guide our analysis. Ye cannot prevail unless Dr. Kim's misrepresentation that Ye had 'nothing to worry about and that he [was] fine' falls into the third category of a 'restraint of personal liberty' that is 'similar' to incarceration or institutionalization. *DeShaney* did not conclusively answer this question, nor was the Court focused on state-created liability, giving much greater consideration to circumstances that would give rise to the special relationship exception. However, the Court made clear that a 'deprivation of liberty' is a bedrock requirement of state liability under the substantive due process clause. Ye's claim places before us the question of whether a mere assurance can constitute an affirmative act that invaded Ye's personal liberty. We implicitly rejected this argument in *Bright* and do so expressly now."); ***Koulta v. Merciez***, 477 F.3d 442, 446, 447 (6th Cir. 2007) ("The officers' failure to administer a breathalyzer test (or otherwise to determine the extent of Lucero's drinking) before ordering her to leave the property may well have been negligent, but it did not 'create' or 'increase'

the danger − of Lucero drinking and driving − that pre-dated their arrival on the scene. . . . In the final analysis, Lucero's admitted proclivity to drink and drive that evening placed Koulta (and other people using the roadways) in as much danger before the officers arrived as afterwards. And much as the officers were in a position to head off the tragedy that materialized minutes later, a reality (and memory) that no court decision will eliminate, their conduct was no more an affirmative risk-creating act than the conduct of the officers in *DeShaney* (who returned an abused child to the custody of his abusive father) or *Bukowsk*i (who returned a mentally disabled girl to the stranger who had been sexually abusing her).[distinguishing *Pena v. DePrisco*, 432 F.3d 98 (2d Cir.2005) and *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.1993)]"); ***Johnson v. City of Seattle***, 474 F.3d 634, 641 (9th Cir. 2007) ("In contrast to the plaintiffs in *Wood*, *Penilla*, *Munger*, *Grubbs* and *Kennedy*, the Pioneer Square Plaintiffs have failed to offer evidence that the Defendants engaged in affirmative conduct that enhanced the dangers the Pioneer Square Plaintiffs exposed themselves to by participating in the Mardi Gras celebration. The decision to switch from a more aggressive operation plan to a more passive one was not affirmative conduct that placed the Pioneer Square Plaintiffs in danger, because it did not place them in any worse position than they would have been in had the police not come up with any operational plan whatsoever. . . . [T]he fact that the police at one point had an operational plan that might have more effectively controlled the crowds at Pioneer Square does not mean that an alteration to this plan was affirmative conduct that placed the Pioneer Square Plaintiffs in danger. The police did not communicate anything about their plans to the Pioneer Square Plaintiffs prior to the incident. Even if proved not the most effective means to combat the violent conduct of private parties, the more passive operational plan that the police ultimately implemented did not violate substantive due process because it 'placed [the Pioneer Square Plaintiffs] in no worse position than that in which [they] would have been had [the Defendants] not acted at all.'"); ***Carver v. City of Cincinnati***, 474 F.3d 283, 286, 287 (6th Cir. 2007) ("Here, the officers removed everyone from the apartment and they controlled the keys to the apartment. It has not been suggested that anyone tried to enter the apartment to render aid to Carver. Nor has it been established that anyone, whether it be the officers or the people removed from the apartment, knew of Carver's need for assistance. Therefore, there is no 'evidence that any private rescue was available or attempted.'. . The officers' act of closing off the apartment to conduct an investigation into the death of Smith-Sandusky did nothing in and of itself to increase the risk of harm to Carver. No allegation has been made that Carver died while the officers were inside the apartment with him. The fact that Carver died from an apparent self-induced drug overdose is tragic. This tragedy, however, does not allow us to usurp Supreme Court precedent that the officers were under no general duty to render aid to Carver. . . In the absence of any allegation that a private rescue was attempted, the officers did not commit a constitutional violation by securing the apartment and leaving Carver lying on the couch."); ***Tanner v. County of Lenawee***, 452 F.3d 472, 478, 479 (6th Cir. 2006) (state-created-danger exception has never been extended to cover situations where the police simply respond to the scene of a 911 call); ***Bright v. Westmoreland County,*** 443 F.3d 276, 283, 284 (3d Cir. 2006) ("We conclude that the state cannot 'create danger' giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the

revocation of the probationer's probation."); ***Jones v. Reynolds,*** 438 F.3d 685, 688, 691, 694, 698, 699 (6th Cir. 2006) ("Because the officers did not have custody of Denise Jones at the time of the accident, because the officers' actions did not place Denise Jones in any more danger than she voluntarily undertook before they arrived and because the officers' participation in this tragedy did not specially place Denise Jones at any more risk than the 150-300 people attending the drag race, all relevant precedent requires us to uphold the judgment of the district court summarily rejecting this constitutional claim. . . . Nothing in the record indicates that the race would not have proceeded if the officers had never arrived at the scene. And nothing in the record indicates that the officers made Jones 'more vulnerable' to the risk that she had already undertaken by voluntarily choosing to watch the race. . . . Even if an officer bet on the drag race, as one spectator alleges, and even if the officers played rap music for 15 minutes rather than 2 minutes, as other spectators allege, that does not change matters. While such conduct certainly would not have discouraged the participants from proceeding with the race, it also cannot be said that it placed the drivers or spectators in greater danger than if the police had never arrived. As deeply regrettable and ultimately tragic as the officers' actions were, no evidence suggests that their conduct altered the risk of harm to Denise Jones. . . . Faced with these kinds of assertions, it is tempting to say that they satisfy the 'state created danger' doctrine. But, to do so, we would have to say that the doctrine covers conduct it does not − that it covers state action that does not create or increase the risk of danger to the victim and that it applies to state action that does not specifically increase the risk of danger to a discrete individual or group of individuals. And even were we to move the doctrine in these directions, that would not advance this claim because the very act of modifying these rules would defeat plaintiff's obligation to show that the officers violated 'clearly established' law. While we decline to extend the doctrine in this case, nothing in our decision prevents future litigants from arguing what the plaintiff has not argued here − that the alleged actions of the officers converted the private misconduct of the drivers into public misconduct and in the process converted this claim into a direct-injury constitutional claim under the *Lewis,* as opposed to *DeShaney,* line of cases."); ***May v. Franklin County Commissioners***, 437 F.3d 579, 585, 586 (6th Cir. 2006) ("In both *Cartwright v. City of Marine City* and *Bukowski v. City of Akron*, we discussed the 'Catch-22' that these sorts of scenarios can create for police officers, where they face a danger of potential liability whether they take action to attempt a rescue or they fail to do so. . . Franklin County would undoubtedly face legal and moral objections, and rightly so, if its Comm Center personnel had failed to dispatch an officer to Kirk's apartment after her repeated calls to 911. May's proposition that appellees violated Kirk's constitutional rights by sending a police cruiser in response to her 911 calls for help is unsettling, and we decline to interpret the Due Process Clause in such a manner as to discourage law enforcement officers from responding to requests for assistance. May has not produced any evidence that Franklin County's dispatch of police to Kirk's apartment created or increased the risk that Moss would harm Kirk. We therefore affirm the district court's conclusion that the dispatch is not an affirmative act under *Kallstrom*. . . .The inability of the Franklin County authorities to prevent Kirk's murder despite her numerous 911 calls to their emergency call center is deeply troubling. May has produced persuasive evidence that appellees failed to follow their established procedure for domestic violence calls when fielding Kirk's first 911 call, and that appellees may also have underestimated the urgency of Kirk's

situation during the second 911 call. Had appellees attempted to obtain more information from Kirk during her phone calls to 911, it is possible that their attempt to intervene would have been more aggressive, and the tragic events of that night might have unfolded differently. While appellees' actions in response to Kirk's calls for assistance may not be faultless, none of appellees' actions directly increased Kirk's vulnerability to danger or placed her in harm's way. . . May has been unable to show that any of appellees' actions constitute affirmative acts as *Kallstrom* requires to sustain her state-created-danger claim."); ***McQueen v. Beecher Community Schools***, 433 F.3d 460, 464-66 (6th Cir. 2006) ("Every regional court of appeals, including this one, has walked through the door left open by the Court and recognized the state-created-danger theory of constitutional liability under § 1983. . . In *Kallstrom*, we recognized the state-created-danger theory of due process liability and laid out three important requirements: an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from the public at large, and the requisite degree of state culpability. . . Although we have sometimes assumed the affirmative-act-plus-risk-creation requirement to be satisfied, . . . *Kallstrom* remains the only time we have explicitly held it to be met. . . . We have not previously considered whether it constitutes an affirmative-act-plus-risk-creation under *Kallstrom* for a teacher to leave students − and more pertinently, the student who ultimately causes the injury − unsupervised. . . The decisions reviewed above, however, provide enough guidance to conclude that Judd's leaving Smith and several of his classmates unsupervised in the classroom was not an affirmative act that created or increased the risk for purposes of *Kallstrom*. The cases most applicable to the situation here are those in which the state officials performed some act, . . .but we held that there was no affirmative act that created or increased the risk because the victim would have been in about the same or even greater danger even if the state officials had done nothing. . . .[J]ust as the plaintiffs in *Cartwright* and *Bukowski* would have faced at least the same danger if the police had not acted, Doe would have faced the danger of Smith drawing his gun and firing at her even if Judd had not acted (i.e., if Judd had remained in the classroom at all relevant times); ***Jackson v. Schultz***, 429 F.3d 586, 591, 592 (6th Cir. 2005) ("Even liberally construing Jackson's allegations, she has also not pled sufficient facts to show a constitutional violation based on the 'stated-created danger' exception. . . . Jackson . . .does not state a constitutional claim that the EMTs hindered third party aid. . . . The EMTs did not discourage others from entering the ambulance. All evidence indicates decedent was free to leave (or be removed from) the ambulance. Furthermore, there is no evidence that any private rescue was available or attempted. No set of facts consistent with the allegations shows that the EMTs interfered with private aid. Thus, Jackson does not allege sufficient facts to support a claim for a constitutional violation based on cutting off private aid."); ***Cartwright v. City of Marine City***, 336 F.3d 487, 493 (6th Cir. 2003) ("The facts of this case indicate, at most, a failure to act; they do not rise to the level of affirmative acts which created or increased the risk that the plaintiff would be exposed to an act of violence by a third party. Defendant officers took plaintiff from a place of great danger: the shoulder of a dark, foggy, two-lane highway. They placed him in a place of lesser danger: the parking lot of an open convenience store, where telephones, restrooms, and food and drink were available to him. . . . The question is not whether the victim was safer *during* the state action, but whether he was safer *before* the state action than he was *after* it."); ***Bukowski v. City of Akron,*** 326 F.3d 702, 709 (6th Cir. 2003) ("It seems difficult to characterize the actions

of the officials as affirmative acts within the meaning of *DeShaney.* The officials arguably did nothing to increase Bukowski's vulnerability to danger. They merely returned her at her request to Hall's residence, where they originally had found her. The Bukowskis argue that the police did not merely refuse to act: instead of simply allowing her to leave the police station, they affirmatively acted by returning her to Hall's residence. Whether or not the defendants 'acted' may be a difficult question in the abstract, but *DeShaney* makes clear that the acts of the officials here clearly fall on the inaction side of the line. Although in *DeShaney* the state returned Joshua to the ultimate aggressor, the *DeShaney* Court explicitly rejected the idea that such acts met the state-action requirement. . . . Examining the quality of governmental involvement here, it is apparent that the government was no more involved in making Bukowski more vulnerable to private violence than it was in *DeShaney* − in both cases, the government was merely returning a person to a situation with a preexisting danger."); ***Hernandez v. City of Goshen,*** 324 F.3d 535, 539 (7th Cir. 2003) ("In this case, the pleadings allege that the Goshen police department learned from Nu-Wood plant manager Greg Oswald's phone call that employee Robert Wissman threatened to do bodily harm to Nu-Wood employees, and that Oswald knew Wissman had access to guns. No other evidence of the City's knowledge or involvement with the situation at Nu-Wood appears on the face of the complaint. This is even less information about the specific danger facing Hernandez and Garza than the police had in *Windle* or the social workers had in *DeShaney*, and we therefore do not find that the City, through its police department's decision not to investigate the phoned-in threat, created or increased the danger faced by the Plaintiffs and their fellow Nu-Wood employees that day."); ***Windle v. City of Marion,*** 321 F.3d 658, 662, 663 (7th Cir. 2003) ("In focusing exclusively on whether the police acted affirmatively, Appellant fails to grasp that she has to establish that the police failed to protect her from a danger they created or made worse. She confuses the inert failure to protect with the proactive creation or exacerbation of danger. In this case the police did nothing to create a danger, nor did they do anything to make worse any danger Chaunce already faced. . . . If the police had never overheard the conversation, and had never been involved at all, the danger faced by Chaunce would likely have been the same or perhaps worse. The police did not place Chaunce in the custody of Rigsbee, and they did nothing to assist Rigsbee. They just failed to intervene until Raymer thought that matters had reached a crisis. This case is indistinguishable from *DeShaney* where the Supreme Court concluded that no constitutional violation had occurred when state actors who may have been aware that a child was being abused by his father did nothing to protect the child. . . . Appellant has not included in this suit a claim against Rigsbee, who as a teacher could also be considered a state actor. Rigsbee's status as a potential state actor does however raise one important question regarding the duties of the Marion Police. In certain cases liability under § 1983 may exist when one state actor fails to intervene to prevent another state actor from causing direct harm to a victim. *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir.1994). Just such a case can exist when one law enforcement officer has reason to know 'that any constitutional violation has been committed by [another] law enforcement official; and the officer had a realistic opportunity to intervene to prevent the harm from occurring.' *Id*. Liability under this theory is certainly not limited to the context of a police officer's relationship with other officers in her department; but on the other hand the rule is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees. In the

instant case there appears no particular governmental connection between Rigsbee and the Marion Police. Appellant has not alleged that the Marion Police have any authority over teachers that they do not have over any other citizen of Marion or that they share any joint responsibility with school officials. To be sure, we are not today deciding a case where an employee of one government entity failed to intervene to prevent harm by an employee of another entity where the two entities shared, in practice, some relationship. Against the background of this case, *Yang* does not apply."); ***Brown v. Commonwealth of Pennsylvania Dept. of Health Emergency Medical Services Training Institute***, 318 F.3d 473, 478 (3d Cir. 2003) ("We have not decided whether the Due Process Clause requires states to provide adequate or competent rescue services when they have chosen to undertake these services. Other appellate courts addressing this question have held that states have no constitutional obligation to provide competent rescue services. [citing cases] We agree with the reasoning of these decisions and join these Circuits in holding that there is no federal constitutional right to rescue services, competent or otherwise. Moreover, because the Due Process Clause does not require the State to provide rescue services, it follows that we cannot interpret that clause so as to place an affirmative obligation on the State to provide competent rescue services if it chooses to provide them."); ***Ruiz v. McDonnell,*** 299 F.3d 1173, 1183 (10th Cir. 2002) ("Here, the crux of Ms. Ruiz's claim is that J.R. suffered injuries of constitutional proportions because the State Defendants improperly licensed Tender Heart after failing to conduct an investigation into the facility. However, we do not view the mere licensure of Tender Heart as constituting the requisite affirmative conduct necessary to state a viable § 1983 claim. Specifically, the improper licensure did not impose an immediate threat of harm. Rather, it presented a threat of an indefinite range and duration. Moreover, the licensure affected the public at large; it was not aimed at J.R. or Ms. Ruiz directly. Unlike the direct placement of a child into an abusive home, the mere licensure of Tender Heart was not an act directed at J.R. which, in and of itself, placed J.R. in danger. For those reasons, we conclude that Ms. Ruiz has failed to allege any affirmative conduct on the part of the State Defendants that created or increased the danger to J.R."); ***White v. Lemacks***, 183 F.3d 1253, 1259 (11th Cir. 1999) ("[T]he 'special relationship' and 'special danger' doctrines applied in our decision in *Cornelius* [*v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)] are no longer good law, having been superseded by the standard employed by the Supreme Court in *Collins*. Under *Collins*, state and local government officials violate the substantive due process rights of individuals not in custody only when those officials cause harm by engaging in conduct that is 'arbitrary, or conscience shocking, in a constitutional sense,' and that standard is to be narrowly interpreted and applied. While deliberate indifference to the safety of government employees in the workplace may constitute a tort under state law, it does not rise to the level of a substantive due process violation under the federal Constitution. . . . In the seven years since *Collins*, we have questioned at least five times whether *Cornelius* retains any viability after *Collins*. . . . In the face of the obvious, it seems we have never quite been able to say goodbye to *Cornelius*, always avoiding the question of whether it has actually left the realm of living precedent in the wake of *Collins*. . . . Enough is enough. Like a favorite uncle who has passed away in the parlor, *Cornelius* needs to be interred. We do so now. Recognizing that it was dealt a fatal blow by *Collins*, we pronounce *Cornelius* dead and buried."); ***Davis v. Fulton County***, 90 F.3d 1346, 1352 (8th Cir. 1996) (evidence was insufficient to establish special duty owed to woman raped by

inmate; failure to adequately supervise prisoner amounted to negligence which could not be the basis of constitutional tort claim); ***Liebson v. New Mexico Corrections Dep't***, 73 F.3d 275, 277 (10th Cir. 1996) (where prison librarian was kidnapped and raped by inmate, court concluded that, "[a]lthough plaintiffs have alleged that defendants' removal of the security officer was done with 'deliberate indifference and in complete disregard' of Ms. Liebson's rights, they have not alleged any specific facts, as did the plaintiff in *Grubbs*, to indicate that defendants' actions were egregious, outrageous, or fraught with unreasonable risk.").

Compare ***Graves v. Lioi***, 930 F.3d 307, 319-30 (4th Cir. 2019), *reh'g en banc denied*, 777 F. App'x 76 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1118 (2020) ("[T]he state-created doctrine is a 'narrow' exception to the general rule that state actors are not liable for harm caused by third parties. . . It applies only when the state affirmatively acts to create or increase the risk that resulted in the victim's injury. Specifically, 'a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission.'. . . The doctrine's conception of an 'affirmative act' is also quite limited. . . . This narrowly confines the scope of qualifying 'affirmative acts' to those that directly create or increase, i.e., cause, the risk a third party posed to the victim. . . . Contrary to Robinson's argument and the dissent's conclusion, discovery did not strengthen her earlier allegations that BCPD officers actively conspired to help Williams avoid arrest by interfering with the execution of his arrest warrant. Quite to the contrary. Even viewing the evidence in Robinson's favor, none of the 'affirmative acts' she relies on can support a due process claim. Our conclusion follows from a straight-forward application of the Supreme Court's decisions in *DeShaney* and *Town of Castle Rock*, as well as this Court's decisions in *Pinder* and *Doe*. . . . At its core, Robinson's claim suffers the same fundamental problem identified in *Town of Castle Rock*, *DeShaney*, *Pinder*, and *Doe*—an attempt to turn inactions and omissions into affirmative acts and to convert what might be a basis for state tort liability into a federal constitutional violation. As the Supreme Court recognized in *Town of Castle Rock*, even mandatory language in a temporary restraining order—or, here, an arrest warrant—does not strip police officers of enforcement discretion. When Lioi and Russell allowed Williams to self-surrender, they were exercising the long tradition of police discretion concerning the circumstances of enforcing a misdemeanor arrest warrant. . . Exercising this sort of routine police discretion does not give rise to a state-created danger. . . To hold otherwise would turn the thousands of instances where the police agree to allow a charged individual to self-surrender into a conspiracy to evade arrest. No precedent countenances such a reading. . . .In short, these circumstances do not give rise to liability under the Due Process Clause. Notably, neither Robinson nor the dissenting opinion cites a single case where an officer's failure to serve a misdemeanor arrest warrant or decision to allow an individual to self-surrender constituted an 'affirmative act' establishing liability under the state-created danger theory. Nor could they do so, as such acts fail to meet the high standard of being 'akin to [the state] actor itself directly causing harm to' Mrs. Williams. . . Our reliance on *Town of Castle Rock* and conclusion that many of Robinson's arguments are based on facts that are properly characterized as omissions or failures to act do not constitute an 'about-face,'. . from our prior decision. We previously recognized the Supreme Court's holding in that case that police officers have discretion in such enforcement and

service decisions and cannot be liable for exercising that discretion because individuals do not have a property interest in such police enforcement. . . We held that Robinson's allegations were distinguishable from *Town of Castle Rock*, however, because 'Lioi's alleged conduct ... was *not confined to* a failure to execute the arrest warrant' given that Robinson alleged that he '*affirmatively acted to interfere with execution of the warrant by conspiring* with Cleaven Williams to evade capture and remain at large.'. . But after discovery, Robinson has marshaled evidence supporting only conduct that *is* confined to a failure to execute the warrant.") *with* ***Graves v. Lioi***, 930 F.3d 307, 334-50 (4th Cir. 2019), *reh'g en banc denied*, 777 F. App'x 76 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1118 (2020) (Gregory, C.J., dissenting) ("At bottom, Appellants have shown that Deputy Lioi and Major Melvin Russell took affirmative steps to allow Cleaven Williams—a community leader and their acquaintance—to evade arrest until a date deemed most convenient by him, a date after he was able to fatally stab his wife. Although the officers did not know that Williams would kill his wife, they were well aware of the domestic assault charges pending against him and that his wife was afraid of him. The officers' conduct amounts to more than mere negligence, and a jury could find true the complaint's allegations—allegations we have said amount to a constitutional violation. Therefore, I respectfully dissent. . . .I cannot agree . . . that the facts developed in discovery in this case are 'substantially different' such that they warrant a departure from our prior holding that the affirmative acts committed by Deputy Lioi created or enhanced the danger to Mrs. Williams. . . I also cannot agree that Appellants' burden at this stage is to present facts that 'strengthen' their 'earlier allegations.'. . We have already concluded that the allegations as pleaded—absent any strengthening—sufficiently stated a claim. Appellants' burden at this stage, a burden which I believe to be satisfied, is merely to present sufficient evidence from which a reasonable jury could find their pleaded allegations to be true. . . . If this case does not present a jury question under a state-created danger theory, it is hard to imagine what would. Must the officers have placed the knife in Williams's hand, diverted the entire police force from the steps of the courthouse where Mrs. Williams was stabbed, and themselves assisted in the killing of Mrs. Williams, as the State suggested during oral argument? The bar to recovery under the theory is a high one, but surely not that high. . . . Before this case, our Court had not encountered a case in which the line between inaction and action was crossed. It is disheartening to see that, when finally faced with a record that supports a state-created-danger due process claim, the Court casts it aside into the pile of omission claims. I would instead find that the law of the case applies, that Appellants have come forward with sufficient evidence to support their due process claim, and that they are entitled to have a jury decide whether Deputy Lioi and Major Russell affirmatively enhanced the danger to Mrs. Williams.")

See also ***Okin v. Village of Cornwall-On-Hudson Police Dept***., 577 F.3d 415, 428-32 (2d Cir. 2009) ("Since *Dwares,* we found that repeated, sustained inaction by government officials, in the face of potential acts of violence, might constitute 'prior assurances,' *Dwares,* 985 F.2d at 99, rising to the level of an affirmative condoning of private violence, even if there is no explicit approval or encouragement. . . .Viewing the evidence in the light most favorable to Okin, we find a genuine issue of material fact as to whether defendants implicitly but affirmatively encouraged Sears's domestic violence. . . . We find the record in this case to support the conclusion that Okin

raises a genuine issue of material fact as to whether the defendants' affirmative creation or enhancement of the risk of violence to Okin shocks the conscience. . . . Given that domestic violence is a known danger that the officers were prepared to address upon the expected occurrence of incidents, the officers who responded to Okin's complaints had ample time for reflection and for deciding what course of action to take in response to domestic violence. . . This is a case where deliberate indifference is the requisite state of mind for showing that defendants' conduct shocks the conscience."); ***Lawrence v. United States,*** 340 F.3d 952, 957 (9th Cir. 2003) ("[I]n each of the cases in which we have applied the danger-creation exception, ultimate injury to the plaintiff was foreseeable. In the present case, to allege liability based on the danger-creation exception, the Plaintiff must show that Officer Messuri and Inspector Hanrahan acted affirmatively, and with deliberate indifference, in creating a foreseeable injury to Plaintiff. . . . Here, Bello's criminal history consisted of a drug trafficking conviction, but no crimes of violence or sexual abuse. Although it might have been foreseeable that Bello would distribute illegal drugs to the children at CGH, it was not foreseeable that he would sexually abuse them. We affirm the district court's findings that the harm to Jessica Lawrence was not foreseeable and that Plaintiff has failed to show the Defendants' conduct was the proximate cause of her injuries."); ***Jones v. Union County, Tennesse,*** 296 F.3d 417, 430, 431 (6th Cir. 2002) ("In this case, Plaintiff offers no factual support for her claim that Union County created or enhanced the danger to her by failing to serve the *ex parte* order of protection in a timely manner. While the Sheriff's Department was well aware of the seriousness of the domestic problems involving Plaintiff and her ex-husband, its failure to serve the *ex parte* order of protection did not create or increase the danger posed to Plaintiff by her ex-husband, or place her specifically at risk."); ***Beck v. Haik***, 234 F.3d 1267, 2000 WL 1597942, at *4 (6th Cir. Oct. 17, 2000) (Table) ("The Seventh Circuit would not quarrel, we assume, with the proposition that public safety officials should have broad authority to decide when civilian participation in rescue efforts is unwarranted. If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt, for instance, it would certainly be permissible to forbid such an attempt. It would not be irrational, similarly, to prohibit private rescue efforts when a meaningful state-sponsored alternative is available. But *Ross* holds that official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts − and we are constrained to agree."); ***Munger v. City of Glasgow Police Dep't***, 227 F.3d 1082, 1086 (9th Cir. 2000) ("In examining whether an officer affirmatively places an individual in danger, . . . we examine whether the officers left the person in a situation that was more dangerous than the one in which they found him."); ***Sutton v. Utah State School for the Deaf and Blind***, 173 F.3d 1226, 1238, 1239 (10th Cir. 1999) ("[T]to hold Moore liable for the injuries suffered by James at the hands of a private individual, plaintiff-appellant must demonstrate intentional or reckless, affirmative conduct on the part of Mr. Moore which created the danger, coupled with 'a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.' . . . Because Moore, as the charged defendant, did not affirmatively act so as to create or enhance the danger to James, plaintiff-appellant's claim on this theory fails as a matter of law."); ***Huffman v. County of Los Angeles***, 147 F.3d 1054, 1061 (9th Cir. 1998) ("[T]he danger-creation plaintiff must demonstrate, at the very least, that the state acted affirmatively . . . and with deliberate indifference . . . in creating

a foreseeable danger to the plaintiff, . . . leading to the deprivation of the plaintiff's constitutional rights . . . . Whether or not the County's failure specifically to prohibit deputies from carrying guns while drinking was bad policy, it did not violate John Huffman's rights under the Fourteenth Amendment, because the County could not have foreseen Kirsch's actions."); ***Hutchinson v. Spink***, 126 F.3d 895, 900 (7th Cir. 1997) ("Even if the State thought that the Spink household posed fewer dangers to Andrew than his home, Hutchinson has also alleged that the State knowingly passed up the chance to place Andrew in a household with risks far lower than those posed by the Spinks . . . . It was the State's affirmative act that placed Andrew with the Spinks instead of the Halversons, not any omission that would lie beyond the reach of § 1983 under *DeShaney*."); ***Reed v. Gardner***, 986 F.2d 1122, 1126-27 (7th Cir. 1993) ("[P]laintiffs . . . may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been . . . By removing a safe driver from the road and not taking steps to prevent a dangerous driver from taking the wheel, the defendants arguably changed a safe situation into a dangerous one."); ***Dwares v. City of New York***, 985 F.2d 94, 99 (2d Cir. 1993) (***DeShaney*** not controlling where plaintiff alleged that "officers conspired with the 'skinheads' to permit the latter to beat up flag burners with relative impunity, assuring the 'skinheads' that unless they got totally out of control they would not be impeded or arrested. . . . Thus, . . . the complaint asserted that the defendant officers indeed had made the demonstrators more vulnerable to assaults."); ***Freeman v. Ferguson***, 911 F.2d 52, 55 (8th Cir. 1990) ("[***DeShaney***] analysis establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of or vulnerability to, such violence beyond the level it would have been at absent state action."); ***Gibson v. City of Chicago***, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990) (***DeShaney*** not controlling when City alleged to have played a part in both creating danger and rendering public more vulnerable to danger); ***Ross v. United States***, 910 F.2d 1422, 1431 (7th Cir. 1990) (plaintiff stated a cognizable claim under § 1983 where plaintiff alleged that her son was deprived of life due to County's policy of cutting off private aid to drowning victims without effective replacement protection), *distinguished* in ***Andrews v. Wilkins***, 934 F.2d 1267 (D.C. Cir. 1991) (whereas Deputy in *Ross* used his authority as state actor to intrude into purely private rescue effort, police in *Andrews* enlisted private assistance as part of ongoing police rescue effort); ***Weeks v. Portage County Executive Offices***, 235 F.3d 275, 278, 279 (6th Cir. 2000) ("We have found a deprivation under the due process clause in situations when the victim was in police custody and the police failed to act or when the police affirmatively acted to put the victim in a more vulnerable position that he would have been in otherwise. . . . [citing cases] In the case before us here, however, Weeks was not and had not been in police custody; it was not Longbottom's actions that caused Weeks' harm; and Longbottom's order to Weeks to move along did not put Weeks in a more vulnerable position than he was in before he encountered Longbottom.").

See also ***Barresi v. City of Boston***, No. CV 18-10737-PBS, 2018 WL 4954157, at *4 (D. Mass. Oct. 11, 2018) ("This case is so troubling because the police officers failed to make even a minimal effort of checking whether McMahon had an active restraining order. If the officers had

done so, they would have discovered that there was an active order and that, according to Boston Police Department Policy, they were required to arrest Tremblay. While the enforcement of the order via an arrest might have prevented the murder, . . . Plaintiff has not alleged more than the officers' failure to arrest Tremblay. This may violate Boston Police Department Policy, but does not implicate substantive due process rights.[citing *Castle Rock*] Accordingly, the claims are dismissed."); ***Gothberg v. Town of Plainville***, No. 3-13-CV-01121 (CSH), 2015 WL 7785797, at *8-10 (D. Conn. Sept. 3, 2015) ("In the case at bar, the complaint does not include the phrase 'state created danger.'. . But Plaintiff Gothberg's allegations describing the communications between the Southington police and the Plainville police on the subject of Gothberg's requested arrest unmistakably invoke the state created danger doctrine. The complaint casts the Southington police in the roles of state actors, who by their descriptions of Gothberg and his propensities created the danger to Gothberg that ultimately came to pass: the Southington police falsely and intentionally told the Plainville police that Gothberg was armed, dangerous and unstable, inevitably leading the Plainville police to use a degree of force in arresting Gothberg that was unnecessary in the true circumstances and thus constitutionally excessive. These allegations focus principally upon the conduct of defendant Michael Shanley, a lieutenant in the Southington police department who, according to the complaint, interviewed Gothberg at the Southington police station on July 14, 2011, confiscated Gothberg's only firearm, 'secured' Gothberg's residence by denying Gothberg access to it and its contents, and on July 15 obtained a warrant to arrest Gothberg, which Southington officers, at Shanley's direction, asked Plainville officers to execute during the early morning of July 16. . . .The case against the Southington police comes down to this: The Plainville police officers' use of force in subduing and shooting Gothberg might have been reasonable if what the Southington police said about Gothberg was true, but it was not true, and the force used against Gothberg was objectively excessive in the actual circumstances as they existed. . . This theory of the case states a claim under the state created danger doctrine because the false statements made by the Southington police to the Plainville police 'assisted in creating or increasing the danger' to Gothberg of an excessively forcible arrest. . . . On the basis of this Second Circuit authority [*Dwares*], I conclude that the complaint at bar adequately alleges that the affirmative actions of the Southington Officers—namely their reckless transmission of information designed to make the Plainville Police unduly agitated and excited, respond toward Plaintiff in an unnecessarily aggressive manner, and to deprive him of his civil rights—created an opportunity for the Plainville Police to harm Plaintiff or increased the risk that they would do so."); ***Turczyn ex rel. McGregor v. City of Utica***, No. 6:13-CV-1357 GLS/ATB, 2014 WL 6685476, at *4-5 (N.D.N.Y. Nov. 26, 2014) ("Unlike *Town of Castle Rock v. Gonzales* . . . or *Neal v. Lee County* . . . cases in which police had limited interaction with either the victim or killer prior to the victim's demise, and upon which defendants rely for dismissal of the claim against Shanley, . . . the allegations here go substantially farther. Turczyn alleges several occasions . . . when Shanley knew of Anderson's threatening acts and did nothing, which arguably communicated to him prior assurances that there would be no penalty to pay for his conduct. . . . *Okin* has specifically recognized the liability that may arise under these circumstances. . . .The amended complaint also pleads facts that demonstrate, at this juncture, egregious behavior that shocks the contemporary conscience. As in *Okin,* the allegations here tend to show that Shanley, who was tasked with

accomplishing certain goals related to curbing domestic violence, was deliberately indifferent as to whether or not Anderson would make good on his multiple threats against Turczyn's life over a twelve-month-period. . . These allegations sufficiently support that Shanley's affirmative conduct was the product of deliberate indifference that shocks the conscience, and would provide a reasonable jury with a valid basis to so find. . . Finally, Shanley is not entitled to qualified immunity at this juncture. Her argument on this issue is two-fold. First, Shanley asserts that no constitutional violation occurred, and, second, she claims that, even if a constitutional violation occurred, the right was not clearly established. . . The first prong of the argument is easily swept aside by reference to the preceding paragraphs that explain that the amended complaint alleges a cognizable substantive due process violation. As for whether or not the right was clearly established, which is a prerequisite to qualified immunity, . . this question has been resolved by the Second Circuit. On the issue, the court has explained that it is 'clearly established,' under the state-created danger theory, 'that police officers are prohibited from affirmatively contributing to the vulnerability of a known victim by engaging in conduct, whether explicit or implicit, that encourages *intentional* violence against the victim, and as that is the substantive due process violation alleged here, qualified immunity does not apply.' *Okin,* 577 F.3d at 434. Accordingly, Shanley is not entitled to qualified immunity at this time."); ***Mohat v. Mentor Exempted Village School Dist. Bd. of Educ.***, No. 1:09 CV 688, 2011 WL 2174671, at *7 (N.D. Ohio June 1, 2011) ("Plaintiffs have not made any allegations in their Complaint that would support a finding that anyone acting under the color of state law committed an *affirmative* act that created or increased the risk of harm to Eric. Further, as discussed above, although parents should be able to expect that their children will be kept reasonably safe when under the school's supervision, the school had no constitutional duty to take affirmative action to protect Eric from harm imposed by other students through bullying and emotional and physical harassment, nor did it have a constitutional duty to take affirmative action to prevent the ultimate harm he imposed upon himself through his suicide. Consequently, however tragic and unfair this may seem, based on the actual allegations set forth in the Complaint, and taking into consideration all of the relevant case law, Plaintiffs have not established that the school's failure to stop the bullying Eric suffered, or its failure to prevent his ultimate suicide, constitute a violation of their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution."); ***Sloane v. Kanawha County Sheriff Dep't***, 343 F.Supp.2d 545, 552, 553 (S.D.W.Va. 2004) ("Assuming the truth of the Sloanes' allegations, Crosier and Moore knew that David's emotional difficulties were such that their conduct would increase the risk that he would harm himself. By questioning David in an abusive manner outside his grandparents' presence, they created an environment in which he was far more likely to cause emotional injury to David. Unlike the defendants in *Pinder*, *Shoenfield*, and other cases in which liability under § 1983 has been barred, Crosier and Moore engaged in affirmative conduct that significantly increased the risk that David would be seriously injured or killed. When a state actor takes actions (actions that, as discussed below, may themselves be unconstitutional) against an emotionally disturbed minor that the state actor knows will create or substantially enhance the risk that the minor will harm himself, and then fails to take any steps to mitigate that risk, he is subject to liability under 42 U.S.C. § 1983 pursuant to a theory of causation and duty premised on the state-created danger doctrine. As such, Plaintiffs' allegations are clearly sufficient to withstand a

motion to dismiss."); ***Kennerly v. Montgomery County Bd. of Commissioners,*** 257 F.Supp.2d 1037, 1043-45 (S.D. Ohio 2003) ("*DeShaney* and *Kallstrom* make it clear that the government has neither a special relationship with the public nor a general duty to warn the public of potential threats of criminal danger, as a matter of constitutional law, and no such special relationship or duty arises merely on account of the local government having placed a known dangerous individual on house arrest and outfitted him with a monitoring device at a prior point in time. Furthermore, a plaintiff cannot plead around *DeShaney*, and come within the ambit of the result reached in *Kallstrom*, merely by naming a more particular sub-class of the public as the group to which the government owed a duty, such as one's 'neighbors.' Neighbors are still the public. *Kallstrom* is not ambiguous: the government must be aware that its actions will increase the vulnerability of a specific individual to criminal danger. . . . Thus, even assuming the truth of the factual pleadings, which means assuming that the County was in fact aware that Peter Atakpu had removed the monitoring device, and in fact was aware that he posed a grave threat to the public, including his neighbors, and in fact had an official policy which allowed it to disregard the existence of such public threats, or, in the alternative, had an official policy to respond to such public threats to prevent any potential harm flowing therefrom but nevertheless intentionally disregarded it, the Plaintiff is not entitled to relief under § 1983. Absent the County taking an action that increased Byron Kennerly's vulnerability to danger at the hands of Peter Atakpu in a manner specific to him, in such a way that set him apart from the general public and from all of Peter Atakpu's other neighbors, the County cannot be held liable for the violence that Peter Atakpu committed upon him. . . . Liability under a state-created-danger theory must be predicated upon affirmative acts. There is not a single affirmative act complained of in the First Amended Complaint. The action of which the Plaintiff complains is inaction: the failure of the County to act. That is not enough."); ***Kallstrom v. City of Columbus,*** 165 F. Supp.2d 686, 700-03 (S.D. Ohio 2001) (on remand) (Based on revised findings of fact, court concludes 'plaintiffs did not have a constitutional privacy interest in the information disclosed by the City[,]' that ACity's release of redacted personnel files pursuant to a valid public records request does not 'shock the conscience' or amount to deliberate indifference on the part of defendant[,]' and A[f]or these reasons, the state-created-danger theory does not apply."); ***Wright v. Village of Phoenix***, No. 97 C 8796, 2000 WL 246266, at *6 (N.D. Ill. Feb. 25, 2000) (not reported) ("Here, as in *Sadrud-Din*, Wright is claiming that Berry abused Jackson-Berry while wearing the mantle of a police officer, that her murder was traceable to his status as a state actor, and that other police officers knew of the threat to Jackson-Berry's life and affirmatively furthered that threat by failing to properly respond to the complaints of domestic violence against Jackson-Berry due to Berry's status in the police department. Accordingly, Counts 2 and 6 state a claim under the Due Process Clause."); ***Wyatt v. Krzysiak***, 82 F. Supp.2d 250, 258, 259 (D.Del. 1999) ("Even if the first three prongs [of *Kneipp*] are met, the Court holds that Krzysiak's acts and/or omissions did not increase the risk of injury to Wyatt because she would have been driving under the influence of alcohol had Krzysiak not intervened. The case law from this and other circuits holds that, under the state created danger doctrine, an officer is not liable unless he increases the risk of harm to the victim. . . . At worse, Krzysiak left Wyatt in the same position as she would have been in had he not intervened at all. It follows that Krzysiak did not increase the risk of harm to Wyatt, even if he told her to drive while under the

influence of alcohol."); ***Norris v. City of Montgomery***, 29 F. Supp.2d 1292, 1297 (M.D. Ala. 1998) ("In order for the plaintiffs to hold the State liable under the special-danger analysis, they must show that the defendants affirmatively placed them in a position of danger that was distinguishable from that of the general public. . . . Accepting the plaintiffs' allegations as true and construing them in the light most favorable to the plaintiffs, the court still finds that they have failed to present facts sufficient to give rise to liability under the special-danger theory. The plaintiffs claim that Officer Perkins affirmatively endangered the plaintiffs by 'giving' Michael Perkins's car back to him. Regardless of whether one construes Officer Perkins's behavior as an affirmative act or an omission, however, the defendants' actions do not satisfy the special-danger standard, because their actions did not increase the danger posed by Michael Perkins to the plaintiffs. Had the defendants given Michael Perkins the alcoholic beverages that caused his intoxication, the defendants arguably would have increased the danger Michael Perkins posed to the plaintiffs. However, Officer Perkins merely failed to impound Michael Perkins's car. By so doing, Officer Perkins did not alter the danger posed by Michael Perkins to other drivers on the roads. The danger posed by Michael Perkins remained the same as if Officer Perkins had never stopped him. And, as mentioned earlier, the defendants were under no constitutional duty to stop Michael Perkins, or any other intoxicated driver, at all."), *aff'd*, 194 F.3d 1323 (11th Cir. 1999); ***Tazioly v. City of Philadelphia***, No. CIV.A. 97-CV-1219, 1998 WL 633747, at *11, *12 (E.D. Pa. Sept. 10, 1998) (not reported) ("The Third Circuit has not addressed the question specifically presented by the facts of this case − whether, under the state-created danger theory, an allegation that a government worker acted with willful disregard for the safety of a child by terminating satisfactory foster care and entrusting the child to the custody of a drug-addicted, unfit, and dangerous biological parent, thereby increasing the foreseeable risk of harm to the child, states a viable § 1983 cause of action for a violation of the child's rights under the Fourteenth Amendment. . . . [T]he evidence, viewed in a light most favorable to the Plaintiffs, indicates that the decision to return Michael to his biological mother was made with actual knowledge that she was unfit and dangerous. . . . Under the four-part test articulated in *Kneipp v. Tedder* and *Mark v. Borough of Hatboro*, the record of this case, when viewed in a light most favorable to Plaintiffs, contains sufficient evidence from which a jury could find that Michael's injuries were caused by a state-created danger."); ***Sadrud-Din v. City of Chicago***, 883 F. Supp. 270, 276 (N.D. Ill. 1995) ("By allowing Edward Johnson to continue to carry his police-issued weapon knowing the information provided by Selena Johnson, the City affirmatively contributed to the circumstances which resulted in Edward Johnson murdering Selena Johnson with that weapon."); ***Boyle v. City of Liberty***, 833 F. Supp. 1436, 1448 (W.D. Mo. 1993) (Based on plaintiffs' allegations that the defendants "intentionally placed [plaintiffs] in a position where personal injury was not merely possible but inevitable[,]" the court concluded that plaintiffs had adequately pled both a duty to protect and a breach of that duty. The scope of the duty and the reasonableness of the conduct would remain to be resolved by summary judgment or trial.); ***Muhammad v. City of Chicago***, 1991 WL 5803 (N.D. Ill. Jan. 16, 1991) (not reported) ("A special relationship arises in two situations: when the state places a person in a position of danger or when it deprives her of the means by which to secure help from private sources."); ***Swader v. Commonwealth of Virginia***, 743 F. Supp. 434, 444 (E.D. Va. 1990) (where defendants required prison employees and their families to live on prison property on which

inmates were allowed to work, special relationship could be shown).

Compare ***Hart v. City of Little Rock***, 432 F.3d 801, 804-09 (8th Cir. 2005) ("Hart and Dyer allege substantive due process violations, arguing Little Rock's release of their personnel files greatly increased the risk of harm by private individuals who might retaliate against them as police officers. . . . Hart and Dyer rely on the 'state-created danger' theory. We assume without deciding that Little Rock's release of Hart's and Dyer's personnel files created sufficient danger to implicate constitutionally protected privacy interests. Additionally, we conclude element two is satisfied because there is no dispute the alleged constitutional violation was precipitated by state action. Accordingly, our analysis will focus on the third element of their § 1983 claim − whether the evidence proved Little Rock acted with the requisite degree of culpability. . . . In this case, Little Rock acted under circumstances in which actual deliberation was practical. Therefore, its conduct shocks the conscience only if it acted with 'deliberate indifference.'. . . In *Lewis,* the Court equated deliberate indifference for substantive due process with Eighth Amendment deliberate indifference. . . Thus, to sustain the district court's denial of JAML, we must conclude there was sufficient evidence to find Little Rock acted intentionally or wrongfully in disregarding a known danger. . . Conversely, if we conclude Little Rock's conduct was merely negligent or even grossly negligent, the denial of JAML must be reversed. . . . We conclude the evidence was insufficient to support a finding Witherell ever considered, *at the time she processed the request,* whether the information would be disseminated to a criminal defendant who might use it to harm Hart and Dyer. . . . The mere fact Little Rock made it a practice to release such information does not prove it ever considered the specific risks articulated by Hart and Dyer. Assuming, as argued by Hart and Dyer, the City 'knew or should have known' its actions exposed them to a significant and increased risk of harm, the evidence only proves the City acted negligently − not with deliberate indifference. . . .We are troubled by Little Rock's practice of releasing its employees' personnel files − especially those of police officers − without notice or any attempt to redact sensitive personal information. Nevertheless, we conclude the evidence shows Little Rock's actions constitute at most negligence or gross negligence and do not rise to the level of subjective deliberate indifference necessary to sustain a substantive due process claim. . . . The *Kallstrom* court based its holding on a finding '[t]he City either knew or clearly should have known' releasing the officers' personal information substantially increased their 'vulnerability to private acts of vengeance.'. . In so holding, the *Kallstrom* court erroneously applied a negligence standard instead of the subjective deliberate indifference standard adopted in *Farmer*. . . The district court's reliance on *Kallstrom* indicates it too improperly adopted a negligence standard, making the denial of Little Rock's motion for JAML erroneous.") *with* ***Kallstrom v. City of Columbus***, 136 F.3d 1055, 1066-67 (6th Cir. 1998) ("[W]hile the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts. Although our circuit has never held the state or a state actor liable under the Fourteenth Amendment for private acts of violence, we nevertheless have recognized the possibility of doing so under the state-created-danger theory. *See Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 912-13 (6th Cir.1995); *Jones v. City of Carlisle*, 3 F.3d 945, 949-50 (6th Cir.1993). Liability under the

state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence. . . . However, because many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a constitutional tort under § 1983 to show 'special danger' in the absence of a special relationship between the state and either the victim or the private tortfeasor. The victim faces 'special danger' where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large. . . . The state must have known or clearly should have known that its actions specifically endangered an individual. . . . Applying the state-created-danger theory to the facts of this case, we hold that the City's actions placed the officers and their family members in 'special danger' by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security. Anonymity is essential to the safety of undercover officers investigating a gang-related drug conspiracy, especially where the gang has demonstrated a propensity for violence. In affirmatively releasing private information from the officers' personnel files to defense counsel in the *Russell* case, the City's actions placed the personal safety of the officers and their family members, as distinguished from the public at large, in serious jeopardy. The City either knew or clearly should have known that releasing the officers' addresses, phone numbers, and driver's licenses and the officers' families' names, addresses, and phone numbers to defense counsel in the *Russell* case substantially increased the officers' and their families' vulnerability to private acts of vengeance. We therefore hold that the City's policy of freely releasing this information from the undercover officers' personnel files under these circumstances creates a constitutionally cognizable 'special danger,' giving rise to liability under § 1983.").

In ***Wood v. Ostrander***, 879 F.2d 583 (9th Cir. 1989) (opinion after rehearing), *cert. denied*, 498 U.S. 938 (1990), the court held an affirmative duty to protect was owed plaintiff by a police officer who arrested the driver of the car in which plaintiff was a passenger, impounded the vehicle and left plaintiff stranded in a high-crime area at 2:30 a.m. Plaintiff was raped by a man who offered her a ride home. *Id*. at 590.

The court reasoned that the officer's actions of arresting the driver, impounding the car and stranding plaintiff in that area at 2:30 a.m. "distinguishe[d] [plaintiff] from the general public and trigger[ed] a duty of the police to afford her some measure of peace and safety." *Id*.

The dissent in ***Wood*** characterized the majority's conclusion as a "special relationship contention... totally inconsistent with the legal principles enunciated so clearly in ***DeShaney***." 879 F.2d at 600 (Carroll, J., dissenting). *Accord* ***Reeves v. Besonen***, 754 F. Supp. 1135, 1140 n.1 (E.D. Mich. 1991).

In ***D.R. v. Middle Bucks Area Vocational Technical School***, 972 F.2d 1364, 1375 (3d Cir. 1992) (*en banc*), *cert. denied*, 113 S. Ct. 1045 (1993), the court rejected the "state created danger" theory in a case involving sexual assaults upon students by other students. The court noted that "[l]iability under the state-created danger theory is predicated upon the states' affirmative acts

which work to plaintiffs' detriments in terms of exposure to danger . . . . Plaintiffs' harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence that supported liability in *Wood*, *Swader*, and *Cornelius*."

See also ***Doe v. Town of Bourne,*** No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *7, *8 (D. Mass. May 28, 2004) ("Neither the custodial relationship exception nor the state-created danger exception applies in this case. As to the former, the Does have not alleged any specialized facts that give rise to a custodial relationship between themselves and defendants, and while the First Circuit has not addressed the issue, other courts have resoundingly concluded that, as a general matter, students do not stand in a custodial relationship with public schools or their officials for purposes of applying *DeShaney*. . . . The allegations in the Complaint are similarly insufficient to support a state-created danger theory of liability. The only conduct of Grondin and Demitri at issue is their nonaction, including their failure to report the rape to Nicole's parents or the police and their failure to investigate, or more generally to prevent, the rape and harassment. Absent any affirmative action by school officials, the state-created danger theory does not open the door for due process violations for situations in which students are harmed by other students, even where the school deliberately ignores either a threat or actual prior instances of violence."); ***Carroll K. v. Fayette County Board of Education***, 19 F. Supp.2d 618, 624 (S.D.W.Va. 1998) ("Here, Plaintiffs allege Principal David Perry told Carroll K. that, as a female, she had no right to defend herself against attacks by male students and that she would be punished if she attempted to. Furthermore, they allege there was a longstanding hostile environment toward females so pervasive it had the force and effect of a custom within the school. Assuming these allegations to be true, which the Court must do, the Court cannot conclude there is no set of facts Plaintiffs could prove that would state a claim and entitle them to relief. Thus, Plaintiffs' claim survives the motion to dismiss insofar as it alleges Defendants created a dangerous situation.").

Compare ***Kneipp v. Tedder***, 95 F.3d 1199, 1201, 1209 n.22 (3d Cir. 1996) (In case involving severely inebriated woman who was stopped by police and then allowed to proceed home alone, court "adopt[ed] the "state-created danger" theory as a viable mechanism for establishing a constitutional violation under 42 U.S.C. § 1983. . . .[noting that] the relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense.") *and* ***Bogle v. City of Warner Robins***, 953 F. Supp. 1563, 1570 (M.D. Ga. 1997) (holding that "Plaintiff was not deprived of her constitutional rights under the Fourteenth Amendment when police officers released her from custody in an impaired state," and Plaintiff was subsequently raped by a third party).

See also ***Sciotto v. Marple Newton School District,*** 81 F. Supp.2d 559, 567 & n.11 (E.D. Pa. 1999) ("A reasonable jury could conclude that Smith and Nathans, by maintaining a tradition of inviting older, heavier, more experienced alumni to participate in wrestling practices, "used their authority to create an opportunity" for Fendler to injury Louis Sciotto that would not have otherwise existed. But for the tradition and Nathans' invitation to Fendler pursuant to that tradition, Fendler would not have been present at practice, and would not have live wrestled Louis

Sciotto on January 10, 1997. On the basis of this evidence, I conclude that a genuine issue of material fact exists as to whether the school defendants used their authority to create an opportunity for the events to occur which caused the injury suffered by Louis Sciotto. . . . Defendants contend that the free and voluntary nature of Louis Sciotto's participation in the wrestling program and his choice to wrestle Greg Fendler exonerates them from liability under the 'state-created danger' theory. While freedom and voluntary participation may be persuasive under a 'special relationship' theory, I find no cases holding that voluntary actions by the plaintiff nullify a 'state-created danger' claim. If voluntary actions by the plaintiff contributing to his or her own danger were dispositive, the Court of Appeals for the Third Circuit would have concluded that the plaintiff's voluntarily decision in *Kneipp* to become severely inebriated, and attempt to walk home, which undoubtedly contributed to her eventual fall and consequent injuries, prevented her from asserting a valid 'state-created danger' claim. The Court of Appeals for the Third Circuit did not do so there, and I decline to do so today."); ***Maxwell v. School District of City of Philadelphia***, 53 F. Supp.2d 787, 792, 793 (E.D.Pa. 1999) (applying *Kneipp* and finding allegations sufficient to state claim under state created danger theory where rape of a mentally impaired student by other students in a locked classroom with teacher present was "foreseeable and a fairly direct result of the state's actions."); ***Apffel v. Huddleston***, 50 F. Supp.2d 1129, 1138 (D. Utah 1999) ("It is persuasive to the court that the cliffs at issue are a natural condition on public land to which Jason Apffel had access at any time. Defendants did not create the cliffs nor the danger posed by climbing them. Furthermore, the court cannot find that the act of a planning a party on state lands near the sandstone cliffs enhanced the danger to decedent. The cases cited by defendants and referenced by the court in this decision compel a conclusion that neither the law as it existed at the time of the accident nor the facts plead in plaintiffs' complaint support finding that the state created the danger to decedent or enhanced the risks that were already in existence."); ***Mason v. Barker***, 977 F. Supp. 941, 945, 947 (E.D. Ark. 1997) ("In the instant case, Plaintiffs contend that Defendants ordered Plaintiffs into Ms. Mason's car and directed them to leave McCrory. The Court believes that such an allegation distinguishes the relatively hands-offs, activity in *Foy* from the affirmative, authoritative conduct at issue here. If police officers compel an individual whom they know to be a danger to herself and others to drive a car out of town, those officers have infringed a constitutionally protected interest under the Due Process Clause. Indeed, such action by police officers presents a perverse scenario in which police officers, clothed with the authority of the State, force a citizen to break the law. . . . Although it is clear that states have no duty to protect citizens from drunk drivers, . . . police officers may not, consistent with the demands of the Constitution, compel individuals whom they know to be heavily medicated to expose themselves and others to danger by ordering them to drive."); ***Estate of Rosenbaum v. City of New York***, 975 F. Supp. 206, 217-18 (E.D.N.Y. 1997) ("If plaintiffs contended simply that the City had failed to respond to requests from the Hasidic community for additional police protection during the Crown Heights disturbances, such a claim would arguably be barred by *DeShaney*, decided two years before the disturbances took place. However, the thrust of plaintiffs' argument is quite different: plaintiffs allege that defendants, by the inappropriate implementation of a policy of restraint, actually exacerbated the danger to the Hasidic community and rendered the community more vulnerable to violence by private actors. . . . The Court concludes, therefore, that plaintiffs have

properly set forth a substantive due process basis for relief under § 1983. The jury will determine at trial whether Dinkins or Brown, or any other state actor, had assisted in creating or increasing danger to the plaintiffs and, if so, whether such actions were the proximate cause of any injuries which plaintiffs sustained.").

In ***Johnson v. Dallas Independent School District***, 38 F.3d 198 (5th Cir. 1994), the court concluded that "[e]ven if the state-created danger theory is constitutionally sound, the pleadings in this case fall short of the demanding standard for constitutional liability." The court explained:

> The key to the state-created danger cases, and the essence of their distinction from *Middle Bucks*, lies in the state actors' culpable knowledge and conduct in 'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.' [cites omitted] Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff.

Id. at 201. *See also* ***Robinson v. Webster County, Mississippi***, 825 F. App'x 192, ___ (5th Cir. 2020), *cert. denied,* 141 S. Ct. 1450 (2021) ("Here, Robinson's claims are premised on an act of private violence. She contends that Webster County, via Sheriff Mitchell, violated her Fourteenth Amendment due process rights by releasing Patterson from jail and permitting him to terrorize her. While Robinson recognizes that under the general rule the county is not liable for Patterson's violent acts against her, Robinson contends that the district court erred by (1) finding Webster County did not have a special relationship with her and (2) declining to apply the state-created danger theory. Based on our precedent, we must disagree. . . . [T]his Court has ' "repeatedly noted" the unavailability of the [state-created danger] theory in this circuit.' *Columbia-Brazoria*, 855 F.3d at 688 (citation omitted). The district court correctly declined to stray from circuit precedent. And we decline as well."); ***Doe v. Columbia-Brazoria ISD***, 855 F.3d 681, 688-89 (5th Cir. 2017) ("In this case, Doe's claim does not arise from the abuse itself because no state actor committed it. . . Instead, there must have been some specific and actionable deficiency on the part of the District that allowed the abuse to occur. . . The case from which the special-relationship requirement was drawn stated that 'nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.'. . A complainant and the state have that relationship only 'when the State takes a person into its custody and holds him there against his will[.]'. . . The relationship exists 'when the state incarcerates a prisoner,' 'involuntarily commits someone to an institution,' or places a child in foster care. . . Notably, 'a public school does not have a special relationship with a student that would require the school to protect the student from harm at the hands of a private actor.'. . . .[I]n *Covington*, we declined to adopt the exception as the law of this Circuit. . . Subsequent panels have 'repeatedly noted' the unavailability of the theory. . . Finally, Doe failed to analyze the theory in a meaningful

way in his opening brief. The argument is thus forfeited. . In summary, Doe's claims are not based on the private conduct of his assailant but on the District's shortcomings in monitoring the students, training the teachers, and establishing a reporting system for sexual assault. '[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'. . That leaves Doe with only the special-relationship theory, having forfeited the possibility of a state-created-danger argument. There was no special relationship between the plaintiff and the state. Doe has thus failed to prove a constitutional violation. The Section 1983 claims were properly dismissed."); ***Morin v. Moore,*** F.3d 309 F.3d 316, 323 (5th Cir. 2002) ("Even if we were to consider all of the Morins' allegations, they fail to satisfy the 'state-created-danger' theory because the Morins have failed to demonstrate that the officers acted with deliberate indifference."); ***McClendon v. City of Columbia (McClendon II),*** 305 F.3d 314, 337, 338 (5th Cir. 2002) (en banc) (Robert M. Parker, J., joined by Judges Wiener and Harold R. DeMoss, Jr., dissenting) ("[T]he state-created danger theory is overwhelmingly accepted in today's federal jurisprudence. In the face of such overwhelming authority, the majority cowers. It does not have the courage to be the only federal circuit court of appeals in the nation to explicitly reject the state-created danger theory even though that is clearly what it wants to do. Although the majority refuses to take the road less traveled in a principled albeit unpopular way, it is perfectly willing to accomplish its objectives through subterfuge. The majority knows only too well how to play the game. If the Circuit never rules on whether this is a viable theory, the Circuit makes it exceedingly difficult for the district courts to rule that the Circuit law in state-created danger cases is 'clearly established' for purposes of a qualified immunity analysis. Thus, state actors who engage in behavior that falls within the confines of the 'state-created danger' theory will always escape liability under the majority's view no matter how egregious their behavior. That is an insidious approach to the law and I reject it outright. The Circuit should quit hiding the ball from the public and make a decision one way or the other. It has refused. [footnote omitted] However, I favor adopting, as has the rest of the country, the state-created danger theory as a viable mechanism for obtaining Section 1983 relief in this Circuit."); ***Martin v. Shawano-Gresham School District,*** 295 F.3d 701, 712 (7th Cir. 2002) ("Because the defendants did not create or increase a risk that Timijane would commit suicide by suspending her and then allowing her to return home at the end of the school day, the Martins' substantive due process claim must fail."); ***Piotrowski v. City of Houston (Piotrowski II)***, 237 F.3d 567, 584, 585 (5th Cir. 2001) ("Although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory. . . . We need not do so here, since, even if we were to adopt it, Piotrowski could not recover. . . . The initial problem is that no matter what official protection Bell received, the City actors did not create the danger she faced. . . . Unlike other cases in which government officials placed persons in danger, the City at most left her in an already dangerous position. Depending on the facts, some cases interpret the state-created danger theory to result in § 1983 liability if government actors increase the danger of harm to a private citizen by third parties. Measured by this standard, the assistance provided to Bell consisted of furnishing Piotrowski's mug shot and failing to warn her of Waring's tip. Neither of these circumstances, however, actually increased the danger to her. . . . Moreover, the City did not act with deliberate indifference. . . . [T]here is no evidence that City actors knew of or participated in the murder

contract, and they did nothing to prevent her from protecting herself."); ***Saenz v. Heldenfels Brothers, Inc.,*** 183 F.3d 389, 391, 392 (5th Cir. 1999) ("[N]either the text nor the history of the Due Process Clause supports holding that an officer who orders another officer to refrain from arresting a suspected drunk driver has committed a constitutional tort. The Due Process Clause is intended to curb governmental abuse of power over the people it governs, not to require state officers to protect the people from each other. . . . Unlike the deputy in *Ross*, Gonzalez was neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the appellants from receiving aid. This 'state-created danger' theory is inapposite without a known victim. . . . [W]e decline to issue the novel ruling that when one officer exercises his discretion by ordering another officer not to apprehend a drunk driver, a third party unknown to the officer at the time of the order who is later injured by the drunk driver has a constitutional claim against the ordering officer.").

See also ***Johnson v. City of Philadelphia***, 975 F.3d 394, 399-400, 404 (3d Cir. 2020) ("Several other Circuit Courts have also recognized the state-created danger theory of liability. . . . But the Supreme Court has not. . . And the doctrine has not escaped criticism, since it does not stem from the text of the Constitution or any other positive law, . . . and consequently vests open-ended lawmaking power in the judiciary. . . Moreover, the 'state-created danger' doctrine offers little help to public employees seeking to better discharge their duties, and does not tell them 'what to do, or avoid, in any situation.'. . But we remain bound to faithfully apply our precedent explaining the scope of the doctrine. As currently formulated, that requires a plaintiff to plead four elements: first, foreseeable and fairly direct harm; second, action marked by 'a degree of culpability that shocks the conscience'; third, a relationship with the state making the plaintiff a foreseeable victim, rather than a member of the public in general; and fourth, an affirmative use of state authority in a way that created a danger, or made others more vulnerable than had the state not acted at all. *See Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018). We apply that precedent to the facts Appellant pleads here. . . . Three lives were lost inside a building long-known to flout safety requirements, amid a bungled rescue effort. One hopes their deaths focus the will and resolve of those able to act. But the City and its employees may be held liable under the state-created danger theory, and under Pennsylvania tort law, only in narrowly defined circumstances. Because those circumstances are not met here, we will affirm the District Court's dismissal of Appellant's complaint."); ***Johnson v. City of Philadelphia***, 975 F.3d 394, 404-05 (3d Cir. 2020) (Matey, J. concurring) ("I write separately to join Judge Porter's view that our full Court should revisit the state-created danger doctrine. As our majority opinion states, the doctrine does not 'stem from the text of the Constitution or any other positive law.'. . The doctrine 'offers little help to public employees seeking to better discharge their duties,'. . . but subjects them to lawsuits for alleged constitutional violations. As Judge Porter notes, the doctrine exemplifies a 'troubling' expansion of substantive due process. . . Many state-created danger cases are tragic and unsettling and this matter is no exception. But the Due Process Clause of the Fourteenth Amendment 'does not transform every tort committed by a state actor into a constitutional violation.'. . Because '[t]he place to make new legislation ... lies in Congress,'. . . I join Judge Porter's call for our full Court to revisit the state-created danger doctrine."); ***Johnson v. City of Philadelphia***, 975 F.3d 394, 405-

06 (3d Cir. 2020) (Porter, J., concurring) ("I join the majority's opinion in full. But I write separately to explain my view that our full Court should revisit the state-created danger doctrine. First, 'it is troubling how far we have expanded substantive due process' in this area. . . As Judge Fisher noted in his concurrence in *Kedra*, we have gone much further than the Supreme Court by 'fashioning' our own state-created danger doctrine and further still by 'stating that there could be liability in non-custodial situations for gross negligence.'. . As the majority opinion observes, the state-created danger doctrine 'has not escaped criticism, since it does not stem from the text of the Constitution or any other positive law.'. . I agree that, '[g]iven that our substantive due process doctrine has gradually lowered the bar for bringing a [state-created danger] claim, it may be time for this full Court to reexamine the doctrine.'. .Assuming the continuing viability of the state-created danger doctrine in our Circuit, the full Court should nevertheless revisit our test for analyzing whether a state actor's behavior 'shocks the conscience.' In *Kedra*, Judge Krause skillfully synthesized our precedent into a three-part framework. First, '[i]n hyperpressurized environments requiring a snap judgment, an official must actually intend to cause harm in order to be liable.'. . Second, '[i]n situations in which the state actor is required to act in a matter of hours or minutes, we require that the state actor disregard a *great* risk of serious harm.'. . And third, when 'the [state] actor has time to make an unhurried judgment, a plaintiff need only allege facts supporting an inference that the official acted with a mental state of deliberate indifference.'. . We have described 'deliberate indifference' as a 'conscious disregard of a *substantial* risk of serious harm,'. . . and also as 'a willingness to ignore a *foreseeable* danger or risk.'. . Our precedent asks district courts to differentiate among the three tiers of culpability and apply them to a set of facts. . . That is no simple task. But it is further complicated by the mystifying differences we have drawn between the second and third tiers of culpability. In my view, there is no practical difference between a 'disregard of a *great* risk of serious harm' (the second tier) and a 'conscious disregard of a *substantial* risk of serious harm' (the third tier). . . . Assuming we continue to recognize the state-created danger doctrine at all, I suggest combining the second and third tiers into one and making the inquiry more straightforward: For a state actor to be liable in a 'hyperpressurized environment requiring a snap judgment,' he must actually intend to cause harm. But in any other context, the state actor must act with deliberate indifference that shocks the conscience. This articulation of the standard hews more closely to Supreme Court precedent, . . . is more consistent with the tests established by our sister circuits that have adopted the state-created danger doctrine, . . . and does not ask state actors like the operator and dispatcher in this case to ponder the gradations among a 'substantial risk,' a 'great risk,' and a 'foreseeable danger' before reacting to an urgent 911 call. I respectfully offer these brief observations about our state-created danger doctrine and hope that in an appropriate case we will revisit the doctrine as a full Court.")

See also ***Perry v. Wildes***, No. 97-3372, 1998 WL 199795, *3 (6th Cir. Apr. 15, 1998) (unpublished) ("[W]e are unwilling to say that police response to a citizen's call for assistance subjects the officers to potential liability for creating a 'special danger' premised upon a heightened sense of security. It does not follow from police presence and opinions about the potential for danger that a constitutional violation has occurred absent some action on the part of the responding officers that forcibly prevents the citizen who requested help from acting on his or her own behalf,

or creates a special danger by enabling a private actor to do something that puts another specifically at risk."); ***Morse v. Lower Merion School Dist.***, 132 F.3d 902, 913-15 (3d Cir. 1997) ("[I]t would not appear that the state created danger theory of liability under § 1983 always requires knowledge that a specific individual has been placed in harm's way. Although it is appropriate to draw lines here, there would appear to be no principled distinction between a discrete plaintiff and a discrete class of plaintiffs. The ultimate test is one of foreseeability. . . . Whether an affirmative act rather than an act of omission is required under the state-created danger theory appears to have been answered by *Mark*. As the *Mark* court noted, one of the common factors in cases addressing the state created danger is that the state actors 'used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.' *Mark*, 51 F.3d at 1152. Thus, the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission."); ***Randolph v. Cervantes***, 130 F.3d 727, 731 (5th Cir. 1997) ("Viewing the evidence in the light most favorable to Randolph's mother, the defendants allowed and encouraged Randolph to voluntarily reside at Pine Hill Apartments as a tenant having the right to come and go from the premises at any time and having the right to cancel her lease. This will not trigger a duty under the state-created danger theory, even if we were to adopt such a theory."); ***Doe v. Hillsboro Independent School District***, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc) ("Viewed in the light most favorable to the plaintiffs, the school district placed the student in the same area as a school custodian who had no known criminal record, sexual or otherwise, with school teachers in the same building but not in the immediate area. This will not trigger a duty under a state-created-danger theory, even if we were to adopt such a theory. Such post hoc attribution of known danger would turn inside out this limited exception to the principle of no duty."); ***Estate of Stevens v. City of Green Bay***, 105 F.3d 1169, 1177 (7th Cir. 1997) ("To recover under this [state-created danger] theory, the estate must demonstrate that the state greatly increased the danger to Stevens while constricting access to self-help; it must cut off all avenues of aid without providing a reasonable alternative. Only then may a constitutional injury have occurred."); ***Seamons v. Snow***, 84 F.3d 1226, 1236 (10th Cir. 1996) ("In addition to the 'special relationship' doctrine, we have held that state officials can be liable for the acts of third parties where those officials 'created the danger' that caused the harm. *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir.1995), *cert. denied*, __ U.S. __, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). However, we stated that a claim brought under the 'danger creation' theory must be predicated on 'reckless or intentional injury-causing state action which "shocks the conscience."' *Id.*"); ***Pinder v. Johnson***, 54 F.3d 1169, 1177 (4th Cir. 1995) (*en banc*) ("When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive. In such instances, the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party. [citing cases] At most, these cases stand for the proposition that state actors may not disclaim liability when they themselves throw others to the lions. [cite omitted] They do not, by contrast, entitle persons who rely on promises of aid to some greater degree of protection from lions at large."); ***Piotrowski v. City of Houston (Piotrowski I)***, 51 F.3d 512, 515 (5th Cir. 1995) ("Piotrowski contends that her allegations qualify by satisfying the 'state-created danger' theory of § 1983 liability. [footnote

omitted] While this Court has not affirmatively held that this theory is a valid exception to the *DeShaney* rule, . . . it has addressed what a plaintiff would have to demonstrate to qualify for relief under this theory. First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference."); ***Leffall v. Dallas Independent School Dist.***, 28 F.3d 521, 532 (5th Cir. 1994) ("[E]ven assuming that substantive due process imposed some duty on the state to protect [student] from dangers arising out of sponsorship of the dance at Lincoln High School, [plaintiff] failed to allege a violation of [student's] due process rights in her complaint because she did not allege facts that demonstrated deliberate indifference to those dangers on the part of the state actors."); ***Salas v. Carpenter***, 980 F.2d 299, 309, 310 (5th Cir. 1992) ("The Fourteenth Amendment does not require [Sheriff] to train and equip members of the sheriff's department for special SWAT or hostage negotiation duties. . . . It does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations. With no constitutional duty to provide SWAT or hostage negotiation equipment, [Sheriff's] failure to do so does not deny due process."); ***Gregory v. City of Rogers***, 974 F.2d 1006, 1012 (8th Cir. 1992) (*en banc*) (officers who arrested designated driver owed no constitutional duty of protection to intoxicated passengers whom driver left in car, with keys and unattended, outside police station; "it was [the driver's] abdication that placed [plaintiffs] in danger, not [the officer's] performance of his official duty."), *cert. denied*, 113 S. Ct. 1265 (1993); ***Hilliard v. City and County of Denver***, 930 F.2d 1516, 1520 (10th Cir. 1991) (in a case factually similar to ***Wood***, the court indicated reluctance to find a constitutional right to personal security where there is no element of state-imposed confinement or custody), *cert. denied*, 112 S. Ct. 656 (1991); ***Leidy v. Borough of Glenolden,*** No. CIV.A. 01-4361, 277 F. Supp.2d 547, 561 (E.D. Pa. 2003) ("Illich and Cooke may have taken Bennett into custody. But when they released him he posed no more of a danger than he did before he came into the station. . . . Other cases reinforce our analysis. In some cases where law enforcement officers were held responsible for a state-created danger, the officers acted to instigate private violence. [footnote collecting cases] In others, the officers acted to place people in harm's way who would otherwise not have been at risk. [footnote collecting cases] In others, the conduct of officers investigating crimes set off other hazards. [footnote collecting cases] In a final set of cases, the officers intervened in such a way as to cut people off from their private sources of protection. [footnote collecting cases] In contrast, where police officers took insufficient measures to avert or control private violence, courts have not deemed the loss of life or liberty to be the result of state action. [footnote collecting cases] By foiling Bennett's surrender, the defendants gave inadequate protective service to the community. But inadequate protective services, like the failure to provide protective services at all, constitute only a failure to protect, and without more we must (reluctantly) deny plaintiffs' claim."); ***Pullium v. Ceresini,*** 221 F. Supp.2d 600, 604, 605 (D. Md. 2002) ("[T]he instant case involves affirmative conduct on the part Officer Ceresini (or another officer under his direction). The officer injected Mr. Pulliam into Plaintiff's home, thus creating a danger where previously none existed. According to the allegations in the Complaint, Mr. Pulliam would not have been in a position to assault Plaintiff if he had not been driven to her home by the officer and if the officer had not ordered Plaintiff to admit him, over her repeated and impassioned protestations. While the Fourth Circuit may be reluctant to impose liability on police officers whose omissions create increased

dangers from third parties, there is no indication that the court would have the same reluctance where it is an officer's affirmative conduct that creates the danger."); ***Stevens v. Trumbull County Sheriffs' Dep't.***, 63 F. Supp.2d 851, 855 (N.D. Ohio 1999) ("Defendants' response to Plaintiff's 911 call did not create or enhance the danger to her. Defendants did nothing to give Plaintiff a heightened sense of security that subjects them to liability for violating her substantive due process rights. Furthermore, Defendants did not place any restraint on Plaintiff such that she was unable to act to protect herself. Plaintiff did not report a threat of imminent harm to her until it was too late for Defendants to respond. As such, Plaintiff has not established that Defendants' conduct violated her substantive due process rights."); ***Henderson v. City of Philadelphia***, No. CIV. A. 98-3861, 1999 WL 482305, at *11, *12 (E.D. Pa. July 12, 1999) (unpublished) ("The cases in which courts have allowed plaintiffs to proceed on their state-created danger claims all discuss actions taken by the defendants which increase the plaintiffs' risk of harm or subject the plaintiffs to harm that did not exist before they acted. . . . In this case, unlike *Kneipp*, the officers did not intervene to remove Henderson's private source of aid, his mother, and did not restrain her ability to assist her son. . . . The officers cannot be liable for the fact that their presence increased Henderson's agitation and his desire to escape. In the absence of an act by the officers that changed the volatile circumstances which already surrounded Henderson, they cannot be liable."); ***Pearson v. Miller***, 988 F. Supp. 848, 857 (E.D. Pa. 1997) (rejecting liability under state-created danger theory where "[p]laintiff's allegations [were] not sufficient to support an inference that Luzerne County C & Y workers knew that Miller posed a 'credible danger' to others and could and should have foreseen that he would assault the plaintiff or someone in a discrete class to which she belongs."); ***Johnson v. City of Oakland***, No. C-97-283 JSB, 1997 WL 776368, *5, *6 (N.D. Cal. Dec. 3, 1997) (not published) ("One condition of a valid state-created danger claim is that the danger would not have existed without the state action. . . . Decisions in at least five other circuits condition relief for state-created danger upon a proven claim that the danger would not otherwise have existed. [citing cases] . . . . Neither the officers' failure to rescue Johnson before the fatal collision nor to call off their pursuit created a danger that would not otherwise have existed. Had the officers not pursued the van with Johnson clinging to its roof, Johnson would have been abandoned to the van's occupants who had shown no concern for Johnson's safety."); ***Semple v. City of Moundsville***, 963 F. Supp. 1416, 1428 (N.D.W.Va. 1997) ("[A]bsent a custodial situation, *Pinder II* and *DeShaney* preclude plaintiffs' claims that a 'special relationship' existed that obligated the police department to protect [decedents] from Michael's violence. Further, plaintiffs have not established that the Moundsville Police Department took any affirmative action to create or enhance the danger that existed from Michael's behavior. This Court finds that this case is a quintessential 'failure to act' case."), *aff'd,* 195 F.3d 708 (4th Cir. 1999); ***Park v. City of Atlanta***, 938 F. Supp. 836, 843 (N.D. Ga. 1996) ("Defendants in the instant case were not responsible for creating the mob's violence in the wake of the Rodney King verdict or directing it toward Plaintiffs or their businesses. The city did give assurances and Plaintiffs acted on these assurances, but the city did not limit the Plaintiffs' freedom of action, and that is what prevents this from arising to a constitutional violation."), *rev'd and remanded on other grounds*, 120 F.3d 1157 (11th Cir. 1997); ***Rutherford v. City of Newport News***, 919 F. Supp. 885, 895 (E.D. Va. 1996) ("In sum, the case law makes clear that the affirmative duty to protect under the Due Process Clause arises primarily in the custodial context.

The 'danger creation' exception, to the extent it is recognized, still requires some element of custody or control − although in these cases the person in state custody or control is not the victim ..., but the perpetrator who harmed the victim."); ***Plumeau v. Yamhill County School District***, 907 F. Supp. 1423, 1443-44 (D. Ore. 1995) ("In this case, there is no evidence that the District was aware of a specific risk of harm to Memorial School students, much less to a particular child such as Amanda. Nor is there any evidence that the District took any affirmative action that created the danger which caused the specific harm suffered by Amanda. The District did hire and retain Moore. However, the mere fact that the District employed Moore to perform normal and customary janitorial duties which incidentally gave him access to the entire school building is insufficient to show that the District took affirmative action creating a specific danger to a specific individual. Absent some notice to the District of Moore's propensity to sexually abuse children, Amanda may not rely on this theory."), *aff'd by Plumeau v. School Dist. No. 40,* 130 F.3d 432 (9th Cir. 1997); ***Young v. Austin Independent School District***, 885 F. Supp. 972, 979 (W.D. Tex. 1995) (allowing students who had a history of disciplinary problems back in school "does not constitute the type of culpable behavior envisioned in the state-created danger theory."); ***Baby Doe v. Methacton School District***, 880 F. Supp. 380, 386 (E.D. Pa. 1995) ("Cases interpreting the state-created danger exception have repeatedly held that a state is not liable for a state-created danger if the victim is not known and identified, but simply a member of the greater public. [citing cases] . . . . We find that there are no allegations in the Amended Complaint to indicate that the Methacton Defendants were aware that they had created a danger specifically to Baby Doe. . . Plaintiffs, therefore, cannot make out a state-created danger claim."); ***Thacker v. City of Miamisburg***, No. C-3-92-188, 1994 WL 1631036, at *5 (S.D. Ohio July 14, 1994) ("Even assuming that those officers removed Nick Foote from the home and promised Janice Foote that he would not return, still it does not appear that a relationship 'special' enough was created such that Janice's reliance on their promise could ultimately lay at the feet of the City the responsibility for her death. There is no evidence that the City prevented her from leaving her home that night before her husband returned to murder her. There is no evidence that the City provided Nick Foote with 'the necessary means and the specific opportunity' to kill Janice. . . Short of such evidence, summary judgment is appropriate."); ***Franklin v. City of Boise***, 806 F. Supp. 879, 887 (D. Idaho 1992) (where plaintiff's son exposed himself to danger by resisting arrest and fleeing, no duty to protect arose under *DeShaney*); ***Robbins v. Maine School Administrative District No. 56***, 807 F. Supp. 11, 13 (D. Me. 1992) ("The relationship between a state and its students does not constitute the special custodial relationship referred to in *DeShaney*. The absence of an affirmative constitutional duty to protect its students does not, however, mean that a state may create a dangerous situation and place students in harm's way without acquiring a corresponding duty to protect those students from resulting violations of their constitutional rights. A state may be held liable if it can fairly be said to have affirmatively acted to create or exacerbate a danger to the victims."); ***Was v. Young***, 796 F. Supp. 1041, 1050 (E.D. Mich. 1992) ("Absent some kind of custodial relationship between the state and either Plaintiffs or their attackers, no constitutional duty can be imposed on Defendants.").

See also ***Breen v. Texas A & M University***, 485 F.3d 325, 333-37 (5th Cir. 2007) ("A number of courts, including the majority of the federal circuits, have adopted the state-created danger theory of section 1983 liability in one form or another. . . Prior to the *Scanlan* decision in the present group of cases, this court had often expressed reluctance to embrace the state-created danger theory, while noting its adoption by other courts.. . . . Although the *Scanlan* opinion did not expressly announce that it was adopting the state-created danger theory, it explicitly recited the previously recognized essential elements of a state-created danger claim, applied them to the pleadings, and decided that the plaintiffs had stated a claim upon which relief could be granted under the theory. . . Thus, the *Scanlan* panel, unlike earlier panels of this court, was squarely faced with complaints that sufficiently alleged the elements of a state-created danger claim, and, therefore, stated claims under that theory. Consequently, the *Scanlan* court, by holding that the district court erred in dismissing plaintiffs' section 1983 claims, necessarily recognized that the state-created danger theory is a valid legal theory.. . . . The *Scanlan* panel's clearly implied recognition of state-created danger as a valid legal theory applicable to the case is the law of the case with respect to these further appeals in these same cases now before this panel. . . . Because the necessary implication of the *Scanlan* court's decision is that the state-created danger theory is, indeed, a valid basis for a claim on the set of facts alleged in the complaints in these cases, that clear implied holding is the law of the case in the present group of appeals."), *amended on reh'g in part by* ***Breen v. Texas A & M University***, 494 F.3d 516, 518 (5th Cir. 2007) (withdrawing that part of prior opinion that recognized state-created-danger theory of liability); ***Rios v. City of Del Rio, Texas***, 444 F.3d 417, 422, 423 (5th Cir. 2006) ("Rios contends. . . that *Scanlan v. Texas A & M Univ*., 343 F.3d 533 (5th Cir.2003), adopted the state-created danger theory. It is certainly not clear that *Scanlan* purports to do so. There the panel primarily addressed the district court's error in considering matters outside the complaint in granting a Rule 12(b)(6) dismissal. The *Scanlan* panel did cite the *Johnson* and *Piotrowsk*i opinions respecting what would be required to make out a state-created danger claim, and stated that the plaintiffs had adequately pled the there referenced required elements thereof; however, this discussion was introduced by the statement that 'this Court has never explicitly adopted the state-created danger theory,' . . . and *nowhere* in the opinion does the court expressly purport to adopt or approve that theory. At least two subsequent panels have construed *Scanlan* as not adopting the state-created danger theory. . . We need not, however, ultimately resolve the meaning of *Scanlan* because, as explained below, prior decisions of this court more specifically on point here than *Scanlan* (and not cited in *Scanlan*) are controlling in the present setting.'[footnotes omitted]); ***Beltran v. City of El Paso,*** 367 F.3d 299, 307 (5th Cir. 2004) ("Beltran alternatively contends that Amador, by providing Sonye with inaccurate information about the status of the patrol units and recommending that she stay in the bathroom, created a dangerous situation for which the state was or should be responsible. This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented. *See, e.g., McClendon,* 305 F.3d at 327-333; *Scanlan v. Texas A & M Univ.,* 343 F.3d 533, 537 (5th Cir.2003) (same). It is unnecessary to do so in this case."); ***Rivera v. Houston Independent School District,*** 349 F.3d 244, 249 & n.5 (5th Cir. 2003) ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. . . .In *Scanlan v. Texas A & M University,*

343 F.3d 533 (5th Cir.2003), we found that 'this Court has never explicitly adopted the state-created danger theory.' *Id.* at 537. Despite remanding that case to the district court for further proceedings, we did not recognize the state created danger theory. . . . We again decline to do. Even if we were to review this case under the state created danger theory, it would fail. . . . Rather than pointing to an annunciated Board policy that was the 'moving force' behind the alleged due process violation, the Parents argue the Board established a custom of tolerating gang activity such that it constituted official Board policy, and this custom increased the danger to their son. . . .However, even if such a custom existed, there is no evidence showing the Board had actual or constructive knowledge of its existence. . . . Furthermore, even if the Parents could show that the Board was not assiduous at fighting gang activity, this does not demonstrate that it was 'deliberately indifferent' to the danger that gang activity might have posed to Avila. Nor does it show that the Board affirmatively placed Avila in a position of danger, namely in the situation where Balderas was a greater threat to him than he would have been otherwise."); ***Scanlan v. Texas A & M University,*** 343 F.3d 533, 537, 538 (5th Cir. 2003) ("Although this Court has never explicitly adopted the state-created danger theory, the Court set out the elements of a state-created danger cause of action in *Johnson v. Dallas Independent School District,* 38 F.3d 198 (5th Cir.1994). In *Johnson,* the Court explained that a plaintiff must show the defendants used their authority to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff. . . Later, the Court explained what is required to establish deliberate indifference. In *Piotrowski v. City of Houston,* the Court explained that to establish deliberate indifference, the plaintiff must show the 'environment created by the state actors must be dangerous; they must know it is dangerous; and ... they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.' . . Even a cursory review of the complaints shows the plaintiffs pleaded facts to establish deliberate indifference. . . . If these allegations were construed in the light most favorable to the plaintiff, the district court should have determined the plaintiffs had pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur. As a result, the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory."); ***Walding v. U.S.***, No. SA-08-CA-124-XR, 2009 WL 701807, at **11-13 (W.D. Tex. Mar.16, 2009) ("Given the state of the law, this Court is faced with the situation in which the Fifth Circuit either still has not recognized the viability of the state-created danger doctrine or it has done so (in *Scanlan*), but later panels of the Court have expressly stated that it did not. Based on a review of all the cases above, however, the Court concludes, as did the *Breen I* panel, that there are three minimum requirements to invoke the doctrine: the plaintiff must show that the harm to the plaintiff resulted because (1) the defendant's actions created or increased the danger to the plaintiff; and (2) the defendant acted with deliberate indifference toward the plaintiff; and (3) there must be an 'identifiable victim.'. . .The Court concludes that Plaintiffs have failed to establish the violation of a constitutional right. Plaintiffs' first complaint is that Defendants licensed the Nixon Facility initially. However, the Court agrees with Magistrate Judge Primomo that Plaintiffs fail to demonstrate that such an act is a sufficient 'affirmative action' directed to an identifiable victim to

trigger the doctrine. . . .[T]he Defendants' failure to take acts, revoke the license, or to otherwise end the abuse is inaction rather than action . . . . This Court agrees with Magistrate Judge Primomo's conclusion that these allegations essentially amount to no more than failing to provide protection from danger."); ***Boudoin v. St. Charles Parish Hosp***., No. 07-68422009, 2009 WL 602961, at **7-10 (E.D. La. Mar. 9, 2009) ("This 'state-created danger' theory of § 1983 liability has charted a tortuous path in the Fifth Circuit, intermittently recognized by panels of the court, only to be rejected by the en banc court soon after. [collecting cases] As a result, the 'state-created danger' doctrine remains inapplicable in the Fifth Circuit, despite the admittedly confusing hodgepodge of decisions on the issue. . . . Plaintiff's claims based on the "state-created danger" doctrine are untenable as a matter of law because the doctrine is not applicable in the Fifth Circuit. Furthermore, to the extent that the doctrine may be applicable, it is certainly not a clearly established constitutional right in light of the Fifth Circuit's inconsistent and sometimes conflicted treatment of the doctrine over the last twenty years. As a result, and to the extent that the 'state-created danger' doctrine might be applicable to this case, Champagne is entitled to qualified immunity."); ***Robinson v. Roberson***, 2009 WL 274133, at *3, *4 (N.D.Tex. Jan. 30, 2009) ("The existence of the [state-created danger] theory in the Fifth Circuit, however, remains doubtful. The Fifth Circuit adopted the state-created danger theory in *McClendon v. City of Columbia,* 258 F.3d 432, 436 (5th Cir.2001), but then, following an *en banc* review, the ruling was vacated, and the Fifth Circuit did not recognize the theory in its opinion following rehearing, *McClendon,* 305 F.3d at 333. More recently, the Fifth Circuit again recognized the state-created danger theory in *Breen v. Texas A & M University,* 485 F.3d 325, 332- 38 (5th Cir.2007), but then voted *sua sponte* to grant rehearing, in part, and withdrew and deleted the portion of the opinion that recognized the theory. *Breen v. Texas A & M University,* 494 F.3d 516 (5th Cir.2007). In between *McClendon* and *Breen,* the Fifth Circuit generally declined to recognize the viability of the theory. [collecting cases] Even if the state-created danger theory were viable in the Fifth Circuit, plaintiff's allegations would fail to state a valid claim."); ***Doe v. Town of Bourne,*** No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *7, *8 (D. Mass. May 28, 2004) ("Neither the custodial relationship exception nor the state-created danger exception applies in this case. As to the former, the Does have not alleged any specialized facts that give rise to a custodial relationship between themselves and defendants, and while the First Circuit has not addressed the issue, other courts have resoundingly concluded that, as a general matter, students do not stand in a custodial relationship with public schools or their officials for purposes of applying *DeShaney*. . . . The allegations in the Complaint are similarly insufficient to support a state-created danger theory of liability. The only conduct of Grondin and Demitri at issue is their nonaction, including their failure to report the rape to Nicole's parents or the police and their failure to investigate, or more generally to prevent, the rape and harassment. Absent any affirmative action by school officials, the state-created danger theory does not open the door for due process violations for situations in which students are harmed by other students, even where the school deliberately ignores either a threat or actual prior instances of violence.").

See also ***Monfils v. Taylor***, 165 F.3d 511, 517 (7th Cir. 1998) ("[W]e note that by having the requirement regarding avenues of self-help included in the instructions, the City received a

benefit it was not strictly entitled to. In a claim such as this one based on a state-created danger, there is no absolute requirement that all avenues of self-help be restricted. *Wallace*, the case on which the City relies, involved, as we have said, a prison guard. He was attempting to establish liability by claiming both that he had a 'special relationship' with the state because of his position as a guard and that prison officials placed him in a position of danger he would not otherwise have faced. The requirement that self-help be restricted went only to his claim of a special relationship. The basis of a special relationship is that the state has some sort of control or custody over the individual, as in the case of prisoners, involuntarily committed mentally ill persons, or foster children. The state's duty to protect those persons or to provide services for them arises from that custody or control. For a person not in custody to claim a special relationship, he must at least claim that the state had sufficient control to cut off other avenues of aid. Recently, in a case which seems to merge the two theories, we have required a finding that alternative avenues of aid have been cut off. *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir.1997). *Wallace*, however, states no such requirement. We think *Wallace* correctly states the law of this circuit: a state can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of aid. As we said in *Wallace*, the elements of the claim are: 'what actions did the prison officials affirmatively take, and what dangers would Wallace otherwise have faced?'").

In ***G-69 v. Degnan***, 745 F. Supp. 254 (D.N.J. 1990), the court found a "special relationship" between an informant and the state, where "both parties anticipate[d] that the informant's activities . . . could result in a threat to [his] life . . . ." *Id*. at 265. Where the state had made guarantees of personal safety to the informant and where the informant's life and liberty are at risk, "the state may not, consistent with the Constitution, walk away from the bargain." *Id*. *See also* ***Butera v. District of Columbia,*** 235 F.3d 637, 649, 650 (D.C. Cir. 2001) ("The circuit courts have adopted the State endangerment concept in a range of fact patterns concerning alleged misconduct by State officials. Regardless of the conduct at issue, however, the circuits have held that a key requirement for constitutional liability is affirmative conduct by the State to increase or create the danger that results in harm to the individual. . . . We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm."); ***Wang v. Reno***, 81 F.3d 808, 818 (9th Cir. 1996) ("[T]he government argues that Wang's due process rights were not violated because the government 'has no constitutional duty to protect a witness from harm stemming from his or her testimony that may occur after the witness is released from the government's custody.' The government's argument fails to take into account the government's constitutional duty to protect a person when it creates a special relationship with that person, or when it affirmatively places that person in danger. . . . Having placed Wang in custody, the government had an obligation to protect him from liberty deprivations he faced by virtue of his testimony in court.").

But see ***Matican v. City of New York***, 524 F.3d 151, 156-59 (2d Cir. 2008) ("We therefore join several of our sister circuits in holding that a noncustodial relationship between a confidential informant and police, absent more, is not a special relationship. *Accord Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir.2005); *Dykema v. Skoumal*, 261 F.3d 701, 706 (7th Cir.2001); *Butera v.. District of Columbia*, 235 F.3d 637, 648 (D.C.Cir.2001); *Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir.1998). . . . In applying the state-created danger principle, "we have sought to tread a fine line between conduct that is 'passive' " (and therefore outside the exception) "and that which is 'affirmative' " (and therefore covered by the exception). . . . As the district court recognized, Matican's allegation that the officers failed to learn about, or inform him of, Delvalle's violent criminal history or his release on bail fall on the passive side of the line. . . . By contrast, Matican's allegation that the officers planned the sting in a manner that would lead Delvalle to learn about Matican's involvement is sufficiently affirmative to qualify as a state-created danger. . . . Here, . . . the officers had ample opportunity to plan the sting in advance. Matican argues that the district court erred in holding that the officers did not act with deliberate indifference. He proposes a balancing test to help factfinders determine when the conscience is shocked by reckless or deliberately indifferent state action that creates or increases a danger. We need not consider Matican's proposed test, because this court's decision last year in *Lombardi* provides sufficient guidance to resolve this issue. In that case, we considered the claims of rescue and cleanup workers at the World Trade Center site following the 9/11 attacks. The workers in that case alleged that the defendants, federal environmental and workplace-safety officials, issued intentionally false press releases stating that the air in Lower Manhattan was safe to breathe, and that in reliance on those statements, the workers did not use protective gear. . . We held that, regardless of whether the situation was a time-sensitive emergency, plaintiffs' allegations of deliberate indifference did not shock the conscience. . . . The same considerations lead us to conclude that Matican's allegations of affirmative conduct by the officers, even if true, do not shock the contemporary conscience. In designing the sting, the officers here had two serious competing obligations: Matican's safety and their own. They could reasonably have concluded that the arrest of a potentially violent drug dealer demanded the use of overwhelming force, even if that show of force might jeopardize the informant's identity in the future. We are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands. As we explained in *Lombardi*, the defendants in our prior state-created danger cases were not subject to 'the pull of competing obligations.'. . .Because the officers were obliged to protect their own safety as well as Matican's, their design of the sting in this case does not shock the conscience."); ***Velez-Diaz v. Vega-Irizarry***, 421 F.3d 71, 81(1st Cir. 2005) ("We hold that plaintiffs have not alleged facts to support a claim based on the state created danger theory. Plaintiffs' theory may be that the government owes a duty to all cooperating witnesses to protect them from harm. There are risks inherent in being a cooperating witness, but the state does not create those dangers, others do, and the witness voluntarily assumes those risks. . . We leave open the question whether, nonetheless, the state may violate substantive due process as to cooperating witnesses if it takes certain actions, such as sending a cooperating witness to what the state knows would be his certain death. Such action may shock the conscience by demonstrating 'deliberate indifference.' . . This case does not come

close. There is no allegation the government knew Velez would be murdered. At most, the allegation is that Velez said that he was tired, not that he said he was under imminent risk. The attempt to show a substantive due process violation based on a claim that some yet unknown regulation required the state to promptly remove 'tired' cooperating witnesses fails. Plaintiffs have therefore failed to carry their burden under the threshold inquiry for qualified immunity. Absent a showing that the agents' conduct violated a constitutional right, qualified immunity applies."); ***Gatlin v. Green,*** 362 F.3d 1089, 1093, 1094 (8th Cir. 2004) ("Gatlin made a courageous decision to leave the MC gang, to cooperate with police, and to start a new life. By cooperating with police in exchange for a reduced sentence and a chance to relocate, Gatlin knowingly assumed a considerable risk that MC gang members would eventually discover his cooperation and seek to avenge him. Gatlin was a twenty-five year MC gang veteran. He could evaluate better than anyone the deadly risk inherent in cooperating with police. The actions of Sergeant Green, fellow police officers, Prosecutor McGlennen, the victim/witness personnel, and the state judiciary were undertaken with a solitary purpose-to minimize the risk of a retaliatory gang 'hit' against Gatlin by providing him with the legal and financial means necessary to flee his would-be avengers. Mrs. Gatlin's contention that more protective measures could have been taken is unavailing based on the record. That Gatlin would ultimately remain in or return to Minneapolis without informing authorities was unknown to Sergeant Green. Gatlin miscalculated the grave risk of harm he assumed. Tragically, his miscalculation cost him his life."); ***Dykema v. Skoumal,*** 261 F.3d 701, 706 (7th Cir. 2001) (rejecting application of state-created danger or custody theory with respect to informant shot by another drug dealer, where informant was experienced drug dealer, voluntarily cooperating with police for Acash, beer, and to get his driver's license back."); ***Summar v. Bennett***, 157 F.3d 1054, 1058, 1059 (6th Cir. 1998) ("Plaintiff has cited several foreign cases, each of which has purportedly concluded that government officials have a duty to protect certain private citizens from a third party's deprivation of their due process rights when a special relationship exists between the victims and the government officials. [citing cases] It is critical to note that in each of these cited cases, the official defendants created the risk of harm to the plaintiff without the consent of the victim. . . . Accordingly, the present controversy can be distinguished from the others because Summar voluntarily elected to serve as a confidential informant, despite being advised that he would have to testify and reveal his status as an agent of the police. . . . [T]his forum does not adopt the proposition of law articulated by the New Jersey district court in *G-69*, and notes that *DeShaney* neither compels nor foreshadows the conclusion pronounced in that renegade decision."); ***McIntyre v. United States***, 336 F.Supp.2d 87, 113 (D. Mass. 2004) ("[T]he plaintiffs argue that, because McIntyre was a government informant, he was 'owed a constitutionally protected duty of care arising out of a recognized "special relationship."' . . . The plaintiffs' argument fails because, unlike an inmate or involuntarily institutionalized patient, the informant/government relationship is voluntary and does not involve physical restraint by government agents. . . .Whatever metaphorical shackles may be inherent in becoming an informant, or to whatever degree being an informant 'significantly compromises one's ability to protect oneself,' is simply insufficient to cloth the informant with substantive due process rights to protection from the harm he might suffer as a consequence of being an informant. Like the patient in *Monahan*, who voluntarily committed himself to a mental institution, McIntyre chose to

be an informant. His freedom to choose whether to cooperate with the government bears no resemblance to the situation of one who, by action of the government, is forced behind locked hospital or prison doors."); ***Williamson v. City of Virginia Beach***, 786 F. Supp. 1238, 1250-55 (E.D. Va. 1992) (situation of seventeen-year-old informant who volunteered his services to police and subsequently committed suicide, not sufficiently analogous to incarceration or institutionalization to create affirmative duty to protect; State did not so restrain his liberty or exercise control so as to render individual incapable of caring for himself). *See also* ***Butera v. District of Columbia,*** 235 F.3d 637, 651 n.16 (D.C. Cir. 2001) ("Because we hold that the right arising from State endangerment was not clearly established in this circuit at the time of Eric Butera's death, we do not address whether the possibly voluntary nature of his conduct would relieve or mitigate the District of Columbia of constitutional liability.").

See aslo ***Vasquez v. Attorney General of the United States***, 208 F. App'x 184, ___ (3d Cir. 2006) ("Vasquez argues the U.S. government has an affirmative duty to protect him because the risk of his being tortured arises from the assistance he provided to federal agents. Generally, the state has no obligation to protect individuals from harm inflicted by third parties. [citing *DeShaney*] However, as this Court explained in *Kamara v. Attorney General*, 'we have recognized a 'state-created danger exception,' such that the government has a constitutional duty to protect a person against injuries inflicted by a third-party when it affirmatively places the person in a position of danger the person would not otherwise have faced.' 420 F.3d 202, 216 (3d Cir.2005). Despite Vasquez's contentions, *Kamara* explicitly declined to recognize the state-created danger exception in the immigration context. This Court determined that extending the exception in this way, 'would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the [Convention Against Torture].'. . Based on this precedent, we reject Vasquez's claim for relief under the state-created danger exception."); ***Guerra v. Gonzales***, No. 04-60650, 2005 WL 1651660, at *2 (5th Cir. July 14, 2005) (not published) ("We have no reason to believe that the Supreme Court would, under any circumstances, apply the state created danger theory in an immigration case unless the petitioner established that the state actors created or increased the danger to the plaintiff. That is the underlying premise upon which the doctrine is based. . . In this case, the IJ [Immigration Judge] found that Guerra failed to establish that his life will be in danger if he is deported to Colombia. The only definitive evidence of danger that was presented to the IJ was evidence of a single phone threat to his wife and a threat in open court by a defendant against whom Guerra was testifying. Both of these threats apparently occurred around the time Guerra was incarcerated in 1999 or 2000. Guerra produced no additional evidence of any continuing threats or other manifestations of danger that may await him if he returns to Colombia. For the above reasons, we conclude that even if the state created danger theory is a viable one in the immigration context, based on the record evidence in this case, it has no application here. We therefore reject Guerra's substantive due process claim."); ***Nora and her Minor Son, Jose v. Wolf***, No. CV 20-0993 (ABJ), 2020 WL 3469670, at *13 (D.D.C. June 25, 2020) ("Plaintiffs have not pointed the Court to any opinion in which this circuit applied the state-created danger doctrine to a non-citizen in immigration proceedings. The doctrine arose in proceedings under 42 U.S.C. §

1983 seeking to hold state actors liable for constitutional violations, and several circuits have expressly rejected the notion that it could be applied in the immigration context. [discussing *Enwonwu v. Gonzales*, 438 F.3d 22 (1st Cir. 2006), *Kamara v. Attorney Gen. of U.S.*, 420 F.3d 202 (3d Cir. 2005), and *Vincent-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008)] In the absence of clear direction from the D.C. Circuit on the issue, and in light of the persuasive reasoning of the three other circuits cited above, the Court cannot find that plaintiffs have shown that they are likely to be successful on the merits of their constitutional claim.").

See also ***Doe v. City of Phoenix***, Nos. CV-07-1901-PHX-GMS, CV-08-1837-PHX-GMS, 2009 WL 4282275, at *12 (D. Ariz. Nov. 25, 2009) ("[T]hose circuits that had addressed the state-created danger doctrine in the context of confidential sources had uniformly found that liability under § 1983 was inappropriate. [citing cases] Thus, even if Individual Officers acted unconstitutionally, it cannot be said that a reasonable public official would clearly have known that the officers' conduct was prohibited with respect to the uncontested facts presented here.").

For cases involving claims of failure to protect witnesses, *see, e.g.,* ***Rivera v. Rhode Island***, 402 F.3d 27, 35-38 (1st Cir. 2005) ("This court has, to date, discussed the state created danger theory, but never found it actionable on the facts alleged. [citing cases] Even if there exists a special relationship between the state and the individual or the state plays a role in the creation or enhancement of the danger, under a supposed state created danger theory, there is a further and onerous requirement that the plaintiff must meet in order to prove a constitutional violation: the state actions must shock the conscience of the court. . . In determining whether the state has violated an individual's substantive due process rights, a federal court may elect first to address whether the governmental action at issue is sufficiently conscience shocking. . . . Of course, whether behavior is conscience shocking varies with regard to the circumstances of the case. . . In situations where actors have an opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice to 'shock the conscience.'. . Keeping all of this in mind, we echo the caution articulated in *Soto*: in a state creation of risk situation, where the ultimate harm is caused by a third party, 'courts must be careful to distinguish between conventional torts and constitutional violations, as well as between state inaction and action.' . . .Rivera argues the state's two actions in identifying Jennifer as a witness and taking her witness statement in the course of investigating a murder compelled Jennifer to testify and thus enhanced the danger to Jennifer. Both are necessary law enforcement tools, and cannot be the basis to impose constitutional liability on the state. Rivera also argues issuance of a subpoena enhanced the risk to Jennifer. Issuing a subpoena is also a vital prosecutorial tool. While requiring Jennifer's testimony may in fact have increased her risk, issuance of a subpoena did not do so in the sense of the state created danger doctrine. Every witness involved in a criminal investigation and issued a subpoena to testify in a criminal proceeding faces some risk, and the issuance of a subpoena cannot become the vehicle for a constitutional claim against a state. The only remaining 'affirmative acts' alleged in the complaint are the defendants' assurances of protection. . . There is no doubt that, if accepted as true, the complaint shows that Jennifer may have been subjected to an increased risk, if she was promised protection, not given it, and relied on the promise. The state, in making these promises,

may have induced Jennifer into a false sense of security, into thinking she had some degree of protection from the risk, when she had none from the state. While the unkept promises may have rendered her more vulnerable to the danger posed by Charles Pona and his associates, merely rendering a person more vulnerable to risk does not create a constitutional duty to protect. . . In part this is because an increased risk is not itself a deprivation of life, liberty, or property; it must still cause such a deprivation. Ultimately, the claims alleged in the complaint are indistinguishable from those in *DeShaney*.. . . The state's promises, whether false or merely unkept, did not deprive Jennifer of the liberty to act on her own behalf nor did the state force Jennifer, against her will, to become dependent on it.. . Moreover, the state did not take away Jennifer's power to decide whether or not to continue to agree to testify. Merely alleging state actions which render the individual more vulnerable to harm, under a theory of state created danger, cannot be used as an end run around *DeShaney*'s core holding. . . We add a few words about the separate shock the conscience test which plaintiff would also have to meet if she established a duty. In part, the test is meant to give incentives to prevent such gross government abuses of power as are truly outrageous. The facts here do not match the need for such incentives. Intimidation and even murder of witnesses is a growing national problem in major urban areas, plaguing witnesses, law enforcement officers, and the communities. It is in the interests of the police to protect witnesses, in order to secure convictions. There can be any number of common reasons why police protection of witnesses is ineffectual, none of which involve acts by the police intended to cause the murder of a needed witness. . . Of course, there may be an extreme set of facts involving such deliberate and malevolent actions by police against witnesses as to shock the conscience and implicate a constitutional violation. Those await another day."); ***W.D.G. ex rel Burrell v. City of Oakland***, No. C 03-04283 WHA, C 02-05642 WHA, 2004 WL 1774226, at *9 (N.D.Cal. Aug. 6, 2004) ("[T]his Court held that a jury could reasonably conclude that Cruz had significantly and affirmatively understated the risk to Grundy, a positive act that may have lulled Grundy into a reduced level of caution, and that Cruz had led Grundy to believe that Cruz would warn Grundy of any specific threat learned from Scott's monitored telephone calls. A reasonable jury could also find that Cruz knew of a concrete and specific threat against Grundy's life and failed to communicate that threat. The facts as to Gilbert, however, are different. As mentioned, there was only one meeting with Gilbert. There were no follow-up meetings as in Grundy. At the meeting with Gilbert, Cruz told him of the risk he assumed in incriminating Scott as Abraham's murderer and told him to stay out of Oakland. Gilbert agreed that he was at risk and he gave neither Cruz nor Rullamas reason to think that he would expose himself to harm. Indeed, unlike Chance Grundy, who purportedly dismissed many of the warnings given by Cruz, Gilbert said he was moving to Sacramento and 'was adamant that he wasn't coming back' . . . Furthermore, Cruz did not assure Gilbert that he was going to monitor Scott's telephone calls and then, when Cruz learned of a specific threat, withhold such information from Gilbert. On this record, this order holds that a reasonable jury could not conclude that Cruz or Rullamas affirmatively created the danger that led to Gilbert's death. Hence, plaintiffs cannot succeed."); ***Clarke v. Sweeney,*** 312 F.Supp.2d 277, 290, 294 (D. Conn. 2004) ("The Second Circuit has not specifically considered whether the 'state created danger exception' to *DeShaney* applies to fact witnesses for whom visible police protection was provided and then withdrawn. . . . [I]t seems clear that this exception requires that the state

actors do more than simply temporarily assign marked police cars for the protection of witnesses to crimes. This exception requires that the government defendant either be a substantial cause of the danger the witness faces or at least enhance it in a material way. Certainly, the BPD could have provided better protection for B.J. Brown and Karen Clarke. However, that does not mean that a violation of the U.S. Constitution occurred. . . Here, the danger posed by the Peelers was not the creation of the state. Nor did the actions of the police provide the Peelers with an opportunity to harm Karen or B.J. Thus, the Court finds that the state created danger exception to *DeShaney* is inapplicable based on the undisputed facts of this case as well as the disputed facts considered in a light most favorable to the plaintiff.").

c. entitlement cases

The Court in ***DeShaney*** did not address petitioners' argument that state law created an "entitlement" to protective services, any deprivation of which would be subject to Fourteenth Amendment due process constraints. 109 S. Ct. at 1003 n.2.

Compare ***Heykoop v. Michigan State Police***, 838 F. App'x 137, ___ (6th Cir. 2020) ("The takeaway from *Lucas*, beyond the simple holding that the *Lucas* plaintiff could not establish a property interest, is that a plaintiff who can point to an 'ordinance, contract[,] or other "rules of mutually explicit understandings,"' including requirements the towing company must satisfy to be placed on and remain on the list, along with express 'procedures' the Post Commanders must follow in order to remove or suspend the towing company from the list has established a 'legitimate claim of entitlement.'. . Because MSP Order 48 contains express reference to these requirements and procedures, Eagle Towing had a clearly established interest in remaining on the Lists.") *with* ***Heykoop v. Michigan State Police***, 838 F. App'x 137, ___ (6th Cir. 2020) (Sutton, J., dissenting) ("I reluctantly dissent from the majority's thoughtful approach to this difficult case. Even assuming there is a protected property interest in staying on a towing call list, that interest is not clearly established. The only relevant cases *rejected* similar claims. *See Lucas v. Monroe Cnty.*, 203 F.3d 964, 978 (6th Cir. 2000); *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 409–11 (6th Cir. 2002). When cases reject a constitutional claim, they do not clearly establish it. And even when dicta in past cases may suggest how to satisfy the claim in a future case, they do not clearly establish the principle. They just pave the way for a future case—and a future holding—to clearly establish it. Independent of all that, I am skeptical that a discretionary policy 'intended for the guidance of [the Michigan State Police] members,'. . . amounts to the source of a protected property interest. The Constitution does not protect guidelines extinguishable at the whim of state officials. With respect, I would reverse the district court's denial of qualified immunity.")

In ***Meador v. Cabinet for Human Resources***, 902 F.2d 474 (6th Cir. 1990), the court determined that Kentucky state law provided children placed in state-regulated foster homes with a "framework of entitlements," including "an entitlement to protective services of which they may not be deprived without due process of law." *Id*. at 476-77. *See also* ***Sealed v. Sealed,*** 332 F.3d 51, 55 (2d Cir. 2003) ("In this case, plaintiffs do not contend that the state of Connecticut has a

constitutional obligation to protect them from child abuse . . . instead they argue that Connecticut's comprehensive child welfare scheme . . . creates an entitlement to protective services subject to Fourteenth Amendment scrutiny."); ***Hilliard v. Walker's Party Store, Inc.***, 903 F. Supp. 1162, 1174 (E.D. Mich. 1995) ("[T]hat plaintiff . . . was ordered to vacate the premises does not constitute a custodial situation giving rise to a special relationship and a duty on the part of the police officers to prevent injury to plaintiff . . . either from himself or third persons . . . Nevertheless, if the Michigan incapacitated persons statute . . . applies, such statute may have given rise to a special relationship through which defendant officers possessed a duty to protect plaintiff['s] well-being. If the statute applies . . . then the question arises whether defendant officers acted with deliberate indifference to plaintiff['s] special needs due to his asserted intoxication.").

In ***Doe by Nelson v. Milwaukee County***, 712 F. Supp. 1370 (E.D. Wis. 1989), *aff'd*, 903 F.2d 499 (7th Cir. 1990), plaintiffs claimed that Wisconsin law created a right to an investigation where there was a report of suspected child abuse and that they had been deprived of this entitlement without due process of law. An examination of state law led the court to conclude there was no entitlement to a mandatory investigation unless the report came from a law enforcement agency or person *required* to report under the statutory scheme. Thus, with no property interest in the investigation of their report, no due process rights were involved.712 F.Supp. at 1377-78.

The Court of Appeals for the Seventh Circuit affirmed, ***Doe by Nelson v. Milwaukee County***, 903 F.2d 499 (7th Cir. 1990), but went on to hold that even if the Does were required to report and the state investigation procedures were properly triggered under state law, "the procedures themselves are not 'benefits' within the meaning of Fourteenth Amendment jurisprudence." *Id*. at 503. The court noted "the confusion that would result from elevating a state-mandated procedure to the status of a constitutionally protected property interest." *Id*. *See also* ***Catinella v. Cty. of Cook, Illinois***, 881 F.3d 514, 518 (7th Cir. 2018) ("Catinella has not identified any state law, local ordinance, or contract provision that substantively limits Cook County's ability to fire him. He relies solely on his personal 'understanding' that 'pursuant to Cook County policies and procedures,' he 'could not be terminated from his employment *unless* [*certain*] *steps were followed*, which in his case were not.' . . At best, that's an allegation about process, not a property right. 'Process is not an end in itself.'. . An employee manual or policy handbook that specifies a set of pre-termination procedures does not 'create an enforceable property right to a job.'. . Catinella has not stated a plausible claim for deprivation of a property interest in his employment."); ***Kvapil v. Chippewa County, Wis.***, 752 F.3d 708, 715 (7th Cir. 2014) ("Without a property interest in his seasonal employment, this remaining argument boils down to the contention that Chippewa County did not follow its own procedures when it suspended and ultimately terminated Kvapil's employment. A local government's failure to follow its own procedural rules, however, does not violate due process.")

Accord ***Lavite v. Dunstan***, 932 F.3d 1020, 1033 (7th Cir. 2019) ("State and local law can create and confer constitutionally protected liberty and property interests, but state and local

procedural protections do not by themselves give rise to federal due process interests. . . .The section of the Madison County Personnel Policy Handbook that Lavite relies upon sets out purely procedural rules. In fact, calling them rules might even be a stretch. The relevant Handbook Policy states that law enforcement *may* investigate, not that it must. Lavite did not identify any substantive liberty or property interest embedded within these procedural regulations."); ***GEFT Outdoors, LLC v. City of Westfield***, 922 F.3d 357, 366 (7th Cir. 2019) ("Even if the Stop Work Notices themselves halted further work on the Billboard, and assuming this work stoppage 'deprived' GEFT of its leasehold interest, GEFT's only complaint about these notices is that they did not comply with the UDO's requirements. But there is no constitutional procedural due process right to state-mandated procedures. *See Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 773 (7th Cir. 2013); *River Park*, 23 F.3d at 166–67 (plaintiff "may not have received the process [the state] directs its municipalities to provide, but the Constitution does not require state and local governments to adhere to their procedural promises"). The fact that the Stop Work Notices did not comply with the UDO's [Unified Development Ordinance] procedures cannot support a procedural due process claim, and GEFT does not raise any other issue with the process it received via the Stop Work Notices beyond their non-compliance with the UDO."); ***Blouin v. Spitzer,*** 356 F.3d 348, 363 (2d Cir. 2004) ("State procedures designed to protect substantive liberty interests entitled to protection under the federal constitution do not themselves give rise to additional substantive liberty interests."); ***Holcomb v. Lykens,*** 337 F.3d 217, 224, 225 (2d Cir. 2003) ("Although state laws may in certain circumstances create a constitutionally protected entitlement to substantive liberty interests, . . . state statutes do not create federally protected due process entitlements to specific state-mandated procedures. . . . Even were we to assume that Vermont law creates a federally protected entitlement to extended furlough, it did not create a similarly protected entitlement to the specific procedures outlined in Vermont Department of Corrections Directive 372.03. Rather, any entitlement to extended furlough would be federally protected by the processes created by the Fourteenth Amendment and outlined in *Morrisey*. These procedures were followed by the defendants when they revoked Holcomb's extended furlough. The defendants may have breached Vermont law or their own procedures, and their conduct may have been deplorable for that reason, but it did not violate the Fourteenth Amendment."); ***Doe by Fein v. District of Columbia***, 93 F.3d 861, 868 (D.C. Cir. 1996) ("In an effort to avoid *DeShaney*, Doe disclaims reliance on 'substantive due process' as such. Rather, she contends that her claim is based on a statutory entitlement to protective services and is thus not governed by *DeShaney* . . . . As noted, however, process alone does not give rise to a protected substantive interest: by codifying procedures for investigating child abuse and neglect reports, D.C. has not assumed a constitutional obligation to protect children from such abuse and neglect. The fact that Doe can point to a D.C. statute mandating investigation does not, therefore, convert a meritless substantive due process claim into a fruitful procedural one."); ***"Tony" L. by and through Simpson v. Childers***, 71 F.3d 1182, 1187 (6th Cir. 1995) (Upon examination of Kentucky's Unified Juvenile Code, the court concluded that "neither the words of the relevant statutes nor the policy goals expressed therein limit the discretion of Defendants enough to create a liberty interest protected by the Due Process Clause of the United States Constitution."); ***Morgan v. Weizbrod***, 17 F.3d 1437, 1994 WL 55607, *2 (10th Cir. Feb. 23, 1994) (Table) (rejecting plaintiff's argument that the

Oklahoma child protection statute created a duty to investigate reports of child abuse, which duty was tantamount to an entitlement protected by the Fourteenth Amendment); ***Pusey v. City of Youngstown***, 11 F.3d 652, 656 (6th Cir. 1993) ("The Ohio victim impact law does not create a liberty interest here because it only provides that the victim has the right to be notified. The statute does not specify how the victim's statement must affect the hearing nor does it require a particular outcome based on what the victim has said."); ***Villanova v. Abrams***, 972 F.2d 792, 798 (7th Cir. 1992) (noting "persistent fallacy that procedural requirements create substantive entitlements"); ***Kellas v. Lane***, 923 F.2d 492, 494 (7th Cir. 1990) ("[A] state creates a protected liberty interest only when it establishes 'specific substantive predicates' that limit the discretion of official decisionmakers and mandates a particular outcome to be reached if the relevant criteria have been met."); ***A.S., by and through Blalock v. Tellus***, 22 F. Supp.2d 1217, 1223 (D. Kan. 1998) (concluding no liberty or property interest in enforcement of Kansas Code for the Care of Children); ***Semple v. City of Moundsville***, 963 F. Supp. 1416, 1431 (N.D.W.Va. 1997) ("[A]lthough a statute may prescribe and codify certain procedures for dealing with domestic violence and/or child abuse, the statute does not automatically create an entitlement that can be enforced by individuals. Rather, before the statute can give rise to a constitutionally protected entitlement it must be based on an independent, substantive constitutional right."), *aff'd,* 195 F.3d 708 (4th Cir. 1999).

See also ***Moya v. Garcia***, 895 F.3d 1229, 1241-42 (10th Cir. 2018) (McHugh, J., concurring in the result in part and dissenting in part) (*amended opinion on denial of rehearing en banc*), *cert. denied*, 139 S. Ct. 1323 (2019) ("[I]t is imperative that we accurately identify the exact nature of the state-created liberty interest Plaintiffs seek to protect. In presenting their case, Plaintiffs have tended to conflate the right to freedom (or bail) with the right to procedures requiring timely bail hearings. Although both are rights created by New Mexico law, . . . only the former can be a protected liberty interest. That is because 'an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.'. . To the extent Plaintiffs argue that New Mexico's fifteen-day rule 'creates a liberty interest protected by constitutional procedural due process,' their position 'reflects a confusion between what is a liberty interest and what procedures the government must follow before it can restrict or deny that interest.'. . . And Plaintiffs are inconsistent in how they frame their protected liberty interest, sometimes relying on New Mexico's fifteen-day rule as an end unto itself and sometimes hinting at the fundamental underlying right to be free of restraint. . . . I would, accordingly, begin the procedural due process analysis by clarifying that Plaintiffs' only relevant protected liberty interest is in their right to 'freedom pending trial.'. . That right may be duly honored via a timely bail determination, but the timely bail determination is a means, not an end. The source of Plaintiffs' liberty interest does not much matter, but it can be said to arise from either the United States Constitution, *see Baker*, 443 U.S. at 144, 99 S.Ct. 2689; *Dodds*, 614 F.3d at 1192, the New Mexico Constitution, *see Brown*, 338 P.3d at 1282, or both. Although New Mexico is free to create procedural rights protecting the underlying right to bail, as it has done here, *see* Rule 5–303 NMRA, the failure of its state officials to protect *state-law* procedural rights is not a Fourteenth Amendment violation, so long as federal due process requirements (which may well be lower) are satisfied. We would not be the first court

to note the irony that, were the rule otherwise, its effect would be to subject states offering *more* procedural protections to stricter federal oversight. . . .The sufficiency of the process afforded Plaintiffs—the adequacy and timeliness of their bail determinations—implicates the second prong of the procedural due process test, not the first. As to this latter question, we ask whether Plaintiffs were afforded all the process that was their due. . . I would have no difficulty holding that Plaintiffs have plausibly alleged that they were not afforded an appropriate level of process."); ***Forrester v. Bass***, 397 F.3d 1047, 1057 (8th Cir. 2005) ("Thus, based on the plain statutory language and court precedent, we hold sections 210.109 and 210.145 of the Missouri Revised Statutes, which were in effect in August 1999, did not create specific, constitutionally protected property or liberty interests in state-created investigative, preventive, and protective social services. Finding no protected interests, we need not decide what, if any, procedural process was due."); ***Bagley v. Rogerson***, 5 F.3d 325, 328 (8th Cir. 1993) ("If a state law gives me the right to a certain outcome in the event of the occurrence of certain facts, I have a right, by virtue of the Fourteenth Amendment, to whatever process is due in connection with the determination of whether those facts exist. This is not at all the same thing as saying that the federal Constitution guarantees me all rights created or conferred upon me by state law."); ***Posr v. City of New York***, 835 F. Supp. 120, 125 (S.D.N.Y. 1993) (Plaintiff's expectation that officers would be disciplined following a finding of excessive force, "did not rise to the level of a constitutionally protected interest. Accordingly, a City decision not to discipline the officers did not violate any of plaintiff's constitutional rights."), *aff'd*, 22 F.3d 1091 (2d Cir. 1994); ***Coker v. Henry***, 813 F. Supp. 567, 570 (W.D. Mich. 1993) ("The Michigan Child Protection Law does not prescribe and mandate compliance with specific procedures substantively limiting the discretion of state officers. It is not sufficiently explicit and mandatory and does not create a legitimate claim of entitlement of the nature here claimed."), *aff'd*, 25 F.3d 1047 (6th Cir. 1994); ***Boston v. Lafayette County, Mississippi***, 743 F. Supp. 462, 472 (N.D. Miss. 1990) (a state statute creating a duty on the part of the sheriff to safely keep prisoners entrusted to his care, could not serve as the source of procedural due process claim).

Compare ***Lee v. Hutchinson***, 854 F.3d 978, 981-82 (8th Cir. 2017) (en banc) (per curiam), ("At the broadest level, the inmates assert that the violations of Arkansas law, regulations, and policy during the clemency process violated the Due Process Clause of the Fourteenth Amendment. As an initial matter, we note that, to the extent the inmates argue that these irregularities *themselves* constitute a violation of their due process rights, this argument fails under well-established law. . . .Based on the record before us, we conclude that the district court was correct in determining that, despite the procedural shortcomings in the clemency process, the inmates received the minimal due process guaranteed by the Fourteenth Amendment."), *cert. denied,* 137 S. Ct. 1623 (2017) *with* ***Lee v. Hutchinson***, 854 F.3d 978, 982-87 (8th Cir. 2017) (en banc) (per curiam) (Kelly, J., dissenting) ("On February 27, 2017, the Governor of Arkansas set execution dates for eight men over the course of eleven days, beginning with two executions on the night of April 17, 2017, and then two more on each of April 20, 24, and 27, 2017. The four appellants here are set to be executed on April 20, 24, and 27. At most, this schedule left appellants with 59 days for their clemency process. The truncated timeframe for appellants to pursue

clemency violated numerous provisions of Arkansas law and policies governing the clemency process. Arkansas requires filing deadlines for clemency petitions to be set no later than 40 days prior to the execution. Ark. Admin. Code § 158.00.1-4.8. But here, the district court found that filing deadlines for several appellants were set less than 40 days before execution. This schedule left Lee and Johnson with 11 days to prepare their applications, Marcel Williams with 16 days, and Kenneth Williams with 18 days. Arkansas' statute also states that the Parole Board "shall solicit the written or oral recommendation" from the committing court, the prosecuting attorney, the county sheriff, and, if requested, the victim or victim's next of kin before the Board considers an application. Ark. Code Ann. § 16-93-204(d). The statute additionally requires that the Board 'shall notify the victim or the victim's next of kin' of the clemency hearing. . . The district court held that appellants 'made a substantial showing that the statutorily required notice to stakeholders was ... not made as the law requires.' Although the Parole Board's Policy Manual states that applicants are entitled to two-hour hearings, the district court found appellants were limited to one hour to present their evidence and arguments. Finally, the Parole Board must notify the public and all stakeholders of its recommendation that clemency be granted 30 days before submitting it to the Governor. Ark. Code Ann. § 16-93-204(e). Therefore, the clemency hearing must be held at least 30 days prior to the execution date. . . None of the appellants' clemency hearings occurred 30 days before their executions dates, leading the district court to conclude that 'the schedule that was followed made it impossible simply in terms of the calendar for the board to comply with this orderly procedure ... that is outlined in the law.' The appellants here argue that Arkansas violated their due process rights by arbitrarily denying them clemency procedures required by Arkansas law, without which they could not meaningfully access the clemency process. They concede that Arkansas' procedures, if followed, comport with the 'minimal procedural safeguards' required by *Woodard*. But, they contend that Arkansas' failure to follow its own procedures constitutes a violation of Due Process because these failures implicate their right to notice and an opportunity to be heard, and make it impossible to benefit from a grant of clemency. Before today, our court had not addressed the specific question presented—namely, whether a clemency applicant facing execution can state a due process claim alleging that the state arbitrarily denied him the procedures explicitly set forth by state law. Justice O'Connor's opinion suggests that compliance with state statutory procedures is a component of the minimal procedural safeguards to which death row clemency applicants are entitled. . . . However, some courts have been hesitant to grant relief based on the contention that the clemency procedure did not accord with state law. . . .Prior to today, our circuit had not explicitly taken a position on the viability of the claim the appellants bring here. However, several cases indicated that such a claim should be available. . . .Although the state standards alone do not dictate the process that is due, . . here, the appellants' claim relies on the violations of state procedural rules to demonstrate that they were arbitrarily denied the ability to benefit from the clemency process. . . Specifically, Arkansas Statute § 16-93-204(e) requires the Parole Board to issue a public notice and notice to all stakeholders of its intention to recommend that the Governor grant an applicant's clemency application at least 30 days or more before submitting said recommendation. Because none of the appellants' clemency hearings were scheduled 30 days before their execution dates, the appellants would have been executed before the Governor could, consistent with the statutorily required procedure, act on their clemency

applications. Only a stay of execution from the court, such as the one the district court issued for Jason McGehee, could have ensured appellants' constitutional right to 'any access to [Arkansas'] clemency process.' *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). The district court was not clearly erroneous in concluding that "'it was impossible from the beginning, once the schedule was laid in, it was impossible for the board to comply. That speaks to me of interference and arbitrariness.'. . .Appellants have also shown that they have a significant possibility of succeeding on their due process claim because the state procedural violations implicate their right to notice and an opportunity to be heard in the clemency process. Such rights are fundamental to due process. . . .I conclude that the lack of notice in combination with the other statutory violations—such as the shortened period to prepare applications, the reduction in the hearing time, and the impossibility that the Governor could act on the recommendation of a grant of clemency in the time allotted—create a significant possibility that the appellants can succeed in showing that the procedure followed in rendering their clemency decisions was wholly arbitrary. . . . The only reason for the expedited clemency process and the abandonment of state clemency procedures was Arkansas' contention that all of the appellants' executions needed to be conducted before April 30 because the execution drugs Arkansas possessed were due to expire. By any measure, the appellants' interest in their own lives is stronger than the state's interest in their soon-to-expire drugs. Finally, members of the public, and in particular those impacted by appellants' executions, have an interest in notice and an opportunity to be heard during the clemency process. . . . Although the outcome of the clemency process is fully in the discretion of the executive, the clemency procedures cannot be arbitrarily applied against the appellants such that they are denied notice and a fair opportunity to present their application. Because I find that the appellants have made a showing of a significant possibility that they were denied due process in their clemency proceedings and the balance of equities tips in their favor, I would grant the motion to stay the executions."), *cert. denied,* 137 S. Ct. 1623 (2017).

But see ***Powell v. Dep't of Human Resources***, 918 F. Supp. 1575, 1581 (S.D. Ga. 1996) ("Given the comprehensive intent of Georgia lawmakers and the mandatory nature of the [Richmond County Child Abuse] Protocol as it applies to all named agencies, the Protocol vests abused children with an entitlement to the procedures and protection mandated therein. Thus, an abused child may not be deprived of these procedures and protection without procedural due process."), *aff'd on other grounds*, 114 F.3d 1074, 1082 n.10 (11th Cir. 1997) ("Because we ultimately conclude that the appellees are entitled to qualified immunity in any event, we can assume arguendo, without deciding, that Powell's son had such a liberty interest.").

In ***Dawson v. Milwaukee Housing Authority***, 930 F.2d 1283 (7th Cir. 1991), plaintiff argued that Wisconsin state law created an entitlement to safe public housing "that the state could not take away without notice and an opportunity for a hearing." Judge Easterbrook rejected the argument, stating that "the Housing Authority's decision to set a particular target level of safety is not person-specific. It is a legislative rather than adjudicative decision, and the due process clause does not require individual hearings before a governmental body takes decisions that affect the interests of persons in the aggregate." *Id*. at 1286.

The entitlement theory has arisen in domestic violence cases, as well as child abuse cases. The Supreme Court has recently spoken to this issue. *See* ***Town of Castle Rock v. Gonzales***, 125 S. Ct. 2796, 2810 (2005) ("We conclude. . .that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband. . . . In light of today's decision and that in *DeShaney,* the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as ' "a font of tort law,"' . . .but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 . . . did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.").

See also ***Burella v. City of Philadelphia***, 501 F.3d 134, 145, 146 (3d Cir. 2007) ("Jill Burella argues that the Supreme Court's decision in *Castle Rock* does not prevent her from succeeding on her procedural due process claim because the Pennsylvania Protection from Abuse Act states that police 'shall arrest a defendant for violating an order.' . . . Therefore, she contends, under the Pennsylvania statute, police officers do not have discretion not to enforce a protection from abuse order. . . . Although the Supreme Court did not specify what language would suffice to strip the police of such discretion, it is clear after *Castle Rock* that the phrase 'shall arrest' is insufficient. . . . . Finally, we cannot ignore that despite framing the issue as one of procedural due process, what Jill Burella appears to seek is a substantive due process remedy: that is, the right to an arrest itself, and not the pre-deprivation notice and hearing that are the hallmarks of a procedural due process claim. In short, whether framed as a substantive due process right under *DeShaney*, or a procedural due process right under *Roth*, Jill Burella does not have a cognizable claim that the officers' failure to enforce the orders of protection violated her due process rights."); ***Burella v. City of Philadelphia***, 501 F.3d 134, 153 (3d Cir. 2007) ("mbro, J., concurring in part) ("Pennsylvania has enacted statutory provisions much stronger than those of Colorado to signal its intent to entitle Ms. Burella and other victims of abuse to redress the lack of enforcement of PFA orders. This laudable effort, which predates *Castle Rock*, does not meet that case's substantial roadblocks. Further revisions to the Protection Act are required, but in no event will they help Ms. Burella. Moreover, I reluctantly concede my colleagues are correct to suggest that a legislature would be hard-pressed to draft around *Castle Rock* in light of the 'well-established tradition of police discretion [that] has long coexisted with apparently mandatory arrest statutes.'. . . Although the Supreme Court has not held explicitly that a state legislature can never mandate arrest or that abuse-protection statutes can never create a constitutionally protected interest, the perception persists that few (if any) paths to those results are available. There is nothing left but to observe that [i]n light of [*Castle Rock*] and ... *DeShaney* ... the benefit that a third party may receive from having someone else arrested for a crime *generally* does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."); ***Hudson v. Hudson***, 475 F.3d 741, 746 (6th Cir. 2007)("We recently applied *Castle Rock* to the enforcement

of a Kentucky statute, holding that its enforcement 'cannot be considered mandatory for purposes of creating a protected property interest under the Due Process Clause.' *Howard v. Bayes*, 457 F .3d 568, 576 (6th Cir.2006). Unlike the statute at issue in *Howard* that granted officers 'purely discretionary authority to arrest,' *id.* at 574 n. 6, the Tennessee Supreme Court considers arrests under the statute at issue here 'operational' as opposed to 'discretionary.' . . As we noted, *supra*, this statute grants officers at least some discretion to determine 'reasonable cause.' Tenn.Code Ann. § 36-3-611(a). While *Matthews* may have defined the arrests as 'operational' to remove state immunity for a state-law negligence claim, it did not decide whether Tennessee law creates a property interest in the enforcement of protective orders. Even if Tennessee law might be read to create some type of property interest, that interest must still rise to the level of a constitutionally protected interest under the Due Process Clause of the Fourteenth Amendment. Braddock's interest in the enforcement of the protection order, specifically the arrest of Hudson, would arise incidentally 'out of a function that government actors have always performed − to wit, arresting people who they have probable cause to believe have committed a criminal offense.'. . We share the Supreme Court's skepticism in *Castle Rock* that this type of entitlement could ever 'constitute a Aproperty' interest for purposes of the Due Process Clause.'. . Imbuing these restraining orders with constitutional property value, protected by the Due Process Clause, would needlessly interfere with Tennessee's choice of how to allocate the resources necessary to enforce its domestic violence laws. We thus hold that the enforcement of Tennessee protective orders does not create a property interest protected by the Due Process Clause of the Fourteenth Amendment."); ***Howard v. Bayes***, 457 F.3d 568, 575, 576 (6th Cir. 2006) (Kentucky statutes did not confer any constitutionally protected property interest upon victim as to arrest of perpetrator); ***Starr v. Price***, 385 F.Supp.2d 502, 509, 510 (M.D. Pa. 2005) ("Plaintiff relies on *Coffman v. Wilson Police Department*, 739 F.Supp. 257 (E.D.Pa.1990), where the court found that a Pennsylvania PFA created a legitimate claim of entitlement. . . . In light of the Supreme Court's recent decision in *Town of Castle Rock, Colorado v. Gonzales*,. . . we find that *Coffman* is not an accurate statement of the law. . . . Plaintiff attempts to distinguish *Castle Rock* by arguing that it holds that the statute did not create an entitlement, whereas her claim is based on the terms of the PFA itself. Plaintiff misconstrues *Castle Rock*, which held that mandatory terms in a restraining order are insufficient to create a property interest protected by the Due Process Clause.").

See also ***Buckley v. Ray***, 848 F.3d 855, 864 (8th Cir. 2017) ("Buckley fails to articulate any legally-cognizable liberty interest created by the Arkansas expungement statute. He contends that the Arkansas expungement statute creates 'liberty and privacy interests.' But he offers no elaboration on what those interests may be, beyond his assertion that the statute 'protect[s] him from unlawful disclosures' of his expunged records. We have previously analyzed the provisions of Arkansas's expungement statute and held that they do not create a liberty interest. *Eagle v. Morgan*, 88 F.3d 620, 626 (8th Cir. 1996). At that time, we observed that the state legislature does not 'possess the Orwellian power to permanently erase from the public record those affairs that take place in open court.'. . Accordingly, Buckley had no state-created liberty interest for the AG Defendants to violate. With no other liberty interest identified, no constitutional violation could have occurred. We therefore affirm the district court's ruling—qualified immunity protects the

actions taken by the AG Defendants."); ***Elliott v. Martinez***, 675 F.3d 1241, 1244, 1245, 1247 (10th Cir. 2012) ("Plaintiffs argue that the grand-jury statute creates an entitlement because it mandates notice to the grand-jury target when specified predicates (that notice will not result in flight, obstruction of justice, or danger to another person) are satisfied. But even if notice is an entitlement under state law, Plaintiffs have failed to state a due-process claim. That is because an entitlement is protected by the Due Process Clause only if it is an interest in life, liberty, or property; and not all entitlements are such interests. For example, often a prisoner's entitlements are not liberty interests. A state law may mandate when a prisoner can be segregated from the general prison population or otherwise subject to special conditions of confinement. But the Due Process Clause imposes no procedural constraints on a prison official in ordering special conditions of confinement unless the official 'imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life.'. . Any lesser hardship does not rise to the level of a deprivation of liberty for one whose freedom has already been lost through conviction of a crime. . . . We do not address here the unraised issue of what safeguards are constitutionally required before a grand jury can issue an indictment. All we say is that the state notice statute does not affect what is required by the Due Process Clause. . . . Our holding is simply that the New Mexico law on which Plaintiffs hinge their argument creates no protected liberty interest.")

d. equal protection cases

Although no such argument was raised in ***DeShaney***, the Court noted that the Equal Protection Clause of the Fourteenth Amendment would be violated by any selective denial of protective services to "certain disfavored minorities." 109 S. Ct. at 1004 n.3. *See, e.g.,* ***Mody v. City of Hoboken***, 959 F.2d 461, 467 (3d Cir. 1992) (rejecting plaintiff's claim where "evidence necessary to show constitutionally discriminatory police action in failing to provide cognizable minorities with protection from crime [was] absent."); ***Baugh v. City of Milwaukee***, 823 F. Supp. 1452, 1460-67 (E.D. Wis. 1993) (rejecting plaintiffs' argument that city had policy of denying equal housing inspection and code enforcement services based on race), *aff'd*, 41 F.3d 1510 (7th Cir. 1994). *See also* ***Estate of Romain v. City of Grosse Pointe Farms***, 935 F.3d 485, 493, 496 (6th Cir. 2019) (Murphy, J., joined by McKeague, J., and Kethledge, J., concurring) ("While not critical to the outcome here, I write to make two additional legal points: Our cases may have overread one statement from *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), while overlooking another statement in that opinion. . . .The Equal Protection Clause's text and history suggest that the right question to ask is: When, if ever, do equal-protection principles give a specific individual the right to challenge a state officer's intentional refusal to provide the protection of the laws that keep the public safe from private violence? Figuring out the right *question* is the easy part; determining the appropriate *answer* is much harder. Thoughtful jurists have suggested a variety of approaches to this class-of-one problem. Perhaps the 'den[ial]' of the 'equal protection of the laws' in the law-enforcement context simply does not occur unless there has been class-based discrimination like the racial discrimination that motivated the clause. . . Or perhaps the clause should reach claims alleging a one-off refusal to provide police protection only if the refusal flows from personal

reasons (such as animosity toward the plaintiff) that are unrelated to public duties. . . Or maybe the traditional equal-protection test works just fine here, requiring a party to show that the police have intentionally discriminated against the plaintiff and that the discrimination lacked a rational basis. . . Any approach also must account for the tradition of prosecutorial and law-enforcement discretion. . . I leave the scope of equal protection for other cases. For present purposes, I note only that the equal-protection question strikes me as a more appropriate question to ask for the types of failure-to-protect allegations that are presented in this appeal. That, in turn, indicates that the due-process question is the wrong question to ask. . . So I am inclined to think this area worthy of reexamination in a suitable future case.")

There is an emerging line of cases in which municipal liability is based on policies used in handling domestic abuse cases, where plaintiffs claim that such policies violate their rights under the equal protection clause of the Fourteenth Amendment. *See, e.g.*, ***Soto v. Carrasquillo***, 878 F. Supp. 324, 328 (D.P.R. 1995) (discussing and citing cases where "a growing number of plaintiffs have turned to section 1983 claims to allege an equal protection violation for a police department's failure to provide protection from domestic violence."), *aff'd sub nom* ***Soto v. Flores***, 103 F.3d 1056 (1st Cir. 1997) ; ***McDonald v. City of Chicago***, Nos. 94 C 3623, 94 C 3624, 1994 WL 732865, *4 (N.D. Ill. Dec. 23, 1994) (not reported) (alleged practice of treating "domestic violence abuse reports from women with less priority than other crimes" sufficient to state equal protection claim); ***Bartalone v. County of Berrien***, 643 F. Supp. 574, 577 (W.D. Mich. 1986); ***Thurman v. City of Torrington***, 595 F. Supp. 1521, 1527-29 (D. Conn. 1984). *See also* ***Hynson v. City of Chester***, 864 F.2d 1026, 1027 n.1 (3d Cir. 1988) (collecting cases).

In ***Balistreri v. Pacifica Police Dept.***, 901 F.2d 696 (9th Cir. 1990), plaintiff was repeatedly abused, harassed and threatened by her estranged husband. Although she obtained a restraining order, the police continued to ignore her requests for protection. *Id*. at 698. In its post-***DeShaney*** second amended opinion, the Court of Appeals affirmed the district court's dismissal of plaintiff's federal due process claim where "Balistreri alleged neither that the State had created or assumed a custodial relationship over her, nor that the state actors had somehow affirmatively placed her in danger." 901 F.2d at 700. *See also* ***Dudosh v. City of Allentown***, 722 F. Supp. 1233, 1235 (E.D. Pa. 1989) (on motion for reconsideration after ***DeShaney***, court relied on ***DeShaney*** to reaffirm finding of no due process violation based on existence of "special relationship" between decedent and police).

Balistreri's complaint also set out an equal protection claim based on discrimination against the plaintiff due to her status as a female victim of domestic violence. The court held that where the allegations in plaintiff's complaint suggested "an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women," the district court should not have dismissed the complaint with prejudice, but should have allowed plaintiff an opportunity to amend in order to properly plead the equal protection claim. 901 F.2d at 701-02.

In ***McKee v. City of Rockwall, Texas***, 877 F.2d 409 (5th Cir. 1989), the court reversed the denial of summary judgment on behalf of individual officers, holding that plaintiff failed to make a sufficient showing on an essential element of her case, in which she asserted that the officers "acted pursuant to a discriminatory policy against making arrests in domestic assault cases." *Id*. at 410.

Plaintiff had introduced a statement made by the Chief of Police, to the effect that his officers "did not like to make arrests" in domestic assault cases. The court refused to treat this statement as having any probative value, distinguishing a "dislike" from a "policy." The statistics introduced by the plaintiff were likewise disregarded, since, "even on their face, [they did not] permit one to infer a disinclination to make arrests in domestic violence cases, much less to infer a policy discouraging such arrests." *Id*. at 415.

Concluding that there was a complete failure of proof on the issue of differential treatment of victims of domestic abuse, the court left undecided the question of whether such differential treatment would constitute intentional gender-based discrimination. *Id*. at 416.

The Fifth Circuit has since adopted the approach taken by the Tenth Circuit in ***Watson, infra.*** *See* ***Shipp v. McMahon***, 234 F.3d 907, 914 (5th Cir. 2000) ("We agree with our sister circuits that the standard articulated in *Watson* represents a coherent approach for courts to review Equal Protection claims pertaining to law enforcement's practices, policies, and customs toward domestic assault cases.").

Compare ***Lefebure v. D'Aquilla***, 15 F.4th 650, 658, 661-62 (5th Cir. 2021) (on denial of rehearing and reh'g en banc) ("In sum, *Shipp* is not about prosecutorial inaction but 'police inaction.'. . . . Here, by contrast, Lefebure does not contend that the police refused to protect her before some future assault by her assailant. Instead, she contends that prosecutors refused to investigate or prosecute him after the assault took place. Here, the appeal concerns only the prosecutor—it does not involve any police officer or other law enforcement official who could have provided her physical protection from an assailant yet failed to do so. . . In sum, none of the cases cited by Lefebure allow a victim to challenge a prosecutor's decision not to investigate or prosecute another person. . . . Our original decision in this case was unanimous. Today the court reaches the same conclusion, based on the same reasoning, but this time by a 2-1 vote. Even so, there is substantial agreement over the substantive legal principles that decide this appeal, not to mention the likely ultimate outcome in this case. To begin with, the dissent 'agree[s] with the majority's view that a victim has no standing to pursue a claim against the district attorney for failure to prosecute her assailant under *Linda R.S.*'. . . In addition, the dissent agrees that 'a dividing line exists between failure-to-protect and failure-to-prosecute claims—that is, claims alleging a failure to protect *before* harm occurs (ex-ante) and a failure to prosecute *after* the fact (ex-post). A plaintiff has standing to pursue the former, but not the latter.'. . That is, of course, precisely our point. . . . The dissent attempts to avoid established precedent by recasting this case as a failure to protect case, rather than as a failure to prosecute case. But the dissent acknowledges

that at least 'some of Lefebure's allegations sound in failure to prosecute.'. . And even setting those allegations aside, the dissent's theory is foreclosed by Supreme Court precedent. In essence, the dissent theorizes that D'Aquilla's failure to prosecute might very well have 'led to her assault.'. . And make no mistake—we have no quarrel with this logic as a conceptual matter. Indeed, we have said as much ourselves: Less prosecution can lead to more crime—and liability rules can encourage or deter law enforcement activity and thereby affect crime rates. . . But as we've explained, Supreme Court precedent prevents us from taking the dissent's logic where it wants us to go. After all, the dissent's theory is the same theory of standing that was pressed in the complaint in *Linda R.S.*, and embraced in Justice White's dissent, but rejected in Justice Marshall's majority opinion. Professor Tribe has confirmed this. All agree that causation and redressability are too attenuated and speculative in cases such as this to warrant standing. And no one has cited a single case to the contrary. The cases cited by the dissent, much like the cases cited by Lefebure, involve the failure to protect, not the failure to prosecute recast as a failure to protect.") *with* ***Lefebure v. D'Aquilla***, 15 F.4th 650, 665-70 (5th Cir. 2021) (Graves, J., dissenting from denial of reh'g and reh'g en banc) ("[D]espite the majority's apparent avoidance of it, a dividing line exists between failure-to-protect and failure-to-prosecute claims—that is, claims alleging a failure to protect *before* harm occurs (ex-ante) and a failure to prosecute *after* the fact (ex-post). A plaintiff has standing to pursue the former, but not the latter. . . In other words, one does not have standing to allege an injury based solely on law enforcement's failure to prosecute someone who has already harmed her, but she does have standing to allege that a discriminatory underenforcement of the law played a part in causing the harm she suffered. . . Unlike in failure-to-prosecute cases, where a third-party wrongdoer is the source of the direct harm the plaintiff suffered as a crime victim, the allegation in failure-to-protect claims is that law enforcement practices played a role in the plaintiff's victimization. . . Such failure-to-protect claims may include allegations that law enforcement's discriminatory inaction increased the likelihood of crimes or even directly led to crimes against a certain group. . . . Although failure-to-protect claims are usually brought against the police, the same logic applies to prosecutors. Prosecutors are, after all, part of law enforcement, and if anything, they may have more power to implement discriminatory policies than the average officer out on patrol. . . The paucity of failure-to-protect cases against prosecutors likely stems in part from absolute prosecutorial immunity. But while prosecutors enjoy immunity from suits filed against them in their individual capacity, . . . Lefebure sued D'Aquilla in both his individual and official capacities. The latter is essentially a *Monell* claim of municipal liability, for which there is not an immunity defense. . . Accordingly, if Lefebure were challenging only the failure to prosecute her attacker, then her claim would be barred by *Linda R.S.* But if Lefebure instead, or additionally, challenges an unconstitutional and discriminatory pattern of conduct that contributed to her assault, she has standing to pursue those allegations. . . . Lefebure raises that prototypical equal protection claim, centered on the injuries she alleges resulted from a discriminatory failure to enforce the law when it comes to rape cases. A right to be free from discriminatory law enforcement policies that enable crime is distinct from an affirmative right to prosecution. As the injury Lefebure asserts is one caused by a policy of discrimination, it implicates the chief original concern of equal protection. This is an injury she has standing to vindicate. For these reasons, Lefebure has alleged the type of failure-to-protect claim that has long been cognizable. Such claims

guard against the dangerous and discriminatory underenforcement of the law based on a victim's status. Although it might be difficult for Lefebure to ultimately prove on the merits that the district attorney's policy, custom, or practice played a role in her assault, she does have standing to pursue such a claim. Accordingly, I dissent.")

In ***Watson v. City of Kansas City, Kansas***, 857 F.2d 690 (10th Cir. 1988), the court reversed a grant of summary judgment for the City, holding that the plaintiff's evidence was sufficient to support a jury determination "that the City and Police Department followed a policy or custom of affording less protection to victims of domestic violence than to victims of nondomestic attacks [and] that the City and Police Department acted with a discriminatory motive in pursuing this policy." *Id*. at 696. While plaintiff's evidence was sufficient to make out an equal protection claim based on her status as a victim of domestic violence, the court affirmed the grant of summary judgment for the City to the extent that the plaintiff's claims asserted gender-based discrimination. *Id*. Where the plaintiff presented no evidence of the policy's adverse impact on women and no evidence of a purpose to discriminate against women as a class, she failed to make out a prima facie case of sex-based discrimination. *Id*. at 697.

See also ***Dalton v. Reynolds***, 2 F.4th 1300, 1309-10 (10th Cir. 2021) ("We find that the facts found by the district court support an equal protection claim. Although Ms. Bascom was similarly situated to other domestic violence victims, she was treated differently because her assailant was a police officer with whom she had been in a domestic relationship. When other domestic violence victims reported domestic violence to SCPD, the non-police officer assailant was arrested 94 percent of the time. When Ms. Bascom and her son repeatedly reported Contreras's domestic violence to SCPD, Contreras was never arrested. Instead, the Officers brushed SCPD domestic violence policy aside to protect their fellow police officer. A reasonable jury could conclude these facts demonstrate disparate treatment of domestic violence victims whose assailants were not police officers and whose assailants were police officers with whom they had been in a domestic relationship. And because of this disparate treatment that does not implicate a fundamental right or a suspect class, rational basis review is appropriate. . . Though rational basis review often spells failure for a claimant, it is not toothless. . . Here, the Officers have offered no rational reason to decline police protection to certain domestic violence victims but to afford it to others, and we can think of none. Finally, the Officers' discriminatory intent may be inferred from their actions pursuant to the facially discriminatory SCPD policies. . . SCPD has two domestic violence policies: one for victims whose assailants are SCPD officers, and one for everyone else. SCPD's 'general public' domestic violence policy requires responding officers to arrest the suspect upon a finding of probable cause unless there are extenuating circumstances and the watch commander agrees. . . Based on this policy, nearly all domestic violence calls in 2016 resulted in arrests. . . In contrast, SCPD's Internal Investigations Policy mandates that any 'serious' allegation against an SCPD officer be referred to an outside agency. The policy categorizes 'domestic violence' crimes as 'serious.'. . When such a referral is made, the IIP stipulates that only the name of the complainant and alleged criminal violation be sent to the outside agency. The outside agency does not receive any additional information provided by the victim or gathered by officers during

the SCPD investigation. . . The policy does not have an exception for exigent circumstances or any provision for when to arrest an SCPD officer. . . Thus, according to SCPD policies at the time of Ms. Bascom's murder, domestic violence victims of non-SCPD police officers received robust police protection, including mandatory arrests, while domestic violence victims of SCPD police officers did not. Because the Officers admitted they were acting according to these facially discriminatory policies in Ms. Bascom's case, discriminatory intent may properly be inferred. . . On these facts and upon de novo review, then, the Officers violated Ms. Bascom's constitutional right to equal protection of the law because Ms. Bascom's disparate treatment by the Officers is not a legitimate end and we may infer discriminatory intent from the facially discriminatory policies the Officers followed.").

In ***Hynson v. City of Chester***, 864 F.2d 1026 (3d Cir. 1988), defendant police officers appealed from a denial of summary judgment on the issue of qualified immunity in a case where plaintiffs alleged that their decedent's right to equal protection was violated by the officers' adherence to a policy of treating domestic abuse victims differently from other victims of violent crimes. *Id*. at 1027. Noting that such a policy was gender-neutral on its face, the Third Circuit established the standard to be followed by the district courts in § 1983 cases based on denials of equal protection in domestic violence situations.

Relying on the ***Watson***, the court determined that to survive a motion for summary judgment, "a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom." *Id*. at 1031.

The court remanded on the qualified immunity issue, concluding that, given the standard articulated, a police officer would lose his qualified immunity only if a reasonable officer would know that a policy of treating domestic violence cases differently from other cases of violence "has a discriminatory impact on women, that bias against women was a motivating factor behind the adoption of the policy, and, that there is no important public interest served by the adoption of the policy." *Id*. at 1032.

On remand, plaintiff offered an expert's analysis and statistics reflecting, over a defined period of time, a lower level of police response to female victims of domestic violence. The district court found the evidence sufficient to withstand the City's motion for summary judgment under the Third Circuit's ***Hynson*** standard. ***Hynson v. City of Chester***, 731 F. Supp. 1236, 1240-41 (E.D. Pa. 1990). Summary judgment was granted as to the individual officers on qualified immunity grounds, since the contours of the particular right involved did not become clearly established until the Third Circuit's decision in ***Hynson***.

See also ***Ricketts v. City of Columbia***, 36 F.3d 775, 780-81 (8th Cir. 1994) ("We agree [with *Hynson* and *Watson*] that if discrimination against women were the purpose behind a municipal custom of providing less protection for victims of domestic abuse, then an equal

protection claim would arise. In this case, the plaintiffs demonstrated a pattern of fewer arrests in cases of domestic violence, but the plaintiffs failed to produce evidence from which a reasonable jury could determine that this pattern proved a policy which was motivated by an intent to discriminate against women."), *aff'd*, 36 F.3d 775 (8th Cir. 1994).

See also ***Soto v. Flores***, 103 F.3d 1056, 1066 (1st Cir. 1997) ("In a matter of first impression for this court, we adopt the *Watson* standard for section 1983 equal protection claims brought by domestic violence victims. . . Under the standard we adopt today, Soto must show that there is a policy or custom of providing less protection to victims of domestic violence than to victims of other crimes, that gender discrimination is a motivating factor, and that Soto was injured by the practice."); ***Eagleston v. Guido***, 41 F.3d 865, 878 (2d Cir. 1994) ("A directed verdict is appropriate in a domestic violence equal protection claim unless the plaintiff adduces evidence sufficient to sustain the inference that there is a policy or a practice of affording less protection to victims of domestic violence than to other victims of violence in comparable circumstances, that discrimination against one sex was a motivating factor, and that the policy or practice was the proximate cause of plaintiff's injury.").

See also ***Jones v. Union County, Tennesse,*** 296 F.3d 417, 427 (6th Cir. 2002) ("In this case, Union County notes that Plaintiff does not indicate whether her equal protection claim is based upon her status as a victim of domestic violence generally or her status as a woman subject to domestic violence. Whatever her status, Plaintiff has failed to identify any policy of Union County that purposefully and intentionally discriminates against victims of domestic violence specifically or women generally."); ***Navarro v. Block (*****Navarro I),** 72 F.3d 712, 717 (9th Cir. 1996) ("In the present case . . . aside from the conclusory allegation that the County's custom of not classifying domestic violence calls as an emergency discriminates against abused women, the Navarros have failed to offer any evidence of such invidious intent or motive. [citing *Hynson* and *Watson*] Nevertheless, even absent evidence of gender discrimination, the Navarros' equal protection claim still survives because they could prove that the domestic violence/non-domestic violence classification fails even the rationality test."); ***Cooper v. City of Chicago Heights***, No. 09 C 3452, 2011 WL 5104478, at *9-*11 (N.D. Ill. Oct. 27, 2011) ("Here, even assuming that the CHPD failed to follow the requirements of the Illinois Domestic Violence Act or documented the incidents involving Iacovetti inappropriately, Cooper offers only as evidence of a 'pervasive' practice the limited number of incidents involving Iacovetti and Baker's comment about an abuser named 'Claude.' He offers no statistical evidence. Taking the term widepread seriously, these few incidents are simply insufficient under *Phelan, Gable, Palmer, Dieter,* and *Palka* to demonstrate a policy so widespread, pervasive and well-settled that it amounted to a municipal policy decision. . . Because Cooper cannot demonstrate a widespread and well-settled practice that the CHPD treated domestic violence complaints less seriously than other complaints, the actions of the City's agents cannot be considered to be a municipal decision under *Monell* and the City is entitled to summary judgment. . . .Though Cooper has not demonstrated that the Defendants' inaction was a violation of Iacovetti's equal protection rights, her death should certainly spark serious reflection by the CHPD and IDOC's highest-ranking officials about how to prevent such instances in the

future. Indeed, Bradley's briefing admits 'a terrible mistake and deficiency' in responding to Iacovetti's complaints. . . However, holding governmental entities responsible for such negligence or poor police work is not permitted by the law and would subject the taxpayer to near limitless liability. For the above reasons, the Court grants the City's and Bradley's motions for summary judgment . . . and enters final judgment in their favor."); ***Cellini v. City of Sterling Heights***, 856 F. Supp. 1215, 1222 (E.D. Mich. 1994) ("While it is beyond question that police need not treat different cases as the same, there still must be a rational relationship between the specific policy adopted and a legitimate governmental interest. Here, the alleged specific policy is one of never arresting in a domestic assault case for misdemeanor assault unless a police officer witnessed the assault. Defendants have not offered any explanation of what governmental interest is served by requiring an officer to have witnessed a domestic misdemeanor assault before making an arrest. The most obvious explanation for such a policy is that Sterling Heights considers a misdemeanor assault less serious when the victim is the assaulter's spouse. Absent an explanation of the governmental interest served by Sterling Heights's policy, defendants fail to satisfy even the relatively permissive rational relationship requirement of the equal protection clause. Such an unexplained discrepancy in the treatment of victims of domestic assault could legitimately give rise to an inference that the police department acted with discriminatory motive in employing its domestic assault policy."); ***Thacker v. City of Miamisburg***, No. C-3-92-188, 1994 WL 1631036, at *3 (S.D. Ohio July 14, 1994) (In its memorandum in support of the motion for summary judgment, the City cites *Siddle v. City of Cambridge*, 761 F.Supp. 503 (S.D.Ohio 1991), in which the policy of another Ohio city concerning the differential treatment of victims of domestic violence was upheld as rationally related to a legitimate state interest. Aside from the fact that *Siddle* is factually distinguishable from this case (e.g., no one was murdered in *Siddle*), it is still incumbent on the City to produce its own evidence as to why its own policy is justifiable. The City of Miamisburg cannot rely upon a judicial ruling concerning the City of Cambridge in another action to explain the reasonableness of a policy of the City of Miamisburg. . . . Meaning no disrespect to Chief Schenck or to the City, the Court would observe that disjointed generalizations are not the stuff of rationally based policies, especially where the policies are alleged to have resulted in the deprivation of life. It is incumbent upon the City to identify the legitimate state interest that is sought to be advanced, to set forth the policy at issue, and to explain how the policy is rationally related to the legitimate state interest.").

See also ***Fajardo v. County of Los Angeles (*****Navarro II*****)***, 179 F.3d 698, 699, 700 (9th Cir. 1999) ("On remand, the district court determined that it did not need to decide whether a custom or policy existed because it had 'previously found that such a [policy] meets the rational basis test.' Accordingly, the district court granted Defendants' Rule 12(c) motion for judgment on the pleadings. We again reverse and remand. . . .[T]he district court erred by equating domestic violence calls with not-in-progress calls and equating non-domestic violence calls with in-progress calls, and by assuming that domestic-violence crimes are less injurious than non-domestic-violence crimes. Because these assumptions formed the basis of the district court's conclusion, the district court also erred when it concluded, as a matter of law, that Defendants' domestic-

violence/non-domestic-violence classification was rational and reasonable under equal-protection analysis.").

B. Liability Based on Failure to Provide Procedural Due Process

1. In ***Parratt v. Taylor***, 451 U.S. 527 (1981), *overruled in part*, ***Daniels v. Williams***, 474 U.S. 327 (1986), an inmate claimed that he was deprived of property without due process of law when prison officials lost a set of his hobby materials, valued at $23.50. *Id*. at 530. The Court held that a negligent deprivation of property, resulting from random and unauthorized conduct of a state actor, does not give rise to a procedural due process claim under the Fourteenth Amendment so long as the state provides an adequate postdeprivation remedy. *Id*. at 543.

In ***Daniels v. Williams***, *supra*, the Court overruled ***Parratt*** to the extent that the case had held that a deprivation within the meaning of the fourteenth amendment due process clause could be effected by mere negligent conduct. In ***Howard v. Grinage***, 82 F.3d 1343 (6th Cir. 1996), the Sixth Circuit has interpreted *Daniels* "to require that, to state a cognizable section 1983 claim based on the deprivation of procedural due process, conduct must be grossly negligent, deliberately indifferent, or intentional." *Id*. at 1350. The court noted that the relevant conduct in a post-deprivation case was "the decision effecting the deprivation, and not to the failure to afford adequate procedures." *Id*. Finally, the court made clear that in a post-deprivation procedural due process case, an official's "motivation, or lack thereof, is simply irrelevant. . . ." *Id*. at 1352.

See also ***Streckenbach v. Vandensen***, 868 F.3d 594, 597-98 (7th Cir. 2017) ("[T]he remedy (the 'process due') for careless blunders that destroy property is litigation, under state law, to recover the property's value. . . And that litigation need not be against the person who made the mistake, a person who might have immunity as a matter of state law even if not as a matter of federal law. . . Wisconsin allows many kinds of tort claims against the state. Wis. Stat. § 893.51(1) (claims dealing with destruction of personal property), § 893.80(1d) (waiver of immunity). The state requires a claim to be filed with the Attorney General within 120 days of the loss, Wis. Stat. § 893.82(3), and Streckenbach missed that deadline, but VanDensen cannot be blamed—nor can a would-be plaintiff avoid *Parratt* by waiting until a state deadline has passed before filing a federal suit. . . . Administrators might be deemed liable for the consequences of an unconstitutional policy, but the 2013 policy cannot be condemned on the ground that it authorizes property to be destroyed without notice. The policy itself provides for notice—both general notice by posting and specific notice by calculating shipping costs when property is received for pickup. That it does not provide for a *third* notice (after the 30 days have lapsed) does not call its validity into question. Notice matters only when there are choices to be made. Once 30 days have run, the property has not been picked up, and funds to ship it are unavailable, there's no choice left under the 2013 policy. Counsel for Streckenbach told us at oral argument that the warden could be personally liable because it was foreseeable that subordinates would make operational errors. But that's just an argument for vicarious liability. As we have already explained, the people who make the errors, not the people who devised the policy, are the ones responsible for those errors. *Every* policy, in

and out of prison, can be undermined by operational gaffes. . . .All we hold today is that VanDensen, the prison's warden, and the deputy warden are not personally liable in damages under § 1983 for the negligence of other employees, or given *Daniels* even for their own negligence."); ***Brown v. Montoya***, 662 F.3d 1162, 1170 & n.13 (10th Cir. 2011) ("According to the Supreme Court, a plaintiff must show that the defendant was more than simply negligent to make out a procedural due process claim. . . .The circuit courts have responded accordingly in requiring a state of mind element such as recklessness or gross negligence. . . The Tenth Circuit has not resolved this issue. . . .We need not decide the appropriate state of mind test to resolve this appeal because Mr. Brown's Complaint alleges conduct that was 'intentional, malicious, sadistic, willful, wanton, obdurate, and in gross and reckless disregard of [Mr. Brown's] constitutional rights.'. . Viewing the facts alleged in the Complaint 'in the light most favorable to [Mr. Brown],'. . . we conclude that Officer Montoya had a sufficiently culpable state of mind in misclassifying Mr. Brown as a sex offender.")

2. The rationale of ***Parratt*** was extended to intentional deprivations of property in ***Hudson v. Palmer***, 468 U.S. 517 (1984), where an inmate complained of an intentional taking of his personal, noncontraband property during the course of a prison "shakedown" search. *Id*. at 520.

In applying the ***Parratt*** doctrine to the intentional deprivation in ***Hudson***, the Court emphasized that "[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." *Id*. at 534. Where the conduct of state actors is random and unauthorized, the State cannot foresee, predict or prevent deprivations resulting from such conduct and a postdeprivation remedy is all the process a State can be constitutionally required to provide. *Id*. at 531-33. *But see* ***Brunson v. Murray***, 843 F.3d 698, 715 n.9 (7th Cir. 2016) ("*Parratt* is a rare exception to due process norms. . . It is 'limited to a narrow category of due process cases where the plaintiff claims he was denied a meaningful pre-deprivation hearing, but under circumstances where the very notion of a pre-deprivation hearing would be impractical and even nonsensical, and where the deprivation was not carried out through established state procedures.' *Armstrong v. Daily*, 786 F.3d 529, 539 (7th Cir. 2015). The procedures to protect Brunson's property interest in his liquor license were available and well-established. A deliberate decision to prevent him from using those procedures does not fit within the narrow *Parratt* doctrine, and certainly not where there is no obvious and sufficient post-deprivation remedy available under state law."); ***Willey v. Kirkpatrick***, 801 F.3d 51, 69 (2d Cir. 2015) ("The district court dismissed this claim [for theft of legal documents] 'because New York state law provides him with an adequate post-deprivation remedy, i.e., § 9 of the Court of Claims Act.'. . In support of this conclusion, the district court cited the Supreme Court's holding that 'even the intentional destruction of an inmate's property by a prison officer does not violate the Due Process Clause if the state provides that inmate with an adequate post-deprivation remedy.'. . If Willey's claim were for the destruction of his television or jewelry, this analysis would suffice. But nowhere does the district court distinguish between replaceable consumer goods and possibly irreplaceable legal documents. Legal documents have characteristics that differentiate them from mere 'property' whose destruction can be adequately remedied by a generic property-deprivation state law. Their theft or destruction, for example, may

irrevocably hinder a prisoner's efforts to vindicate legal rights. On remand, the district court should consider this claim as one for impeding access to the courts[.]")

See also ***Davison v. Rose***, 19 F.4th 626, 642 (4th Cir. 2021) ("We agree with the district court that the post-deprivation remedies provided in this case satisfy due process. As the district court recognized, Davison posed an ongoing threat of disruption to the educational process. Davison also had a number of post-deprivation remedies available to him, including several levels of administrative review, as well as state court review pursuant to Va. Code § 22.1-87. Davison had opportunities to discuss the no-trespass ban with Defendants, which he did in the administrative appeal, and he retained the ability to come to the school, provided that he had consent from Stephens or her designee. Thus, under the facts of this case, the post-deprivation remedies available satisfied any required due process. Thus, we affirm the district court's conclusion that Davison was not deprived of procedural due process."); ***Miranda v. City of Casa Grande***, 15 F.4th 1219, 1225-28 (9th Cir. 2021) ("[T]o say that the deprivation of a driver's license can implicate procedural due process protections does not resolve the level of protection that must be afforded. The touchstone of procedural due process is notice and an opportunity to be heard. . . . The immediate problem Miranda encounters with any procedural due process claim is that he received considerable process. At the police station, Officer Rush read to him from a standardized form designed to confirm that he was not expressly consenting to a blood draw (and to minimize error in that determination). Although many § 1983 litigants justifiably complain about police failing to obtain a warrant, here Rush secured a warrant for a blood draw through a judge on the Casa Grande Justice Court. While Miranda protests that this warrant was unnecessary because he had consented to the blood draw, Rush points out that nothing prevented him from seeking a warrant regardless, and there can be little doubt that the warrant was supported by probable cause.Once Rush determined that Miranda failed expressly to consent to a blood draw and that his license should therefore be suspended, Arizona law afforded Miranda an opportunity to challenge that suspension before a state ALJ. . . Miranda took full advantage of this process, with the assistance of counsel and witnesses. And he raises no due process challenge to Arizona's procedures themselves. Instead, Miranda's contention is that Officer Rush testified falsely at the first ALJ hearing about whether Miranda had recanted his refusal to submit to the blood draw, and that this alleged lie standing alone formed a procedural due process violation when it led to his license being temporarily suspended. Miranda is incorrect. In *Parratt v. Taylor*, . . . the Supreme Court explained that meaningful postdeprivation remedies will suffice when the deprivation was the 'result of a random and unauthorized act by a state employee.'. . When there is a 'necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process,' 'postdeprivation remedies made available by the State can satisfy the Due Process Clause.'. . A state employee acting in an unauthorized manner fits that situation, the Supreme Court held, because '[i]n such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur.'. . *Parratt* involved a state employee's allegedly negligent conduct. In *Hudson v. Palmer* . . . the Supreme Court extended *Parratt*'s logic to an official's intentional misconduct. . . . We think *Hudson* provides the proper fit here. Officer Rush, to be sure, strongly resists Miranda's allegation that he lied in the

first ALJ hearing, with Rush maintaining that his perception of the chaotic events was reasonable. But assuming without deciding that Rush did lie, that conduct can only be described as 'unauthorized' under *Hudson*. . . Miranda himself argues in his briefing that 'Rush abused the authority of his position and undermined the safeguards owed to Miranda,' suggesting Rush did so to 'punish plaintiff for working for the "Feds."' That is akin to the 'unauthorized personal vendetta' at issue in *Hudson*. . . As in *Hudson*, Rush (by Miranda's allegations) was 'bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards.'. . Indeed, the conclusion that Rush's conduct was unauthorized is, if anything, stronger here than in *Hudson* itself because Rush engaged in alleged wrongdoing notwithstanding the fact that Arizona *had* put in place various pre-deprivation safeguards for driver's license suspensions—procedures whose adequacy Miranda does not challenge here. Whereas *Hudson* involved no predeprivation process at all, . . . Rush's alleged misconduct took place within a defined state process that included a neutral arbiter and various other protections traditionally designed to secure the truth (availability of counsel, cross-examination, witnesses under oath, etc.). Rush was not even the final decisionmaker here; the ALJ was. Nor does Miranda suggest additional procedures, much less reasonable ones, that would reliably prevent dishonest testimony. . . In short, Miranda provides no basis to conclude that Rush's alleged intentional misconduct was authorized, much less that it was predictable or reasonably avoidable. . . For unauthorized deprivations like this one, 'the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.'. . To determine whether Miranda has made out a procedural due process claim, the proper inquiry thus turns on the procedures the State afforded Miranda after his initial license suspension. There can be no serious question that those postdeprivation procedures were both meaningful and sufficient under the Due Process Clause. When Miranda discovered the station house videos, he was granted a second administrative hearing. At this hearing, he had the opportunity to present new evidence and arguments before a new ALJ, who ultimately voided the suspension and reinstated Miranda's license. 'A violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right ....'. . . Here, however, Miranda received both. On top of this, Arizona also allows Miranda to bring state law claims, which he is presently pursuing against Rush and the City of Casa Grande in Arizona state court. . . Whether or not Miranda proves successful in state court, the availability of potential state tort remedies supports our view that Arizona has provided Miranda with adequate postdeprivation process. Miranda protests that punitive damages are not available through his state law claims. But that Miranda 'might not be able to recover under these remedies the full amount which he might receive in a § 1983 action is not ... determinative of the adequacy of the state remedies.'. . Because Arizona has provided Miranda with sufficient post-deprivation mechanisms, Miranda cannot demonstrate a procedural due process violation and has 'received all the process that was due.'. . Accepting Miranda's contrary position, meanwhile, would be both inconsistent with governing precedent and potentially dramatic in its implications, threatening to turn nearly every mishap or misdeed in a state administrative process into a federal constitutional violation. The Supreme Court has long cautioned that we should not make 'the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'. . In the case of a deprivation resulting from a flawed state

proceeding of the type at issue here, what matters under the Due Process Clause is not merely the initial deprivation itself but whether the State has set up adequate procedural protections surrounding it. Here, we conclude that Arizona's post-deprivation processes are sufficient. Miranda's § 1983 claim thus fails."); ***Calderone v. City of Chicago***, 979 F.3d 1156, 1165-67 (7th Cir. 2020) ("As the district court observed, Calderone specifically alleges that the individual defendants acted out of 'negative animus' and 'bias' against her. This is not a challenge to the disciplinary procedures prescribed by municipal law. Rather, Calderone readily admits that she describes a series of 'random and unauthorized' departures from municipal law, resulting in the deprivation of her property interest in continued public employment. These 'allegations of biased decisionmaking suggest only that [Calderone] may have suffered a random and unauthorized deprivation of [her] property interest in public employment.'. . 'In this instance, [Calderone] must avail herself of ... post-deprivation remedies or demonstrate that the available remedies are inadequate.'. . An inadequate remedy, for the purposes of due process, is a 'meaningless or nonexistent' one. . . Conversely, an adequate post-deprivation remedy is one that is promptly able to restore the employee to her post. . . Here, as the district court appreciated, a collective bargaining agreement with 'extensive grievance and arbitration procedures' protected Calderone's employment. Such procedures 'can (and typically do) satisfy the requirements of post-deprivation due process.'. . Calderone does not say that the grievance and arbitration procedures were meaningless. Quite the contrary, the procedures were meaningful because they led to her reinstatement. . . Calderone argues that 'the collective bargaining agreement provides that only the Union and the Employer may submit a grievance to arbitration, which means precisely that Calderone herself had no access to a post-deprivation hearing.' But the Union represented Calderone and was bound by its duty of fair representation to present her side of the story. Without evidence that the Union breached its duty handling her grievance, Calderone cannot state a due process claim on this basis. . . Additionally, Calderone objects to the fact that she has not yet received back pay or otherwise been made whole. She 'wants money. That's what the due process clause does *not* guarantee; the federal entitlement is to process, not to a favorable outcome.'. . It is a far cry from bizarre, as Calderone sees it, to require her to either take advantage of the available post-deprivation remedies or illustrate how exactly those remedies are inadequate. Calderone does not challenge the fundamental fairness of the remedies afforded her under the collective bargaining agreement with the City; instead, she thinks the City has not held up its end of the deal. . . The Constitution leaves such qualms about substance, as opposed to process, to state law. . . The district court properly dismissed this claim."); ***Hudson v. City of Highland Park, Michigan***, 943 F.3d 792, 801 (6th Cir. 2019) ("[D]ue process does not fix every breach of contract or violation of state labor law. . . Before Hudson can use this federal cause of action in this way, he must show that state law remedies cannot help him. . . This he has not done. Michigan affords quite a few remedies in this setting, and Hudson has not shown their inadequacy. He could have brought a breach of contract claim in Michigan courts. . . He could have claimed that his discharge constituted an unfair labor practice under Michigan's Public Employees Relations Act. . . Or he could have filed a charge with the Michigan Employment Relations Commission asking them to investigate the city's alleged misbehavior. . . Hudson does not explain why he never invoked these remedies and why they would not correct his process objections. . . On this record, his claim fails as a matter of

law."); ***GEFT Outdoors, LLC v. City of Westfield***, 922 F.3d 357, 367 (7th Cir. 2019) ("GEFT also says that Westfield 'violated its leasehold interest in the [Esler] Property by threatening GEFT's representatives with arrest and imprisonment.' But GEFT cannot support its claim based on this theory either. When a plaintiff alleges a deprivation based on conduct that is 'random and unauthorized, the state satisfies procedural due process requirements so long as it provides a meaningful post-deprivation remedy.'. .GEFT presented evidence that on December 16, Zaiger came onto the Esler Property, identified himself as the Westfield city attorney, and told Lee and the others on the site that they would be arrested if work was not stopped immediately. According to GEFT, it was only because of these threats that it stopped constructing the Billboard, and it was these threats that therefore deprived it of its leasehold interest. . . But both GEFT and Westfield agree that neither local nor state law authorizes the arrest of anyone violating a municipal ordinance. Even if Zaiger is considered an employee of Westfield (which is an open question as Zaiger worked for a private law firm representing the city), GEFT has not identified any evidence Westfield authorized Zaiger's threats or even could have predicted he would make them that day. . . As Westfield points out, the Indiana Tort Claims Act provides a remedy for any abuse of process that Zaiger's actions represent. . . GEFT has not made any attempt to show that it took advantage of this process or that this remedy would be insufficient to compensate it for what was lost by Zaiger's threats. *See Veterans Legal Defense Fund v. Schwartz*, 330 F.3d 937, 941 (7th Cir. 2003) ("Given the availability of state remedies that have not been shown to be inadequate, plaintiffs have no procedural due process claim."). Because it has not made this showing, GEFT has not demonstrated it is likely to succeed on the merits of its procedural due process claim."); ***Tucker v. City of Chicago***, 907 F.3d 487, 491-93, 495 (7th Cir. 2018) ("While *Parratt* holds that post-deprivation remedies may be sufficient if the deprivation is 'random and unauthorized,' neither *Parratt* nor *Zinermon* stands for the proposition that post-deprivation remedies are otherwise irrelevant to a procedural due process claim. Rather, the adequacy of pre-deprivation proceedings may turn on the availability and nature of post-deprivation remedies. . . . Indeed, a plaintiff who foregoes her right to pursue post-deprivation remedies available under state law faces a high hurdle in establishing a due process violation. . . Such remedies go directly to the question whether a plaintiff has been afforded due process of law. Thus, the district court was correct to consider Tucker's right to pursue judicial review in state court. . . .As this court has recognized, 'Due process does not require notice-on-demand but rather timely notice, and a one month delay in receiving notice does not offend due process.'. . Although the delay in this case is six months, it is still considerably shorter than prosecutorial delays accepted in other contexts. . . . And the interest at stake here is monetary, less significant than (for example) one's liberty interest in a criminal prosecution, or even property interest in continued employment. . . . Even assuming Tucker is right that the city's interpretation of its ordinance is incorrect, federal due process protection is not a guarantee that state governments will apply their own laws accurately. . . . If Tucker believed the administrative law judge's interpretation of the ordinance was legally incorrect, she could have appealed her fine to Illinois's state courts. Her amended complaint makes no attempt to establish the inadequacy of that avenue of redress. . . .Although a six month delay between inspection and citation may not be a model of administrative efficiency, the delay in this case did not violate the Constitution. Similarly, the proper interpretation of a municipal ordinance

is a matter of local law for state courts to decide, not constitutionally required procedure."); ***Elizarri v. Sheriff of Cook County***, 901 F.3d 787, 791 (7th Cir. 2018) ("*Pembaur* does not create the possibility of organizational liability in the absence of individual violations. To the contrary, it is established that a municipality cannot be held liable without an underlying violation of the Constitution by a municipal employee. See, e.g., *Los Angeles v. Heller*, 475 U.S. 796 (1986); *Swanigan v. Chicago*, 881 F.3d 577, 582 (7th Cir. 2018). A distinctive feature of this case—and the reason why we said earlier that we are not deciding whether liability is possible even in theory—is that plaintiffs wanted the jury to find the Sheriff liable without showing that *any* of the Sheriff's subordinates violated the Constitution. Plaintiffs' first argument about the evidence is that the district court should have told the jury about *Black v. Dart*, 2015 IL App (1st) 140402 (2015). This decision holds (according to plaintiffs) that Illinois law never provides inmates of the Jail with financial remedies for lost or stolen goods, but according to defendants it holds only that one plaintiff failed to present his claim for compensation properly. The dispute about the scope of *Black* highlights a contradiction in the Sheriff's legal position. The Sheriff's staff tells inmates that the state courts provide remedies for lost or stolen property, but, when ex-inmates sue, the Sheriff's lawyers tell the state judiciary that no remedy is available. That two-faced approach is hard to justify, but state remedies are a matter of state law rather than constitutional entitlement. The Sheriff's lawyers did not argue to the jury in this suit that Illinois supplies a remedy for lost or stolen property, cf. *Parratt v. Taylor*, 451 U.S. 527 (1981), and it was therefore unnecessary for the judge to tell the jury that state law does not provide a remedy (if that is indeed the right understanding of *Black*); ***Simpson v. Brown County***, 860 F.3d 1001, 1010, 1013 (7th Cir. 2017) ("In those cases where a plaintiff is not entitled to pre-deprivation process (e.g., where state action is random and unauthorized or where a *Hodel*-type emergency warrants summary action), the Constitution still requires an adequate post-deprivation remedy. Such a remedy need not be identical to the remedy otherwise available under § 1983. . . .Though a state remedy need not match in every respect the relief otherwise available under § 1983, such a remedy must still offer meaningful redress for the particular injury suffered by the plaintiff. . . . Like the plaintiff in *Pro's Sports Bar* [*& Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865 (7th Cir. 2009)], Simpson seeks damages to compensate him for income he allegedly lost when his license was terminated. The County proposes a petition for common-law judicial review, but we are aware of no Indiana case (and the County has cited none) where a litigant obtained damages through such an action. The proposed remedy, in other words, cannot address the harm Simpson claims that he suffered, and it is inadequate on the facts of this case as alleged. Reinstatement of a septic license, like reinstatement of a liquor license, does not address the financial losses resulting from an inability to operate one's business for some length of time. We are aware of no alternative state remedy that might redress Simpson's injury."); ***CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore***, 769 F.3d 485, 488, 489 (7th Cir. 2014) ("We have held repeatedly that a plaintiff who ignores potential state law remedies cannot state a substantive due process claim based on a state-created property right. . . .Without this requirement, procedural due process claims based on 'random and unauthorized' deprivations of property (which might also be described as 'arbitrary') could be brought as substantive due process claims even when a post-deprivation remedy was available. . . This would undermine the holdings of [*Hudson* and *Parratt*] that a post-

deprivation remedy is sufficient to satisfy due process in such situations. The claims would simply be reframed as substantive due process claims. . . We have similarly held that, regardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court. . .Cenergy had options under state law for obtaining the building permits that it did not use."); ***Tenny v. Blagojevich***, 659 F.3d 578, 583(7th Cir. 2011) ("While the path to relief − including potential monetary awards if and when the current commissary mark-up policy is declared illegal − may be circuitous, this does not make it inadequate. We are thus satisfied that the plaintiffs have adequate post-deprivation remedies in state court, which dooms their constitutional due process claims. Put another way, this case is really about a substantive violation of Illinois law, not about the procedures required before the plaintiffs can be deprived of a property interest. The plaintiffs' grievance is about *what* was done (the mark-up in excess of 25%), not the *procedures* followed to do it. And that is exactly what this court, and the Supreme Court, have worried 'would make of the Fourteenth Amendment a font of tort law,' or in this case administrative law, 'to be superimposed upon whatever systems may already be administered by the States.'. . Federal courts do not sit to compel a state's compliance with its own law. . . Even assuming the plaintiffs were deprived of a property interest created by state law, '[f]ailure to implement state law violates that state law, not the Constitution; the remedy lies in state court.'. . Even assuming that the prison regulation in this case created a protected property interest in a certain cap on the mark-up of commissary goods, the plaintiffs have not alleged that post-deprivation remedies are inadequate to satisfy constitutional due process requirements."); ***Marco Outdoor Advertising, Inc. v. Regional Transit Authority***, 489 F.3d 669, 675 (5th Cir. 2007) ("Because an unsuccessful bidder may seek an immediate injunction through a summary proceeding, and because the injunction may enjoin the execution of the contract, the injunction prevents the deprivation 'of any significant property interest' and is therefore an adequate pre-deprivation remedy. . . . The summary proceeding, together with RTA's announcement of the contract award, satisfies the elements of the due process prong of the Due Process Clause that are at issue in this case. . . . We thus conclude: We assume for the purposes of deciding this appeal that the Public Bid Law applies to Marco's bid and that Marco has properly alleged a property interest in the right to receive the Contract; nevertheless, we conclude that Marco's procedural due process claim fails. The Public Bid Law explicitly authorizes Marco to seek state court injunctive relief to enjoin RTA from awarding the contract to Clear Channel. For the reasons given, we hold that Marco has failed to show that it has been denied due process of law provided in the Fourteenth Amendment."); ***Veterans Legal Defense Fund v. Schwartz,*** 330 F.3d 937, 941 (7th Cir. 2003) ("While a plaintiff is not required to exhaust state remedies to bring a § 1983 claim, this does not change the fact that no due process violation has occurred when adequate state remedies exist. The whole idea of a procedural due process claim is that the plaintiff is suing because the state failed to provide adequate remedies. Therefore, we do not require a plaintiff to pursue those remedies in order to challenge their adequacy, but likewise we do not allow a plaintiff to claim that she was denied due process just because she chose not to pursue remedies that were adequate. Given the availability of state remedies that have not been shown to be inadequate, plaintiffs have no procedural due process claim."); ***Ores v. Village of Dolton,*** 152 F.Supp.3d 1069, 1080-82 (N.D. Ill. 2015) ("Having determined that the notice and

interrogation were adequate at the *pre*-suspension phase, the next question is whether Ores was entitled to some form of *post*-deprivation process. . . It is undisputed that Ores did not go through any post-suspension process with the police department or Board, whether in the form of a hearing in front of the Board, union meeting, or otherwise. . . Ores argues that this violated due process, while Defendants argue that Ores was not due any process in addition to his pre-suspension interrogation. . . Neither side is completely right: despite Defendants' argument to the contrary, the lack of *any* post-suspension process would violate procedural due process because it would deprive Ores of a full opportunity to respond. . . . In sum, Ores's pre-suspension interrogation was not a full opportunity to be heard and an insufficient means to review his imposed punishment. . . . But the analysis is not over yet. Even though Ores was constitutionally entitled to receive some form of post-deprivation process, the question now is whether any post-deprivation remedies were available, regardless of whether Ores actually took advantage of them. . . . Here, Ores argues that Jones exceeded his statutory authority by imposing a fifteen-day suspension when he was only authorized to impose suspensions of no more than five days, and that Jones deprived Ores of a chance to review this decision. . . .[U]ltimately the Court concludes that state-court process—in the form of mandamus, injunctive relief, and declaratory judgment actions—was available to Ores. So there was no procedural due process violation because the state provided adequate remedies to challenge his suspension."); ***Gonzalez v. Dooling***, 98 F.Supp.3d 135, 143-44 (D. Mass. 2015) ("Plaintiff's arguments notwithstanding, it is clear that the *Parratt–Hudson* doctrine applies and bars recovery here. The record shows that the process for determining whether an offender was subject to CPSL was dictated by the Talbot Memo. Defendants had no discretion to determine whether Plaintiff was subject to CPSL. Defendants' actions were circumscribed by state law, SJC case law, and the Talbot Memo. There are no facts to support the allegation that Defendants had authority to *set* the Legal Unit process, only to act pursuant to it. Moreover, Plaintiff's allegations are that Defendants acted *outside* of the established Parole Board Legal Unit procedures in erroneously placing him on lifetime parole, despite the absence of such a sentence on the docket. The record shows that Defendant Hall or Defendant Goldman, or possibly both, committed exactly the type of 'random and unauthorized' mistake that the state cannot guard against with predeprivation process. Accordingly, under *Parratt–Hudson,* the focus is on whether there is adequate postdeprivation process."); ***Learnard v. Inhabitants of the Town of Van Buren,*** 182 F. Supp.2d 115, 125, 126 (D. Maine 2002) ("The Court thus concludes that it must focus on whether official policy that existed at the time of the deprivation would adequately have protected the Plaintiff's interest if followed. If so, then the failure to follow that policy was random and unauthorized. At the time of Plaintiff's termination, both Maine law and the Van Buren Town Charter required that Town employees only be removed 'for cause' and 'after notice and a hearing' . . . . Official policy, therefore, was to provide Town employees with constitutionally adequate procedures before terminating their employment. To the extent that the March 29 hearing did not provide Plaintiff an adequate opportunity to respond in that he was unable to attend, Defendants' conduct in holding the hearing was 'random and unauthorized.' . . . . Finally, then, the Court must address the second *Parratt-Hudson* question: were the state procedures that were available to Plaintiff adequate to remedy the flaws in the pretermination procedure? It is not necessary to linger long on this point. Plaintiff successfully utilized the procedures for reviewing administrative action

under Maine Rule 80B and obtained a new hearing in front of the Council. Furthermore, after the state court ordered a new hearing, the Town reinstated Plaintiff on administrative leave with pay. Finally, there is no evidence that the October hearing was deficient. . . . Therefore, Plaintiff received the procedure he was due in the form of adequate postdeprivation remedies and cannot state a claim for a procedural due process violation."); ***McCall v. Dep't of Human Resources,*** 176 F. Supp.2d 1355, 1369 (M.D. Ga. 2001) ("The Supreme Court has held that, when a state official's random and unauthorized actions deprive a person of a liberty interest protected by the Fourteenth Amendment, a state may satisfy its procedural due process obligations by providing an adequate post-deprivation remedy. . . . Assuming that the conduct of Defendants Almand, Mitchell, and Gibson, as alleged in the complaint, deprived Rayshom of his procedural due process rights created by the Children and Youth Act, it must certainly be described as random and unauthorized. Indeed, it is inconceivable that the state would authorize its officials to violate a foster child's constitutional rights or that the state could foresee that they would do so absent any prior suggestive conduct. Thus, this claim turns on the adequacy of the post-deprivation remedies available under Georgia law. Because the Court finds that the GTCA provides a constitutionally adequate post-deprivation remedy, . . .Rayshom's procedural due process rights were not violated. Essentially, there was no procedural due process violation in this case because the availability of relief under the GTCA means that any potential violation was not complete."); ***Culberson v. Doan***, 125 F. Supp.2d 252, 265, 266 (S.D. Ohio 2000) ("The Court agrees with Defendants in that Plaintiffs have not offered any evidence that Chief Payton or the Village of Blanchester had an established internal office policy or procedure of abandoning criminal investigations, intentionally or recklessly assisting criminal suspects in their disposal of evidence, or depriving the citizens of the Village of Blanchester of their constitutionally protected property right to recover the remains of their deceased relatives.. . . . Having reviewed this matter, the Court finds that Plaintiffs' substantive due process and/or state law claims asserted in their Complaint may provide an adequate remedy to Plaintiffs for the conduct that was allegedly engaged in by Chief Payton and the Village of Blanchester. Therefore, this Court finds that Plaintiffs' procedural due process claim must fail as there exist adequate state law procedures, such as Plaintiffs' state law claims for damages, in order to guarantee due process for any injury sustained as a result of Defendants' alleged conduct in this matter.").

In ***Sturdevant v. Haferman***, 798 F. Supp. 536, 540 (E.D. Wis. 1992), the court found the defendant prison officials' conduct to be random and unauthorized, but concluded that the state postdeprivation remedy was inadequate where the process could result only in expungement of a conduct report, but no damages for being placed in "adjustment segregation." *Accord*, ***Smith v. McCaughtry***, 801 F. Supp. 239, 243 (E.D. Wis. 1992) (even if defendants' conduct considered "random and unauthorized," plaintiff could still seek redress under § 1983 where state law certiorari remedy is inadequate.). *Contra* ***Scott v. McCaughtry***, 810 F. Supp. 1015, 1020 (E.D. Wis. 1992) ("[T]his court concludes that the State has provided adequate post-deprivation remedies in certiorari, in the inmate grievance system and in tort."); ***Duenas v. Nagle***, 765 F. Supp. 1393, 1400 (W.D. Wis. 1991).

See ***Hamlin v. Vaudenberg***, 95 F.3d 580, 585 (7th Cir. 1996) (noting that "[t]he adequacy of Wisconsin post-deprivation remedies is the subject of a federal district court rift in Wisconsin[,]" and concluding that "[i]n this case, the inmate complaint review system and certiorari review allow consideration of alleged due process violations. Both offer relief from liberty deprivations by reinstating prisoner status in the general population (even assuming that disciplinary segregation implicates due process) and expunging the prisoner's disciplinary record. Neither can offer money damages, which would be available in a state law tort action against the prison officials, but these proceedings are neither meaningless nor nonexistent, so they provide all the process that is constitutionally required. We agree with the district court that Wisconsin post-deprivation proceedings are adequate.").

See also ***Meyers v. Village of Oxford***, 739 F. App'x 336, ___ (6th Cir. 2018) ("Though *Mertik* predates the five-factor test enunciated in *Quinn*, this court has consistently stated that '[s]ome alteration of a right or status 'previously recognized by state law,' *such as* employment, must accompany the damage to reputation.'. . .Moreover, we have considered a number of non-employment cases in addition to *Mertik* without declaring that only terminated employees have a right to a name-clearing hearing. . . .The five-factor test that has developed in the employment context can easily be modified for use in non-employment cases. Indeed, the third, fourth, and fifth factors require no modification and, as the district court found, are met here: the alleged stigmatizing statements were made at a public meeting; Appellants claim that the statements are false; and the statements were voluntarily made public. . .. As to the first factor, the stigmatizing statements must have been 'made in connection with "the loss of a governmental right, benefit, or entitlement."'. . Second, the statements must accuse the plaintiff of more than 'merely improper or inadequate performance, incompetence, neglect of duty or malfeasance,'. . .; they must be of the type 'that [would] foreclose[ ] his freedom to take advantage of other employment opportunities.'. . Under this modified test, Appellants' complaint is sufficient: the alleged stigmatizing statements (1) were made in connection with the loss of Appellants' status as reserve officers for the Village of Oxford Police Department and (2) accused Appellants of illegally impersonating police officers."); ***Gunasekera v. Irwin***, 551 F.3d 461, 470, 471 (6th Cir. 2009) ("Considering the first prong of this test, we believe that it is clear that where, as here, the employer has inflicted a public stigma on an employee, the only way that an employee can clear his name of the public stigma is through publicity. The injury of which Gunasekera complains is the fact that he was publicly associated with and perhaps partially blamed for a plagiarism scandal. As to the second prong of *Mathews,* publicity adds a significant benefit to the hearing, and without publicity the hearing cannot perform its name-clearing function. A name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera's name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved. . . . In order to determine what the name-clearing hearing should entail and what its limits might be in each case, courts should again turn to the *Mathews* balancing test described above. . . . We hold that Gunasekera has sufficiently alleged that he was deprived of a protected liberty interest without due process of law to withstand

this Rule 12(b)(6) motion. In order to satisfy due process, the university is required to offer Gunasekera a name-clearing hearing that is adequately publicized to address the stigma the university inflicted on him. The exact nature of that publicity depends on a fact-intensive review of the circumstances attending his case, and we leave to the district court the initial determination regarding the exact parameters of the name-clearing hearing due to Gunasekera."); ***Wojcik v. Massachusetts State Lottery Commission,*** 300 F.3d 92, 103 (1st Cir. 2002) ("In order to successfully establish a claim for the deprivation of a liberty interest without due process, we require the employee to satisfy five elements. First, the alleged statements must level a 'charge against [the employee] that might seriously damage his standing and associations in his community' and place his 'good name, reputation, honor, or integrity ... at stake.' . . . Statements merely indicating the employee's improper or inadequate performance, incompetence, or neglect of duty are not sufficiently serious to trigger the liberty interest protected by the Constitution. Second, the employee must dispute the charges made against him as false. . . Third, the stigmatizing statements or charges must have been intentionally publicized by the government. . . . That is, the defamatory charges must have been aired 'in a formal setting (and not merely the result of unauthorized "leaks").' . . . Fourth, the stigmatizing statements must have been made in conjunction with an alteration of the employee's legal status, such as the termination of his employment. . . Finally, the government must have failed to comply with the employee's request for an adequate name-clearing opportunity."); ***Quinn v. Shirey,*** 293 F.3d 315, 322, 324 (6th Cir. 2002) ("While Plaintiff argues that a different standard may exist in some other circuits and that the Supreme Court has not addressed the issue, this Court has spoken on the issue and does require that an employee request a name-clearing hearing. . . . [T]his Court has never imposed an affirmative duty on an employer to apprize the employee of his right to a name-clearing hearing. . . .[A] plaintiff who fails to allege that he has requested a hearing and was denied the same has no cause of action, whether or not he had been informed of a right to a hearing before filing suit."); ***Sharp v. Lindsay,*** 285 F.3d 479, 489 (6th Cir. 2002) ("Where, as here, the employee's livelihood has not been jeopardized by his allegedly premature dismissal from a fixed-term position, it is even clearer than it might otherwise be that the deprivation of the employee's finite interest is something that 'can be compensated adequately by an ordinary breach of contract action.' We see no justification for turning Mr. Sharp's ordinary breach of contract action into a federal constitutional case. . . . Given the fixed term of the contract, it is plain under *Ramsey* that Mr. Sharp had no due process right to notice and a hearing before his reassignment − at no loss of pay − to a teaching position. The reassignment may have breached the contract, but Tennessee provides a perfectly adequate procedure for determining whether a breach has occurred and for granting redress if it did. To require Mr. Sharp to avail himself of that procedure by repairing to the courts of Tennessee . . . does no violence to the concept of due process of law."); ***Powell v. Georgia Dep't of Human Resources***, 114 F.3d 1074, 1082 n.11 (11th Cir. 1997) (assuming without deciding that Defendants would be immune from suit under Georgia Tort Claims Act, that immunity does not affect adequacy of post-deprivation process afforded by the state.); ***Thompson v. AOC***, 2009 WL 961167, at *13 n.15 (D. Utah Apr. 8, 2009) ("Although the Tenth Circuit has not yet adopted such a requirement, several circuits have held that to show that a liberty interest in an individual's reputation has been infringed, an employee must show that she has requested and been denied a

name-clearing hearing. *See e.g. Bledsoe v. City of Horn Lake*, 449 F.3d 650, 653 (5th Cir.2006); *Quinn v. Shirey*, 293 F.3d 315, 321 (6th Cir.2002)"); ***McCall v. Dep't of Human Resources,*** 176 F. Supp.2d 1355, 1369 (M.D. Ga. 2001) ("Assuming that the conduct of Defendants Almand, Mitchell, and Gibson, as alleged in the complaint, deprived Rayshom of his procedural due process rights created by the Children and Youth Act, it must certainly be described as random and unauthorized. Indeed, it is inconceivable that the state would authorize its officials to violate a foster child's constitutional rights or that the state could foresee that they would do so absent any prior suggestive conduct. Thus, this claim turns on the adequacy of the post-deprivation remedies available under Georgia law. Because the Court finds that the GTCA provides a constitutionally adequate post-deprivation remedy, . . . Rayshom's procedural due process rights were not violated. Essentially, there was no procedural due process violation in this case because the availability of relief under the GTCA means that any potential violation was not complete. There being no violation of Rayshom's procedural due process rights, Defendants Almand, Mitchell, and Gibson are entitled to qualified immunity on this claim. . . . . The Court does not lightly ignore the precedent established in *Taylor* on this point. However, because the GTCA had not been enacted when the Eleventh Circuit decided *Taylor,* the Court concludes that the portion of *Taylor* dealing with procedural due process cannot withstand scrutiny under the *Hudson/Parratt* rule in light of the Georgia General Assembly's enactment of the GTCA in 1992. In fact, the Eleventh Circuit concluded its opinion in *Taylor* with the following observation: 'Since the child's claim ... is a procedural due process claim, the state of Georgia may alter its statutes and ordinances in such a way as to change or eliminate the expectation on which this child had the right to rely.' 818 F.2d at 800. The Georgia General Assembly did just that when it enacted the GTCA in 1992. As a result, Rayshom's right to rely on the Children and Youth Act for procedural due process was eliminated, and he is required to seek relief under the GTCA rather than the procedural component of the Due Process Clause of the Fourteenth Amendment.").

See also ***Belcher v. Norton***, 497 F.3d 742, 753 (7th Cir. 2007) ("Because we conclude that Deputy Marshal Norton is entitled to the broad statutory immunity afforded by ITCA, we also must conclude that the statute does not provide an adequate state law remedy to the plaintiffs. Relegating the plaintiffs to this state statutory scheme would deprive them of any meaningful avenue to seek redress for the deprivation that they claim to have suffered. Therefore, we must conclude that the district court erred in granting summary judgment in favor of the defendants on the plaintiffs' procedural due process claim."); ***Roy v. City of Augusta, Maine,*** 712 F.2d 1517 (1st Cir. 1983) (state remedy inadequate where absolute immunity available); ***Larramendy v. Newton***, 994 F. Supp. 1211, 1214-16 (E.D. Cal. 1998) ("Plaintiffs argue that an adequate state remedy is unavailable here because a successful state action for malicious prosecution against this defendant is foreclosed by virtue of the state's immunity statutes. . . They maintain that because there is no adequate remedy available under state law they have a right to proceed under § 1983 in this court. . . . The question is whether there is a remedy under state law sufficient to satisfy the requirements of due process, when the state's tort law provides absolute immunity for intentional conduct violating plaintiffs' constitutional rights. As far as the court can determine, neither the United States Supreme Court nor the Ninth Circuit has directly addressed the issue of whether due

process is satisfied under these circumstances. . . . The issue is . . . not whether the state may define its tort law without coming into conflict with federal law, but whether, when it defines its law so as to preclude recovery, a plaintiff has a meaningful opportunity to be heard sufficient to comport with the requisites of due process. . . . The statute before the court suffers a defect similar to a statute of limitations which applies as a bar no matter when a plaintiff files. Because under state law plaintiffs are deprived of any remedy whatever the facts, it is clear that plaintiffs' ability to file a complaint is not effective process. Because under state law plaintiffs have no remedy, the state tort law does not provide an adequate postdeprivation process sufficient to satisfy the Fourteenth Amendment."); ***Corp. of Pres. of Church of Jesus Christ of Latter Day Saints v. Environmental Protection Commission of Hillsborough County***, 837 F. Supp. 413, 417 (M.D. Fla. 1993) (state remedy inadequate where compensation not available).

3. The ***Parratt/Hudson*** doctrine does not apply to deprivations by state actors, acting pursuant to established state procedure which failed to provide for predeprivation process where it was possible, practicable and constitutionally required.

In ***Logan v. Zimmerman Brush Co.***, 455 U.S. 422 (1982), the Court upheld plaintiff's claim where a state statutory scheme destroyed plaintiff's property interest without the proper procedural safeguards. *Id*. at 435-36.

See also ***Cahoo v. SAS Analytics Inc.***, 912 F.3d 887, 902-03 (6th Cir. 2019) ("Plaintiffs pleaded a plausible procedural due process claim. First, Plaintiffs have a significant interest in maintaining eligibility for unemployment benefits, receiving ungarnished wages, and obtaining their state and federal income tax refunds. Second, the current system poses a profound possibility of erroneous deprivations—the Auditor General found that MiDAS' error rate exceeded 93%. . . And while the government's legitimate interest in preserving fiscal and administrative resources cannot be ignored, this interest is not so great as to negate the need for adequate notice before interfering with these substantial property interests. Therefore, Plaintiffs adequately alleged that the Individual Agency Defendants did not provide them with sufficient process before depriving them of their protected property interests. The Individual Agency Defendants argue that Plaintiffs failed to allege a plausible due process claim because Agency procedures provided for a pre-deprivation hearing if claimants elected to appeal a fraud determination. The Court is unpersuaded by this argument. Plaintiffs allege that the Agency terminated a claimant's right to benefits *before* any appeal hearing took place; they allege the Agency terminated a claimant's right to benefits immediately once MiDAS made a positive fraud determination. While claimants had the opportunity to appeal a fraud determination, 'postdeprivation remedies alone will not satisfy due process if the deprivation resulted from conduct pursuant to an "established state procedure," rather than random and unauthorized conduct.'. . Accordingly, the adequacy of Plaintiffs' opportunity to appeal their original fraud determinations is immaterial to the question of whether the Individual Agency Defendants violated Plaintiffs' due process rights. Construing Plaintiffs' Complaint liberally and accepting Plaintiffs' allegations as true, as this Court must do at this stage, Plaintiffs sufficiently alleged that the Individual Agency Defendants violated their

rights to due process."); ***Hoefling v. City of Miami***, 811 F.3d 1271, 1283 (11th Cir. 2016) ("With respect to the procedural due process claim, the district court should analyze whether this is one of those situations where the existence of a post-deprivation remedy is sufficient, as in *Tinney,* 77 F.3d at 380, or whether Mr. Hoefling has sufficiently alleged that the destruction of his sailboat was pursuant to a policy or practice of the City (i.e., the alleged 'cleanup' program) such that pre-deprivation notice was feasible and required under cases like *Hudson v. Palmer,* 468 U.S. 517, 532 (1984) (explaining that, 'where the property deprivation is effected pursuant to an established state procedure,' a post-deprivation state remedy cannot satisfy due process), and *Rittenhouse v. DeKalb Cnty.,* 764 F.2d 1451, 1455 (11th Cir.1985) (holding that the focus on the adequacy of post-deprivation remedies—due to the random, unauthorized act of an employee—does not apply 'where a deprivation occurs pursuant to an established state procedure,' because in those circumstances, a 'predeprivation process is ordinarily feasible'); ***Lane v. City of Pickerington***, 588 F.App'x 456, 466 (6th Cir. 2014) ("This court has applied *Parratt's* rule inconsistently in two 'parallel but contradictory' lines of authority. *Mitchell,* 375 F.3d at 482. We conclude, as we did in *Mitchell* . . . that *Parratt* has no application here because Lane was not deprived of his constitutionally protected property interest due to a random or unauthorized act; Defendants had the opportunity to provide Lane pre-deprivation process pursuant to an established procedure-and indeed did provide a pre-termination hearing, albeit a constitutionally inadequate one."); ***Catron v. City of St. Petersburg***, 658 F.3d 1260, 1266-69 (11th Cir. 2011) ("Plaintiffs have sufficiently alleged that the City has deprived them of liberty interests in two ways, by 1) enforcing the trespass ordinance to prohibit them from having access to a specific park (Williams Park) as ordinarily used by the public; and 2) carrying out a policy of enforcing the ordinance to prohibit their use of all parks in the City open to the public generally. These allegations satisfy the first element for a procedural due process claim. . . .The ease with which trespass warnings may be issued is particularly problematic here because the trespass ordinance provides no procedural means for a warning-recipient to challenge the warning. An evident process for such challenges has significant value in avoiding mistakes. Even if it is impractical for the City to provide a pre-warning hearing to 'assure that there are reasonable grounds to support' the trespass warning, the City must provide some post-deprivation procedure to satisfy the requirements of the Due Process Clause. . . .[A]s the trespass ordinance is currently written, Catron has been provided by the City with no way to contest the trespass warning or at least the scope of the warning. Catron's only options, it seems, are to relinquish his right to visit city parks altogether or to violate the trespass warning and subject himself to a criminal prosecution for trespass by a different sovereign (the state) or to bring a court action challenging the entire scheme. We conclude that Plaintiffs have stated a claim, facially and as-applied, under the Due Process Clause: Section 20-30 lacks constitutionally adequate procedural protections as the ordinance is presently written and allegedly enforced."); ***Brentwood Academy v. Tennessee Secondary School Athletic Association***, 442 F.3d 410, 433, 434 (6th Cir. 2006) (on remand) ("Under circuit precedent, a § 1983 plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either: (1) an 'established state procedure that itself violates due process rights,' or (2) a 'random and unauthorized act' causing a loss for which available state remedies would not adequately compensate the plaintiff. . . A plaintiff alleging the first element of this test would not need to

demonstrate the inadequacy of state remedies. . . If the plaintiff pursues the second line of argument, he must navigate the rule of *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), which holds that a state may satisfy procedural due process with only an adequate postdeprivation procedure when the state action was 'random and unauthorized.'. . In *Zinermon*, . . .the Supreme Court narrowed the *Parratt* rule to apply only to those situations where predeprivation process would have been impossible or impractical. In this context, an 'unauthorized' state action means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law. . . Whether seen as an attack on an established state procedure or as an attack on a 'random and unauthorized' act, Brentwood's claim is not subject to the *Parratt* rule, as it clearly was not 'impossible' for the TSSAA to grant a predeprivation hearing . . . to Brentwood on these facts. . . . It seems clear that Carter and the Board had the authority to impose the penalties against Brentwood; their acts were not 'random and unauthorized.' If, as is more likely, the TSSAA's action was the result of an 'established state procedure,' then the question becomes whether that procedure violated Brentwood's due process rights."); ***Silberstein v. City of Dayton***, 440 F.3d 306, 315, 316 (6th Cir. 2006) ("Appellants do not dispute that the Civil Service Commission denied Silberstein an opportunity to be heard, but argue that this did not constitute a due process violation because an adequate state corrective judicial process existed. Appellants' conclusion is in error. The rule requiring a § 1983 plaintiff to show the inadequacy of a state's post-deprivation corrective proceedings, articulated by the Supreme Court in *Parratt v. Taylor*, 451 U.S. 527 (1981), applies only where the deprivation complained of is random and unpredictable, such that the state cannot feasibly provide a predeprivation hearing. . . . Silberstein was fired by an official action of the city's Civil Service Board after lengthy deliberation and consultation with attorneys. This was not a random, unauthorized deprivation, and Silberstein need not show that the state's post-deprivation corrective procedures were inadequate in order to allege adequately a deprivation of her due process rights."); ***Allen v. Thomas,*** 388 F.3d 147, 149 (5th Cir. 2004) ("Because the undisputed facts reveal that Allen's word processor and radio were confiscated under the authority of a prison administrative directive, the confiscation was not a random, unauthorized act by a state employee. . . The district court erred in applying the *Parratt/Hudson* doctrine."); ***Mitchell v. Fankhauser***, 375 F.3d 477, 483, 484 (6th Cir. 2004) ("Despite the Supreme Court's and this court's pronouncements that *Parratt* applies only to random, unauthorized deprivations of property, this court has occasionally applied *Parratt*'s requirement of pleading the inadequacy of state-court remedies more broadly [citing cases]. . . . On the other hand, other decisions of this court, in addition to *Carter* and *Watts*, have recognized the distinction between random, unauthorized acts and established state procedures. [citing cases] We are therefore faced with deciding between multiple precedents on both sides − those that apply *Parratt* only to random, unauthorized deprivations of property and those that apply *Parratt* more broadly. Our analysis convinces us that the correct line of authority in the Sixth Circuit is that of *Watts, Macene*, *Carter*, and *Moore*. In the present case, Mitchell was not deprived of his property interest in his job pursuant to a random or unauthorized act. Mitchell, therefore, 'was required neither to plead nor prove the inadequacy of post-termination state-law remedies in order to prevail.'. . We therefore decline to apply *Parratt* and *Vicory* to the present case."); ***Higgins v. Beyer,*** 293 F.3d 683, 694 (3d Cir. 2002) (Under *Zinermon,* prisoner was entitled to predeprivation

notice and hearing before deduction of funds from his inmate account by prison officials Aacting under the authority of an established state procedure for seizing a prisoner's funds to satisfy court-ordered fines."); ***Zimmerman v. City of Oakland,*** 255 F.3d 734, 739 (9th Cir. 2001) (*Parratt* and *Hudson* did not foreclose a due process challenge to the adequacy of the procedures under which the removal of nuisance automobiles was carried out); ***Stauch v. City of Columbia Heights***, 212 F.3d 425, 432, 433 (8th Cir. 2000) ("The existence of state post-deprivation remedies has been deemed to satisfy procedural due process in situations where the alleged constitutional deprivation was caused by random and unauthorized action. . . The present action does not fall within that paradigm of cases. The actions taken by the City were neither random nor unauthorized and it was certainly feasible for the City to have provided the Stauches with an opportunity to appeal the determination that their units were unlicensed."); ***Moore v. Bd. of Educ. of Johnson City Schools***, 134 F.3d 781, 785 (6th Cir. 1998) ("[T]he district court erred in applying *Parratt* to the present case. Moore was required neither to plead nor prove the inadequacy of post-termination state law remedies in order to prevail. Instead, because the termination hearing conducted by Simmons was neither a random nor unauthorized event, but rather was done pursuant to established procedures, we must 'evaluate the challenged procedures directly to ensure that they comport with due process.'"); ***Seals v. Edwards***, 985 F.2d 561 (6th Cir. 1993) (Table, Text in Westlaw) ("When there is an established state procedure, which is followed, . . . the fact that one decision maker somewhere in the process allegedly goes astray, does not turn what occurred into a random and unauthorized act. . . . Since a plaintiff always alleges some act of wrongdoing, if wrongdoing is made to equate, *ipso facto*, with random and unauthorized conduct, . . . then every plaintiff would be forced to plead himself out of court in an effort to state a claim."); ***Brotherton v. Cleveland***, 923 F.2d 477, 482 (6th Cir. 1991) (removal of deceased's corneas was pursuant to established state procedure and necessitated predeprivation process); ***Otero v. Dart***, No. 12 C 3148, 2016 WL 74667, at *9 (N.D. Ill. Jan. 7, 2016) ("Because Plaintiff's [procedural due process] claim is based on Defendant's policies and practices, the *Parratt* doctrine does not apply, and thus Defendant's argument is without merit. . . . Plaintiff does not explain what type of notice was required or the nature of the process he was due under the circumstances – nor has Plaintiff cited legal authority lending guidance to this question. After careful research, the Court has not found any legal authority concerning what pre-deprivation process would be appropriate for Plaintiff's overdetention claim – most likely because the protections under substantive due process are a better fit under the circumstances. . . . To clarify, Plaintiff's claim essentially rests on the premise that no matter how much process Defendant could or would provide, the substantive component of due process bars Defendant from unreasonably detaining him after his acquittal. . . In sum, construing the evidence and all reasonable inferences in Plaintiff's favor, he has failed to submit evidence to establish every element that is essential to his procedural due process claim for which he will bear the burden of proof at trial. . .As such, the Court grants Defendant's motion regarding Plaintiff's procedural due process claim."); ***Allen v. Leis,*** 154 F. Supp.2d 1240, 1263, 1267 (S.D. Ohio. 2001) ("Where state actors are following established state procedures that result in the deprivation of an individual's property, the existence of post- deprivation remedies are ordinarily irrelevant and the requirements of prior notice and an opportunity to be heard apply."); ***Leslie v. Lacy***, 91 F. Supp.2d 1182, 1188 (S.D. Ohio 2000) ("Where state actors are following established

state procedures that result in the deprivation of an individual's property, the existence of postdeprivation remedies is ordinarily irrelevant and the requirements of prior notice and opportunity to be heard apply, although a postdeprivation hearing may be adequate where a predeprivation hearing is impossible or impracticable, or there is a necessity for quick action."); ***Burton v. Sheahan***, 68 F. Supp.2d 974, 982 (N.D. Ill. 1999) ("[T]he Supreme Court in *Parratt* held that there is no liability for a deprivation of procedural due process if a state remedy exists which adequately supplies the procedures that are necessary to remedy the deprivation. However, *Parratt* does not apply, and a plaintiff need not prove that state law remedies are inadequate, if the harm resulted from an official governmental policy or if the plaintiff is objecting to the failure to provide an adequate post-deprivation remedy.").

But see ***Hughlett v. Romer-Sensky***, 497 F.3d 557, 567, 568 (6th Cir. 2006) ("Plaintiffs argue that the district court misread *Hudson,* because a 'postdeprivation state remedy does not satisfy due process where the property deprivation is effected pursuant to an established procedure.' . . Plaintiffs neglect to consider *Hudson's* instruction that a postdeprivation procedure may remedy 'either the necessity of quick action by the State *or the impracticality of providing any meaningful predeprivation process*. . . .' The district court properly found that a predeprivation notice and hearing requirement would be impractical for this type of administrative decision.Further, Ohio has established an administrative review process for child support recipients who want to contest the amount or the manner of delivery of their support payments. . . Under the code, a custodial parent may request a hearing if payments have not been properly distributed, or are not issued in a timely fashion. . . The review procedure includes 'the right to an administrative appeal from the decision of the hearing officer and the right to judicial review of the decision rendered in the administrative appeal.'. . The plaintiffs have failed to show that this postdeprivation remedy is inadequate to address their claims.The district court did not err when it found that plaintiffs failed to allege facts sufficient to show that they were entitled to predeprivation notice and hearing, or that postdeprivation remedies supplied by the State are inadequate."); ***Carcamo v. Miami-Dade County***, 375 F.3d 1104, 1106 n.4 (11th Cir. 2004) ("We also note that Appellant is mistaken to assume that the existence of a government 'policy or practice' necessarily bars the application of *Parratt-Hudson*. Rather, post-deprivation remedies may be acceptable even in contexts involving a state policy or procedure. In *Rittenhouse v. DeKalb County*, 764 F.2d 1451 (11th Cir.1985), we concluded that 'the rationale underlying the "established state procedure" exception is that where a deprivation occurs pursuant to an established state procedure, pre-deprivation process is ordinarily feasible.' . .Thus, the acceptability of post-deprivation process turns on the feasibility of pre-deprivation process, not the existence of a policy or practice."); ***Tillman v. Lebanon County Correctional Facility***, 221 F.3d 410, 421 n.12 (3d Cir. 2000) ("We recognize that some cases hold that *Parratt* does not apply where an ' Aestablished state procedure' ' destroys an entitlement without proper procedural safeguards. . . .In such a case, a predeprivation hearing is still required. . . However, the Supreme Court has since noted in an ex parte forfeiture case, i.e., one that involves established state procedures, that in 'extraordinary situations,' predeprivation notice and hearings are unnecessary. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed.2d

490 (1993). The case before us presents such an 'extraordinary situation.'"); ***Harris v. City of Akron***, 20 F.3d 1396, 1404-05 (6th Cir. 1994) ("We conclude that the district court correctly granted summary judgment on the plaintiff's procedural due process claim. Although the court incorrectly analyzed the issue under the 'random and unauthorized act' *Parratt* exception, we believe judgment for the defendants was proper under the other *Parratt* rationale. The defendants were faced with a situation that required quick action. The non-emergency procedure for notifying the owner of a building would not have removed the threat to public safety and health perceived by the responsible officials. The state provided a meaningful postdeprivation process to determine the propriety of the demolition decision. Under these circumstances the requirements of procedural due process were satisfied.").

It is also generally settled that ***Parratt/Hudson*** is inapposite where plaintiff is claiming the violation of a constitutional right afforded specific protection by the Bill of Rights or where plaintiff is alleging a violation of substantive due process. *See, e.g.,* ***Zinermon v. Burch***, 110 S. Ct. 975, 983 (1990) (dictum) ("As to these two types of claims....[a] plaintiff may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights."); ***Dean for and on behalf of Harkness v. McKinney***, 976 F.3d 407, 420-21 (4th Cir. 2020) ("*Parratt-Hudson* doctrine does not bar the plaintiff's substantive due process claim. In *Zinermon v. Burch*, . . . the Supreme Court limited the application of the doctrine to procedural due process claims for which the state provides an adequate post-deprivation remedy. As the Court explained, 'the Due Process clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them."'. . In such cases, '[a] plaintiff ... may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.'. . .Our Circuit has adopted the Supreme Court's reasoning, holding that

[S]ome abuses of governmental power may be so egregious or outrageous that no state post-deprivation remedy can adequately serve to preserve a person's constitutional guarantees of freedom from such conduct. Thus, conduct that 'shocks the conscience' ... violates substantive guarantees of the Due Process Clause independent of the absence or presence of post-deprivation remedies available through state tort law.

Temkin, 945 F.2d at 720. . . Here, the plaintiff has made only a substantive due process claim. Such a claim focuses on egregious state conduct rather than unfair procedures. McKinney's argument fails because the availability and adequacy of a post-deprivation state remedy is irrelevant to the analysis for a substantive due process claim. And according to *Zinermon*, the availability of a state law remedy for McKinney's egregious conduct does not impact the plaintiff's § 1983 suit. . . . This Court, relying upon the body of well-reasoned Fourth Circuit precedent and persuasive authority, declines to extend the *Parratt-Hudson* doctrine to the plaintiff's substantive due process claim. Such an extension would be inconsistent with the jurisprudence that recognizes the fundamental differences between substantive and procedural due process claims. Accordingly, we find that the plaintiff's Fourteenth Amendment substantive due process claim against McKinney is not barred by the *Parratt-Hudson* doctrine."); ***Armstrong v. Daily***, 786 F.3d 529, 539-43, 545 (7th Cir. 2015) ("The defendants argue that Armstrong's claims based on the loss or destruction of exculpatory

evidence are procedural due process claims, and procedural due process claims are governed by *Parratt.* . . But no court has applied *Parratt* to claims that the government violated a defendant's right of access to exculpatory evidence. Armstrong's claims do not seek notice and a hearing—like the procedural due process claims addressed in *Parratt* and its progeny—but rather seek to vindicate rights of fundamental fairness in criminal proceedings. . . . No court has accepted the defendants' argument that the *Parratt* analysis applies when the plaintiff is alleging that wrongful conduct corrupted fair fact-finding in the criminal justice system. We will not be the first. . . . When *Parratt* and its progeny are understood properly, it becomes clear that Armstrong can proceed on his claim because the defendants' actions were not 'random and unauthorized' within the meaning of *Parratt* and that state tort law does not provide an adequate remedy. . . . *Parratt* cannot apply simply because the defendant official's actions were prohibited by state law and subject to a tort remedy. A closer reading of *Parratt, Hudson,* and later cases shows that the Supreme Court never intended *Parratt* to reach as broadly as the defendants argue. The Court's decisions make clear that *Parratt* is limited in three ways: first, 'random and unauthorized' conduct means unforeseeable misconduct that cannot practicably be preceded by a hearing; second, misconduct that is legally enabled by a state's broad delegation of power is not 'random and unauthorized'; and third, an official's subversion of established state procedures is not 'random and unauthorized' misconduct. . . . The same reasoning applies to Armstrong's claim against lab technicians Daily and Campbell since he alleges that their actions caused him to spend an additional three years in prison, which were also the product of established state procedures."); ***McCullah v. Gadert,*** 344 F.3d 655, 660 (7th Cir. 2003) ("In order to evaluate McCullah's complaint, we must now decide whether the *Parratt* rule must be applied to foreclose all constitutional claims for which there is a parallel remedy under state law, even if they are brought under a textually specific part of the Constitution, or if it applies only in the due process area. Our sister circuits have disagreed about the answer to this question. At least one circuit appears to have adopted a broad reading of *Parratt.* See *Reid v. New Hampshire,* 56 F.3d 332, 341 (1st Cir.1995) (holding that the *Parratt* rule forecloses a claim of false arrest under the Fourth Amendment because of the availability of a parallel cause of action under state law). Three other circuits take a narrower approach. See *Taylor v. Meacham,* 82 F.3d 1556, 1560 (10th Cir.1996); *Eugene v. Alief Indep. Sch. Dist.,* 65 F.3d 1299, 1303 (5th Cir.1995); *Singer v. Fulton County Sheriff,* 63 F.3d 110, 114-15 (2d Cir.1995). We agree with the latter group. A more expansive version of the *Parratt* rule would be directly contrary to the teaching of *Carey v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), that '[i]n some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right.' *Id.* at 258, 98 S.Ct. 1042. The Court has never held that § 1983 is available only for cases with no state analog; indeed, it has specifically underscored that the contrary is true. . . Furthermore, the core of *Parratt*'s holding is that a post- deprivation hearing (in a court) is sometimes all the process that is 'due'; in contrast, no amount of process can support an arrest without probable cause. *Parratt* has nothing to say about a Fourth Amendment claim.").

Accord ***Daniels v. Williams***, 474 U.S. 327, 338 (1986) (Stevens, J., concurring in judgments). *See also* ***Soldal v. County of Cook***, 923 F.2d 1241, 1249 (7th Cir. 1991) (panel

opinion) ("[A] constitutional right that is not simply the elementary due process right to notice and a hearing is actionable under section 1983 regardless of the adequacy of the plaintiff's remedies under state law."), *reheard en banc*, ***Soldal v. County of Cook***, 942 F.2d 1073 (7th Cir. 1991) (*en banc*), *reversed on other grounds*, 113 S. Ct. 538 (1993).

But see ***Guertin v. Michigan***, 924 F.3d 309, 313-14 (6th Cir. 2019) (Sutton, J., concurring in the denial of rehearing en banc *cert. denied sub nom.* ***City of Flint v. Guertin***, 140 S. Ct. 933 (2020) *and cert. denied sub nom.* ***Busch v. Guertin***, 140 S. Ct. 933 (2020) ("A similar case already exists in state court. Based on the same events, several individuals filed a putative class action in the Michigan courts against most of the same defendants under the substantive due process guarantee of the Michigan Constitution. . . The Michigan Court of Appeals denied the defendants' motions for summary disposition as to the state law due process bodily integrity claims, and that case continues to wind its way through the Michigan court system. . . Would it not make sense for the federal courts to wait and see what relief the Michigan Constitution provides before determining whether the state defendants violated the Due Process Clause of the U.S. Constitution? Before deciding whether someone may sue a State for depriving him of property or liberty or life without due process, the federal courts first consider the judicial process the State provides him to remedy his alleged injuries. . . For that reason, if the underlying state and federal claims in today's case turned on process in its conventional sense, the federal courts presumably would stay their hand to determine what process the State provided. If that approach makes sense in the context of *procedural* due process, it makes doubly good sense in the context of *substantive* due process. Otherwise, we give claimants more leeway when they raise the most inventive of the two claims, rewarding them for asking us to do more of what we should be doing less. This is not a new concept. For some time, the federal courts have tried to avoid federal constitutional questions when they can. . . One way to further that goal is to learn whether the substantive due process protections of the Michigan Constitution or any other state laws redress the plaintiffs' injuries. Because the 'open-ended' nature of substantive due process claims lacks 'guideposts for responsible decisionmaking,'. . . we should welcome input from the Michigan courts about what process, substantive or otherwise, is due under state law. Better under these circumstances, it seems to me, to hold the federal substantive due process claims in abeyance—and avoid prematurely creating new federal constitutional tort regimes—until the plaintiffs have had a chance to vindicate their rights in state court. . .All of this by the way will prove beneficial whether the plaintiffs win or lose in state court. If they win, there will be less, perhaps nothing at all, for the federal courts to remedy under federal substantive due process. If they lose, the state courts' explanation may inform the federal claims."); ***Browder v. City of Albuquerque***, 787 F.3d 1076, 1083-86 (10th Cir. 2015) (Gorsuch, J., concurring) ("We shouldn't be surprised that the common law usually supplies a sound remedy when life, liberty, and property are taken. After all, the whole point of the common law as it evolved through the centuries was to vindicate fundamental rights like these. That's the insight of *Parratt v. Taylor,* 451 U.S. 527 (1981). While 42 U.S.C. § 1983 authorizes federal courts to remedy constitutional violations by state officials acting under color of state law, and while *Monroe v. Pape,* 365 U.S. 167 (1961), has read this authorization broadly, the authority to remedy a claim doesn't always mean the duty to do so. Federal courts often abstain when they otherwise

might proceed out of respect for comity and federalism and the absence of any compelling need for their services. . . *Parratt* explains that this familiar principle applies in the § 1983 context just as it does elsewhere. Often, after all, there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate those same rights using a deep and rich common law that's been battle tested through the centuries. . . Of course, if a plaintiff can establish that state law won't remedy a constitutional injury *Parratt* recognizes that the doors of the federal courthouse should remain open to him. . . . But when a rogue state official acting in defiance of state law causes a constitutional injury there's every reason to suppose an established state tort law remedy would do as much as a novel federal remedy might and no reason exists to duplicate the effort. . .Our case highlights the point. We face a traffic accident, a deeply tragic traffic accident, but also exactly the sort of thing state courts have long and ably redressed. A state court could provide relief using established tort principles (e.g., negligence) and there's little reason to doubt it would—after all, the officer's actions violated state law and he's even been criminally charged. Or a federal court might provide the same relief using primordial constitutional tort principles that must be expounded more or less on the fly—by asking what's 'arbitrary' or what 'shocks the judicial conscience.'. . .To entertain cases like this in federal court as a matter of routine risks inviting precisely the sort of regime the Supreme Court has long warned against—one in which 'any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation' in federal court and thus 'make of the Fourteenth Amendment a font of tort law' needlessly superimposed on perfectly adequate existing state tort law systems. . . True, language in *Zinermon v. Burch,* 494 U.S. 113 (1990), suggests that *Parratt's* abstention principle may apply to procedural and not substantive due process claims like the one in this case. . . But, respectfully, the suggestion along these lines came in dicta and several reasons exist to doubt it. For starters, the distinction between procedural and substantive due process isn't found in the constitutional text and is famously malleable in any event; one might wonder whether a boundary like that offers a stable foundation on which to rest such a weighty distinction. . . One might ask too whether *Parratt* itself might be better understood as a substantive rather than a procedural due process case. . .Then there's the fact the Supreme Court and others have already applied *Parratt* to cases involving the deprivation of substantive rights. *See, e.g., Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 195 (1985); *Newsome v. McCabe,* 256 F.3d 747, 750–51 (7th Cir.2001); *Schaper v. City of Huntsville,* 813 F.2d 709, 718 (5th Cir.1987). And the fact the Supreme Court has repeatedly admonished courts to proceed with special caution when handling substantive due process claims. . . Finally, after *Zinermon* came *Lewis,* a decision in which the Court specifically reserved the question whether *Parratt* applies to substantive due process claims, confirming that the issue remains a live and open one. . . Indeed, it's hard to identify a principled justification for extending *Parratt* piecemeal to procedural due process claims rather than wholesale to all due process claims. *Zinermon* observed that a substantive due process violation is complete upon a deprivation while a procedural due process violation requires us to wait and see what process the state provides. But it's unclear why that distinction makes a difference when *Parratt's* logic cuts across both kinds of cases, asking in all events whether there's a need for federal intervention or whether state remedial

processes might do just as well. Losing a child is a nightmare of the darkest sort and the suffering the Browder family has had to endure is beyond words. But there's little reason to think that state courts would fail to fulfill their oaths to see justice done in this case, at least as well as it can ever be done in a case so tragic. To be sure, a *Parratt* argument wasn't properly presented in this case and so we rightly hold it waived in this instance. But when the issue is raised in appropriate future cases, I believe we would do well to consider closely its invitation to restore the balance between state and federal courts. For we should be able to expect both that justice will be done in cases like this one and that it will be done while exhibiting the sort of cooperative federalism that has traditionally defined our law.")

See also ***Marquez v. Garnett***, 567 F. App'x 214, 217, 218 (5th Cir. 2014) ("Stripped of multiple conclusory statements in the amended complaint, the allegation here is that the student was sliding Garnett's compact disc across a table during class time and Garnett reacted. As in *Fee* and *Moore,* the setting is pedagogical, and C.M.'s action was unwarranted. The inference must be that Garnett acted to discipline C.M., even if she may have overreacted. . . Because Marquez's pleadings demonstrate corporal punishment rather than a mere attack, the only remaining question is the sufficiency of state remedies. The parties do not dispute that, as we found in *Fee* and *Moore,* Texas provides criminal and civil remedies to parents like Marquez. . . In this case, Garnett was charged in state court with assault causing bodily injury, was placed on administrative leave, and was required to surrender her teaching certificate in response to her conduct. Marquez has not shown that C.M.'s substantive due process rights were violated . . .Fifth Circuit law squarely forecloses Marquez's claim against Garnett. Accordingly, she was entitled to qualified immunity."); ***Moore v. Willis Independent School District***, 233 F.3d 871, 874, 875 (5th Cir. 2000) ("We have held consistently that, as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment, whether it be against the school system, administrators, or the employee who is alleged to have inflicted the damage. . . . By now, every school teacher and coach must know that inflicting pain on a student through, inter alia, unreasonably excessive exercise, violates that student's constitutional right to bodily integrity by posing a risk of significant injury. This right is not implicated, however, when, as in this case, the conduct complained of is corporal punishment − even unreasonably excessive corporal punishment − intended as a disciplinary measure."); ***United of Omaha Life Ins. Co. v. Solomon***, 960 F.2d 31, 35-39 (6th Cir. 1992) (*Parratt* applied to substantive due process claim where Michigan law provided adequate postdeprivation remedy); ***Fee v. Herndon***, 900 F.2d 804, 810 (5th Cir. 1990), *cert. denied*, 498 U.S. 908 (1990) (in case involving corporal punishment of special education student, no substantive due process claim was stated where adequate post-punishment remedy was available under state law); ***Polenz v. Parrott***, 883 F.2d 551, 558 (7th Cir. 1989) (substantive due process claim based on deprivation of property interest is cognizable where plaintiff claims either violation of some other substantive constitutional right or inadequacy of state law remedies); ***Weimer v. Amen***, 870 F.2d 1400, 1406 (8th Cir. 1989) ("In situations where procedural due process claims alleging property deprivation are prohibited in section 1983 actions by ***Parratt***, claims based on substantive due process should be barred as well.); ***Mann v. City of Tucson***, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J.,

concurring) (***Parratt*** should apply to "all unforeseeable deprivations of life, liberty, and property as well as all unplanned violations of 'substantive' due process rights."); *See also* ***Peterson v. Baker***, 504 F.3d 1331, 1338 (11th Cir. 2007) ("Thus, based on the totality of the circumstances as observed in the light most favorable to Plaintiff, we conclude that the student's punishment was not obviously excessive. . . Our conclusion is not out of line with case law from this circuit as well as other circuits. In short, the standard is shock the conscience and totality of the circumstances; and when some reason exists for the use of force, constitutional violations do not arise unless the teacher inflicts serious physical injury upon the student."). *But see* ***Saldana v. Angleton ISD***, No. 3:16-CV-159, 2017 WL 1498066, at *2–3 (S.D. Tex. Apr. 25, 2017) ("If Saldana's pleadings cannot be said to allege anything more than excessive corporal punishment, and so long as the State of Texas affords 'adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions,' her claims would be subject to dismissal under Fifth Circuit precedent. *See, e.g., Fee v. Herndon,* 900 F.2d 804, 807-08 (5th Cir. 1990); *Flores v. School Board of DeSoto Parish,* 116 Fed. App'x. 504, 509 (5th Cir. 2004) ("[t]his circuit does not permit public school students to bring claims for excessive corporal punishment as substantive due process violations under § 1983 if the State provides an adequate remedy"); *Marquez v. Garnett,* 567 Fed. App'x. 214, 217 (5th Cir. 2014). However, Saldana's allegations plausibly plead acts by a school district employee that could be either 'arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,' or a 'random, malicious, and unprovoked attack.' Saldana describes actions that can be plausibly described as 'lack[ing] any pedagogical justification.' *Marquez,* 567 Fed. App'x at 217; *see also Jefferson v. Ysleta Independent School District,* 817 F.2d 303, 304 (5th Cir. 1987) (teacher tied a second-grade student to a chair using a jump rope over the course of two school days without any punishment or disciplinary justification.). Taking all of Saldana's well-pleaded allegations as true and drawing all inferences in her favor—as is required at this stage of the litigation—the Court cannot conclude as a matter of law that Saldana has failed to state a constitutional violation. Further, under the authorities cited above, Saldana sufficiently pleads that Hernandez's alleged actions would have violated clearly established law at the time—*i.e.,* that a reasonable school district employee would have understood that a school bus monitor's repeatedly striking a disabled, nonverbal student, without any provocation or justification, violated the child's substantive due process rights and that such conduct was objectively unreasonable in light of the clearly established law at the time. [citing cases]")

Compare ***T.O. v. Fort Bend ISD***, 2 F.4th 407, 413-15 (5th Cir. 2021) ("The Fourth Amendment is applicable in a school context. In this circuit, however, claims involving corporal punishment are generally analyzed under the Fourteenth Amendment. It is well-established in this circuit that 'corporal punishment in public schools implicates a constitutionally protected liberty interest' under the Fourteenth Amendment. But, 'as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment.' This rule was developed in *Ingraham v. Wright* and applied in *Fee v. Herndon*. It recognizes that, while 'corporal punishment in public schools "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state

goal of maintaining an atmosphere conducive to learning,"' when the state provides alternative post-punishment remedies, the state has 'provided all the process constitutionally due' and thus cannot 'act "arbitrarily," a necessary predicate for substantive due process relief.' Based on the foregoing, we have consistently dismissed substantive due process claims when the offending conduct occurred in a disciplinary, pedagogical setting. [citing examples] In contrast, we have allowed substantive due process claims against public school officials to proceed when the act complained of was 'arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.' [citing examples] We allowed those claims to proceed because, unlike disciplinary measures, these alleged acts were 'unrelated to any legitimate state goal. Fidelity to our precedent requires us to affirm the dismissal of the instant claim of substantive due process. The aide removed T.O. from his classroom for disrupting class, and Abbott used force only after T.O. pushed and hit her. Even if Abbott's intervention were ill-advised and her reaction inappropriate, we cannot say that it did not occur in a disciplinary context. The facts alleged simply do not suggest that T.O. was the subject of a 'random, malicious, and unprovoked attack,' which would justify deviation from *Fee*. To borrow from the unpublished opinion in *Marquez*, in which this court dismissed § 1983 claims brought by an autistic seven-year old whose aide yelled at, grabbed, shoved, and kicked that student for sliding a compact disk across a desk, 'the setting is pedagogical, and [T.O.'s] action was unwarranted.' Furthermore, we have consistently held that Texas law provides adequate, alternative remedies in the form of both criminal and civil liability for school employees whose use of excessive disciplinary force results in injury to students in T.O.'s situation." footnotes omitted) *with* ***T.O. v. Fort Bend ISD***, 2 F.4th 407, 419-21 & n.2 (5th Cir. 2021) (Winer, J., joined by Costa, J., specially concurring) ("Twenty years ago, I called for en banc reconsideration of *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711, and *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), in which we held that injuries resulting from corporal punishment do not violate the Fourteenth Amendment as long as the forum state provides adequate alternative remedies. . . I write separately today to re-urge the same, hoping that the intervening decades of experience will have persuaded my colleagues that the rule is not only unjust, but is completely out of step with every other circuit court and clear directives from the Supreme Court. At the time I concurred in *Moore*, our circuit was already isolated in its position, with the Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all holding that corporal-punishment-related injuries implicate constitutional rights regardless of the availability of state remedies.[2] **[fn. 2:** Which constitutional rights are violated by excessive corporal punishment is another matter. The Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits analyze such claims under the Fourteenth Amendment and require a student to demonstrate that the punishment 'shocked the conscience' in order to prevail. [collecting cases] The Seventh and Ninth Circuits, in contrast, consider corporal punishment to constitute a 'seizure' and thus ask whether the punishment was objectively unreasonable under the Fourth Amendment. [citing cases]**]** Since then, the Second Circuit has joined the fray, siding with the majority. . . These cases, like our own, rely on the Supreme Court's acknowledgement in *Ingraham* that 'corporal punishment in public schools implicates a constitutionally protected liberty interest.'. . In *Ingraham*, the Supreme Court held that procedural due process rights were not violated by corporal punishment if alternative remedies existed, but

declined to consider whether such punishment implicated substantive due process rights. . . Unlike this court, all other circuit courts have declined to apply *Ingraham*'s procedural due process reasoning to substantive due process claims, instead concluding that under particular circumstances, excessive corporal punishment can violate substantive due process rights (or Fourth Amendment rights), regardless of the availability of alternative remedies. The Supreme Court has yet to be called on to resolve this dramatically lopsided circuit split, but it is only a matter of time. More importantly, subsequent writings by the Supreme Court highlight a major problem in the reasoning we applied in *Ingraham* and *Fee*. Specifically, the Supreme Court has made it clear that the availability of state remedies *does not* replace a cause of action under § 1983. In *Parratt v. Taylor*. . . and *Hudson v. Palmer* . . . the Supreme Court held that an individual deprived of a constitutionally protected property interest by the random and unathorized act of a state actor could not bring procedural due process claims under § 1983 unless the forum state failed to provide adequate post deprivation remedies. Notably, the Supreme Court in *Parratt* approvingly cited its own ruling in *Ingraham*, affirming that *Ingraham*'s reliance on the availability of post-deprivation remedies was properly cabined to procedural due process claims. . . The theory underlying *Parratt*/*Hudson* and their progeny is that a procedural due process violation challenges not the deprivation itself, but merely the procedure (or lack thereof) according to which the deprivation occurs. But a *substantive* due process violation is fundamentally different, insomuch as a § 1983 substantive due process action challenges not the procedure attendant to the deprivation, but the deprivation itself. The Supreme Court stressed this distinction in *Zinermon v. Burch*, . . . in which it explained that, with respect to substantive due process claims, 'the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. A plaintiff ... may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.'. . In other words, while a procedural due process violation may be eliminated by an adequate, state-provided, post-deprivation process, a substantive due process violation occurs at the moment of the deprivation itself, making the availability of alternative remedies wholly irrelevant. *Fee*, decided just three months later, makes no mention of *Zinermon*'s explicit pronouncement, instead citing this circuit's decision in *Ingraham*, among others, for the proposition that the existence of state remedies forecloses any substantive due process violations in an educational context. . . Nevertheless, this circuit has repeatedly recognized that *Parratt*/*Hudson*'s focus on alternative remedies is inapplicable to substantive due process claims in other contexts. . . In other opinions, we have recognized that *Fee*'s reasoning is in conflict with *Zinermon*. . . For the foregoing reasons, I remain firm in my conviction that *Fee* and *Ingraham* were wrongly decided—a conviction that has only grown stronger with the clarity of hindsight and thirty years of watching this rule being applied to the detriment of public school students in Texas, Mississippi, and Louisiana. . . This rule flies in the face of the many decisions by our colleagues in other circuits and those sitting on the highest court of this land. Let us fix the error before the Supreme Court decides to fix it for us.")

a. Note on *Manuel v. City of Joliet*

Compare ***Manuel v. City of Joliet, Ill.***, 137 S. Ct. 911, 914-22 (2017) ("Petitioner Elijah Manuel was held in jail for some seven weeks after a judge relied on allegedly fabricated evidence to find probable cause that he had committed a crime. The primary question in this case is whether Manuel may bring a claim based on the Fourth Amendment to contest the legality of his pretrial confinement. Our answer follows from settled precedent. The Fourth Amendment, this Court has recognized, establishes 'the standards and procedures' governing pretrial detention. . . And those constitutional protections apply even after the start of 'legal process' in a criminal case—here, that is, after the judge's determination of probable cause. . . Accordingly, we hold today that Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment (while we leave all other issues, including one about that claim's timeliness, to the court below). . . . Manuel's complaint alleged that the City violated his Fourth Amendment rights in two ways—first by arresting him at the roadside without any reason, and next by 'detaining him in police custody' for almost seven weeks based entirely on made-up evidence. . . .[T]he Seventh Circuit held that Manuel's complaint, in alleging only a Fourth Amendment violation, rested on the wrong part of the Constitution: A person detained following the onset of legal process could at most (although, the court agreed, *not* in Illinois) challenge his pretrial confinement via the Due Process Clause. . . . The Fourth Amendment protects '[t]he right of the people to be secure in their persons ... against unreasonable ... seizures.' Manuel's complaint seeks just that protection. Government officials, it recounts, detained—which is to say, 'seiz[ed]'—Manuel for 48 days following his arrest. . . .As reflected in *Albright*'s tracking of *Gerstein*'s analysis, pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. . . That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause. . . If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment. For that reason, and contrary to the Seventh Circuit's view, Manuel stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention. . . . Legal process did not expunge Manuel's Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime. . . .Our holding—that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process—does not exhaust the disputed legal issues in this case. It addresses only the threshold inquiry in a § 1983 suit, which requires courts to 'identify the specific constitutional right' at issue. . . After pinpointing that right, courts still must

determine the elements of, and rules associated with, an action seeking damages for its violation. . . Here, the parties particularly disagree over the accrual date of Manuel's Fourth Amendment claim—that is, the date on which the applicable two-year statute of limitations began to run. The timeliness of Manuel's suit hinges on the choice between their proposed dates. But with the following brief comments, we remand that issue to the court below. In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts. . . Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. . . But not always. . . . In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue. With these precepts as backdrop, Manuel and the City offer competing views about what accrual rule should govern a § 1983 suit challenging post-legal-process pretrial detention. According to Manuel, that Fourth Amendment claim accrues only upon the dismissal of criminal charges—here, on May 4, 2011, less than two years before he brought his suit. . . Relying on this Court's caselaw, Manuel analogizes his claim to the common-law tort of malicious prosecution. . . An element of that tort is the 'termination of the ... proceeding in favor of the accused'; and accordingly, the statute of limitations does not start to run until that termination takes place. . . Manuel argues that following the same rule in suits like his will avoid 'conflicting resolutions' in § 1983 litigation and criminal proceedings by 'preclud[ing] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution.'. . In support of Manuel's position, all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a 'favorable termination' element and so pegged the statute of limitations to the dismissal of the criminal case. . .That means in the great majority of Circuits, Manuel's claim would be timely. The City, however, contends that any such Fourth Amendment claim accrues (and the limitations period starts to run) on the date of the initiation of legal process—here, on March 18, 2011, *more* than two years before Manuel filed suit. . . According to the City, the most analogous tort to Manuel's constitutional claim is not malicious prosecution but false arrest, which accrues when legal process commences. . . And even if malicious prosecution were the better comparison, the City continues, a court should decline to adopt that tort's favorable-termination element and associated accrual rule in adjudicating a § 1983 claim involving pretrial detention. That element, the City argues, 'make[s] little sense' in this context because 'the Fourth Amendment is concerned not with the outcome of a prosecution, but with the legality of searches and seizures.'. . And finally, the City contends that Manuel forfeited an alternative theory for treating his date of release as the date of accrual: to wit, that his pretrial detention 'constitute [d] a continuing Fourth Amendment violation,' each day of which triggered the statute of limitations anew. . . So Manuel, the City concludes, lost the opportunity to recover for his pretrial detention by waiting too long to file suit. We leave consideration of this dispute to the Court of Appeals. . . Because the Seventh Circuit wrongly held that Manuel lacked any Fourth Amendment claim once legal process began, the court never addressed the elements of, or rules applicable to, such a claim. And in particular, the court never confronted the accrual issue that the parties contest here. . . On remand, the Court of Appeals should decide that question, unless it finds that the City has previously waived its timeliness argument. . . And so too, the court may consider any other still-live issues relating to the contours

of Manuel's Fourth Amendment claim for unlawful pretrial detention.") *with* ***Manuel v. City of Joliet, Ill.***, 137 S. Ct. 911, 923-29 (2017) (Alito, J., with whom Thomas, J., joins, dissenting) ("What is perhaps most remarkable about the Court's approach is that it entirely ignores the question that we agreed to decide, *i.e.,* whether a claim of malicious prosecution may be brought under the Fourth Amendment. I would decide that question and hold that the Fourth Amendment cannot house any such claim. If a malicious prosecution claim may be brought under the Constitution, it must find some other home, presumably the Due Process Clause. . . .Although the Court refuses to decide whether Manuel's claim should be so treated, the answer to that question—the one that the Court actually agreed to review—is straightforward: A malicious prosecution claim cannot be based on the Fourth Amendment. . . . [M]alicious prosecution's favorable-termination element makes no sense when the claim is that a seizure violated the Fourth Amendment. The Fourth Amendment, after all, prohibits *all* unreasonable seizures—regardless of whether a prosecution is ever brought or how a prosecution ends. A 'Fourth Amendment wrong' 'is fully accomplished,'. . .when an impermissible seizure occurs. The Amendment is violated and the injury is inflicted no matter what happens in any later proceedings. Our cases concerning Fourth Amendment claims brought under 42 U.S.C. § 1983 prove the point. For example, we have recognized that there is no favorable-termination element for a Fourth Amendment false imprisonment claim. . . An arrestee can file such a claim while his prosecution is pending—and, in at least some situations—will need to do so to ensure that the claim is not time barred. . .. By the same token, an individual may seek damages for pretrial Fourth Amendment violations *even after a valid conviction*. . . . The favorable-termination element is similarly irrelevant to claims like Manuel's. Manuel alleges that he was arrested and held based entirely on falsified evidence. In such a case, it makes no difference whether the prosecution was eventually able to gather and introduce legitimate evidence and to obtain a conviction at trial. The unlawful arrest and detention would still provide grounds for recovery. Accordingly, there is no good reason why the accrual of a claim like Manuel's should have to await a favorable termination of the prosecution. For all these reasons, malicious prosecution is a strikingly inapt 'tort analog[y],'. . . for Fourth Amendment violations. So the answer to the question presented in Manuel's certiorari petition is that the Fourth Amendment does *not* give rise to a malicious prosecution claim, and this means that Manuel's suit is untimely. I would affirm the Seventh Circuit on that basis. . . . Instead of deciding the question on which we granted review, the Court ventures in a different direction. The Court purports to refrain from deciding any issue of timeliness, . . . but the Court's opinion is certain to be read by some to mean that every moment of pretrial confinement without probable cause constitutes a violation of the Fourth Amendment. And if that is so, it would seem to follow that new Fourth Amendment claims continue to accrue as long as the pretrial detention lasts. . . . In my view, a period of detention spanning weeks or months cannot be viewed as one long, continuing seizure, and a pretrial detainee is not 'seized' over and over again as long as he remains in custody. . . Of course, the damages resulting from an unlawful seizure may continue to mount during the period of confinement caused by the seizure, but no new Fourth Amendment seizure claims accrue after that date. . .Thus, any possible Fourth Amendment claim that Manuel could bring is time barred. . . .The Court reads [*Albright v. Oliver* and *Gerstein v. Pugh*] to mean that the Fourth Amendment can be violated 'when legal process itself goes wrong,'. . . but the accuracy of that interpretation

depends on the meaning of 'legal process.' The Court's reading is correct if by 'legal process' the Court means a determination of probable cause at a first or initial appearance. . . When an arrest warrant is obtained, the probable-cause determination is made at that time, and there is thus no need for a repeat determination at the first or initial appearance. But when an arrest is made without a warrant, the arrestee, generally within 48 hours, must be brought before a judicial officer, . . . who then completes the arrest process by making the same determination that would have been made as part of the warrant application process. . . Thus, this appearance is an integral part of the process of taking the arrestee into custody and easily falls within the meaning of the term 'seizure.' But other forms of 'legal process,' for example, a grand jury indictment or a determination of probable cause at a preliminary examination or hearing, do not fit within the concept of a 'seizure,' and the cases cited by the Court do not suggest otherwise. . . .In the end, *Gerstein* stands for the proposition that the Fourth Amendment requires a post-arrest probable cause finding by a neutral magistrate; it says nothing about whether the Fourth Amendment extends beyond that or any other 'legal process.'. . . A well-known medical maxim—'first, do no harm'—is a good rule of thumb for courts as well. The Court's decision today violates that rule by avoiding the question presented in order to *reach* an unnecessary and tricky issue. The resulting opinion will, I fear, inject much confusion into Fourth Amendment law. And it has the potential to do much harm—by dramatically expanding Fourth Amendment liability under § 1983 in a way that does violence to the text of the Fourth Amendment. I respectfully dissent.")

See also ***McDonough v. Smith***, 139 S. Ct. 2149, 2156 n.3 (2019) ("The Second Circuit borrowed the common-law elements of malicious prosecution to govern McDonough's distinct constitutional malicious prosecution claim, which is not before us. . . This Court has not defined the elements of such a § 1983 claim, see *Manuel* v. *Joliet*, 580 U. S. ___, ___–___ (2017) (slip op., at 14–15), and this case provides no occasion to opine on what the elements of a constitutional malicious prosecution action under § 1983 are or how they may or may not differ from those of a fabricated-evidence claim. Similarly, while noting that only McDonough's malicious prosecution claim was barred on absolute-immunity grounds below, we make no statement on whether or how the doctrine of absolute immunity would apply to McDonough's fabricated-evidence claim. Any further consideration of that question is properly addressed by the Second Circuit on remand, subject to ordinary principles of waiver and forfeiture.")

b. Post-*Manuel* Cases:

First Circuit

See ***Jordan v. Town of Waldoboro***, 943 F.3d 532 (1st Cir. 2019), included *supra*, under post-*McDonough* cases.

Pagán-González v. Moreno, 919 F.3d 582, 590, 599-602 (1st Cir. 2019) ("Because we conclude that the officers' deception invalidated the consent given for their warrantless entry and search, thus rendering those actions unlawful, we must also consider the second prong of the inquiry:

whether the defendants are nonetheless entitled to qualified immunity because no reasonable officer would have understood that her conduct violated the Fourth Amendment. . . . The government argues that the defendants in this case are entitled to qualified immunity because there is no consensus on 'what constitutes permissible deception in enforcing the criminal law.'. . Pointing out that the plaintiffs themselves have conceded that 'there is no Supreme Court or First Circuit case forbidding agents from using a ruse,' the government goes on to characterize this case as one in which 'known officers misrepresent[ed] their investigative purpose and claim[ed] to be investigating one crime when they are really investigating another.'. . . But the question on which qualified immunity turns in this case is not whether government agents ever may use a ruse to obtain consent for a warrantless search. Under current law, they clearly may. Hence, plaintiffs' 'concession' that ruses have never been prohibited by the Supreme Court or our court is irrelevant to our inquiry. The government likewise misses the mark in pressing the lack of clarity on the lawfulness of ruses in which officers obtain consent by misrepresenting the crime they are investigating. Importantly, the deception that prompted Pagán-González's consent was not simply a lie about the purpose of the agents' search, but it involved fabrication of an emergency. In other words, the facts as alleged implicate the narrow line of cases described above in Section II.B.2.ii. . . . Hence, the second-prong question we must address is whether the 'robust "consensus of cases"' on fabricated exigent circumstances put the defendants on notice of the unconstitutionality of their particular ruse. . . Even more specifically, we must consider whether a reasonable law enforcement officer would have understood that the false report of a virus threatening computers in Washington, D.C., conveyed to Pagán-González at his home by a force of ten federal agents identified as such, was materially equivalent to the ruses in the fabricated emergency precedent and thus invalidated his consent to search. . . Essentially for the reasons leading us to conclude that Pagán-González's complaint states a claim for an unlawful search under the Fourth Amendment, we also hold that the virus ruse falls squarely within the 'body of relevant case law' in which consent premised on a fabricated emergency was found invalid. . . The clear and primary rationale of this line of precedent is that the consenting individual had no real option to deny access to his home or property because the threat depicted by law enforcement agents was so imminent and consequential that only immediate access could prevent severe harm. In the 'explosion' cases -- involving lies about bombs or a gas leak -- officers used the threat of personal harm and destruction of the individual's residence. . . In the cases involving young girls, the need to find a missing child or the accusation of a rape likewise presented scenarios where time was of the essence. . . No reasonable law enforcement officer could fail to understand the similar compulsion that is inherent in the lie used in this case. . . Indeed, the potential impact of the implied cyberattack carried out in part via Pagán-González's computer on the nation's capital was broader than the harms presented in the cases described above -- implicating national security -- and, as we have noted, the threat posed by such an attack was a well-known phenomenon by 2013. . . . Here, the severity of the threat was clearly communicated to Pagán-González by the arrival on his doorstep of ten federal agents. Accordingly, every reasonable officer would have understood that the ruse used here, carried out in a manner that signified an emergency, would leave an individual with effectively no choice but to allow law enforcement officers inside his home so they could attempt to alleviate the grave threat. And, in turn, a reasonable officer would have known that thus denying Pagán-

González a 'free and unconstrained choice' to forgo the constitutional protection of a warrant was a violation of his Fourth Amendment rights. . . . Defendants are therefore not entitled to qualified immunity on appellant's search-based Fourth Amendment claim. . . . The widespread view that probable cause to arrest or prosecute may be established in civil proceedings with unlawfully seized evidence means that, regardless of our view on the merits of Pagán-González's malicious prosecution claim, the defendants are entitled to qualified immunity on that claim. Put simply, no clearly established law barred the defendants from using evidence obtained in the unlawful search to support probable cause for the criminal charges brought against Pagán-González. In so concluding, we do not reach the first question of the qualified immunity analysis, i.e., whether Pagán-González might in fact have a viable Fourth Amendment claim stemming from his arrest and pre-trial detention. Pagán-González fails to develop fully an argument that he has satisfied the unsupported-by-probable-cause requirement stated in *Hernandez-Cuevas* notwithstanding the 'real,' but unlawfully obtained, evidence of his criminal activity the officers submitted to the magistrate judge. Nor does he suggest an alternative analysis for considering his unlawful detention claim under the Fourth Amendment, such as the forceful theory of relief described by our colleague in his thoughtful concurrence. . . Accordingly, the district court properly dismissed the malicious prosecution claim on the ground that defendants are entitled to qualified immunity.")

Pagán-González v. Moreno, 919 F.3d 582, 602-04, 607-17 (1st Cir. 2019) (Barron, J., concurring) ("I fully agree with the analysis that the majority sets forth to explain why David Pagán-González ("Pagán") states a viable Fourth Amendment claim with respect to the allegedly unconstitutional, warrantless search for which he seeks damages. I do so notwithstanding the defendants' assertion of qualified immunity. I also agree with the majority that Pagán has failed to provide us with a basis for overturning the District Court's order dismissing what he styles as his malicious prosecution claim. In that claim, he seeks damages for the pre-trial detention that he endured and that he contends violated the Fourth Amendment's prohibition against unreasonable seizures. I agree with the majority that Pagán fails to show, with respect to this claim, that he has alleged a violation of clearly established law, and thus I agree that this claim must be dismissed because it cannot survive the second step of the qualified immunity inquiry. The choice to resolve a constitutional tort claim with reference only to the second step of the qualified immunity inquiry -- as we do here with respect to Pagán's claim concerning his detention -- is often a sensible one. There is a risk, however, that such a choice will unduly stunt the development of the law. . . Thus, in what follows, I explain why I am of the view that -- absent qualified immunity's obscuring screen -- Pagán has stated a viable claim for damages under the Fourth Amendment with respect to his pre-trial detention. . . . In sum, Pagán has clearly alleged that at least one of the agents involved in effecting his detention deliberately or recklessly misled the magistrate judge into thinking that the sole evidence of probable cause -- the computer -- had been acquired through a constitutionally compliant consensual transfer. But, Pagán has plausibly alleged, that agent was in fact aware that this evidence had been acquired through a clearly unconstitutional coercive ruse. The consequence of these allegations is that Pagán's detention-based claim brings to the fore at the first step of the qualified immunity inquiry an important legal question. We must decide, at

this first step, whether these allegations about this agent's trickery in securing the arrest warrant describe a constitutional violation, such that Pagán may recover damages for his pre-trial detention. We must decide whether those allegations state such a violation, moreover, notwithstanding that the magistrate judge relied on real evidence of criminal activity to make the probable cause finding that served as the predicate for the issuance of the arrest warrant that resulted in Pagán's seizure and notwithstanding that this real evidence was in fact strong enough to support that probable cause finding. In my view, these allegations do suffice to state such a violation. To explain why, though, I need to wend my way through an unfortunately complex doctrinal thicket. Only then can I adequately explain why, on the one hand, Pagán fails to show that he has alleged a violation of clearly established law, but, on the other, little logic supports the precedential obstacles that potentially stand in the way of his doing so. . . .Pagán's complaint -- unlike the one in *Hernandez-Cuevas* itself, . . . challenges a pre-trial seizure that was based on a finding of probable cause by a magistrate judge that was premised on real and substantial (rather than fabricated) evidence of his criminal activity. To be sure, Pagán does challenge the lawfulness of the means by which law enforcement acquired that evidence -- and the misrepresentations that law enforcement made to the magistrate judge about those means. He does not assert, though, that the evidence itself was fabricated by law enforcement, as was alleged to have been the case in *Hernandez-Cuevas*, . . . or even that the evidence was on its face so patently weak that it was obviously insufficient to make out a finding of probable cause. Nor does Pagán develop any argument as to how, notwithstanding the existence of real and substantial evidence of his criminal conduct, his claim is nonetheless one that clearly satisfies the probable cause element that *Hernandez-Cuevas* appears to have established. . . Nor, moreover, does he even develop any argument as to why his claim does not need to be of that kind in order for it to survive the second step of the qualified immunity inquiry. Thus, I agree with the majority that -- at least given the arguments that Pagán makes to us -- *Hernandez-Cuevas* poses an insuperable obstacle to his claim going forward. Accordingly, I join the majority's holding at step two of the qualified immunity inquiry. . . There has, however, been yet another change in the relevant legal landscape, although this one occurred only after the initiation of Pagán's case. It thus does little to help Pagán meet the 'clearly established law' prong of the qualified immunity inquiry, at least given the arguments that he makes to us. Nevertheless, this change does suggest to me that it would be a mistake to make too much of the obstacle that seemingly stands in the way of Pagán's claim with respect to similar claims that may be brought by others. Thus, in the remainder of my analysis, I explain my reasons for so concluding. . . . The post-*Hernandez-Cuevas* legal change that I have in mind was brought about by the Supreme Court's recent decision in *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911 (2017). An implication that I draw from *Manuel* is that it does not make sense to continue to treat a Fourth Amendment-based claim for damages resulting from an unlawful seizure effected via pre-trial detention of a criminal defendant as if it were one for 'malicious prosecution.' A further implication that I draw from *Manuel* is that we are not obliged to borrow the elements from the common law -- or substantive due process -- tort of malicious prosecution when considering a Fourth Amendment-based claim that is brought for damages for the harm caused by such pre-trial detention. To support the first of these conclusions, I note that the Supreme Court granted certiorari in *Manuel* on the question of 'whether an individual's Fourth Amendment right to be free from unreasonable seizure

continues beyond legal process *so as to allow a malicious prosecution claim based upon the Fourth Amendment.*'. . Yet, the Court held, 'Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment,' even though it occurred 'after the start of "legal process[,]"'. . . without ever referring to such a claim as one for 'malicious prosecution[.]'. . . In addition to the fact that *Manuel* eschews the 'malicious prosecution' label, it also supports the implication that I draw from it that courts need to examine claims such as the one that Pagán brings through the lens of the Fourth Amendment rather than through the lens of the common law tort of malicious prosecution. Although *Manuel* expressly encourages us to 'look first to the common law of torts' to define the elements of a § 1983 claim, it explains that those '[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, . . . serving "more as a source of inspired examples than of prefabricated components."'. . The Court then proceeds to admonish us to 'closely attend to the values and purposes of the constitutional right at issue' when 'applying, selecting among, or adjusting common law-approaches.'. .Thus, it is with this fresh guidance from *Manuel* in mind that I now consider whether the Fourth Amendment claim that *Manuel* recognizes encompasses a claim like Pagán's. For the reasons set forth below, I conclude that it does. I do so despite the fact that the evidence that the magistrate judge relied upon to issue the arrest warrant that permitted Pagán's seizure was both real and sufficient to establish the requisite probable cause. I do so, as well, even though the analogous evidence of probable cause in *Manuel* allegedly had been fabricated by law enforcement, just as it allegedly had been fabricated in *Hernandez-Cuevas*. . . . As *Manuel* recognizes, a claim of the kind that Pagán brings is necessarily predicated on a challenge to whether the seizure at issue comports with the Fourth Amendment. The focus, therefore, should be on discerning the elements of the constitutional tort that logically relate to the constitutional right -- namely, the Fourth Amendment prohibition against unreasonable seizures -- on which the tort is grounded. . . Such a focus, however, makes it mysterious to me why we would continue to define the elements of the claim as *Hernandez-Cuevas* -- at least at first blush -- presently does. . . I start with the favorable termination element, which *Hernandez-Cuevas* retains from the old, pre-*Albright* constitutional tort of malicious prosecution based on the common law tort. . . I then consider the element concerning probable cause, which *Hernandez-Cuevas* retains from the earlier version of the tort as well. With respect to making favorable termination an element of the Fourth Amendment-based tort, such as the one that Pagán brings, I see little reason to retain that element post-*Manuel*. The termination of the prosecution -- even if unfavorable to the defendant -- cannot render the pre-trial seizure of the defendant constitutional if that seizure was unlawful from the inception. No matter how the prosecution ends -- including if it ends in a conviction -- the defendant still has a right for there to have been a constitutionally valid basis for the pre-trial detention that he endured. Thus, the favorable termination element -- an artifact of the old, no longer viable substantive due process-based malicious prosecution constitutional tort -- seems to me to be an anachronism. . . I reach the same conclusion with respect to the element concerning probable cause -- at least if we understand that element to require a showing that the magistrate judge's finding of probable cause that grounded the seizure was predicated on evidence that law enforcement fabricated or that was so patently weak that it could not plausibly support a probable cause finding. I add this caveat about whether *Hernandez-Cuevas* actually meant to establish a definitive holding about the requirements

of the probable cause element for the following reason. In *Hernandez-Cuevas*, the only evidence of probable cause had -- allegedly -- been fabricated by law enforcement. . . Thus, we had no occasion there to decide -- definitively -- whether the probable cause requirement that we set forth was intended to require the plaintiff to show that there was simply no real evidence sufficient to establish probable cause at all. It was enough to conclude that the claim could go forward when the plaintiff had made that showing by virtue of the allegations concerning fabrication. But, insofar as *Hernandez-Cuevas* does establish a probable cause element of a strict kind, I do not see why it is right to do so given the recent guidance that we have received from *Manuel*. Here, too, my concern is that the element is being defined with reference to the old, now-rejected malicious prosecution constitutional tort, rather than with reference to the Fourth Amendment-based tort, which is the only variant of that tort that remains viable after *Manuel*. There is a logic to requiring the prosecution to have been based on real evidence of a crime at the outset if the constitutional claim targets the bringing of the prosecution itself. There is no similar logic, though, to imposing that requirement if the constitutional claim challenges only the seizure that occurred in connection with that prosecution. To see why, we need only follow *Manuel*'s admonition that, in discerning the elements of this Fourth Amendment-based tort, we must keep our eye on the underlying constitutional right. . . A consideration of that right, as I shall next explain, reveals that even real and substantial evidence of probable cause -- such as is present in Pagán's case -- may be insufficient to render an arrest warrant that is issued based on that evidence one that law enforcement may constitutionally rely upon to carry out the ensuing seizure. . . . An arrest warrant can legitimate a seizure premised on a warrant that in fact lacks probable cause. An arrest warrant cannot legitimate a seizure under the Fourth Amendment if law enforcement precluded the magistrate judge from performing the neutral gatekeeping role required of it by the Warrant Clause. In such circumstances, the warrant cannot provide a good faith basis for law enforcement to think that the seizure was lawful due to the trick on the magistrate judge that was used to secure the warrant. Against this legal background, *Hernandez-Cuevas* and *Manuel* were hardly innovative in permitting Fourth Amendment-based damages claims to proceed where the plaintiff alleged that his pre-trial seizure had been carried out pursuant to an arrest warrant that the magistrate judge issued based on evidence of probable cause that law enforcement had fabricated. . . In such circumstances, the warrant clearly could not legitimate the seizure, given the trick that law enforcement had performed on the magistrate judge that led the magistrate judge to issue the warrant. The question for our purposes, though, is not quite so easily answered as it was in those cases. The trickery in *Manuel* and *Hernandez-Cuevas* led the magistrate judge to issue a warrant based on evidence of probable cause that simply did not exist and that law enforcement knew from the outset did not exist. In a case like Pagán's, by contrast, law enforcement has not tricked the magistrate judge into believing that there was evidence of probable cause when there in fact was none. There was such evidence all along. Rather, law enforcement has -- allegedly -- merely tricked the magistrate judge into believing that the evidence of probable cause was constitutionally acquired when law enforcement knew it was not. As I read our precedent, however, where officers trick the magistrate judge about the unlawfully acquired nature of the evidence that they have put forward to establish probable cause, the resulting warrant is no less premised on a lie or reckless half-truth that materially taints the magistrate judge's capacity to perform the constitutionally

prescribed gatekeeping role than when the deceit concerns the existence of the evidence. Thus, law enforcement's ability to rely on that warrant in good faith to justify the seizure may be limited just as it would be in a case in which the lie or reckless untruth does concern the evidence's existence. Specifically, we have explained that a warrant -- even if predicated on evidence that was itself real -- may not be relied upon by law enforcement, if it had been secured by deliberate lies or reckless omissions that misled the magistrate judge into thinking that critical evidence of probable cause had been acquired constitutionally or with a good faith belief that it had been. . . We have done so, presumably, on the understanding that a fully informed magistrate judge might have exercised its discretion to decline to issue the warrant had it known that the evidence of probable cause had been secured only through law enforcement conduct that was not constitutional or that was not undertaken in good faith that it was. In fact, our precedent, like the precedent of other circuits, makes clear that a magistrate judge may decline to issue a warrant when the evidence forming the basis for probable cause is known to have been acquired in such concerning circumstances. . . Thus, lies or reckless omissions that hide facts that would reveal such problematic means of acquiring such evidence -- like the lies alleged by Pagán -- interfere with the magistrate judge's constitutional role as a gatekeeper. . . . [T]he following would appear to be clear, at least under our precedent. When law enforcement intentionally or recklessly makes false statements to a magistrate judge about the constitutional or good faith means by which law enforcement obtained the evidence that supplies the basis for finding the probable cause necessary to justify the warrant that would permit a pre-trial seizure of a criminal defendant, such lies -- or reckless omissions -- undermine the magistrate judge's ability to perform its constitutional role under the Warrant Clause. . . Such intentionally false statements or reckless omissions thus preclude law enforcement officers from relying in good faith on the arrest warrant that is then issued (at least when the officers know of the lies or reckless omissions). And thus, under our precedent, such lies or reckless omissions prevent that warrant from legitimating the seizure that is carried out in reliance on it, . . . notwithstanding that the lies or reckless falsehoods concerned only the means by which the evidence of probable cause had been acquired and not the existence of the evidence itself. . . . Against this legal backdrop, I do not see why a plaintiff should be barred from seeking damages for his pre-trial seizure, simply because he can show that the lies or the reckless omissions that law enforcement told the magistrate judge to secure the arrest warrant concerned only how real evidence had been acquired and not whether such real evidence existed. The deceit still stripped the magistrate judge of the ability to perform its constitutionally prescribed gatekeeping role. The deceit did so by stripping the magistrate judge of the opportunity to deny law enforcement the ability to exploit the unconstitutional conduct it used to acquire the evidence that supplies the sole basis for procuring the warrant that would permit a defendant to be seized. Under our precedent, therefore, the seizure would appear to be no less unconstitutional -- insofar as the warrant is necessary in the first place -- for having been carried out pursuant to unconstitutional trickery of that comparatively subtle (but still egregious) sort. . . . Allowing claims like Pagán's to proceed would not mean that constitutional tort suits could be used to attack arrests based on warrants as a general matter. *Leon* still shields officers where they rely on warrants in good faith, except in very limited circumstances, such as *Franks* violations in securing the warrant. . . But, when the officers' reliance on that warrant is in bad faith -- such as when the

officer who participates in the seizure is also responsible for the reckless or deliberate misrepresentations that led to the warrant's tainted issuance -- I do not see why the specter of a damages judgment should not be in the offing. This approach is also entirely consistent with the prevailing view that the exclusionary rule does not apply to civil proceedings. . . Under this approach, the inquiry is not whether the evidence shows that there was probable cause to believe the plaintiff had committed a crime. The inquiry is whether law enforcement precluded the magistrate judge from performing its constitutionally assigned gatekeeping role through deliberate lies or reckless omissions about the means used to acquire the evidence of probable cause. Thus, as the Fourth Amendment-based tort claim does not depend on guilt or innocence or on whether the improperly procured evidence was real or fake, the plaintiff does not need to exclude the evidence of probable cause to win. The plaintiff needs only to put forward facts sufficient to show a *Franks* violation. In addition, in all § 1983 cases and *Bivens* actions, plaintiffs must show some causation between the defendant's conduct, the constitutional violation, and the plaintiff's injury. . . As we explained in *Hernandez-Cuevas*, 'in most cases, the neutral magistrate judge's determination that probable cause exists for the individual's arrest is an intervening act that could disrupt any argument that the defendant officer had caused the unlawful seizure.'. . We noted, too, that this 'causation problem' can be overcome only if it is clear that law enforcement officers were 'responsible for [the plaintiff's] continued, unreasonable pretrial detention,' including by 'fail[ing] to disclose exculpatory evidence' or 'l[ying] to or misle[ading] the prosecutors.'. . . For these reasons, I conclude that Pagán has sufficiently stated a claim for damages under the Fourth Amendment -- save, that is, for the qualified immunity defense that bars that claim from surviving here. The lack of clarity in our precedent or the Supreme Court's as to the elements of such a claim precludes him from overcoming that defense -- at least given his arguments to us. I recognize that this caveat concerning qualified immunity is a rather significant one -- and not only in Pagán's case. The defense of qualified immunity is usually invoked in cases like this one, just as it has been invoked here. A plaintiff who loses at the second step of the qualified immunity inquiry is no better off than one who loses at the first step. Still, it is important to address the first step of the qualified immunity inquiry. That step is certainly relevant in cases in which the defense of qualified immunity is not properly invoked -- and, in fact, it was not invoked in either *Hernandez-Cuevas* or *Manuel*. . . With respect to that step, moreover, it is clear to me that, in light of *Manuel*, it is a mistake to attempt to fashion a half-fish, half-fowl, hybrid malicious prosecution/Fourth Amendment based tort. I thus do not see how, post-*Manuel*, we could continue to justify treating a Fourth Amendment-based claim such as Pagán brings here -- targeting, as it does, only the seizure and not the prosecution -- as a species of the old malicious prosecution tort. Rather, we must understand that tort for what it is -- a Fourth Amendment-based challenge to pre-trial detention that targets law enforcement's efforts to circumvent the warrant requirement through lies or reckless omissions that conceal from the magistrate judge facts material to its ability to perform its constitutionally assigned role. For that reason, I think it important to lay out this analysis here. That way, in a subsequent case we will be better positioned to resolve definitively how *Manuel* bears on -- and, in my view, supersedes -- two of the elements of the constitutional tort that we described in *Hernandez-Cuevas*: the ones concerning favorable termination and probable cause. . . Unless we at some point address step one of the qualified immunity inquiry in

a case involving such a claim, or otherwise definitively define the elements of this constitutional tort post-*Manuel*, we will be at risk of leaving the law unclear in key respects. In consequence, we will be permitting our pre-*Manuel* case law to exert an outsized influence on the types of remedies that may be available to those who have been the victims of unlawful law enforcement trickery of the kind that the Fourth Amendment quite clearly condemns. Finally, and relatedly, I would not rule out the possibility that, even before our court does provide clarity to the doctrine in this area, a plaintiff might be able to develop an argument -- which Pagán has not attempted to do here -- as to why such a claim might be viable even in the face of a qualified immunity defense. Our Fourth Amendment precedents in *Bain* and *Diehl* clearly establish that law enforcement officers -- per *Franks* -- may not rely on warrants in good faith that are the product of their own reckless half-truths about the constitutionality (or the officers' good faith belief in the constitutionality) of the means used to acquire the evidence of probable cause on which the magistrate judge relied in issuing the warrant. Nor does *Hernandez-Cuevas* suggest otherwise. Rather, *Hernandez-Cuevas* at most creates doubt about the content of one element of the constitutional tort suit that may be brought to recoup damages for the harm caused by the pre-trial detention that results from such clearly unconstitutional law enforcement conduct. Given that qualified immunity is intended to serve a practical, functional purpose, I am not certain that law enforcement officers should be immune from damages for engaging in conduct that, at the time it was undertaken, was clearly unconstitutional under our precedent, simply because we had not also as of that time clearly described an element of the constitutional tort that may be brought to recover damages for the harm caused by such conduct. We have no occasion, however, to consider such a refined question of qualified immunity law here. I thus leave it for another day. For present purposes, it is enough to lay out the lines along which the relevant doctrine may be reconstructed. Doing so is the first step along the route to ensuring that this body of doctrine is freed from the lingering influence of the pre-*Albright* tort of malicious prosecution and thus may reflect more fully *Manuel*'s suggestion that we 'closely attend to the values and purposes of the constitutional right at issue' when 'applying, selecting among, or adjusting common law-approaches.'")

Denault v. Ahern, 857 F.3d 76, 83-84 (1st Cir. 2017) ("At least three of our sister circuits have expressly rejected Fourth Amendment claims based on a failure to return property after it was lawfully obtained. *See Shaul v. Cherry Valley-Springfield Cent. Sch. Dist*., 363 F.3d 177, 187 (2d Cir. 2004); *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003); *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999). They have reached that conclusion in different ways. The Sixth Circuit focused on the definition of 'seizure,' finding that the term has temporal bounds such that it protects only the interest in retaining property and not the interest in regaining it. . . The Seventh Circuit held that applying the Fourth Amendment in these circumstances stretches its protections too far beyond the amendment's purpose of constraining unlawful intrusions into constitutionally protected areas. . . And the Second Circuit rejected the seizure-includes-retention theory out of hand, writing that '[t]o the extent the Constitution affords [a plaintiff] any right with respect to a government agency's retention of lawfully seized property, it would appear to be procedural due process.'. . The plaintiffs make no effort to address these authorities or explain why the alleged violation of their constitutional rights sounds in the Fourth Amendment. On such a record, we are

offered no reason to disagree with our sister circuits that, to the extent a plaintiff may challenge on federal constitutional grounds the government's retention of personal property after a lawful initial seizure in circumstances such as these, that challenge sounds in the Fifth Amendment rather than in the Fourth Amendment. A different result may well obtain when the government seizes a person rather than property. *See Manuel v. City of Joliet*, —— U.S. ——, 137 S.Ct. 911, 919, 197 L.Ed.2d 312 (2017). But where property is concerned, it would seem that the Fifth Amendment's express protections for property provide the appropriate framework. In particular, the Takings Clause provides recourse where 'private property [is] taken for public use, without just compensation.'. . In different circumstances, we might well find that a plaintiff's claims do not necessarily fail merely because the plaintiff wrote 'Fourth' rather than 'Fifth' in his or her briefs. Here, though, substance followed form, as these plaintiffs never provided the evidence that would be required to support a claim that the defendants violated the Fifth Amendment. Most notably, the plaintiffs do not even claim, let alone prove, that they first sought compensation through state procedures or that 'all potential state remedies are "unavailable or inadequate,"' as required to bring a ripe takings claim in federal court. . . We therefore find that the evidence did not support a verdict in favor of the plaintiffs on their preserved federal constitutional claims. Accordingly, the district court's ultimate disposition of the plaintiffs' federal constitutional claims based on the retention and transfer of the plaintiffs' property was correct.")

Watson v. Mita, No. CV 16-40133-TSH, 2017 WL 4365986, at *5 n.3 (D. Mass. Sept. 29, 2017) ("As the Supreme Court recently decided, the Fourth Amendment provides a basis under § 1983 for challenging pre-trial detention. *Manuel v. City of Joliet*, ——U.S. ——, 137 S.Ct. 911, 914–15, 197 L.Ed.2d 312 (2017). *Manuel* did not address, however, whether the tort of malicious prosecution, as opposed to some other common law cause of action, provides an appropriate framework for these Fourth Amendment § 1983 claims.")

Second Circuit

See ***Smalls v. Collins***, 10 F.4th 117 (2d Cir. 2021) in cases under post-*McDonough* heading.

Frost v. New York City Police Dep't, 980 F.3d 231, 250-51 & n.14 (2d Cir. 2020), *pet. for cert. filed sub nom City of New York v. Frost*, No. 20-1788 (U.S. June 21, 2021) ("Taken together, then, *Garnett*, *Zahrey*, and *Ricciuti* establish that the (perhaps imprecisely named) fair trial right protects against deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision, *were that evidence presented to the jury*. . . And we have expressly distinguished this right from the separate, although related, right not to be convicted based on the use of false evidence *at trial*. . . In the instant case, Frost raises a genuine dispute of material fact as to whether he was thus deprived of his liberty. As explained above, there is a triable question as to whether Vega's identification of Frost was coerced. Similarly, there is a triable question as to whether Vega's identification would likely have influenced the jury at Frost's criminal trial given that Vega, unlike McLaurin, was not Frost's fellow suspect. These two facts, in turn, create a genuine dispute as to whether Vega's

identification 'critically influenced' the decision to prosecute Frost, . . thereby resulting in a deprivation of his liberty. . . . Because we conclude that there is a triable issue as to whether defendants coerced Vega into falsely identifying Frost, and as to whether Vega's identification resulted in Frost's prosecution, Frost's due process claim should not have been dismissed. . . To be clear, we offer no view as to the ultimate outcome. We conclude only that there are triable issues of fact such that resolution at summary judgment is not appropriate. . . . The Supreme Court's holding in *Manuel v. City of Joliet*, . . . relied upon by the dissent, . . . does not compel a different result. In *Manuel*, the Supreme Court held that a § 1983 plaintiff could challenge his pretrial detention based on purportedly fabricated evidence under the Fourth Amendment, even after a judge determined that this evidence constituted probable cause. . . But just as a Fourth Amendment claim survives the initiation of 'legal process,'. . . our precedents establish that a fair trial claim under the Due Process Clause may accrue before the trial itself. Accordingly, the holding of *Manuel* does not preclude Frost's fair trial claim.")

Frost v. New York City Police Dep't, 980 F.3d 231, 259-60, 262-63 (2d Cir. 2020) (Kearse, J., dissenting in part), *pet. for cert. filed sub nom City of New York v. Frost*, No. 20-1788 (U.S. June 21, 2021) ("Most recently, in *Manuel v. City of Joliet*, . . .the Supreme Court confirmed that an accused alleging the fabrication of evidence against him 'may challenge his pretrial detention on the ground that it violated the Fourth Amendment,'. . . and held that lower court decisions that the petitioner should instead have 'challenge[d] his pretrial confinement via the Due Process Clause'. . .were error[.] . . .The majority in the present case, in concluding that summary judgment dismissing Frost's substantive due process fair-trial claims was error, relies principally on two cases, *Zahrey* and *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 130 (2d Cir. 1997) ("*Ricciuti*"). I disagree with the majority's view that the claim upheld in *Zahrey* was one for denial of a fair trial; and while I do not disagree with *Ricciuti*'s conclusion that the plaintiffs there had asserted a viable constitutional claim for unwarranted prolonged pretrial detention, I view its conclusion that the plaintiffs had a viable due process claim for denial of their right to a fair trial--in a case in which the charges against them were dismissed without a trial--as contrary to the Supreme Court's instruction that claims of pretrial deprivations should be analyzed under the Fourth Amendment. . . . I think it clear in light of *Manuel*--which was based on settled Supreme Court precedent, some of which preceded *Ricciuti*--that *Ricciuti* should have addressed the claim it was upholding not as a due process claim for denial of a fair trial, but rather as a Fourth Amendment claim for unduly prolonged deprivation of the plaintiffs' pretrial liberty. The source of plaintiffs' right was the Fourth Amendment since only their pretrial liberty had been curtailed, not their right to fairness in a trial that was not held. . . .In sum, even if it were proven that the Officers fabricated Vega's 2011 identification of Frost as the shooter as alleged, the undisputed evidence without reference to the Vega identification forecloses any claim by Frost for deprivation of his liberty prior to trial. And we are in agreement that it is undisputed here that *Vega's allegedly coerced identification of Frost could not have 'distort[ed] the record' at Frost's trial*, [*Dufort*, 874 F.3d at 355], *because Vega did not repeat this identification in his trial testimony*. . . In my view the majority's reinstatement of Frost's claim that he was denied a fair trial is thus without legal or factual foundation. This case is not meaningfully distinguishable from *Dufort*, and I would affirm

the grant of summary judgment dismissing the due process claims of denial of a fair trial.")

Dufort v. City of New York, 874 F.3d 338, 354, 355 n.7 (2d Cir. 2017) ("In the context of false arrest and malicious prosecution claims, an officer is entitled to qualified immunity if he had either probable cause or 'arguable probable cause.'. . Arguable probable cause exists 'if officers of reasonable competence could disagree on whether the probable cause test was met.'. .We conclude that it would be inappropriate to grant qualified immunity to these Defendants at the summary judgment stage. Dufort has established a dispute of material fact as to whether the Defendants intentionally withheld or manipulated key evidence during his arrest and prosecution. He has introduced sufficient evidence from which a reasonable jury could conclude that the Defendants placed him in a deeply defective lineup, extracted an 'identification' from Park that was limited to the color of his clothing, and then withheld the suspect nature of this identification from prosecutors and the grand jury. Such a 'knowing' violation of his Fourth and Fifth Amendment rights would, if proven, be enough to overcome the protection of qualified immunity. Although Dufort has not produced any direct evidence of a malicious intent on the part of the Defendants, he is not required to do so. Circumstantial evidence is generally sufficient to prove intent, and Dufort has introduced enough such evidence to survive summary judgment. . . .Dufort also appears to allege a 'substantive due process' claim, based on his constitutional right not to be arrested or detained without probable cause. Insofar as this claim stems from the Defendants' decision to arrest Dufort and his subsequent five-year detention on Rikers Island, it appears to be entirely coextensive with Dufort's claims for false arrest and malicious prosecution and is therefore subsumed under those claims. *See Manuel*, 137 S. Ct. at 917–19 (noting that claims for pretrial detention based on fabricated or withheld evidence are evaluated as malicious prosecution claims under the Fourth Amendment); *Wallace v. Kato*, 549 U.S. 384, 388–89 (2007) (noting that the forcible detention of plaintiff without probable cause is conceptualized as a false arrest claim under the Fourth Amendment for § 1983 purposes).")

Newson v. City of New York, No. 16CV6773ILGJO, 2019 WL 3997466, at *4–6 (E.D.N.Y. Aug. 23, 2019) ("The question remains whether this was an injury of constitutional dimension. The City argues that a plaintiff cannot bring a '*Brady*' claim under § 1983 unless he was actually convicted as a result of the *Brady* violation . . . , a rule most courts have concurred with[.] [citing cases] However, the view that the legal effect of a *Brady* violation has significance only upon a conviction has not been definitively embraced by the Second Circuit, and may be persuasively called into doubt. . . In any event, the question of whether a '*Brady*' claim may be brought by an acquitted plaintiff is academic. In cases where a plaintiff has been deprived of his liberty prior to trial due to the State's suppression of exculpatory evidence, courts have recognized that he may bring a § 1983 claim under the Fourth Amendment. The key case on point is *Russo v. City of Bridgeport*, 479 F.3d 196 (2d Cir. 2007), *cert. denied*, 552 U.S. 818 (2007). . . . The *Russo* Court did not mention *Brady*. However, it is clear that the constitutional violation that occurred in *Russo*—namely, the defendant-officers' failure to turn the footage over to prosecutors, which prevented them from discharging their own duty to disclose it to Russo, . . was akin to breach of their *Brady* obligations. *Brady* suppression can occur even 'when the government fails to turn over

evidence that is "known only to police investigators and not to the prosecutor,". . . and '[t]he police therefore are under a duty to disclose exculpatory information to the prosecutor[.] . . . Although the '*Brady*' rule is, strictly speaking, a creature of the Due Process Clause, . . . the plaintiff's claim in *Russo* was cognizable under the Fourth Amendment because the officers' failure to forward the video tape to prosecutors resulted in a *pretrial* deprivation of liberty rather than an actual conviction. *See Manuel v. City of Joliet, Ill.*, 137 S.Ct. 911, 920 (2017) (holding that "the Fourth Amendment governs a claim for unlawful pretrial detention...."). It might be argued that *Russo* is distinguishable on the grounds that the misconduct in that case was committed by the police, rather than by prosecutors. However, there is no basis in law or logic to narrow *Russo*'s reasoning to police officers. . . Indeed, at least one court has suggested that a Fourth Amendment *Monell* claim may be brought against the City where a plaintiff's pretrial confinement was prolonged by the prosecution's own suppression of exculpatory evidence. . . . Here, similar to both *Russo* and *Ambrose*, Plaintiff alleges that the QCDA violated *Brady* and withheld evidence which, if disclosed sooner, might have resulted in his earlier release. Thus, Plaintiff has pleaded the first two elements of a *Russo* violation, namely, that he has a right to be free from continued detention stemming from the State's mishandling or suppression of exculpatory evidence, and that the actions of the defendant violated that right. . . As for the third *Russo* element, Plaintiff has adequately pleaded conduct that 'shocks the conscience,'. . . a standard easily satisfied at the motion to dismiss stage where 'all reasonable inferences' must be 'draw[n] ... in favor of the plaintiff[.]'")

Nelson v. County of Suffolk, No. 12CV5678DRHAKT, 2019 WL 3976526, at *10 (E.D.N.Y. Aug. 22, 2019) ("[A] claim for malicious prosecution is grounded in the protections of the Fourth Amendment and an essential element of such a claim is the absence of probable cause. . . In contrast a claim asserting the denial of a right to a fair trial 'finds it roots in the Sixth Amendment, as well as the due process clauses of the Fifth and Fourteenth Amendments, which secure the fundamental right to a fair trial in criminal proceedings.'. . The existence of probable cause is irrelevant to such a claim. . . Finally, although in the majority of cases 'the question of whether the defendant fabricated evidence becomes synonymous with the question of whether genuine probable cause existed, and accordingly a plaintiff's malicious prosecution and fair trial claims would rise or fall together' nonetheless 'these remain distinct constitutional claims.'")

Hamilton v. City of New York, No. 15-CV-4574 (CBA) (SJB), 2019 WL ____ (E.D.N.Y. Mar. 19, 2019) ("As it had no occasion to reach the issue, the Second Circuit did not address the interaction between *McDonough* and *Heck* for plaintiffs like Hamilton, who were convicted based on the alleged fabricated evidence. This Court is now presented with that issue. Defendants contend that *McDonough* did not limit its holding to plaintiffs who were never convicted, and that under *McDonough*, Hamilton's claims are time-barred and should not be equitably tolled. . . Hamilton knew of Smith's fabricated statements and suffered a liberty deprivation when he was arrested based on those statements in 1991, and thus he was required to commence his claim no later than 1994. . .Hamilton and amicus curiae the Innocence Project argue that *McDonough* is limited to litigants who were never convicted in criminal proceedings, contending that a more

expansive reading would undermine the remedial purpose of § 1983. . .Because Hamilton's fabrication of evidence claim would necessarily impugn the validity of his conviction under *Heck*, they contend it did not accrue until his conviction was overturned in 2015. . . Alternatively, if the Court concludes that Hamilton's claim is time-barred under *McDonough*, the Innocence Project urges the Court to apply equitable tolling. . . To resolve this issue, the Court must reconcile the principles enunciated in *McDonough* and *Heck*, which are in some tension in this case. Under a straightforward application of *McDonough*, Hamilton's claim is time-barred: Smith's fabricated and coerced testimony was used to deprive Hamilton of his liberty when he was arrested and subsequently convicted, and he became 'aware of that tainted evidence and its improper use' at the very latest at trial, when his attorney presented Smith's recantation statement attesting that her inculpatory statements were fabricated. . . Hamilton's claim thus accrued by 1992, and the three-year statute of limitations has long since passed. But the Second Circuit explicitly recognized in *McDonough* that 'the *Heck* rule for deferred accrual' was not 'called into play' because *McDonough* was never convicted. . . In this case, however. *Heck* is 'called into play': unlike *McDonough*, Hamilton was subject to 'a conviction or sentence that [had] not been invalidated, that is to say, an outstanding criminal judgment,' from 1992 to 2015. . . Under *Heck*, 'a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.' . . Thus, 'the *Heck* rule for deferred accrual.... delays what would otherwise be the accrual date of a tort action until the setting aside of an extant conviction which success in that tort action would impugn.' . .Under *Heck*, therefore, 'a prisoner-plaintiff may not assert a civil damages claim that necessarily challenges the validity of an outstanding criminal conviction.'. . In this case, the issue is whether Hamilton's fabrication of evidence claim accrued only once his conviction was invalidated in 2015—rendering his claim timely—because it necessarily challenged the validity of his outstanding conviction under *Heck*. 'Unlike malicious prosecutions, many violations of constitutional rights, even during the criminal process, may be remedied without impugning the validity of a conviction.'. . .For example, § 1983 claims alleging excessive force, unlawful arrest without probable cause, or unreasonable searches may accrue before any conviction and 'exist independent of the termination of the criminal proceedings.'. . By contrast, the Second Circuit has held that *Brady*-based § 1983 claims 'necessarily imply the invalidity of the challenged conviction,' because establishing a *Brady* violation requires a plaintiff to demonstrate prejudice, the "'touchstone'" of which is a "'reasonable probability of a different result"' at trial. . . A *Brady* violation warrants a 'vacatur of the judgment of conviction and a new trial in which the defendant now has the *Brady* material available to her.'. . In addition, a § 1983 claim may 'necessarily imply that the plaintiffs criminal conviction was wrongful' if, '[i]n order to prevail in this § 1983 action, [the plaintiff] would have to negate an element of the offense of which he has been convicted.'. .In applying these principles, the Court concludes that Hamilton's fabrication of evidence claim would have necessarily implied the invalidity of his conviction, and under *Heck*, and it did not accrue until his conviction was invalidated in 2015. The gravamen of Hamilton's claim is that Defendants coerced Smith—the sole eyewitness against him at trial—into falsely identifying him as the perpetrator of Cash's murder and testifying to that effect in judicial proceedings, thereby depriving him of his right to a fair trial. This fabrication claim requires Hamilton to prove, among other things, that the fabricated

testimony was 'likely to influence a jury's decision,'. . . a showing that—by definition—would cast doubt on the jury's conclusion and 'necessarily imply the invalidity of his conviction or sentence[.]' . . .The Court recognizes that this conclusion is in some tension with the Second Circuit's decision in *McDonough*. Although defendants contend that *McDonough* employs no limiting language and, in fact, specifically contemplates the application of its accrual rule to litigants who were convicted, . . . *McDonough* also explicitly recognized that *Heck* was not 'called into play' in that case. Moreover, its reasoning was drawn principally from *Veal v. Geraci,* 23 F.3d 722 (2d Cir. 1994), a decision that pre-dated the Supreme Court's decision in *Heck*. Therefore, *McDonough*'s applicability to a litigants who fall within *Heck*'s ambit is debatable. . . *Heck* is undoubtedly 'called into play' in this case, and the Court is not at liberty to ignore governing and applicable Supreme Court precedent. Indeed, much as the Second Circuit declined to address *Heck* because the plaintiff was never convicted, citing *Wallace*, *Wallace* compels this Court to consider *Heck*, because Hamilton was convicted. . . As explained above, under *Heck*, the Court concludes that Hamilton's claim did not accrue until his conviction was invalidated in 2015, because his fabrication of evidence claim—if brought earlier—would have necessarily implied the invalidity of his 1992 conviction. Accordingly, Hamilton's claim is timely.")

Lynch v. City of New York, No. 17CV7577, 2018 WL 4660371, at *5-6 (S.D.N.Y. Sept. 28, 2018) ("At the outset, analyzing whether an underlying constitutional violation exists requires some precision in defining the constitutional injury. The Complaint alleges that the City's bail practices result in delays both in accepting bail payments *and* releasing pre-trial detainees after their bail has been paid. Thus, the constitutional inquiry centers on the point at which a delay in accepting bail once it has been fixed or in releasing pre-trial detainees after the legal basis for detention has ended becomes unconstitutional. This inquiry raises the threshold question of the constitutional provision giving rise to Plaintiffs' claims, which Plaintiffs assert under the Fourth and Fourteenth Amendments. . . . While the authority in this Circuit is sparse, other federal courts of appeals have recognized that the fixing of bail gives rise to a liberty interest in paying bail that is protected by substantive due process. *See, e.g.*, *Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017); *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010); *Campbell v. Johnson*, 586 F.3d 835, 840 (11th Cir. 2009); *Golberg v. Hennepin Cty.*, 417 F.3d 808, 811 (8th Cir. 2005). Similarly, other federal courts have generally used the rubric of substantive due process to analyze claims based on the delayed release of pre-trial detainees after the legal basis for detention has dissolved. *See, e.g.*, *Berry v. Baca*, 379 F.3d 764, 773 (9th Cir. 2004); *Barnes v. Dist. of Columbia*, 793 F. Supp. 2d 260, 274, 275 & n.11 (D.D.C. 2011). To be sure, the Supreme Court has held that an individual may state a Fourth Amendment claim for unlawful pre-trial detention even *after* the initiation of legal process. *Manuel*, 137 S. Ct. at 919. Indeed, the Second Circuit has previously recognized that the Fourth Amendment governs post-arraignment pre-trial detention in light of the Supreme Court's observation that the 'Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.' *Russo v. City of Bridgeport*, 479 F.3d 196, 208 (2d Cir. 2007) (quoting *Albright*, 510 U.S. at 274). But this is not to say that the Fourth Amendment necessarily governs *every* constitutional challenge to pre-trial detention. As explained in *Manuel*, '[l]egal process did not expunge [plaintiff's] Fourth Amendment claim because the process he

received failed to establish what that Amendment makes essential for pretrial detention--probable cause to believe he committed a crime.'. . In this context, *Russo*'s conclusion that the Fourth Amendment squarely covers the right to be protected against 'sustained detention stemming directly from law enforcement officials' refusal to investigate available exculpatory evidence' is more akin to detention without probable cause. . . By contrast, Plaintiffs here do not challenge their detentions on the basis that the City lacked a constitutional basis for detention *ab initio*. Instead, their challenges are based on infringements to liberty interests that only ripen *after* bail has been fixed and *after* it has been paid--and after the probable cause determination has been made. Thus, this Court finds substantive due process a more appropriate lens through which to analyze Plaintiffs' claims. . . . Here, Plaintiffs adequately allege that their interest in paying bail and being released after paying bail has been infringed by the City's deliberate indifference. As the Second Circuit recently reiterated, the ' "touchstone of due process" is protection from "the exercise of power without any reasonable justification in service of a legitimate governmental objective."'. . Plaintiffs allege that the City systemically infringes pre-trial detainees' liberty interests in paying bail by routinely removing them from the courthouse before bail can be posted and transferring them to DOC facilities to begin a multi-hour intake procedure during which they are categorically ineligible for release. Construing all inferences in favor of Plaintiffs, the Complaint suggests that there is no reason--aside from accommodating shift changes and bus schedules--that detainees cannot be held at the courthouse to allow bail to be paid; nor is there any reason why bail cannot be accepted during the intake procedure. Ultimately, whether the City can demonstrate a legitimate governmental objective is a matter for summary judgment or trial.")

Butler v. Hesch, No. 1:16-CV-1540, 2018 WL 922187, at *11 n.1 & *12 (N.D.N.Y. Feb. 15, 2018) ("The plaintiff in *Manuel* urged the Court to find that his Fourth Amendment claim accrued only upon the dismissal of the criminal charges, analogizing the claim to the common-law tort of malicious prosecution. . . The Supreme Court noted that 'all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a "favorable termination" element and so pegged the statute of limitations to the dismissal of the criminal case.'. . The defendant, however, argued that the plaintiff's Fourth Amendment claim should be considered most analogous to the tort of false arrest and that it should accrue when legal process commences. . .The Supreme Court declined to decide this issue and remanded the matter back to the Seventh Circuit. . . . Contrary to Plaintiff's position, *Manuel* does not stand for the proposition that false arrest and malicious prosecution may now be morphed into one generic Fourth Amendment claim that does not accrue until the illegal detention ends. False arrest and false imprisonment claims challenge detention without legal process, whereas a malicious prosecution claim challenges allegedly unlawful confinement after the initiation of legal process. The *Manuel* decision does not purport to – nor does it – change existing Supreme Court and Second Circuit jurisprudence with respect to the accrual of a Section 1983 unlawful arrest/unlawful imprisonment claim. Rather, the decision merely corrects the Seventh Circuit's error in precluding the assertion of a Fourth Amendment post-legal-process claim. As discussed above, Plaintiff was transferred to federal custody on June 4, 2013, and had an initial appearance before Magistrate Judge Hummel that same day. . . On June 5, 2013, Plaintiff filed a letter waiving his rights to both a detention and

preliminary hearing. . . such, Plaintiff's false arrest and false imprisonment claims accrued no later than June 5, 2013 and Plaintiff's December 28, 2016 complaint is untimely as to these claims. Based on the foregoing, the Court grants Defendants' motions to dismiss as to Plaintiff's false arrest and unlawful imprisonment causes of action.")

Third Circuit

DeLade v. Cargan, 972 F.3d 207, 208-12 (3d Cir. 2020) ("On appeal from the denial of qualified immunity, the question presented is whether DeLade's claim of wrongful arrest and pretrial detention is cognizable under the Due Process Clause of the Fourteenth Amendment. We conclude that a claim alleging unlawful arrest and pretrial detention that occur prior to a detainee's first appearance before a court sounds in the Fourth Amendment—and not the Due Process Clause of the Fourteenth Amendment. . . . Qualified immunity shields a government official from liability unless the official's conduct violated a constitutional right that is clearly established. . . But in this case, we are presented with an antecedent question: whether the Fourteenth Amendment provides DeLade a viable vehicle for relief. More specifically, we must decide whether DeLade's claim of unlawful arrest and pretrial detention against Cargan is cognizable under the Due Process Clause of the Fourteenth Amendment, as DeLade contends, or under the Fourth Amendment only. This distinction matters because of the more-specific-provision rule. Under that rule, 'if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'. . Simply put, if DeLade's claim of unlawful arrest and pretrial detention sounds in the Fourth Amendment, then it cannot be asserted under the Due Process Clause of the Fourteenth Amendment. . . . After the Supreme Court decided *Manuel*, we recognized that *Manuel* stands for the proposition that 'the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. . The United States Court of Appeals for the Seventh Circuit agrees. '*Manuel* [ ] makes clear that the Fourth Amendment, *not the [Fourteenth Amendment's] Due Process Clause*, governs a claim for wrongful pretrial detention.' *Lewis v. City of Chicago*, 914 F.3d 472, 475 (7th Cir. 2019) (emphasis added). . . To date, we have not delineated when a claim of unlawful pretrial detention stops implicating the Fourth Amendment and begins to fall under the Due Process Clause of the Fourteenth Amendment. . . . This case requires us to address the question more directly. We conclude that the Fourth Amendment always governs claims of unlawful arrest and pretrial detention when that detention occurs before the detainee's first appearance before a court. Our conclusion is compelled by *Manuel*—even by one of the dissenting opinions. Although Justice Alito, joined by Justice Thomas, . . . dissented in *Manuel*, they 'agree[d] with the Court's holding up to a point: The protection provided by the Fourth Amendment continues to apply after the start of legal process, if legal process is understood to mean the issuance of an arrest warrant or ... an initial appearance under federal law.'. . So the Supreme Court in *Manuel* unanimously agreed that the Fourth Amendment covers a detainee's arrest and pretrial detention *at least* through his initial appearance before a court. . . . [W]e hold that the Fourth Amendment always governs claims of unlawful arrest and pretrial detention when that detention occurs prior to the detainee's first appearance before a

court.")

Geness v. Cox, 902 F.3d 344, 355 n.6 (3d Cir. 2018) ("In its recent opinion in *Manuel*, the Supreme Court left unresolved whether a claim for unlawful pretrial detention, i.e., imprisonment that persists without probable cause beyond the onset of legal process, accrues at the onset of that legal process, like a claim of false arrest, . . . or accrues only upon dismissal of the charges, like a claim of malicious prosecution[.] . . In *Manuel*, the Court remanded to the Seventh Circuit to address the issue in the first instance; here, we have no need to address the issue, given both Geness's failure to raise the issue of accrual. . . and our conclusion that Geness, in any event, failed to raise a genuine dispute of material fact as to probable cause[.]")

Geness v. Cox, 902 F.3d 344, 355 n.12 (3d Cir. 2018) ("Under our case law to date, a malicious prosecution claim fails so long as 'the proceeding was *initiated* ... with[ ] probable cause.'. . The Supreme Court has recently stated, though, that, 'those objecting to a pretrial deprivation of liberty may invoke the Fourth Amendment when ... that deprivation occurs [even] after legal process commences,'. . . and some of our Sister Circuits have implicitly authorized a malicious prosecution claim based upon a theory of 'continuing prosecution,' i.e., that the prosecution continued and charges were not dismissed after the revelation of sufficient exculpatory information to undermine a probable cause finding[.] . . . We have no occasion to consider that theory today, as it was not raised by Geness and he states his claim only against Cox, not any other actors responsible for Geness's continued confinement.")

Baskerville v. City of Harrisburg, No. 1:19-CV-420, 2020 WL 108421, at *4–5 (M.D. Pa. Jan. 9, 2020) ("Prior to the Supreme Court's decision in *Manuel*, the dividing line between false imprisonment claims (implicating the Fourth Amendment) and malicious prosecution claims (invoking due process) was institution of legal process. . . However, the *Manuel* Court held that Fourth Amendment protections extend beyond the start of legal process and apply to 'post-legal-process' pretrial detention when that custody suffers from the same constitutional infirmities as unlawful 'pre-legal-process' arrest and detention. . . Such a situation may arise when 'legal process itself goes wrong,' for instance, when 'a judge's probable cause determination is predicated solely on a police officer's false statements.'. . A claim under the Fourth Amendment 'drops out' once trial has occurred, and any allegations of insufficient evidence for conviction and subsequent incarceration implicate the Due Process Clause of the Fourteenth Amendment. . . Baskerville does not contend that his arrest for drug possession was improper. In other words, he does not claim an initial 'false arrest.' Indeed, it is uncontested that his initial arrest and detention were lawful. Baskerville is alleging that his continued pretrial detention based upon the subsequent initiation of firearms charges violates his rights under the Fourth Amendment. That is, Baskerville maintains that state and federal authorities lacked probable cause to bring the firearms charges. Specifically, the amended complaint alleges that defendant officers falsified evidence connecting Baskerville to a handgun he never possessed. Under *Manuel*, these claims arise under the Fourth Amendment and do not sound in Fourteenth Amendment malicious prosecution.[3] [fn. 3: To the extent that Baskerville's amended complaint asserts a Fourteenth Amendment due process claim that state

actors intentionally used fabricated evidence to deprive him of liberty without due process, such a claim must be dismissed. *See McDonough v. Smith*, 588 U.S. __, 139 S. Ct. 2149, 2155-59 (2019). The Supreme Court has expressly likened this type of claim to malicious prosecution, thus requiring—as an element—favorable termination of the related criminal proceedings.] Nevertheless, Baskerville cannot state a civil claim for relief at this time, as he is currently incarcerated pending trial on the related federal felon-in-possession charge. In *Manuel*, on remand from the Supreme Court, the Seventh Circuit held that a Fourth Amendment claim for 'wrongful custody' following initiation of legal process accrues when the unjustified pretrial detention ends. . . We find the Seventh Circuit's analysis to be both logical and persuasive. The wrong asserted by Baskerville, like the claimant in *Manuel*, is post-legal-process pretrial detention without probable cause—a wrong that 'is ongoing rather than discrete.'. . Resolution of this asserted wrong necessarily requires termination of any pretrial custody duly authorized by legal process. . . Moreover, Baskerville's ongoing pretrial detention is properly authorized by legal process. Hence, this detention cannot be attacked through Section 1983. . . For these reasons, we must dismiss Baskerville's Fourth Amendment claims without prejudice; quite simply, his claims have not yet accrued.")

Byrd v. Mangold, No. CV 19-504, 2019 WL 5566752, at *4 (E.D. Pa. Oct. 28, 2019) ("Although it is not clear from the Complaint, it is possible Byrd asserted another Fourth Amendment claim for his post-legal-process pretrial detention without probable cause pursuant to *Manuel v. City of Joliet*, 137 S. Ct. 911, 919–20 (2017). The accrual date for this claim is unsettled, and the Supreme Court and the Third Circuit have both declined to opine on the issue. . . Nevertheless, the two accrual dates considered include either (1) the date one is bound over for legal process, like a claim for false arrest or false imprisonment, or (2) the date upon dismissal of criminal charges, like a claim of malicious prosecution. . . At the latest, this claim accrued at the same time as the malicious prosecution claim. Accordingly, the Court's analysis of the malicious prosecution claim will also decide any alleged post-legal-process pretrial detention claim.")

Fourth Circuit

Hupp v. Cook, 931 F.3d 307, 324-25 (4th Cir. 2019) ("[W]here a police officer takes certain steps, such as first conferring with a prosecutor about moving forward with a criminal prosecution, and a magistrate judge later affirms the officer's determination that probable cause exists for the prosecution, those steps weigh in favor of a finding of qualified immunity. They do not end the qualified immunity inquiry, however, as they 'need only appropriately be taken into account in assessing the reasonableness of [the officer's] actions.'. . A grant of qualified immunity still rests on our determination that an officer acted reasonably under the circumstances. Because a magistrate's finding of probable cause is but a factor in our consideration of the overall reasonableness of the officer's actions, a defendant to a malicious prosecution claim is not absolved from liability when the magistrate's probable-cause finding 'is predicated solely on a police officer's false statements.' *Manuel*, 137 S. Ct. at 918. An officer who lies to secure a probable-cause determination can hardly be called reasonable. Likewise, where an officer provides

misleading information to the prosecuting attorney or where probable cause is 'plainly lacking,'. . . the procedural steps taken by an officer no longer afford a shield against a Fourth Amendment claim. This is because '[l]egal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement.'. . .Hupp contends that the magistrate's finding of probable cause does not afford Trooper Cook qualified immunity on her malicious prosecution claim because the probable-cause finding rested on false statements made by Trooper Cook in the criminal complaint against her. Specifically, Hupp asserts that the criminal complaint falsely stated, *inter alia*, that she refused to comply with Trooper Cook's orders to 'step aside,' began cursing at him, 'raised her hands towards' him before he grabbed her arm, and then grabbed at him and 'began cursing' after he grabbed her arm. . . We agree with Hupp that the district court's finding of qualified immunity on this claim was in error. As we have explained, disputes of fact preclude a finding at this stage that a reasonable officer would have believed that probable cause existed for Hupp's arrest. . . . .Given the disputes of the underlying historical facts, the supported assertion that Trooper Cook's statements in the criminal complaint were not entirely truthful, and the lack of undisputed evidence that otherwise would support a probable-cause finding, we cannot find that Trooper Cook is entitled to qualified immunity on Hupp's malicious prosecution claim under section 1983.")

Everette-Oates v. Chapman, No. 5:16-CV-623-FL, 2017 WL 4933048, at *4 (E.D.N.C. Oct. 31, 2017) ("According to the first amended complaint, plaintiff was charged in indictment on August 6, 2013, and that indictment and her arrest on August 7, 2013, procured through fabrication and concealment of evidence, constitute an unlawful seizure in violation of her Fourth Amendment rights. . . Defendants, including defendant Long, allegedly caused defendant Chapman to testify falsely to secure that indictment, and conspired to do so. . . As such, by August 7, 2013, plaintiff possessed sufficient facts about the harm done to her that reasonable inquiry would reveal her cause of action based upon conspiracy to effectuate unlawful seizure in violation of the Fourth Amendment. Plaintiff argues, nonetheless, that her Fourth Amendment rights continued to be violated during the pendency of her prosecution, citing *Manuel v. City of Joliet*, 137 S.Ct. 911, 918 (2017). *Manuel,* however, expressly reserved the question of the time period for accrual of a Fourth Amendment claim based upon a prosecution commenced through unlawful act of fabrication or concealment of evidence to obtain warrant or indictment. . . In addition, this court previously dismissed plaintiff's claim for 'malicious prosecution,' which claim would have had as an element 'criminal proceedings terminated in plaintiff's favor.'. . Plaintiff's remaining Fourth Amendment claims are premised, by contrast, upon 'additional conduct preceding the indictment' constituting concealment and fabrication of evidence to secure indictment. . . Consistent with the law currently in force, as well as the court's prior rulings, plaintiff's Fourth Amendment claims accrued upon issuance of the indictment secured through fabrication and concealment of evidence.")

Osborne v. Georgiades, No. CV RDB-14-182, 2017 WL 3978485, at *6 (D. Md. Sept. 11, 2017) ("The holding in *Chalmers* is consistent with the recent decision of the United States Supreme Court in *Manuel v. City of Joliet, Ill.*, in which the Court rejected the plaintiff's attempt to frame his complaint based on unlawful pretrial detention within the context of a Fourteenth Amendment

due process claim. . . The Court there stated that, '[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.'. . As Osborne similarly alleges that the legal process against him—that is, the arrest warrant application prepared by Georgiades—was unsupported by probable cause, his claims lie within the Fourth Amendment only. In sum, plaintiff's attempt to frame his claims within the context of the Fourteenth Amendment is unavailing and does not excuse his inability to prove an essential element of his § 1983 malicious prosecution claim. Accordingly, Georgiades is entitled to summary judgment.")

Fifth Circuit

Bradley v. Sheriff's Dep't St. Landry Parish, 958 F.3d 387, 391-93 (5th Cir. 2020) ("The reasoning, and holding, in *Wallace* compels the conclusion that Bradley's wrongful arrest claim is barred by limitations, even if he contends that damages flowed from that false arrest until he was found not guilty. 'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more.'. . After Bradley's arraignment, 'any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself.'. . Bradley's allegedly false imprisonment ended 'when legal process was initiated against him, and the statute would have begun to run from that date' rather than the date when he was acquitted. . . . The Supreme Court also considered in *Wallace* the argument that *Heck v. Humphrey* should compel the conclusion that a claim for pre-arraignment detention could not accrue until there was a termination of criminal proceedings in the plaintiff's favor. . . . In *Wallace*, the Supreme Court rejected the argument that, because of *Heck*, accrual could not occur until there was a favorable termination of criminal charges, reasoning that 'the impracticality of' a 'rule' that 'an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside ... should be obvious.'. . Among other scenarios, the Court posited 'what if ... the anticipated future conviction never occurs,' or 'what if prosecution never occurs—what will the trigger be then?'. . The Court concluded that the proper course is for the plaintiff to file suit and that a stay could be employed if necessary. . . .Bradley's briefing in our court does not draw any distinction between his claim for wrongful arrest and wrongful detention. He does not argue that the limitations period applicable to a wrongful arrest claim differs from that applicable to a wrongful detention claim. He does not differentiate between detention prior to the commencement of legal process and post-process detention. . . . The Supreme Court's decision in *Manuel v. City of Joliet* expressly left open the question of the date on which limitations begins to run for 'unlawful pretrial detention even beyond the start of legal process.'. . Though Bradley cites *Manuel*, he does so only in connection with claims other than those arising from pretrial detention. He argues only that *Manuel* 'seems to extend pretrial detentions as any impingement on a person's freedom as providing a [§] 1983 claim. Although Plaintiff was released from jail, he was still subjected to additional restrictions (bail, etc.).' Bradley's brief does not cite any of this court's decisions regarding limitations for post-process pretrial detention claims. His briefing as to the limitations period applicable to wrongful detention is inadequate; he makes no legal argument beyond bare assertions and cites to no

applicable cases addressing the question. . . We decline to disturb the district court's ruling that both claims are time-barred.")

Bradley v. Sheriff's Dep't St. Landry Parish, 958 F.3d 387, 395-96 (5th Cir. 2020) ("Suits brought under § 1983 require the deprivation of a right guaranteed under the United States Constitution. . . . The magistrate held that '[t]here is no constitutional right to be free from malicious prosecution,' and therefore Bradley 'ha[d] no such federal claim.' While this court's precedent establishes 'that no ... freestanding constitutional right to be free from malicious prosecution exists,'. . . it recognizes the viability of § 1983 prosecution claims rooted in the violation of a specific constitutional right. . . In *Castellano v. Fragozo*, we held that '[Appellant's] contention that the manufacturing of evidence and knowing use of perjured testimony attributable to the state is a violation of due process is correct," and could be brought under § 1983. . . However, Bradley has inadequately briefed the issue. Bradley devotes a single paragraph to his prosecution claims. He states only that 'the constitutional claim centers around a lack of due process under the 5th and 14th Amendments' and that he was deprived of his constitutional rights when Deputy Joshua Godchaux allegedly 'conspir[ed] to unlawfully seize and detain him, coerc[ed] [a co-defendant] to involve Bradley in a crime, provid[ed] false inculpatory evidence, and inflict[ed] emotional distress upon him.' Bradley concludes the paragraph by saying he 'has the right to be free from malicious prosecution.' These are all conclusory assertions devoid of any specifics. Bradley fails to cite to the record. Nor does he cite any case law. . .Under *Wallace*, Bradley's wrongful detention claim is part of a malicious prosecution claim. . . However, Bradley does not discuss the wrongful detention claim as part of his malicious prosecution claim. Though he cites *Manuel*, which held that the 'Fourth Amendment ... establishes "the standards and procedure"' governing pretrial detention ... even after the start of "legal process,"'. . . he asserts only that his 'constitutional claim centers around a lack of due process under the 5th and 14th Amendments.' This does not constitute an argument that a wrongful detention claim, which is based on the Fourth Amendment, was included within the malicious prosecution claim and therefore that the district court erred in dismissing the wrongful detention claim. He fails to mention the Fourth Amendment at all. Bradley has inadequately briefed his 'malicious prosecution' claim. Thus, we need not address Bradley's tolling arguments on this claim. The district court's dismissal of Bradley's 'malicious prosecution' claim is affirmed.")

Fusilier v. Zaunbrecher, No. 19-30657, 2020 WL 1490745, at *2 (5th Cir. Mar. 26, 2020) (not reported) ("Fusilier's allegations in the operative complaint mirror those in *Winfrey*. Fusilier alleged (1) a '48 Hour Warrant' was issued for his arrest, (2) the warrant was signed by a state judge in the usual course, (3) he was arrested pursuant to that warrant, (4) but the officer preparing the warrant knew that there was no probable cause to arrest Fusilier, and (5) Zaunbrecher was not honest in her statements that formed the basis of the warrant affidavit (specifically about Fusilier showing a badge or otherwise pretending to be a peace officer). According to Fusilier, these misstatements show there was no probable cause to have 'detained—which is to say "seiz[ed]"' —him for 29 days in jail and for months of house arrest. . . As should be apparent, *Winfrey* controls. Since Fusilier is challenging 'an unlawful [detention] pursuant to a

warrant' that the defendants caused to be issued because of 'misstatements,' Fusilier's claim best fits with a malicious prosecution analogy. *Winfrey*, 901 F.3d at 493; *see also McDonough*, 139 S. Ct. at 2158. Accordingly, the district court was wrong to conclude his claim accrued when he had his hearing in front of the magistrate judge. Instead, his claim accrued when he was acquitted.")

Garcia v. San Antonio, Texas, No. 18-50274, 2019 WL 3938467, at *2 (5th Cir. Aug. 19, 2019) (not reported) ("The Fourth Amendment protects against pretrial detention instituted pursuant to wrongful legal process. . . Legal process 'goes wrong' when a probable cause determination is baseless, such as when 'a judge's probable-cause determination is predicated solely on a police officer's false statements.'. . Garcia's complaint alleges that he 'was brought before a magistrate judge,' and, based on Officer Orta's 'false police report that [Garcia] drove a vehic[le] while intoxicated which [Officer Orta] had never witnessed,' Garcia 'was given a $75,000 bond.' Garcia then 'lost years and months illegally detained' until 'the prosecutor dismissed the alcohol related charge on Dec. 4, 2015.' These allegations, construed liberally, sufficiently state a claim for pretrial detention pursuant to wrongful legal process under the Fourth Amendment. . .This court has previously addressed the timeliness of a complaint filed by an individual who was detained pursuant to wrongful legal process. . . In *Winfrey*, legal process commenced when the plaintiff was arrested pursuant to an arrest warrant that was based on 'reckless misstatements and omissions' in an officer's probable cause affidavit. . . The court determined that claims for detention pursuant to the 'wrongful institution of legal process' are more akin to malicious prosecution than false arrest, so such claims accrue when criminal proceedings end in a plaintiff's favor. . . Though somewhat distinct in its facts, *Winfrey*'s integrated analysis of *Wallace* and *Manuel* applies here as well: Garcia's claim for detention caused by the wrongful institution of legal process accrued when criminal proceedings ended in his favor on December 4, 2015. Because Garcia filed his complaint less than two years later, this claim was timely.")

Winfrey v. Johnson, No. 18-20022, 2019 WL 1399321, at *4 (5th Cir. Mar. 26, 2019) (not reported) ("Based on *Winfrey II*, the misstatements in Johnson's arrest-warrant affidavit meant it lacked probable cause. The Supreme Court has made clear that pretrial seizures, even if they follow legal process, can violate the Fourth Amendment if the initial seizure occurred without probable cause and nothing later remedied the lack of probable cause. [citing *Manuel v. City of Joliet*] That is the case here – the material misstatements and omissions in the arrest-warrant affidavit led to Winfrey's unlawful arrest and pretrial detainment. But that is not the end of this story, because Megan was reindicted and tried on evidence obtained after further investigation of her case. Megan does not contradict the record evidence that Deputy Johnson's involvement in her investigation ceased following the issuance of the arrest warrant in February 2007, at which point the investigation was taken over by the Texas Rangers and the District Attorney's investigator, James Kirk. The further investigation included follow-up interviews with Campbell and other witnesses. At trial, new and potentially incriminating testimony about an alibi attempt and evidence tampering were offered by her ex-husband Hammond and her boyfriend at the time of the killing, Jason King. . . Consequently, at the time of reindictment, the initial lack of probable cause ceased being the cause of Winfrey's detention and damages ceased accruing from Johnson's Fourth

Amendment violation. Additionally, although the Texas Court of Criminal Appeals ultimately reversed Winfrey's conviction, that court's painstaking review of the totality of the circumstantial evidence underlying her conviction undermines Megan's argument that the initial lack of probable cause supporting her arrest persisted through reindictment, trial, and incarceration, and continued to taint the case against her. In concluding that the evidence was insufficient to prove Megan's guilt beyond a reasonable doubt, the court nowhere suggested that there was no probable cause to indict or try her for murder. In fact, the majority found that the evidence did indeed raise a suspicion of her guilt. The court's analysis further supports the conclusion that the initial lack of probable cause ceased with Megan's reindictment and so did the damages. . . . Megan argues that because her liberty was constrained beyond her initial arrest, and because Texas law provides an insufficient state tort law remedy, she may press a § 1983 federal malicious prosecution claim under procedural due process. She acknowledges, however, that the Supreme Court did not approve a substantive due process claim arising from malicious prosecution, *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807 (1994), and no subsequent decision of that Court or this court has rendered such a claim cognizable, much less 'clearly established.' *See, e.g.*, *Castellano v. Fragozo,* 352 F.3d 939 (5th Cir. 2003) (en banc). Even if this court accepted Megan's invitation to break new legal ground, which we do not, Johnson would be entitled to qualified immunity. The district court's dismissal of the malicious prosecution claim was correct.")

Winfrey v. Rogers, 901 F.3d 483, 491-93, 496 n.4 (5th Cir. 2018) ("This Court has held that although there is no 'freestanding constitutional right to be free from malicious prosecution,' '[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example.' *Castellano v. Fragozo*, 352 F.3d 939, 945, 953 (5th Cir. 2003) (en banc). In *Albright v. Oliver*, . . . a plurality of the Supreme Court said that malicious-prosecution claims must be based on the Fourth Amendment, rather than on 'the more generalized notion of "substantive due process,"' because the Fourth Amendment is the explicit textual source against this type of government behavior. . . And recently, in *Manuel v. City of Joliet*, . . . the Supreme Court considered whether a plaintiff had stated a Fourth Amendment claim when he was arrested and charged with unlawful possession of a controlled substance based upon false reports written by a police officer and an evidence technician. . . There, the Court said the plaintiff's 'claim fits the Fourth Amendment, and the Fourth Amendment fits [the plaintiff's] claim, as hand in glove.'. . And it held 'that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. .These cases fully support a finding that the Fourth Amendment is the appropriate constitutional basis for Junior's claim that he was wrongfully arrested due to the knowing or reckless misstatements and omissions in Johnson's affidavits. We, therefore, hold that a Fourth Amendment claim is presented, and we will decide the remainder of the issues based upon this legal conclusion. . . .The accrual date depends on whether Junior's claim more closely resembles one for false imprisonment or one for malicious prosecution. . . A false-imprisonment claim is based upon 'detention without legal process.'. . It 'begins to run at the time the claimant becomes detained pursuant to legal process.'. . A malicious-prosecution claim is based upon 'detention accompanied ... by *wrongful institution* of legal process.'. . It 'does not accrue until the

prosecution ends in the plaintiff's favor.'. . Johnson urges us to find that this case fits within *Wallace v. Kato.* There, the Supreme Court found that the plaintiff's unlawful warrantless-arrest Fourth Amendment claim resembled a false-imprisonment claim, because the constitutional violation occurred when the plaintiff was arrested without a warrant instead of when the conviction was later set aside. . . Law enforcement officers transported the fifteen-year-old plaintiff to a police station—without a warrant or probable cause to arrest him—and interrogated him into the early morning. . . So, the Court found that the plaintiff's claim accrued when he was initially arrested. . . Here, we find that Junior's claim is more like the tort of malicious prosecution, because Junior was arrested through the wrongful institution of legal process: an arrest pursuant to a warrant, issued through the normal legal process, that is alleged to contain numerous material omissions and misstatements. Junior thus alleges a wrongful institution of legal process—an unlawful arrest *pursuant to* a warrant—instead of a detention with no legal process. Because Junior's claim suggests malicious prosecution rather than false imprisonment, his claim accrued when his criminal proceedings ended in his favor on June 12, 2009. He filed his suit well within the two-year limitations period on May 26, 2010. So Junior's claim survives the time bar. . . . Junior urges us to overrule our independent-intermediary doctrine based on *Manuel v. City of Joliet*, but we cannot do that and find it unnecessary. In *Manuel*, the Supreme Court held 'that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. . The Court said that a grand jury indictment that 'was entirely based on false testimony' could not expunge the plaintiff's Fourth Amendment claim. . . But it did not hold that officers can never be insulated from liability based on later determinations by an intermediary when all the necessary information was placed before that intermediary. Instead, the Court affirmed a principle that we have consistently followed: when an intermediary's proceeding is tainted by an officer's unconstitutional conduct, the independent-intermediary doctrine does not apply.")

Jauch v. Choctaw County, 874 F.3d 425, 429-32, 435 (5th Cir. 2017), *cert. denied,* 139 S. Ct. 638 (2018) ("We address only the Fourteenth Amendment and hold that this excessive detention, depriving Jauch of liberty without legal or due process, violated that Amendment; for that reason, her motion for summary judgment should have been granted as to the Fourteenth Amendment Due Process claim. . . . While this appeal was pending, the Supreme Court issued *Manuel v. City of Joliet*, which held that a defendant seized without probable cause could challenge his pretrial detention under the Fourth Amendment. . . *Manuel* does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that *only* the Fourth Amendment is available to pre-trial detainees. For example, even when the detention is legal, a pre-trial detainee subjected to excessive force properly invokes the Fourteenth Amendment. . . So, too, may a legally seized pre-trial detainee held for an extended period without further process. This Court has already addressed the interplay between the Fourth and Fourteenth Amendment, and *Manuel* fits with these prior cases. In 1996, we held the Fourth Amendment inapplicable to the usual pretrial detainee who was *properly arrested* and awaiting trial. . . When confronted with a defendant held upon probable cause who spent nine months in pretrial detention, we found the Fourth Amendment inapplicable and the due process clause of the Fourteenth Amendment implicated. *See Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000). The

Fourth Amendment could not have been violated, we explained, because the plaintiff was originally arrested 'pursuant to a valid court order,' but the 'alleged nine month detention without proper due process protections' would amount to a due process violation if proven. . . By contrast to these cases, where a claim of unlawful detention was accompanied by allegations that the initial arrest was not supported by valid probable case, we held that analysis was proper 'under the Fourth Amendment and not under the Fourteenth Amendment's Due Process Clause.' *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 441 (5th Cir. 2015); *see also Castellano v. Fragozo*, 352 F.3d 939, 953 (5th Cir. 2003) (en banc). Just like *Manuel*. . . . *Jones* is binding, but it did not state whether the due process violation was of the procedural or substantive variety. Other circuits appear split on the question. *Compare Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) (substantive due process); *Hayes v. Faulkner Cnty., Ark.*, 388 F.3d 669 (8th Cir. 2004) (substantive due process), *with Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) (procedural due process); *see also Armstrong v. Squadrito*, 152 F.3d 564, 575 & n.4 (7th Cir. 1998) (specifically rejecting *Oviatt* and its procedural due process approach). We find the answer from Supreme Court cases. 'The touchstone of due process is protection of the individual against arbitrary action of government.' *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). This is true with respect to both procedural and substantive due process. . . . Here, we deal with a deprivation of a protected liberty interest due to an allegedly unfair procedural scheme. The Constitution itself protects physical liberty. . . As a matter of procedure, defendants held in Choctaw County on capias warrants are held without an arraignment or other court proceeding until the circuit court that issued the capias next convenes. Our task is to determine the constitutionality of this procedure, and we are satisfied that Jauch's right to procedural due process is most squarely implicated. Without deciding whether substantive fundamental unfairness may support a due process holding with little procedural deficiency, we hold that prolonged-detention cases do raise the immediate question of whether the pre-trial detainee's procedural due process rights have been violated. . . . Ordinarily, '[t]he starting point for any inquiry into how much "process" is "due" must be the Supreme Court's opinion in *Mathews v. Eldridge*,' and we would consider the private interest at stake, the risk of erroneous deprivations under existing procedures in light of available alternative or additional procedures, and the government's interest. . . .The Supreme Court subsequently clarified the law, holding "that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which ... are part of the criminal process," reasoning that because the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure," the Due Process Clause "has limited operation" in the field.' *Kaley v. United States*, ––U.S. ––––, 134 S.Ct. 1090, 1101, 188 L.Ed.2d 46 (2014) (quoting *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 2576, 120 L.Ed.2d 353 (1992)) (alterations in original). . . . .This is not a case about presumptions, evidence, or any workaday aspect of the process-in-action. This is a case about confinement with process deferred. . . .There is thus room to argue that the *Mathews* test is more appropriate under the circumstances. Ultimately, we again follow the Supreme Court's example, choosing not to decide which test applies 'because we need not do so.'. . The *Medina* test represents the 'narrower inquiry' and is 'far less intrusive than that approved in *Mathews.*'. . 'A rule of criminal procedure usually does not violate the Due Process Clause unless it (i) "offends some principle of justice so rooted in the

traditions and conscience of our people as to be ranked as fundamental," or (ii) "transgresses any recognized principle of "fundamental fairness" in operation."'. . . Even under the deferential *Medina* test, the indefinite-detention procedure violated Jauch's right to procedural due process. . . . For the following reasons, we conclude that indefinite pre-trial detention without an arraignment or other court appearance offends fundamental principles of justice deeply rooted in the traditions and conscience of our people. The same traditions that birthed our Sixth Amendment right to a speedy trial and Eighth Amendment prohibition of excessive bail condemn the procedure at issue. . . . Here, the challenged procedure denies criminal defendants their *enumerated* constitutional rights relating to criminal procedure by cutting them off from the judicial officers charged with implementing constitutional criminal procedure. . . This is unjust and unfair.")

McClin v. Ard, 866 F.3d 682, 692-94 (5th Cir. 2017) ("*Albright*'s statements on the Fourth Amendment seizure issue, which were not essential to that case's outcome, are non-binding though indicative, and our court has never decided whether voluntary surrender to an arrest warrant constitutes a seizure. Several other circuit courts, however, have relied on *Albright* to hold that a state official's acceptance of a voluntary surrender to an arrest warrant constitutes a seizure. . . .The Defendants argue that McLin fails to plead a seizure because he does not allege that his pre-trial liberty was limited. In support, they point to cases where courts have ruled that the issuance and receipt of a criminal summons or citation—without the imposition of additional, pre-trial restrictions—may not implicate the Fourth Amendment. [cases collected in footnote] If, however, the summons or citation is accompanied by more burdensome restrictions—such as restrictions on out-of-state travel and pre-trial reporting requirements—some courts, including this one, have recognized that a seizure may occur incident to a pre-trial release. . . .The Defendants' reliance on cases concerning seizures incident to pretrial release is misplaced. McLin's Fourth Amendment claim does not stem from any conditions imposed on him once he was issued the summons. Indeed, McLin does not plead any pre-trial restrictions at all. Rather, McLin's seizure occurred when he surrendered to the arrest warrants and LPSO exercised authority consistent with the warrants—even if McLin thereafter signed his summons and was allowed to leave. The existence or non-existence of any pretrial restrictions does not impact the analysis of this seizure. . . The Defendants have not pointed to a case in which a court found that a person surrendering to an arrest warrant was *not* seized for Fourth Amendment purposes.")

Harris v. Mamou Police Department, No. 6:18-CV-01024, 2019 WL 4200600, at *2 (W.D. La. Sept. 3, 2019) ("*Manuel*. . . is inapposite here because that case involved a plaintiff subject to detention after legal process had commenced and, according to the court, was grounded on a wrongful arrest and false imprisonment claim that was more like a malicious prosecution claim. The Fifth Circuit has never recognized an independent federal claim for malicious prosecution. *See Castlellano v. Fragazo,* 352 F.3d 939, 942 (5th Cir. 2003) (holding that "malicious prosecution standing alone is no violation of the United States Constitution."). The Fifth Circuit and the Supreme Court, however, have recognized that a false imprisonment claim that involves 'detention *accompanied...* by wrongful institution of legal process' is more akin to a

malicious prosecution claim and should, therefore, accrue only when the prosecution ends in the plaintiff's favor. . . Here, there was no detention accompanied by wrongful institution of legal process because Harris was released from custody prior to arraignment and the commencement of the legal process. Accordingly, the *Manuel* rule for accrual does not apply.")

Sixth Circuit

Lester v. Roberts, 986 F.3d 599, 606-07 (6th Cir. 2021) ("Lester's federal malicious-prosecution claim alleges a violation of the Fourth Amendment under 42 U.S.C. § 1983. Yet neither the Constitution nor § 1983 uses the words 'malicious prosecution.' Perhaps unsurprisingly, then, our justification for this constitutional claim has evolved over time. We once suggested that defendants had a substantive-due-process right under the Fourteenth Amendment to be free from malicious prosecutions that 'shock the conscience.'. . But the Supreme Court rejected our view in *Albright v. Oliver*[.] . . A plurality explained that the 'Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.'. . The plurality, however, opted to leave open the question whether a malicious-prosecution claim could be asserted under the Fourth Amendment. . . We have taken a winding path since *Albright*. Shortly after that decision, we continued to follow our previous malicious-prosecution framework under the Fourteenth Amendment simply by changing the 'label' to the Fourth. *See Spurlock v. Satterfield*, 167 F.3d 995, 1006 & n.19 (6th Cir. 1999). We soon recognized a textual problem: The Fourth Amendment regulates seizures, so we held it does not 'support a separate malicious prosecution claim independent of the underlying illegal seizure.' *Frantz v. Village of Bradford*, 245 F.3d 869, 876 (6th Cir. 2001). But *Frantz*'s reading did not last long. We next held that *Frantz* conflicted with *Spurlock*, which 'obliged' us to 'recognize a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment.' *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003). Since then, we have acknowledged that our old framework (with its shocks-the-conscience test) does not fit the Fourth Amendment. We have thus changed the elements for a constitutional malicious-prosecution claim. *See Sykes v. Anderson*, 625 F.3d 294, 308–09 (6th Cir. 2010). Today, we require proof that: (1) the defendant 'made, influenced, or participated in the decision to prosecute'; (2) the government lacked probable cause; (3) the proceeding caused the plaintiff to suffer a deprivation of liberty; and (4) the prosecution ended in the plaintiff's favor. *See Jones v. Clark County*, 959 F.3d 748, 756 (6th Cir. 2020). Our current status quo looks no more stable. We have called the malicious-prosecution label an 'unfortunate and confusing' 'misnomer.'. . Consider the text: The Fourth Amendment protects '[t]he right of the people to be secure in their persons ... against unreasonable ... seizures[.]'. . It bars certain kinds of seizures, not prosecutions. *Tlapanco v. Elges*, 969 F.3d 638, 658–59 (6th Cir. 2020) (Thapar, J., concurring). And it establishes an objective reasonableness test, not a subjective maliciousness test. . . Or consider precedent: The Supreme Court has never adopted a malicious-prosecution claim since *Albright*. To the contrary, it has avoided that name. *See Manuel v. City of Joliet*, —— U.S. ——, 137 S. Ct. 911, 919–20, 197 L.Ed.2d 312 (2017). *Manuel* considered a claim that the police used false evidence to charge and detain the plaintiff before trial. . . Highlighting the Fourth Amendment's text, the Court asked whether the police had caused an 'unreasonable' 'seizure' of

the plaintiff. . . And it noted that the pretrial detention qualifies as a 'seizure.'. . Like our earlier decision in *Frantz*, therefore, *Manuel* suggests that we should focus on the *seizure* (Lester's two-year detention) rather than the *prosecution* (Lester's criminal proceedings). Regardless, this distinction between a seizure and a prosecution does not matter here. Whether it should be called a 'malicious-prosecution claim' or simply an 'unreasonable-seizure claim,' the claim has two universally applicable ground rules. As a matter of substance, the Fourth Amendment prohibits only those pretrial seizures (or prosecutions) that lack *probable cause*, and § 1983 grants qualified immunity to defendants who mistakenly but reasonably conclude that probable cause exists. As a matter of procedure, the Fourth Amendment prohibits extended pretrial detentions unless a *neutral decisionmaker* finds that probable cause exists, and § 1983 grants absolute immunity to witnesses who testify before one such decisionmaker (the grand jury).")

Tlapanco v. Elges, 969 F.3d 638, 658-60 (6th Cir. 2020) (Thapar, J., concurring) ("I concur in the thoughtful majority opinion, which correctly resolves the disputed issues before us. I write separately to offer a reminder that 'malicious prosecution' is a troublesome label for claims based on unreasonable pretrial detention. As our court explained years ago, this cause of action is better characterized 'simply as the right under the Fourth Amendment to be free from continued detention without probable cause.'. . In other words, it's 'a plain-vanilla Fourth Amendment claim.'. .While old habits can be hard to break, I encourage parties and judges in this circuit to follow the Supreme Court's lead in *Manuel* and 'eschew[ ] the "malicious prosecution" label.' *Pagán-González v. Moreno*, 919 F.3d 582, 608 (1st Cir. 2019) (Barron, J., concurring) (discussing *Manuel*, 137 S. Ct. 911); *see also Jones v. Clark Cty.*, 959 F.3d 748, 777 (6th Cir. 2020) (Murphy, J., concurring in part and dissenting in part) (noting that *Manuel* "conspicuously avoided that label"). The label serves little purpose and leads only to confusion. If you doubt it, just look at this case. The police arrested Tlapanco pursuant to a warrant after a magistrate judge made a (possibly invalid) probable-cause determination. He was then held on that warrant throughout his detention. Thus, by all appearances, he suffered no more than one unreasonable seizure of his person. Logically, that *one* seizure should give rise to *one* Fourth Amendment claim. Yet Tlapanco brings two—a false-arrest-and-imprisonment claim *and* a 'malicious prosecution' claim, both based on the same seizure and ensuing detention. The majority opinion properly accepts this presentation given that all parties litigated on this basis. Still, it's worth pointing out that the parties' presentation seems duplicative. What explains this redundancy? If you study Tlapanco's pleadings, it's unclear whether he originally intended to bring the 'malicious prosecution' count as a Fourth Amendment claim. Rather, he seems to have pled the false-arrest-and-imprisonment count to cover the Fourth Amendment injury of unreasonable seizure and detention and then to have proffered a 'malicious prosecution' claim based on some independent constitutional right to be free from wrongful criminal charges. But this court has not recognized a freestanding malicious-prosecution claim under due-process principles. Or at any rate, not since before *Albright v. Oliver*, which rejected a substantive-due-process right to be free from unreasonable prosecution. . . What this court has recognized—and repeatedly *called* 'malicious prosecution,' though often with reluctance—is a Fourth Amendment claim for unreasonable seizures related to prosecutions. . . As we have explained, "malicious prosecution" is a "misnomer" for this kind of claim for at least two reasons:

(1) it has no separate "malice" element; and (2) since it's rooted in the Fourth Amendment, it targets the wrong of unreasonable detention, not the wrong of unjustified prosecution as such. . . In other words, both the adjective and the noun in 'malicious prosecution' are misleading. Even so, the label has stuck and is now embedded in our caselaw. So you can hardly blame the parties for their initial assumption that Tlapanco could bring both a 'malicious prosecution' claim and a false-arrest-and-imprisonment claim. . . Later, as the case proceeded, the parties read the fine print and shifted the 'malicious prosecution' count onto a Fourth Amendment footing. But no one seemed to notice that this produced two Fourth Amendment claims for a single Fourth Amendment injury. To avoid this confusion in the future, we should stop calling it 'malicious prosecution' when a plaintiff brings a Fourth Amendment claim based on unreasonable pretrial detention.")

Jones v. Clark County, Kentucky, 959 F.3d 748, 776-77 (6th Cir. 2020) (Murphy, J., concurring in part and dissenting in part) ("Under our precedent, a plaintiff pursuing a claim that a defendant engaged in a 'malicious prosecution' in violation of the Fourth Amendment must satisfy four elements. *See Sykes*, 625 F.3d at 308–09. The plaintiff must show that (1) the defendant made, influenced, or participated in the decision to initiate a criminal prosecution against the plaintiff; (2) probable cause did not exist for the prosecution; (3) the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor. . . We have added that the Fourth Amendment contains 'two types' of these claims. . . One exists for the 'wrongful institution of legal process' without probable cause and the other for the 'continued detention without probable cause' when, for example, new exculpatory evidence comes to light. . . The Supreme Court, however, 'has not yet decided whether there is a cognizable claim for malicious prosecution under the Fourth Amendment.'. . And our cases have long bemoaned the 'malicious-prosecution' label. We have said that this label is 'somewhat of a misnomer,'. . . calling it 'both unfortunate and confusing[.] . . But we found ourselves '"stuck with that label" in part because of its use by the Supreme Court and other circuits.'. . I agree that the common-law elements of this malicious-prosecution tort fit uncomfortably with the Fourth Amendment's text barring 'unreasonable' 'seizures.'. . The tort focuses on a prosecution; the text focuses on a seizure. The tort requires subjective maliciousness; the text requires objective unreasonableness. But it is not clear to me that we are 'stuck' with this label after the Supreme Court's recent *Manuel* decision. There, the plaintiff argued that the government had arrested and detained him for 48 days 'based solely on false evidence' that did not establish probable cause from the outset of his detention. . . The dissent in *Manuel* affirmatively detailed why the Fourth Amendment's text conflicts with the elements of the common-law tort of malicious prosecution. . . The majority conspicuously avoided that label and did not respond to the dissent's arguments when holding that Manuel stated a Fourth Amendment claim. . . It instead reasoned simply that '[t]he Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause.'. . *Manuel* thus might free us of the malicious-prosecution framework. As the Seventh Circuit said on remand in that case: 'After *Manuel*, "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention.'. . And while '[t]here is no such thing as a constitutional right not to be prosecuted without probable cause,' 'there *is* a constitutional right

not to be held in custody without probable cause.'. . Yet I would leave *Manuel*'s possible effect for another day. Any potential framing of Jones's claim includes a probable-cause element, and Murray is entitled to qualified immunity on that element.")

Howse v. Hodous, 953 F.3d 406, 408-09 & n.2 (6th Cir. 2020), *cert. denied,* 141 S. Ct. 1515 (2021) ("Here, Howse himself admitted that he tried to make it more difficult for the officers to arrest him by stiffening up his body and screaming at the top of his lungs. That's enough to provide probable cause for the obstructing-official-business charge. And because there was probable cause for *that* charge, Howse cannot move forward with *any* of his malicious-prosecution claims. According to our circuit, malicious-prosecution claims are based on the Fourth Amendment. *Spurlock v. Satterfield*, 167 F.3d 995, 1006, 1006 n.19 (6th Cir. 1999).[2] **[fn2:** A majority of the Supreme Court has not yet decided whether there is a cognizable claim for malicious prosecution under the Fourth Amendment. Justice Alito, writing in dissent in *Manuel v. City of Joliet*, reasoned that malicious-prosecution claims do not arise under the Fourth Amendment. . . If they are constitutionally cognizable at all, he said, they must arise under another constitutional provision—presumably the Due Process Clause. . . But because our circuit has held that a federal malicious-prosecution claim does arise under the Fourth Amendment (and not the Due Process Clause), we are bound by that decision and must consider Fourth Amendment principles when defining the scope of the claim. *See, e.g.*, *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010) (refusing to import the common-law malice requirement into a federal malicious-prosecution claim because that would conflict with Fourth Amendment principles).**]** Although we call it a claim for malicious prosecution, that's a bit of a misnomer. After all, our circuit doesn't even require a showing of malice to succeed on such a claim. *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010). It's really a claim for an 'unreasonable prosecutorial seizure' governed by Fourth Amendment principles. . . Under the Fourth Amendment, an officer can seize someone so long as he has probable cause that the person has violated the law. . . . [C]laims for false arrest and malicious prosecution both arise under the Fourth Amendment. They both hinge on an alleged unreasonable seizure. And they both rise and fall on whether there was probable cause supporting the detention. Indeed, just like in the context of false arrests, a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge. In the end, there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false-arrest claim.")

Howse v. Hodous, 953 F.3d 406, 415-17 (6th Cir. 2020), (Cole, C.J., dissenting in part), *cert. denied,* 141 S. Ct. 1515 (2021) ("The Supreme Court tells us that the tort of malicious prosecution is 'entirely distinct' from the tort of false imprisonment, which includes false arrest, as the former remedies the wrongful institution of legal process and the latter remedies detention in the absence of legal process. . . Here, the majority determines that these 'entirely distinct' claims must necessarily be analyzed in the exact same way, despite myriad reasons to follow the Supreme Court's direction and treat them differently. And it does so sua sponte, absent the urging of any party, and without the support of a single decision of this court or any other. I decline to join the majority in making this leap to new legal ground. We have never indicated that a malicious

prosecution claim fails so long as there is probable cause to prosecute on one of several charges. In every prior case where there were some valid charges on the indictment and we were tasked to consider a malicious prosecution claim on acquitted charges, we separately analyzed whether probable cause supported the charge that was the subject of the claim. . . . [O]ther circuit courts have explicitly rejected the majority's approach, and with good reason. The Second Circuit has concluded that a malicious prosecution claim can proceed even when a separate charge is supported by probable cause. *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991). That court observed that the majority's approach would allow prosecutors to tack on additional meritless charges in any case where they had probable cause to prosecute for a single offense. . . The Seventh Circuit held that 'a malicious prosecution claim is treated differently from one for false arrest[.]' *Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007). . . .Other circuits have joined this conclusion. . . . I join these circuits and dispute the majority's contention that 'there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false arrest claim.'. . . I further believe that when we reach this claim, summary judgment is inappropriate given this record. Perhaps the most ardently disputed fact in this case is whether Howse struck or attempted to strike the officers as they confronted him on his own porch; the officers say he did, while Howse says he did not. Given that we view disputed facts in the light most favorable to Howse, we proceed on the assumption that Howse did not strike either officer. A malicious prosecution claim survives where an officer knowingly or recklessly makes a false statement or falsifies or fabricates evidence. *King v. Harwood*, 852 F.3d 568, 587–88 (6th Cir. 2017). A natural corollary of our assumption that Howse's version of the events is the true one is that Hodous and Middaugh's statements that spurred the prosecution of Howse for assault are false. I would therefore hold that the malicious prosecution claim should proceed.")

Mills v. Barnard, 869 F.3d 473, 480-87 (6th Cir., 2017) ("The prototypical case of malicious prosecution involves an official who fabricates evidence that leads to the wrongful arrest or indictment of an innocent person. In this case, however, the indictment conclusively determines that probable cause existed for Mills's detention, at least before the DNA test. . . But the § 1983 version of 'malicious prosecution' is not limited to the institution of proceedings; it can also support a claim for 'continued detention without probable cause.'. . .The existence of an indictment is thus not a talisman that always wards off a malicious-prosecution claim. Instead, 'even if independent evidence establishes probable cause against a suspect, it would still be unlawful for law-enforcement officers to fabricate evidence in order to strengthen the case against that suspect.'. . We recently held in *King v. Harwood*, 852 F.3d 568 (6th Cir. 2017), that pre-indictment nontestimonial acts that were material to the prosecution of a plaintiff could rebut the presumption of probable cause established by a grand-jury indictment. . . For this exception to apply, a transgressing officer must have acted 'knowingly or recklessly' in making false statements that were material to the prosecution. . . In this case, where the DNA report was the linchpin of the prosecution's probable cause, the fact of a pre-existing indictment does not trump the fact that—if the complaint's allegations are taken as true, as we must take them—Jenkins termed exculpatory evidence 'inconclusive' 'despite clear evidence that CM's underwear contained semen from

multiple men that [were] not Mr. Mills.'. . . Mills's complaint is sufficiently well-pleaded to establish the element that there was a lack of probable cause for the prosecution following Jenkins's DNA analysis. . . . Mills had to state more than the conclusion that 'Jenkins did so intentionally.' But by including in the complaint the facts that the DNA results were clearly exonerating under the analysis used by Jenkins, that Jenkins denied making an error in her analysis, and that the incriminating opposite conclusion was provided to prosecutors, Mills's complaint provides sufficient factual context to support a plausible claim that Jenkins intentionally falsified the report. . . . Because Mills's complaint alleges that Jenkins's intentionally falsified report was material to his prosecution and that the falsities therein provided otherwise lacking probable cause, along with the allegations that he had been deprived of liberty and the criminal proceeding had eventually been resolved in his favor, he sufficiently pleaded a claim of malicious prosecution under 42 U.S.C. § 1983. The district court was in error in holding that the indictment conclusively resolved the issue of probable cause. Accordingly, we reverse the district court's grant of the motion to dismiss with respect to the malicious-prosecution claim. . . .The district court combined the fabrication claim and the withholding claim into one, but this was in error. In *Gregory*, this court analyzed separately claims that a forensic expert withheld evidence and that the expert had fabricated evidence. . . This result is sensible, as the claims have different elements, most notably, that one involves the suppression of favorable evidence and the other the manufacture of damaging evidence. . . Mills has stated a plausible claim that satisfies the elements of a fabrication-of-evidence claim. . . . The source of Mills's *Brady* claim, as distinguished from his fabrication claim, is that there existed additional DNA evidence—classified by Jenkins as 'inconclusive'—that was in fact exculpatory. . . The complaint alleges that Jenkins was responsible for 'the suppression of exonerating exculpatory evidence, including, but not limited to, the DNA evidence that clearly excluded Mr. Mills but was labeled as "inconclusive."' It further claims that the evidence 'was actually exculpatory,' but Jenkins's report was 'incomplete' and that a full report would have proven that DNA in C.M.'s underwear was 'actually conclusively someone else's DNA.' These claims map onto the requirements for a *Brady* violation: (1) evidence favorable to a defendant (results that conclusively excluded Mills as contributor of the DNA); (2) that was suppressed; (3) and would have had a reasonable probability of changing the result of the proceeding (the corroboration of C.M.'s testimony by the DNA evidence was the basis of the jury's guilty verdicts). . . . It is important to note that this appeal comes to us at the motion-to-dismiss stage, rather than at summary judgment where more facts are available to the district court. At the next stage, Jenkins may provide evidence that makes it clear that the DNA analytic methods used by SERI differed, that the evidence available to her was not exculpatory, or that her actions were innocent or negligent at worst. But at this stage, the complaint has stated legally cognizable claims.")

Miller v. Maddox, 866 F.3d 386, 393-94 (6th Cir. 2017) ("Miller's participation in the pretrial release program constitutes a deprivation of liberty separate from the initial seizure. . . .Miller was not only arrested and incarcerated, but also required to pay $35 to be accepted into the pretrial program, could have been required to post a $3,000 bond, was required to attend court appearances, and required to check in with a case manager once per week. This case involves precisely the factors that were missing in *Noonan* and that *Johnson v. City of Cincinnati* suggested could

constitute a deprivation of liberty apart from the initial seizure. . . .To the extent that Miller was detained for any amount of time after being accepted into the pretrial release program, that portion of her detention prolonged the seizure beyond the point necessary to carry out the seizure's purpose. The parties do not point us to any place in the record stating how long, if at all, after acceptance into this program Miller remained detained. Accordingly, we find that there is a genuine dispute of material fact with respect to whether Miller suffered a deprivation of liberty by being detained past the time necessary to enroll her in the pretrial services program.")

Hoskins v. Knox County, No. 6:17-CV-84-REW-HAI, 2020 WL 1442668, at *22-23 & n.36 (E.D. Ky. Mar. 23, 2020) ("The Fourth Amendment prohibits unreasonable seizures. . . Both arrest and pretrial detention are seizures. . . A seizure without probable cause is unreasonable. . . Fabricated evidence cannot satisfy the probable-cause requirement. . . When only fabricated evidence supports a seizure, probable cause is lacking, and the seizure is unreasonable. . . Inversely, when demonstrably untainted proof adequately supports a seizure, the mere existence of fabricated evidence does not constitute a Fourth Amendment violation. . . The distinction is primarily one of causation: in the first scenario, the fabricated evidence undeniably *causes* the seizure, but in the second, seizure follows as a lawful consequence of legitimate evidence, which can elicit no reasonableness-based objection.[36] **[fn. 36:** That is not to say there can be no other objection (legal or otherwise) to an officer's deliberate or reckless fabrication of evidence. But there can be no objection *grounded in the Fourth Amendment*, which (in this context) is satisfied by a reliable showing of untainted probable cause.**]** Any statement to the contrary—namely, the suggestion that a Fourth Amendment claim premised on fabrication may proceed even when probable cause exists—has an explanation that does not spell victory for Plaintiffs on this score. First, as discussed above, evidence fabrication can violate *due-process rights. See Halsey*, 750 F.3d at 292 & n.17 (citing cases from the First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits). Probable cause is not a defense to a *due-process-based* fabrication claim. *See Spencer v. Peters*, 857 F.3d 789, 801–02 (9th Cir. 2017) (contrasting the role of probable cause in fabrication claims based on the Fourth Amendment and due process). That is of no consequence here because Plaintiffs expressly abandoned any due-process fabrication theory. . . . To the extent Plaintiffs argue that *Webb v. United States*, 789 F.3d 647 (6th Cir. 2015), suggests that independent, untainted probable cause does not foreclose a Fourth Amendment claim based on fabrication, that is wrong, as a logical. . . and precedential. . . matter. Absent further guidance from the *en banc* Sixth Circuit or the Supreme Court, taintless *probable cause* necessarily defeats Fourth Amendment claims for detention *without probable cause.* An allegation of evidence fabrication, which the Court views as intertwined with the probable-cause question in this case, is no elemental kryptonite. Here, Plaintiffs' asserted constitutional injury is 'unlawful post-legal-process pretrial detention.' . . . No one disputes that the Fourth Amendment underlies Plaintiffs' fabrication theory. . . The Fourth Amendment is similarly relevant to Plaintiff's malicious-prosecution count. . . This shared constitutional basis alone does not render one claim subsumed by the other; for example, the Fourth Amendment applies to both false-arrest and excessive-force claims, but the two violations meaningfully differ from one another and require separate analysis. . . However, that principle does not hold true here.

Plaintiffs' wide-ranging allegations. . .reduce to a single foundational inquiry: whether (in material part, by fabricating evidence) Defendants caused Plaintiffs to suffer a Fourth Amendment injury—that is, detention without probable cause. Count I (malicious prosecution) adequately covers this ground because it requires the Court to consider the determinative issue of probable cause. . . Count II does not, in the concrete context of this case, present a separately cognizable Fourth Amendment violation under § 1983.")

Jenkins v. Louisville-Jefferson County Metro Gov't., No. 3:17-CV-00151-RGJ, 2019 WL 1048850, at *2–3 (W.D. Ky. Mar. 5, 2019) ("*Manuel* . . . dictates that an individual may pursue a fabrication-of-evidence claim under § 1983 even though the criminal action against him did not go to trial. To hold otherwise would collapse the two stages of a fabrication-of-evidence claim and bar any plaintiff alleging pretrial fabrication of evidence, as Jenkins does here. . . Sixth Circuit precedent supports this conclusion. Defendants cite *Mills* for the proposition that Jenkins must have been convicted to proceed with a fabrication-of-evidence claim. . . However, *Mills* concerned a Fourteenth Amendment fabrication-of-evidence claim that had proceeded to trial. . . Even so, the Sixth Circuit has consistently recognized fabrication-of-evidence claims by individuals who did not face trial in the underlying criminal proceeding. [citing cases] Defendants' argument is therefore unavailing, and the fact that the state-court action did not go to trial does not bar Jenkins's fabrication-of-evidence claim. . . . In addition, Defendants' argument conflates two separate claims under the Fourth Amendment: a malicious-prosecution claim and a fabrication-of-evidence claim. '[A] malicious-prosecution claim and a fabrication-of-evidence claim have different elements—most notably, that [the former] requires a plaintiff to prove that there was a lack of probable cause to support the criminal charges and the [latter] does not.'. . Thus, while Jenkins's stipulation of probable cause barred his malicious-prosecution claim, . . the stipulation does not similarly bar his fabrication-of-evidence claim. Jenkins may thus proceed with his fabrication-of-evidence claim.")

Anderson v. Knox County, No. CV 6:17-133-KKC, 2018 WL 4658831, at *6 (E.D. Ky. Sept. 27, 2018) ("When precisely the accrual date commences for a Section 1983 action challenging 'post-legal-process pretrial detention' has been squarely framed but left unresolved by the Supreme Court. *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 921–22 (2017). Following and adopting the reasoning of its own precedent, however, the Court determines that a Fourth Amendment fabrication of evidence claim accrues at the date of the termination of proceedings in a defendant's favor. . . *Hoskins* reasoned that a fabrication of evidence claim is analogous to a malicious prosecution claim, and that the same accrual rules should apply to both. Although a fabrication of evidence claim does not require proof of favorable termination, both malicious prosecution and fabrication of evidence 'seek recompense for the same injury—unlawful post-legal process pretrial detention—and permit recovery of the same damages.'. . The theories are 'two sides of the same coin,' 'two theories of liability for unlawful pretrial detention under the Fourth Amendment.'. . The Court adopts this reasoning in full. Accordingly, as Anderson was acquitted on May 25, 2016, and he filed this suit on May 22, 2017, Anderson's Fourth Amendment fabrication of evidence claim is timely, just as his malicious prosecution claim.")

Allen v. Rucker, No. 5:17-CV-00340-JMH, 2018 WL 1611595, at *4–6 (E.D. Ky. Apr. 3, 2018)

("Citing *Manuel*, the Supreme Court recently granted certiorari, vacated the judgment, and remanded a Sixth Circuit case decided only two months before *Manuel. Sanders v. Jones*, 138 S. Ct. 640 (2018). In the original Sixth Circuit case, *Sanders v. Jones*, 845 F.3d 721 (6th Cir. 2017), the circuit found 'it is well-established in this circuit that an indictment by a grand jury conclusively determines the existence of probable cause unless the defendant-officer "knowingly or recklessly presented false testimony to the grand jury to obtain the indictment."'. . The court further explained that *Rehberg* eliminated plaintiff's ability to rebut probable cause because grand-jury testimony was now untouchable. . . This created a 'harsh' consequence by 'largely foreclosing malicious prosecution claims where the plaintiff was indicted.'. . The circuit has since eased the 'harsh' result recognized in *Sanders.* In *King v. Harwood*, the court created a new exception allowing plaintiffs indicted by a grand jury to rebut probable cause in malicious prosecution cases where:

(1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury), the presumption that the grand-jury indictment is evidence of probable cause is rebuttable and not conclusive.

852 F.3d at 587-88.

The court reasoned that this exception fits *Rehberg*'s framework by allowing actions against 'complaining witnesses' (as opposed to 'testifying witnesses') who 'set the wheels of government in motion by instigating an action.'. . *King* further explains that the new exception aligns with the Supreme Court's decision in *Manuel* and circuit precedent. . . But *King* did not disturb the absolute immunity afforded to officers in malicious prosecution cases "*to the extent that [Plaintiff's] claims are based on [Defendant's] grand-jury testimony.*". . . Accordingly, plaintiffs cannot use grand-jury testimony to rebut probable cause. . . But plaintiffs may use evidence from *outside* the grand-jury room to rebut probable cause. . . Thus, the analysis does not begin and end with grand-jury testimony. To the contrary, 'actions that are prior to, and independent of, [an officer's] grand-jury testimony' may rebut the probable-cause presumption. . . . As such, a grand-jury indictment in the Sixth Circuit is no longer 'a talisman that always wards off a malicious-prosecution claim.'. . A plaintiff can overcome the grand-jury-indictment-created probable cause through 'pre-indictment nontestimonial acts that were material to the prosecution.'. . As such, to state a claim for malicious prosecution in a case where a grand-jury indictment has been issued, a plaintiff must plead specific facts showing a defendant-officer made false statements or fabricated evidence that set the prosecution in motion. Without more, a plaintiff cannot rebut the presumption of probable cause established by a grand-jury indictment. . . .*King* did not alter the federal pleading standard; it established a new route around the probable cause presumption created by a grand jury indictment. To take that route, a plaintiff must show that the officer made false statements or

fabricated evidence, and those actions set the wheels of prosecution in motion. . . And to plead that a defendant-officer made false statements or fabricated evidence, a plaintiff must identify *specific* instances of such false statements or fabricated evidence. . . In other words, a plaintiff must tell the court what *particular* evidence was fabricated or what *particular* testimony was falsified. General statements alleging false, misleading, or fabricated evidence, without more, amount to vague conclusory allegations, 'not specific allegations necessary to survive a motion to dismiss.'. . . In sum, although Allen *says* Rucker employed improper tactics, concealed facts, suppressed evidence, omitted material facts, presented false information, and misled prosecutors, Allen fails to explain any of her allegations. She does not point to a single *specific* instance of any of these things happening. Simply saying so does not make it true. Nor does it satisfy the federal pleading standard. Even in her response to Rucker's Motion to Dismiss, Allen fails to include any specific factual allegations supporting her claims. Without *any* factual allegations, Allen's claims fail. Her complaint reads precisely like those in *Meeks, Bickerstaff*, and *Rapp*: general, vague, and conclusory allegations unsupported by specific facts. Without any particular facts, these statements amount to legal conclusions and do not provide a basis for surviving a motion to dismiss.")

Hoskins v. Knox County, Kentucky, No. CV 17-84-DLB-HAI, 2018 WL 1352163, at *12-15 (E.D. Ky. Mar. 15, 2018) ("Much like the parties in *Manuel*, the parties here attempt to analogize Plaintiffs' Fourth Amendment fabrication-of-evidence claim to common-law torts. Plaintiffs urge the Court to adopt the accrual rule for malicious-prosecution claims, which postpones accrual until the favorable termination of criminal proceedings. . . The Defendants, on the other hand, argue that such a rule makes little sense in the post-legal-process pretrial detention context because there is no 'existing conviction or sentence in jeopardy of being impugned or invalidated.'. . Instead, the Defendants suggest that the Court adopt the accrual rules for unlawful-arrest claims. . . Because the parties rely heavily on the cases that establish the accrual rules for malicious-prosecution claims—*Heck v. Humphrey*, 512 U.S. 477 (1994)—and unlawful-arrest claims—*Wallace v. Kato*, 549 U.S. 384—a review of those cases is warranted. [discussion of cases] [T]he Defendants argue that the lack of a conviction against Plaintiffs prevents *Heck*'s delayed-accrual rule from applying here. . . In its place, Defendants point to *Wallace* as the proper guidepost for the case at bar. . . The Court agrees with the Defendants on the first point—because the Plaintiffs were never convicted, their reliance on *Heck* is unavailing. That *Heck* does not apply, however, does not mean that *Wallace* controls or that *Wallace* establishes the accrual date for Plaintiffs' fabrication-of-evidence claim. . . Rather, *Wallace* simply serves as an example of the type of analysis this Court must undertake—the Court must look to the common law of torts, select the most analogous tort, and fashion an appropriate accrual rule. . . .[T]he *Wallace* Court held that the statute of limitations on plaintiff's § 1983 unlawful-arrest claim 'commenced to run when he appeared before the examining magistrate and was bound over for trial,' and that consequently, plaintiff's claim was time-barred. . . But, *Wallace*'s logic is less persuasive in the fabrication-of-evidence context. Because a false-imprisonment claim is based upon 'detention without legal process,' it makes sense that the claim accrues when the constitutional violation ceases— 'at the time the [plaintiff] becomes detained pursuant to legal process.'. . Pretrial detention, on the other hand, 'can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal

process in a criminal case.' *Manuel*, 137 S. Ct. at 918. Put another way, the commencement of legal process is of no consequence to a claim challenging pretrial detention if the lack of probable cause continues. . . Why, then, should a Fourth Amendment claim for unlawful pretrial detention accrue—and the statute of limitations begin to run—when legal process commences, an event that the Supreme Court has held has no significance in the pretrial-detention context? The answer is simple—it should not. Accordingly, the Court finds that the common-law tort of malicious prosecution provides the proper analogy to the Plaintiffs' fabrication-of-evidence claim, for much the same reasons as the Supreme Court explained in *Heck*[.] . . . Although not a perfect fit, because a fabrication-of-evidence claim does not require Plaintiffs to prove that the prior criminal proceedings terminated in their favor, the common-law tort of malicious prosecution is the most apt analogy. Both malicious-prosecution and fabrication-of-evidence claims seek recompense for the same injury—unlawful post-legal-process pretrial detention—and permit recovery of the same damages. Essentially, the claims are two sides of the same coin—that is, two theories of liability for unlawful pretrial detention under the Fourth Amendment. By contrast, the common-law tort of false imprisonment has little in common with Plaintiffs' fabrication-of-evidence claim. The nature of the injuries and the remedies provided are entirely distinct. While an unlawful arrest has a definite duration—from the initial seizure until the start of legal process—fabrication of evidence can occur and give rise to a Fourth Amendment claim at any time—before arrest, after arrest but before legal process, or during post-legal-process pretrial detention. . . Moreover, the wisdom behind the accrual rule for false-imprisonment and wrongful-arrest claims—that the harm is complete and the injury has ended—amounts to sheer folly in the fabrication-of-evidence context. Therefore, Defendants' attempt to fit Plaintiffs' fabrication-of-evidence claim into *Wallace*'s unlawful-arrest accrual rule is akin to shoving a square peg into a round hole. Given the value and purposes of the constitutional right at issue—the right to be free from unlawful pretrial detention based on the fabrication of evidence—the Court finds that the common-law tort of malicious prosecution bears the closest resemblance to Plaintiffs' fabrication-of-evidence claim. Thus, that claim accrued—and the statute of limitations began to run—when the criminal proceedings terminated in Plaintiffs' favor—on June 30, 2016 and August 22, 2016. Accordingly, Plaintiffs' fabrication-of-evidence claim, which was brought within one year of the termination of the underlying criminal proceedings, is not time-barred and the KSP Defendants' Motions to Dismiss (Doc. # 36 and 39) are **denied** with respect to Count Two.")

King v. Harwood, No. 3:15-CV-762-GNS, 2017 WL 6029633, at *4–6, *9 (W.D. Ky. Dec. 5, 2017) ("As the law stands today, the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits all recognize malicious prosecution as an actionable § 1983 claim under the Fourth Amendment. [collecting cases] On the other hand, the Fifth and Eighth Circuits have either explicitly rejected a Fourth Amendment § 1983 malicious prosecution claim or have declined to rule on the issue. [collecting cases] The current state of the law in the Seventh Circuit is not as clear-cut. Following the Supreme Court's abrogation of the Seventh Circuit's key holding in *Newsome v. McCabe* in its *Manuel* decision, whether a § 1983 malicious prosecution claim may be brought under the Fourth Amendment in the Seventh Circuit is in a state of flux. In *Newsome*, the Seventh Circuit held that a malicious prosecution claim was not an appropriate § 1983 action

under the Fourth Amendment. . . But the Supreme Court, as Justice Alito points out in his dissent in *Manuel*, did not rule on whether malicious prosecution claims could be brought under the Fourth Amendment. . . Instead, it remanded the case back to the Seventh Circuit to decide on which date the statute of limitations on the plaintiff's claims began to run. . . This is crucial in determining whether a malicious prosecution claim is viable under the Fourth Amendment, because the plaintiff had analogized his claims of a constitutional violation to the common law tort of malicious prosecution, which has a statute of limitations that begins to run when criminal proceedings are terminated. . . The government, on the other hand, argued that the alleged constitutional violation was most similar to the common law tort of false arrest, with the statute of limitations starting on the date of the initiation of the legal process. . . The Supreme Court's sole holding, however, was that a 'seizure' under the Fourth Amendment can continue past an initial appearance in a criminal case. . . As Justice Alito writes, it is still possible for the Seventh Circuit to find that malicious prosecution is not a valid Fourth Amendment claim and, at the same time, be consistent with the Supreme Court's holding in *Manuel* . . . . Based on the Seventh Circuit's prior holdings and the fact that the Supreme Court did not hold that its previous position was incorrect, the Court concludes that the Seventh Circuit's prior position of not permitting § 1983 claims under the Fourth amendment is still the law of the circuit. . . At the time of this opinion's entry, the Seventh Circuit has yet to rule on the remanded *Manuel.* . . Three Circuit Courts with precedent different from that of nine Circuit Courts is more than sufficient to constitute a circuit split. . . Therefore, the Court concludes that there is a current circuit split on the issue of malicious prosecution claims under the Fourth Amendment, and this factor weighs in favor of Harwood. . . . [B]ased on the presence of a circuit split regarding the constitutional viability of malicious prosecution claims, the Court believes that there is a reasonable probability that four Justices will grant Harwood's petition for Writ of Certiorari. . . .After reviewing the applicable case law, the undersigned does not believe that there is a 'significant possibility' that the Sixth Circuit's decision will be reversed. The Supreme Court could reverse the Sixth Circuit on two grounds: (1) a § 1983 malicious prosecution claim is not actionable under the Fourth Amendment; or (2) the Sixth Circuit's *King* exception is contrary to Supreme Court precedent. Looking to the former first, the current circuit split is 9-3 in favor of allowing § 1983 malicious prosecution claims under the Fourth Amendment. While the undersigned does not presume to know the minds of any of the Supreme Court Justices, it is important to note that the Sixth Circuit falls into the majority view that malicious prosecution claims are actionable under the Fourth Amendment. It is not an outlier or rogue circuit that has come to a conclusion of law contrary to every other circuit. In the Court's opinion, this fact means that Supreme Court reversal is less likely than if the Sixth Circuit was in the minority. Thus, the Court concludes that reversal on this ground is not a 'significant possibility.' Examining the *King* exception leads to a similar result. As described in greater detail in the preceding section, the Court does not believe that the key holding in *King* goes against Supreme Court precedent, *Rehberg* specifically. Therefore, the Court concludes that reversal on this ground is also not a 'significant possibility.' Thus, the Court cannot conclude that there is a significant possibility that the Sixth Circuit's opinion in *King v. Harwood* will be overturned by the Supreme Court.")
[**Note:** Supreme Court denied certiorari in *King v. Harwood.* 138 S. Ct. 640 (2018)]

See also ***King v. Harwood***, No. 3:15-CV-762-CHB, 2020 WL 1578615, at *8 (W.D. Ky. Apr. 1, 2020) ("[W]hile the record has changed, it has not changed in Harwood's favor. The record as a whole even more clearly demonstrates the existence of multiple genuine issues of material fact than it did three years ago when the Sixth Circuit rendered its opinion.")

Seventh Circuit

Gupta v. Melloh, 19 F.4th 990, 1001-02 (7th Cir. 2021) ("The district court also granted summary judgment to Melloh on Gupta's claim that Melloh violated his Fourth Amendment rights by falsifying allegations in the probable cause affidavit. The district court called this a claim for 'unreasonable prosecution.' Melloh refers to it as a 'malicious prosecution' claim. We have noted that after the Supreme Court case in *Manuel*, '"Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention.'. . The briefing and discussions of this claim are a bit muddled, perhaps because the law on malicious prosecution was evolving in the Supreme Court and in this court just as this case was progressing. . . Nevertheless, we can boil our conclusions down to a few simple observations. First, the Supreme Court decision in *Manuel*, makes clear that a plaintiff can bring a Fourth Amendment claim for unlawful detention either before or after the start of the legal proceedings. . . Second, falsifying the factual basis for a judicial probable-cause determination violates the Fourth Amendment.")

Conyers v. City of Chicago, 10 F.4th 704, 710 (7th Cir. 2021), *pet. for cert. filed*, No. 21-898 (U.S. Dec. 14, 2021) ("Plaintiffs contend that the Supreme Court's later decision in *Manuel v. City of Joliet* . . . shows that *Lee* wrongly rejected the idea that the Fourth Amendment applies to a continuing seizure. . . But for at least two reasons, *Manuel* does not help them. First, *Manuel* dealt with pretrial confinement, not the retention of property. More importantly, even if we were to equate persons and property for these purposes, it would not help our plaintiffs. *Manuel* was about a defendant's ability to show that a finding of probable cause—necessary to support the detention—was based upon fabricated evidence. . . In other words, were the seizure and detention flawed from the outset? No such question arose in *Lee*, and no such question exists in our case. All we are concerned with is the distinct question whether the City had a duty to release the property sooner, or on more favorable terms. As *Lee* recognized, that issue falls more naturally under the Due Process Clause of the Fourteenth Amendment, or perhaps the Takings Clause of the Fifth Amendment. The district court thus correctly rejected the plaintiffs' Fourth Amendment theory.")

Kuri v. City of Chicago, Illinois, 990 F.3d 573, 575 (7th Cir. 2021) ("Defendants are right to say that the due-process theory is deficient. Before *Manuel v. Joliet* . . . many courts—including the Seventh Circuit—saw claims of wrongful detention pending trial as based on the Due Process Clause. A claim under the Fourth Amendment based on arrest and detention without probable cause ended, these decisions said, when a judge ordered the suspect detained for trial. But *Manuel* held that the Fourth Amendment supplies the basis for a claim until the suspect is

either convicted or acquitted. We have since held that *Manuel* abrogated any due-process objection to pretrial detention that has been approved by a judge. If the detention is not supported by probable cause, however, the Fourth Amendment provides a remedy. See, e.g., *Lewis v. Chicago*, 914 F.3d 472 (7th Cir. 2019); *Manuel v. Joliet*, 903 F.3d 667 (7th Cir. 2018). We decline Kuri's invitation to revisit those precedents. This means that the verdict cannot rest on the Due Process Clause. But the Fourth Amendment remains. Once the jury decided to believe Russell and Fernandez that the detectives were lying about their identification of Kuri, that left his arrest and detention without support. Defendants tell us that the Fourth Amendment claim fails as a matter of law because, unless the judicial process has been corrupted, there cannot be a problem given the order detaining Kuri for trial. That understanding may find support in some pre-*Manuel* cases, but it has none afterward. The Supreme Court held that a Fourth Amendment theory based on lack of probable cause survives a judicial decision holding a suspect in custody. The Justices said that the right question is whether the arrest and detention are supported by probable cause.")

Young v. City of Chicago, 987 F.3d 641, 644-46 (7th Cir. 2021) ("Young argues that the police violated his due process rights by both fabricating evidence and withholding exculpatory evidence in order to detain him before trial. But as Young admits, our decision in *Lewis* precludes this claim. *Lewis* was a § 1983 case, like this one, in which the plaintiff argued that 'misconduct by law enforcement—falsifying the police reports that led to his pretrial detention—... violated his right to due process.'. . We rejected this claim because, according to the Supreme Court's decision in *Manuel I*, 'the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention.'. . If in *Lewis* we did not let the plaintiff's due process claim proceed when the police falsified 'reports that *led* to his pre-trial detention,'. . . we certainly will not let Young's due process claim proceed when the alleged police misconduct did not lead to his pretrial detention. As explained, the probable cause from his scene of arrest did. Young nevertheless argues that we should overturn *Lewis* because it incorrectly narrowed the scope of the due process clause. He specifically notes that '[w]e have consistently held that a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of her liberty in some way.'. . We reject this call. *Lewis* was based on *Manuel I*—a Supreme Court decision that we are bound to follow. And Young has not demonstrated that *Lewis* misinterpreted *Manuel I.* The Supreme Court there stated that a Fourth Amendment violation can occur 'when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. ... And for that reason, [legal process] cannot extinguish the detainee's Fourth Amendment claim—or somehow ... convert that claim into one founded on the Due Process Clause.'. . The Court then concluded, 'If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.'. . The court did not say that the right 'could lie' in the Fourth Amendment. It said that the right lies there. We will continue to heed that instruction. Young's reliance on *Whitlock* is also unpersuasive. In *Whitlock*, we stated that falsifying evidence 'violates due process *if that evidence is later used to deprive the defendant of her liberty in some way*.'. . As explained, the alleged police misconduct here did not deprive Young of any liberty; his pretrial detention was lawful even if the misconduct occurred.

Young claims, though, that he suffered a broader liberty harm than mere pretrial detention. Namely, he argues that the alleged police misconduct influenced his bond amount and his preliminary hearing. But as the district court put it, that's just another way of saying it affected his pretrial detention, which is protected by the Fourth Amendment alone. Young also says that the misconduct affected the prosecutor's charging decision. But that is not a liberty harm. '[T]here is no such thing as a constitutional right not to be prosecuted without probable cause.'. . As a final note, Young is not left in the lurch without a due process claim. He had—and pursued—an avenue for relief under the Fourth Amendment. He just didn't succeed. We will not subvert Supreme Court precedent by adding a due process claim to the mix just so he can have another bite at the apple.")

Williams v. Dart, 967 F.3d 625, 632-37 (7th Cir. 2020) ("The plaintiffs alleged that, by conducting independent reviews of the courts' bail orders and on that basis continuing to hold persons already admitted to bail without purpose or plan for their release, the Sheriff arrogated to himself a decision that was not his to make. These allegations stated a claim under the Fourth Amendment. . . .Wrongful pretrial custody is what plaintiffs complain of here. If plaintiffs' custody was wrongful, it was the Fourth Amendment that made it so, whether for want of probable cause, as in *Manuel*, or for want of a neutral decisionmaker, as in *Gerstein*, where the Court 'decided some four decades ago that a claim challenging pretrial detention fell within the scope of the Fourth Amendment.'. . .In this case, plaintiffs allege that, in place of court-ordered release on specified terms, the Sheriff substituted 'prolonged detentions' as well as 'significant restraints' on pretrial release of his own devising. The practical result was that his sole exercise of discretion caused the jailing of each plaintiff for three to fourteen days. Those decisions, say plaintiffs, imperiled plaintiff Marcus Johnson's education and impaired plaintiff Joshua Atwater's family relationships, for example. The teaching of *Gerstein* is unmistakable: these decisions were not the Sheriff's to make. 'When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.'. . .In this case, no one disputes 'the continuing existence of "probable cause"' to believe plaintiffs committed the offenses charged. . . Once plaintiffs appeared before the court, however, such probable cause ceased to be a justification for the Sheriff's unilateral seizure. . . Put differently, the original probable cause was 'exhausted' by the courts' bail orders. . . This is the true sense of plaintiffs' 'degree of seizure' and 'reseizure without probable cause' characterizations. It is only another way of expressing our original conclusion: courts, not sheriffs, make pretrial detention decisions. . . .In this case, the Sheriff argues that plaintiffs had to be jailed because they 'failed to secure enrollment' in his electronic monitoring program and could not be left at liberty without contravening the courts' bail orders. Grant the premises—setting aside the intolerable elision of the agent (plaintiffs did not 'fail to secure enrollment;' the Sheriff denied them enrollment), as well as the irreconcilable conflict with the Sheriff's position on the contempt of court claim (where, as we explain below, the Sheriff argues the courts' bail orders were nullities he was free to disregard). Even so, this argument runs headlong into the limits of the surety's friendly custody. We agree the Fourth Amendment did not oblige the Sheriff or anyone else to act as plaintiffs' surety even under court order. The Fourth Amendment is not a vehicle for enforcing the terms of state law. . . Assuming the Sheriff was thus free to pull the string whenever he pleased, having

pulled it he was most certainly not free to keep plaintiffs in custody indefinitely and without explanation. He was free only to deliver plaintiffs at once or to detain them very briefly until it could be done—to return them to court after a brief time needed for administrative purposes, as we would say today. . . As explained above, 'reasonable administrative delay' is not a plausible characterization of the Sheriff's unilateral detention decisions alleged in this case. . . .We emphasize that we have neither the institutional competence nor the desire to manage Cook County's pretrial release program. . . Indeed, this court's scrutiny of proffered administrative justifications for detention could not be called unduly zealous. . . The Fourth Amendment does not require any particular administrative arrangement for processing bail admissions. It does require, however, that whatever arrangement is adopted not result in seizures that are unreasonable in light of the Fourth Amendment's history and purposes. '[I]f the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty,' the Sheriff's flat refusal to heed the courts' bail orders alleged in this case, based on nothing more than a policy disagreement and resulting in unjustified detentions of multiple days, simply will not do. . . Plaintiffs' complaint stated claims for wrongful pretrial detention under the Fourth Amendment.")

Flynn v. Donnelly, No. 18-2590, 2019 WL 6522890, at *3 (7th Cir. Dec. 4, 2019) (not reported) ("After the Illinois trial courts quashed the evidence against Pirro and Flynn in 2013, both plaintiffs were released on bond until the cases against them were dismissed in late 2017. Theoretically, pretrial release could be construed as a seizure, but only if 'the conditions of that release impose[d] significant restrictions on liberty.'. . Before the oral argument in this case, the appellants had never alleged that they were subject to restrictive bond conditions, only that they were unlawfully detained. At oral argument they had nothing to back up the insinuation, contradicted by the defendants, that their bond conditions prevented them from leaving the state. Therefore, the statute of limitations on any unlawful detention claim began to run when their physical custody ended in 2013.")

Camm v. Faith, 937 F.3d 1096, 1107 (7th Cir. 2019) ("The defendants argue for the first time on appeal that this claim is barred by the two-year statute of limitations applicable to § 1983 suits in Indiana. We held in *Manuel* that a Fourth Amendment claim for wrongful detention accrues when the detention ends. Camm sued one year after his acquittal and release. But there was one time period between 2000 and 2013 in which Camm was arguably free of custody: he was released on bail for six weeks in 2005. At oral argument Camm's counsel told us that he continued to be under restraints during that time—an ankle bracelet and house arrest—which for our purposes arguably would be enough to constitute 'custody.'. . On closer examination, however, the state-court records indicate that the restraints were perhaps less stringent than counsel suggested: Camm did wear an electronic-monitoring device, but he was only confined to his house from the hours of 9 p.m. to 6 a.m. Otherwise, he was free to move about, but only within a two-county area. We have no need to resolve questions about bail conditions or decide the legal significance of this brief break in physical custody. In the district court, the defendants did not mount a limitations defense to the Fourth Amendment claim (or, as everyone characterized it then, the malicious-prosecution claim); they only challenged the timeliness of the *Brady* claim and the state-law claims. The limitations

argument is therefore waived.")

Anderson v. City of Rockford, 932 F.3d 494, 512-13 (7th Cir. 2019) ("[T]he plaintiffs' amended complaint alleges that the defendant officers violated their rights under the Fourth and Fourteenth Amendments by improperly subjecting them to judicial proceedings without probable cause. But '[t]here is no such thing as a constitutional right not to be prosecuted without probable cause.'. . There is, however, 'a constitutional right not to be held in custody without probable cause,'. . . and the Supreme Court has 'ma[de] clear that the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention[.]'. . The plaintiffs do not assert they were subjected to pretrial detention (though evidence in the record suggests they were)—but even if they had, their claim would still fail because it hinges upon showing the absence of probable cause to support their arrests and confinement. The record supports the district court's conclusion that at least some of the defendant officers reasonably believed that the plaintiffs were guilty of murder based on the accounts given by Dowthard and Brown. And it cannot reasonably be disputed that the written statements of Dowthard and Brown provided probable cause to support the arrests. Summary judgment, therefore, was appropriate on the plaintiffs' federal claim.")

Knox v. Curtis, No. 18-2989, 2019 WL 2338525, at *2 (7th Cir. June 3, 2019) (not reported) ("Knox contends that his 'false arrest' claim against Curtis. . . 'should have not been dismissed for time barred reasons.' Based on legal developments that post-date the district court's judgment, we agree with Knox that he stated a timely claim under the Fourth Amendment. About three weeks after the district court dismissed Knox's suit, this court decided *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018), *pet. for cert. filed* (Feb. 21, 2019) ("*Manuel II*"), clarifying the nature and date of accrual of various Fourth Amendment claims. Under *Manuel II*, if a plaintiff complains about 'a search or seizure [that] causes injury independent of time spent in custody,' then his or her claim accrues at the time of the 'pre-custody event[ ].'. . But when a plaintiff challenges 'the propriety of his time in custody,'. . the Fourth Amendment claim accrues only 'when the detention ends.'. . Knox falls into the latter category, which renders his suit timely. Although he asserts that 'there was no probable cause for [the] arrest,'. . . Knox does not complain about any pre-custody injury. Based on his allegations as a whole, it is clear that the real problem is the loss of liberty—specifically, 'the absence of probable cause that would justify [his] detention.'. . Therefore, Knox's claim that he was arrested and detained without probable cause accrued either in August 2017 (when he was released on bond), . . . or in November 2017 (when he was convicted). *See Mitchell v. City of Elgin*, 912 F.3d 1012, 1017 (7th Cir. 2019) (noting we have yet to decide whether pretrial-release conditions constitute a Fourth Amendment seizure). Either way, Knox's original complaint, submitted in January 2018, was filed well within the two-year limitations period, and thus, his Fourth Amendment claim is timely. . . . We reject Curtis's alternate argument that even if Knox's claim is timely, it is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). To the extent that Knox challenges his post-conviction detention, *Heck* indeed bars his § 1983 suit. . . However, Knox also challenges his pretrial (pre-bond) detention, the unlawfulness of which does not have 'any necessary effect on the validity of [his] conviction.' *Mordi v. Zeigler*, 870 F.3d 703, 708 (7th Cir. 2017); *see also Manuel II*, 903 F.3d at 670 (plaintiff's claim that "police hoodwinked the

judge" at probable-cause detention hearing was not *Heck*-barred once plaintiff was released from custody). Therefore, dismissal of Knox's suit at this stage was improper.")

Regains v. City of Chicago, 918 F.3d 529, 534-37 (7th Cir. 2019) ("Applying the principle of *Manuel II* to Regains' argument that his seventeen-month detention for a crime that he was misled into committing was unconstitutional, we conclude that his claim accrued when he was released on December 3, 2012, and that his claim was timely filed. . . . [O]n appeal, Regains consistently has characterized his claim as a violation of his Fourteenth Amendment due process rights. At the time he filed the appeal, that was his only option; our decision in *Newsome*. . .precluded the argument that pretrial detention that occurred after the start of the judicial process violated the Fourth Amendment. *Manuel I* since has abrogated *Newsome*, holding that 'the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. . In the post-*Manuel I*/*Manuel II* world, 'the Fourth Amendment, not the Due Process Clause, is the source of the right in a § 1983 claim for unlawful pretrial detention, whether before or after the initiation of formal legal process.'. . .Because Regains timely filed his complaint, we reverse the district court's dismissal of the complaint and remand for further proceedings consistent with this decision.")

Lewis v. City of Chicago, 914 F.3d 472, at 474-80 & n.2 (7th Cir. 2019) ("The combined effect of *Manuel I* and *II* saves part of Lewis's case. Consistent with *Manuel I*, Lewis pleaded a viable Fourth Amendment claim for unlawful pretrial detention. And *Manuel II* confirms that the claim is timely because Lewis filed it within two years of his release from detention. The due-process claim is another matter. *Manuel I* makes clear that the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention. To the extent *Hurt v. Wise*, 880 F.3d 831, 843–44 (7th Cir. 2018), holds otherwise, it is incompatible with *Manuel I* and *II* and is overruled. . . . *Manuel I* . . . clarified that the constitutional injury arising from a wrongful pretrial detention rests on the fundamental Fourth Amendment principle that a pretrial detention is a 'seizure'—both *before* formal legal process and *after*—and is justified only on probable cause. . . Manuel alleged that his detention was not supported by probable cause because the judge's order holding him for trial was based only on 'police fabrications.'. . If that proved to be true, his detention was unreasonable in violation of the Fourth Amendment. . . Put another way, the initiation of formal legal process 'did not expunge Manuel's Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime.'. . As we explained in our decision on remand in *Manuel II*, a Fourth Amendment claim for wrongful pretrial detention is concerned with 'the detention rather than the existence of criminal charges.'. . . Lewis alleges that the officers falsely asserted, both in their police reports and in testimony at the probable-cause hearing, that he admitted residing at the apartment where the gun was found and that they found evidence showing that he lived there. Accepting these allegations as true, as we must at this stage, no reasonable officer could have thought this conduct was constitutionally permissible. It makes no difference that our circuit caselaw situated the constitutional violation in the Due Process Clause rather than the Fourth Amendment. . . . Under *Manuel II*, Lewis's Fourth Amendment claim is timely. Lewis remained

in jail until the charges against him were dropped on September 29, 2015. He filed this § 1983 suit less than a year later on July 26, 2016, well within the two-year statute of limitations.[2] [fn. 2: We note that the Supreme Court has granted certiorari to resolve a circuit split on the claim-accrual question reserved in *Manuel I*. *See McDonough v. Smith*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2019 WL 166879 (2019).] . . . . Lewis argues that this same misconduct by law enforcement—falsifying the police reports that led to his pretrial detention—also violated his right to due process, giving rise to an *additional* constitutional claim under § 1983. *Manuel I* holds otherwise, as does our decision on remand in *Manuel II*. To reiterate, *Manuel I* explained that '[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.'. . As we've noted above, *Manuel I* clarified that the initiation of formal legal process 'cannot extinguish the detainee's Fourth Amendment claim—*or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause*.'. . It's now clear that a § 1983 claim for unlawful pretrial detention rests *exclusively* on the Fourth Amendment. Lewis relies on *Hurt v. Wise* as support for his position that pretrial detention based on fabricated evidence violates rights secured by *two* constitutional provisions—the Fourth Amendment *and* the Due Process Clause of the Fourteenth—and is actionable under § 1983 as two separate constitutional claims. *Hurt* conflicts with *Manuel I* and *II*, so we take this opportunity to clear up the conflict. . . . In *Manuel II*—decided nine months after *Hurt*—we explained that all § 1983 claims for wrongful pretrial detention—whether based on fabricated evidence or some other defect—sound in the Fourth Amendment. Like the plaintiffs in *Hurt*, Manuel relied on the tort of malicious prosecution as an analogy. . . We explained that while this 'might have seemed sensible before the Supreme Court spoke,' after *Manuel I* it is the 'wrong characterization'; indeed, 'the Justices deprecated the analogy to malicious prosecution.'. . . Instead, the constitutional right in question is the 'right not to be held in custody without probable cause,' the violation of which gives rise to a 'plain-vanilla Fourth Amendment' claim under § 1983 because the essential constitutional wrong is the 'absence of probable cause that would justify the detention.'. . In other words, the Fourth Amendment, not the Due Process Clause, is the source of the right in a § 1983 claim for unlawful pretrial detention, whether before or after the initiation of formal legal process. We overrule precedent only in limited circumstances; a clear intracircuit conflict is one of them. . . *Manuel II* and *Hurt* cannot be reconciled. Indeed, *Hurt* is hard to square with *Manuel I*. The Supreme Court held that the initiation of formal legal process following an arrest does not convert a Fourth Amendment unreasonable-seizure claim 'into one founded on the Due Process Clause.'. . The injury of wrongful pretrial detention may be remedied under § 1983 as a violation of the Fourth Amendment, not the Due Process Clause. To the extent *Hurt* holds otherwise, it is overruled. We close by noting the important point that a claim for wrongful pretrial detention based on fabricated evidence is distinct from a claim for wrongful *conviction* based on fabricated evidence: '[*C*]*onvictions* premised on deliberately fabricated evidence will always violate the defendant's right to due process.' [citing cases] Moreover, misconduct of this type that results in a conviction might also violate the accused's right to due process under the rubric of *Brady v. Maryland*. . . and *Kyles v. Whitley*. . . if government officials suppressed evidence of the fabrication. . . We reiterate that we deal here only with a claim of wrongful *pretrial detention*, not a claim of

wrongful *conviction*.")

Mitchell v. City of Elgin, 912 F.3d 1012, 1013-17 (7th Cir. 2019) ("*Manuel I* clarified that pretrial detention without probable cause is actionable under 42 U.S.C. § 1983 as a violation of the Fourth Amendment. . . But the Court did not decide when the claim accrues. Instead, the Court left that issue open for this court to decide on remand. . . In September a panel of this court answered that lingering question, holding that a Fourth Amendment claim for unlawful pretrial detention accrues when the detention ends. *Manuel v. City of Joliet* ("*Manuel II*"), 903 F.3d 667, 670 (7th Cir. 2018). . . .We asked the parties to file position statements addressing whether Mitchell's claim is timely under *Manuel II*. They have done so. Based on the current state of the record and briefing, however, we find ourselves unable to decide the timeliness question. The parties have not adequately addressed whether and under what circumstances a person who is arrested but released on bond remains 'seized' for Fourth Amendment purposes. Moreover, we do not know what conditions of release, if any, were imposed on Mitchell when she bonded out after her arrest. The most we can say at this juncture is that Mitchell *might* have a viable Fourth Amendment claim under *Manuel I* and *II*. We therefore reverse the judgment on that claim alone and remand to the district court for further proceedings consistent with this opinion. . . . *Manuel I* recasts the legal framework for part of Mitchell's case. To the extent that her claim is one for unlawful detention without probable cause, it may survive beyond the pleading stage—*provided*, however, that she sued on time. . . . Mitchell contends that her Fourth Amendment claim accrued on August 22, 2013, when the state judge entered a verdict of acquittal in her criminal case. She filed suit on May 23, 2014, less than two years later, so if she is correct on the accrual question, her claim is timely. At first blush Mitchell's position is hard to square with *Manuel II*, which as we've noted held that a Fourth Amendment claim for unlawful pretrial detention accrues when the *detention* ends, *not* when the *prosecution* ends. Mitchell was not detained beyond her initial arrest; she bonded out the same day and suffered no further pretrial detention. To overcome this impediment, Mitchell argues that despite her pretrial release, she remained 'in custody' until she was exonerated at trial. For support she draws on the law of habeas corpus, which considers a person who is released on bail to be 'in custody' for purposes of testing the legality of the custody via the writ. . . We're skeptical about the habeas analogy. . . . [T]here are important differences between modern habeas corpus and the protections of the Fourth Amendment. Habeas corpus has expanded into a statutory framework for federal-court review of state convictions tainted by egregious federal constitutional error. The Fourth Amendment, by contrast, guards against unreasonable seizures. And seizures, whether discrete or continuous, are *events*—not outcomes. Because these bodies of law address different wrongs, we're not ready to assume that 'custody' in the former context necessarily constitutes 'seizure' in the latter. The defendants posit that under *Manuel II* Mitchell's seizure ended when she was released on bond immediately after her arrest on August 17, 2011. This suit came more than two years later, so if they're right, Mitchell's Fourth Amendment claim is untimely. This argument overlooks the possibility that pretrial release might be construed as a 'seizure' for Fourth Amendment purposes if the conditions of that release impose significant restrictions on liberty. Several of our sister circuits have adopted this approach. *See, e.g.*, *Evans v. Ball*, 168 F.3d 856, 861 (5th Cir. 1999) (explaining that a seizure

occurred where the plaintiff had to "obtain permission before leaving the state, report regularly to pretrial services, sign a personal recognizance bond, and provide federal officers with financial and identifying information"), *abrogated on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). Two circuits have even gone so far as to characterize the obligation to appear in court, standing alone, as an ongoing seizure. *Black v. Montgomery County*, 835 F.3d 358, 366–67 (3d Cir. 2016); *Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013). This appears to be a minority position, however. [citing cases] In any event, there is out-of-circuit support for the proposition that the concept of 'seizure' under the Fourth Amendment extends beyond physical detention. We haven't given a Fourth Amendment 'seizure' quite such a broad construction. . . And until the Supreme Court spoke in *Manuel I*, two aspects of our Fourth Amendment jurisprudence made the prospect of a 'nondetention seizure' quite unlikely in this circuit. First, we rejected the concept of a continuous seizure. . . Second, we characterized Fourth Amendment claims as only viable 'up to the point of arraignment.'. . The latter proposition was plainly abrogated in *Manuel I*. But the effect of *Manuel I* on the Fourth Amendment status of pretrial release conditions is less certain. The panel in *Manuel II* had no occasion to address the question because Elijah Manuel was held in jail until the charges against him were dropped. We have misgivings about construing a simple obligation to appear in court—a uniform condition of any pretrial release—as a 'seizure' for Fourth Amendment purposes. Converting every traffic ticket into a nascent Fourth Amendment claim strikes us as an aggressive reading of the constitutional text. And the canonical test for seizures remains whether a state official has terminate[d] or restrain[ed]' an individual's 'freedom of movement' such that 'a reasonable person would have believed that he was not free to leave.'. . Whether pretrial-release conditions satisfy that standard—and if so, which ones—will have to be resolved in this circuit in the wake of *Manuel I* and *II*. On this record, however, we are unable to decide the matter. The parties haven't briefed the legal question of the scope of a Fourth Amendment 'seizure' in this context. And even if we decided to reach the merits, we lack sufficient information about Mitchell's conditions of release to determine if she remained 'seized' while on pretrial release. . . . For now, all we can say is that in light of *Manuel I*, Mitchell's Fourth Amendment claim was wrongly dismissed based on our now-abrogated circuit caselaw. But the timeliness of the claim remains an open question, and gaps in the briefing and record preclude our ability to answer it. We therefore reverse and remand for further proceedings consistent with this opinion.")

Fritz v. Evers, 907 F/3d 531, 534 (7th Cir. 2018) ("Probable cause is required to support custody, see *Manuel v. Joliet*, —— U.S. ——, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017), but not to support a public charge of crime. '[T]here is no such thing as a constitutional right not to be prosecuted without probable cause.' *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013). A criminal trial may occur months if not years after charges become public, and in the interim the accused does not have a constitutional right to a hearing at which a judge will determine whether the grand jury should have issued an indictment. See *Kaley v. United States*, 571 U.S. 320, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014).")

Manuel v. City of Joliet, Illinois, 903 F.3d 667, 669-71 (7th Cir. 2018) (on remand from Supreme

Court), *cert. denied,* 139 S. Ct. 2777 (2019) ("Defendants contend that Manuel's claim accrued on March 18, when the judge ordered him held pending trial. If that's right, then Manuel sued too late. He maintains that the clock started on May 4, when his position was vindicated by dismissal of the prosecution. We do not accept either approach. We hold that Manuel's claim accrued on May 5, when he was released from custody. That makes this suit timely. Defendants' position relies on *Wallace*, which held that a Fourth Amendment claim accrues (and the period of limitations starts) as soon as the plaintiff has been brought before a judge (or, in the language of both *Wallace* and *Manuel*, has been held pursuant to legal process). . . This position encounters two problems. First, Wallace complained about his arrest rather than the custody that post-dated his appearance before a judge. . . Many violations of the Fourth Amendment concern pre-custody events: a search may invade privacy without the authorization of a warrant, or the police may use excessive force. These events can be litigated without awaiting vindication on the criminal charges, *Wallace* holds, because they do not deny the validity of any ensuing custody. . . Manuel, by contrast, contests the propriety of his time in custody. Second, the line that the Justices drew in *Wallace*—in which a claim accrues no later than the moment a person is bound over by a magistrate or arraigned on charges, . . . and all Fourth Amendment claims are to be treated alike—did not survive *Manuel*. There the Court held that wrongful pretrial custody violates the Fourth Amendment 'not only when it precedes, but also when it follows, the start of legal process in a criminal case.'. . When a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends. . . Notice that we speak of a continuing *wrong*, not of continuing *harm*; once the wrong ends, the claim accrues even if that wrong has caused a lingering injury. . . .When a search or seizure causes injury independent of time spent in custody, the claim accrues immediately; but when the objection is to the custody, a different approach must control. Manuel's position, which relies on an analogy to the tort of malicious prosecution—in which the claim does not accrue until the plaintiff has prevailed ("been vindicated") in the criminal case—might have seemed sensible before the Supreme Court spoke. As the Supreme Court recounted, it was popular among other courts of appeals, which characterized the claim as 'Fourth Amendment malicious prosecution.'. . If that's the claim, then what could be better than a rule devised for malicious-prosecution suits? Indeed, the defendants themselves conceded when this case was last here that, if the wrong is (as Manuel insisted) 'Fourth Amendment malicious prosecution,' then the accrual date is May 4. But the Justices deprecated the analogy to malicious prosecution. After *Manuel*, 'Fourth Amendment malicious prosecution' is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention. . . The problem is the wrongful custody. '[T]here is no such thing as a constitutional right not to be prosecuted without probable cause.' *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013). But there *is* a constitutional right not to be held in custody without probable cause. Because the wrong is the detention rather than the existence of criminal charges, the period of limitations also should depend on the dates of the detention. The wrong of detention without probable cause continues for the duration of the detention. That's the principal reason why the claim accrues when the detention ends. . .A further consideration supports our conclusion that the end of detention starts the period of limitations: a claim cannot accrue until the would-be plaintiff is entitled to sue, yet the existence of detention forbids a suit for damages contesting that detention's validity. . . . After *Preiser*, *Heck*,

and *Edwards*, § 1983 cannot be used to contest ongoing custody that has been properly authorized. Those decisions do not concern the way to deal with executive custody that lacks a judicial imprimatur—for example, detention in a police department's cells before presentation to a judge. But Manuel was held by authority of a judicial decision that probable cause existed to show that he had committed a drug offense. He contends that the police hoodwinked the judge by falsely asserting that the pills he possessed had tested positive for an unlawful drug, and if he is right he is entitled to damages. Still, his detention was judicially authorized, which given *Preiser* means that a § 1983 suit had to wait until his release. *Heck* tells us that a claim does not accrue before it is possible to sue on it. . . Once he was out of custody and could sue, Manuel's claim accrued. He filed this action within two years and is therefore entitled to a decision on the merits. The judgment of the district court is reversed, and the case is remanded for proceedings consistent with this opinion and the Supreme Court's.")

Stone v. Wright, No. 17-2905, 2018 WL 3998415, at *1–2 (7th Cir. Aug. 21, 2018) (not reported) ("Well before *Manuel*, this circuit too had held that the Constitution does not create a freestanding malicious-prosecution claim. Although aspects of that state-law tort may play roles in litigation under 42 U.S.C. § 1983, the plaintiff still must show a violation of some specific constitutional right. See, e.g., *Hurt v. Wise*, 880 F.3d 831, 843 (7th Cir. 2018) (citing cases) . . .The district judge's conclusion that Stone could not do this, given her delay in seeking relief for the wrongful arrest and detention, led the court to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). Stone's appellate brief proceeds as if there were a stand-alone federal constitutional right not to be prosecuted without probable cause, despite this court's contrary decisions. She does not ask us to reexamine these decisions; instead she ignores them. Nor does she ask us to treat the Fourth Amendment theory as live to the extent that it is used derivatively (through the lens of malicious prosecution). This strategy cannot succeed. The district court was right to hold, under decisions not questioned here, that Stone lacks a federal, stand-alone claim equivalent to the state-law tort of malicious prosecution. (Stone's reply brief does hint at a challenge to the law of this circuit, but the challenge is not express and at all events comes too late.) The district court's decision sent all of Stone's state-law claims to state court. That is where they belong.")

Hurt v. Wise, 880 F.3d 831, 843 (7th Cir. 2018) ("Deadra and William are also pursuing claims that they characterize as based on 'malicious prosecution.' For this purpose they are suing only the EPD Defendants. We said in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), that there is no free-standing constitutional tort of malicious prosecution, though there are other constitutional rights (*e.g.,* such as those under the Due Process Clause and the Fourth Amendment) that protect people against abusive arrests, fabrication of evidence, etc. While *Manuel* rejected some aspects of *Newsome*'s holding, nothing in *Manuel* changed the general rule that the federal constitution does not codify state tort law. But in this case, the fact that the plaintiffs have used the terminology 'malicious prosecution' is of no moment. What matters is whether they have identified the constitutional right at issue, and they have done so. The Fourteenth Amendment's Due Process Clause is the relevant constitutional source; it forbids the state from depriving a person of liberty (including by pre-trial detention) based on manufactured evidence. . . As the EPD Defendants

conceded in their reply brief, this type of due process claim can be based on false police reports.") [*See also* ***Hurt v. Vantlin***, No. 314CV00092JMSMPB, 2019 WL 3980759, at *3 (S.D. Ind. Aug. 23, 2019) ("The EPD Defendants also argue that because the law is 'unsettled' for a Fourth Amendment wrongful pretrial detention claim, they are entitled to qualified immunity. . . The Seventh Circuit affirmed this Court's denial of qualified immunity related to William and Deadra's wrongful pretrial detention. . . The Court rejects the argument that the same conduct at issue in their former malicious prosecution claim – which the Seventh Circuit found was not subject to immunity – is magically immune because the claim is now labeled a Fourth Amendment claim. The law proscribing detention in the absence of probable cause, and the inapplicability of qualified immunity for detention in the absence of arguable probable cause, however the claim is labeled, has been settled for years.")]

Ewell v. Toney, 853 F.3d 911, 917 (7th Cir. 2017) ("We note in passing that the Supreme Court recently held in *Manuel v. City of Joliet*, . . . that the Fourth Amendment continues to govern at least some claims for unlawful pretrial detention even after the legal process has begun through a judicial probable-cause determination or comparable procedure. The rule in this circuit had been that claims (such as Ewell's) for unlawful detention could be brought only under the Due Process Clause once legal process had begun. See, *e.g.*, *Llovet v. City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014). Nothing in *Manuel*, however, affects the question now before us, which is whether Ewell is entitled to damages for time spent in custody that was fully credited to her state sentence.")

See also ***Martin v. Marinez***, 934 F.3d 594, 599-600, 602-03 (7th Cir. 2019) ("We have not resolved the specific question whether a plaintiff may recover damages for post-arrest incarceration following a Fourth Amendment violation when probable cause supported the ultimate arrest and initiation of criminal proceedings, but the application of the exclusionary rule spared the plaintiff from the criminal prosecution. As Martin notes, there is a split of authority on the question of whether a defendant whose Fourth or Fifth Amendment rights have been violated can recover damages for incarceration, legal defense fees, or emotional distress in a subsequent civil suit under § 1983. *Compare Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999) (no damages for costs associated with defending against gun possession charges when evidence for charges arose from unlawful search); *Hector v. Watt*, 235 F.3d 154, 155–59 (3d Cir. 2000) (no damages for costs incurred in criminal prosecution for drug possession charges arising from unconstitutional search) *with Borunda v. Richmond*, 885 F.2d 1384, 1389–90 (9th Cir. 1988) (allowing admission of acquittal of criminal charges in plaintiffs' subsequent § 1983 suit to recover money spent on attorneys' fees defending criminal charges). . . . In rejecting proximate cause as a theory for recovery, the Third Circuit, like the Second Circuit in *Townes*, concluded that the policy reasons behind the exclusionary rule would not be served by allowing the plaintiff to 'continue to benefit from the exclusionary rule in his § 1983 suit and be relieved of defense costs from a prosecution that was terminated only because of the exclusionary rule.'. . Specifically, the court in *Hector* carefully considered the competing policy concerns that might be served by allowing damages arising from defending a criminal proceeding triggered by the discovery of contraband via an unconstitutional search. Bearing in mind the goal of the exclusionary rule to deter Fourth

Amendment violations, the court concluded that policy considerations militated against any incremental contribution to such deterrence that might be had by allowing for civil damages arising well after the initial constitutional privacy violation that led to the discovery of contraband. . .The court in *Hector* thus ultimately concluded that although there would admittedly be some deterrent value to imposing liability for *all* consequences that unfold from a search or seizure unsupported by probable cause, the downsides of such an approach would outweigh its benefits. Specifically, the magnitude of the potential liability would routinely be unrelated to the seriousness of the underlying Fourth Amendment violation, in the sense that the damages award would often turn not on the nature of the unconstitutional invasion of privacy but on whatever contraband officers happened to uncover. . . Noting that it would be irresponsible to impose potential liability so disproportionate to the underlying constitutional violation and that neither the scholarly authority nor any common-law tort supported such a theory of recovery, the Third Circuit concurred with *Townes* to hold that, 'Victims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy–including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.; but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution.'")

Liggins v. City of Chicago, No. 1:20-CV-04085, 2021 WL 2894167, at *3–4 (N.D. Ill. July 9, 2021) ("In 2019 the Seventh Circuit adopted *Manuel's* reasoning in *Lewis v. City of Chicago*, holding that constitutional challenges to pre-trial detention lie in the Fourth Amendment, not the Fourteenth. . . Lewis had spent two years-in pretrial detention because of a falsified police report. The *Lewis* court held that after *Manuel* '*all* § 1983 claims for wrongful pretrial detention—whether based on fabricated evidence or some other defect—sound in the Fourth Amendment' and 'the Fourth Amendment, not the Due Process Clause, is the source of the right in a § 1983 claim for unlawful pretrial detention, whether before or after the initiation of formal legal process.'. . Despite this clear precedent from the Seventh Circuit, Liggins argues that *Lewis* was wrongly decided, because *Manuel* 'did not extinguish due process claims for unlawful pretrial detention.' . . He relies on *McDonough v. Smith*, 139 S. Ct. 2149 (2019), where an election worker was targeted for investigation and prosecution. In *McDonough* the petitioner alleged evidence against him was falsified by the prosecutor because of a political grudge. Although he was indicted by a grand jury using this falsified evidence, he was not detained pending trial and was eventually acquitted. His subsequent § 1983 suit alleged both fabrication of evidence and malicious prosecution without probable cause. . . The Supreme Court, having granted *certiorari* to resolve a question about the statute of limitations, did not address whether Petitioner's claims should have been brought under the Fourth or Fourteenth Amendments, saying only that it 'assume[d] without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.'. . The Court agrees that the procedural posture of *McDonough* has created room for some debate. But district courts in the Seventh Circuit have refused to hold that *Lewis* incorrectly interpreted *Manuel* in light of *McDonough*. . . In light of *Manuel* being on all fours with the facts presented here and until the Seventh Circuit says otherwise, *Lewis* is the precedent that binds this Court. Plaintiff's Fourteenth Amendment claims

are dismissed, but his Fourth Amendment claims may proceed.")

Grayer v. City of Chicago, No. 20-CV-00157, 2021 WL 2433661, at *1-3 (N.D. Ill. June 15, 2021) ("No party disputes that the Fourth Amendment applies to claims arising from pretrial detention. But the Fourteenth Amendment comes into play only for claims that arise following a criminal conviction. Because Plaintiffs were never convicted of a crime, the Fourteenth Amendment plays no permissible role in Plaintiffs' complaint. Accordingly, Defendants' partial motion to dismiss is granted. . . . Plaintiffs allege they were subjected to pretrial detention without probable cause in violation of their Fourth and Fourteenth Amendment rights. . . No party disputes that a Section 1983 claim alleging wrongful pretrial detention arises under the Fourth Amendment. . . But the question remains: can a challenge to pre-trial incarceration also arise under the Fourteenth Amendment? In short, the answer is no. . . . In the wake of *Manuel I* and *II*, the Seventh Circuit has further clarified that the pre/post-conviction line permits no equivocation: pretrial claims arise under the Fourth Amendment, and post-conviction claims arise under the Fourteenth Amendment. . . . Despite this precedent, Plaintiffs argue that *Lewis* is contrary to the Supreme Court's decision in *McDonough v. Smith*[.] . . This Court respectfully disagrees. Contrary to Plaintiffs' suggestion, *McDonough* did not hold that 'unlawful pretrial detention can also sound in the Fourteenth Amendment.'. . *McDonough*, rather, addressed when the statute of limitations for a fabricated evidence claim begins to run. . . Acknowledging that 'the Second Circuit treated [the plaintiff's claim] as arising under the Due Process Clause,' the Supreme Court pointedly noted that '[w]e assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.'. . In view of this qualification, this Court cannot find that *Lewis*—which directly applied *Manuel I*—and later on-point Seventh Circuit cases were abrogated by implication through *McDonough*. . . Moreover, this conclusion is bolstered by the Seventh Circuit's post-*McDonough* application of *Manuel I* and *Lewis* in *Kuri* and *Young*—neither of which mention *McDonough*. . . Plaintiffs attempt to avoid the effect of *Lewis* and related decisions by distinguishing, for claim-accrual purposes, between allegations of fabricated evidence (*e.g.*, *McDonough*) and those involving unlawful detention (*e.g.*, *Lewis* and *Manuel I*). . . This distinction does not make a difference—at least not in this case. Although Plaintiffs cite some decisions explaining that a later date of accrual should apply to fabrication of evidence claims, . . . at issue here is the legal basis of the claimed right of action, not the marker for when that action accrues. And on that score, the law is against Plaintiffs: *Lewis* rejected any distinction between pretrial fabrication of evidence claims and those based on wrongful pretrial detention. *Lewis*, 914 F.3d at 479 ("all § 1983 claims for wrongful pretrial detention— whether based on fabricated evidence or some other defect—sound in the Fourth Amendment"). . . Because that rule is the controlling law in this circuit, Plaintiffs' reliance upon the Fourteenth Amendment is foreclosed.")

Walker v. White, No. 16 CV 7024, 2021 WL 1058096, at *10–11 (N.D. Ill. Mar. 19, 2021) ("Defendants have preserved their argument that Walker's Fourth Amendment claim is untimely, but I reject it. '[A] Fourth Amendment claim for wrongful pretrial detention accrues when the detention ceases.' *Lewis v. City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019). And if the pretrial-

detention claim implicates the validity of the underlying conviction, as it does here, then the claim doesn't accrue until the plaintiff receives a favorable termination of his case. *Savory v. Cannon*, 947 F.3d 409, 430–31 (2020). Walker's conviction was vacated and he was released from custody in March 2016. He filed his complaint a few months later, on July 7, 2016, well within the two-year time limit. . . The Fourth Amendment prohibits unreasonable searches and seizures. Arrest and pretrial detention are both seizures and are justified only on probable cause. . . . There's a factual dispute about whether the officers saw Russell sell drugs to Brown, saw Walker throw cocaine out the window, and found cocaine in Walker's sock and car. But Walker doesn't dispute that there was marijuana in plain view in the car's ashtray. He makes no attempt to grapple with that fact in his response brief. Because there was undisputed evidence that a crime had occurred in plain view, the officers had probable cause to arrest Walker. No reasonable jury could find otherwise. . . Summary judgment is granted to all defendants on the false-arrest claim. . . Defendants' argument, however, collapses the distinction between false arrest and wrongful pretrial detention. The Supreme Court has recognized a difference between 'pre-legal-process[ ] arrest' and 'post-legal process[ ] pretrial detention.' *Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017). The Fourth Amendment governs both. . . Unlawful pretrial detention occurs 'when the police hold someone without any reason before the formal onset of a criminal proceeding,' and also when 'legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements.'. . Walker claims that he was both unlawfully arrested and unlawfully held before trial. Although the marijuana cigarette precludes his false-arrest claim, the record is unclear on whether Walker was detained on that basis as well. The Local Rule 56.1 statements of fact don't mention a judicial probable-cause determination, initial appearance, arraignment, detention hearing, or the like. Nor is there mention of which charges were written up in a criminal complaint. No one disputes that Walker was held pretrial. He testified at his deposition that he was transferred to county jail after the officers processed him at the precinct. . . He went to bond court right after the transfer, and arraignment court three weeks later. . . But the earliest judicial proceeding the parties included as an exhibit in the record is dated April 2006, after Walker was indicted. . . He was indicted only on the cocaine offenses. And there's reason to think he was never charged with the marijuana in the car: in the defendants' Local Rule 56.1 statement, they cite only to Walker's deposition to support the fact that there was marijuana in the car. . . If a judge based the probable-cause determination solely on the cocaine offenses, a jury could find Reyes, White, and Flatley liable for unlawful pretrial detention. In other words, 'legal process itself' may have been compromised if Walker's detention was based 'solely on a police officer's false statements.'. .Without evidence showing that Walker was detained on the basis of the marijuana in his car, the officers are not entitled to judgment as a matter of law on the pretrial-detention claim—the dispute over the drug evidence creates a material dispute over the wrongfulness of Walker's detention. Summary judgment is granted to all defendants on the false-arrest claim and to all defendants but Flatley, Reyes, and White on the pretrial-detention claim.")

Henderson v. Rangel, No. 19-cv-06380, 2020 WL 5642943, at *3 (N.D. Ill. Sept. 21, 2020) ("Before *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017) (*Manuel I*), and *Manuel v. City of Joliet*,

903 F.3d 667 (7th Cir. 2018) (*Manuel II*), the Seventh Circuit suggested that wrongful pretrial detention can be a deprivation of liberty cognizable under the Due Process Clause. But following *Manuel I and Manuel II*, the Seventh Circuit has made clear that 'the Fourth Amendment, not the Due Process Clause, is the source of the right in a § 1983 claim for unlawful pretrial detention.'. . Applying *Lewis*, courts in this Circuit have dismissed wrongful pretrial detention claims brought under the Fourteenth Amendment's Due Process Clause by defendants who, like Henderson, were acquitted at trial and did not allege any post-trial deprivation of liberty. . . Henderson acknowledges *Lewis* but argues that it is undermined by the Supreme Court's decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019). In *McDonough*, the Court considered when a claim for fabrication of evidence accrued. . . The Court 'assume[d] without deciding' that the Second Circuit's framing of the claim as implicating the Due Process Clause was appropriate. . . The Court's assumption seems to create some friction with the Seventh Circuit's view that a wrongful pretrial detention claim can be only be brought under the Fourth Amendment. But this Court cannot disregard the Seventh Circuit's pronouncement in *Lewis* based on the Court's 'assumption—rather than holding— that such a claim is viable.'. . Because Counts I and II are brought under the Due Process Clause of the Fifth and Fourteenth Amendments, and because neither govern Henderson's wrongful pretrial detention claim, both counts are dismissed against Officers Rangel and Rosiles with prejudice.")

Baker v. City of Chicago, No. 16-CV-08940, 2020 WL 5110377, at *6 (N.D. Ill. Aug. 31, 2020) ("Despite Plaintiffs' suggestion to the contrary, . . . *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), plainly bars any federal claims that sound in malicious prosecution where, as here, there is an adequate state law remedy. . . Neither the Supreme Court nor the Seventh Circuit has disturbed that status quo with more recent rulings. While it is true that the Supreme Court in *Manuel* partially abrogated *Newsome* in finding that the Fourth Amendment can support a claim for unlawful pretrial detention beyond the start of legal process*, Newsome's* conclusions regarding the viability of federal malicious prosecution claims remain good law in this Circuit. [collecting cases] Accordingly, Plaintiffs cannot proceed with their federal malicious prosecution claims in Count II. Those claims are dismissed.")

McWilliams v. City of Chicago, No. 14 C 3902, 2020 WL 1530747, at *4 (N.D. Ill. Mar. 31, 2020) ("'[A] claim for unlawful pretrial detention accrues when the detention ceases.'. . The issue here is *when* plaintiff's detention ceased. If it ceased when plaintiff was released on bond, then his claim is not timely. If, however, it ceased when he was released from Jail, then his claim is timely. This issue has not been squarely resolved. In *Mitchell*, the Seventh Circuit determined that 'pretrial release might be construed as a "seizure" for Fourth Amendment purposes if the conditions of that release impose *significant* restrictions on liberty,' but the court went on to say that it had 'misgivings about construing a simple obligation to appear in court—a uniform condition of any pretrial release—as a "seizure" for Fourth Amendment purposes.'. . Ultimately, the court declined to decide the issue because the record did not contain sufficient information about the plaintiff's conditions of release. . . Since this ruling, courts with more robust records have come to different conclusions. Some courts have found that an individual released on bond with minimal restrictions

is not seized for purposes of the Fourth Amendment. . . Other courts have found that these minimal requirements do constitute a seizure. . . On this record, the Court finds that plaintiff's claim is timely. While plaintiff initially had minimal bond requirements imposed on him, the requirements placed on him became more restrictive, his bond was later revoked, and he was then detained at the Jail for five months until the CCSAO *nolled* the charges against him. Although plaintiff did not comply with his bond requirements and therefore bears some responsibility for his five-month pretrial detention at the Jail, he ultimately would not have spent the five months in the Jail had it not been for the allegedly unlawful stop and search and fabricated evidence. Because plaintiff's detention ended on February 14, 2014 and he filed his amended complaint naming the Defendant Officers within the two-year statute of limitations on January 29, 2016, the Court finds this claim to be timely.")

Moorer v. Platt, No. 18 CV 3796, 2020 WL 814924, at *2–3 (N.D. Ill. Feb. 19, 2020) ("If probable cause existed to suspect Moorer of murder, then his pretrial detention did not violate the Fourth Amendment. . . In addition to the absence of probable cause, Moorer must also allege that defendants knew they lacked probable cause to arrest him. . . Defendants argue that the complaint pleads the existence of probable cause, because it alleges that eyewitnesses identified Moorer as the shooter. 'Probable cause can be based on a single identification from a credible eyewitness.'. . Although the complaint does not come right out and say it, Moorer's theory is that the defendants knew the eyewitness identifications were false or unreliable and therefore the identifications did not provide probable cause to believe Moorer was the killer. This is a reasonable inference from the allegations. The complaint alleges that the identification procedures were improper and suggestive, the officers knew of Moorer's alibi, they knew his nickname was not Boom, they knew he did not have a matching phone number, and they reported conducting photo arrays at a time when they could not have yet identified Moorer as a suspect. The complaint adequately pleads defendants' knowledge and the absence of a reliable identification. This is enough to get past the pleading stage for a Fourth Amendment claim. Moorer will have to prove that every defendant was personally involved in the wrongful pretrial detention, it was unreasonable to credit the eyewitness identifications, and nothing broke the chain of proximate causation from a defendant's conduct to Moorer's damages. . . But these are issues for another day.")

Blackmon v. City of Chicago, No. 19 C 767, 2020 WL 60188, at *4 (N.D. Ill. Jan. 6, 2020) ("Defendants' argument is straightforward: Blackmon has brought a claim for Fourth Amendment malicious prosecution and the Seventh Circuit has made it clear that he cannot. Blackmon seems to acknowledge that Defendants are correct on the case law, but he insists that Defendants' arguments are merely semantic and that he actually brought a claim for wrongful seizure, pretrial detention, and deprivation of liberty without probable cause, which was simply mislabeled as a claim for 'federal malicious prosecution.' But as Defendants correctly note, Blackmon's complaint suggests otherwise. Count V makes no mention of any wrongful arrest, pretrial detention, or custody. As pleaded, Count V is clearly based on Blackmon's wrongful prosecution and his being 'improperly subjected to judicial proceedings'—not his wrongful pretrial detention. . . Though Count V does mention that Blackmon 'suffered loss of liberty,' there are no allegations connecting

the loss of liberty to any kind of arrest or pretrial detention or custody without probable cause. This can easily be remedied in an amended complaint. Because Count V is based on Blackmon's wrongful prosecution without probable cause, it is dismissed without prejudice.")

Young v. City of Chicago, No. 17 C 4803, 2019 WL 6349892, at *5–6 (N.D. Ill. Nov. 27, 2019) ("Defendants are correct that Young cannot bring a due process claim for unlawful pretrial detention. *Manuel I* abrogated older Seventh Circuit precedent holding that pretrial detention after legal process started did not give rise to a Fourth Amendment claim but could constitute a due process claim if state law failed to provide an adequate remedy. . . After *Manuel I*, the Seventh Circuit explained that all § 1983 claims for wrongful pretrial detention sound in the Fourth Amendment. . . Then, in *Lewis*, the Seventh Circuit applied these decisions to overrule its prior precedent in *Hurt v. Wise*, 880 F.3d 831 (7th Cir. 2018) to the extent it held the injury of wrongful pretrial detention may be remedied under § 1983 as a violation of the Due Process Clause. . . *McDonough* does not limit *Lewis's* application to this case. In *McDonough*, the Court considered when the statute of limitations begins to run for evidence fabrication claims. . . The Court noted that the Second Circuit interpreted the claim as arising under the Due Process Clause and assumed 'without deciding that the Second Circuit's articulations of the right at issue and its contours are sound' as certiorari was not granted on those issues. . . Nor does earlier Seventh Circuit law, explaining that the use of fabricated evidence to deprive a person of liberty is a due process violation, save Young's claim. . . As the *Lewis* panel noted, prior decisions holding that pretrial detention based on police fabrications violates the Due Process Clause 'cannot be reconciled' with *Manuel II*. . . Young's argument that he has a due process claim based on defendant officers' use of false evidence in his pretrial proceedings likewise fails. He contends that false evidence had a 'real life effect on the bond court, preliminary hearing, and trial judge....'[.] . . He does not specify which information was false and the only such effect he identifies is that his bond was set at an amount too high for him to pay. In other words, he complains he was detained due to false evidence. Consequently, Young's claim that false evidence tainted his pretrial proceedings sounds in the Fourth Amendment and fails for the same reasons as his unlawful detention claim.")

Neita v. City of Chicago, No. 19 C 595, 2019 WL 5682838, at *4 (N.D. Ill. Nov. 1, 2019) ("As distinct from a claim of unlawful detention, there is no right of action for malicious prosecution based on the Fourth Amendment. . . The point of these cases, as it relates to Neita, is that his remedy for the alleged Fourth Amendment violations he suffered are the false-arrest and illegal-search-and-seizure claims he raised above. . . Count III is dismissed.")

Brown v. City of Chicago, No. 18 C 7064, 2019 WL 4694685, at *5–6 (N.D. Ill. Sept. 26, 2019) ("The *Manuel I* Court did not address the availability of a federal claim for malicious prosecution. . . Rather, as the Seventh Circuit observed on remand, '[a]fter *Manuel* [*I*], "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify detention.' *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018) ("*Manuel II*"). Put another way, the constitutional wrong recognized in *Manuel I* and *II* was 'the detention rather than the existence of criminal charges.'. . Plaintiff urges that

even if there is no federal malicious prosecution claim, *Manuel I* still allows for a claim under the Fourth Amendment for detention without probable cause. It is true that 'what matters' is not 'terminology' but 'identif[ying] the constitutional right at issue.'. . But as Defendant correctly notes, a claim for detention without probable cause is inconsistent with the allegations in Count VI, all of which concern the institution of judicial proceedings against Plaintiff and not his detention. And even if Plaintiff had identified unlawful detention as the constitutional right at issue, the Fourth Amendment protects only Plaintiff's right to be free from *pretrial* detention; a claim for wrongful conviction sounds in due process.")

Mayo v. Lasalle County, No. 18 CV 01342, 2019 WL 3202809, at *4–7 (N.D. Ill. July 15, 2019) ("The plaintiffs maintain that the fact that the charges against Manuel had been dropped the day ***before*** he was released from custody distinguishes that case from this one, where the charges against Mayo and Burt remained pending for several months after their release. This argument is inconsistent with the Seventh Circuit's holding in *Manuel II*, which 'held that a Fourth Amendment claim for unlawful pretrial detention accrues when the ***detention*** ends, ***not*** when the ***prosecution*** ends.' *Mitchell v. City of Elgin*, 912 F.3d 1012, 1015 (7th Cir. 2019) (describing *Manuel II*'s holding). The plaintiffs nevertheless maintain that *Heck v Humphrey*, 512 U.S. 477 (1994), barred them from bringing an unlawful detention claim while charges were still pending against them. . . . *Heck* poses no impediment to asserting a § 1983 claim while charges are pending, or even following a conviction, where success on the claim is not inherently inconsistent with the validity of the state court charges. That is the case with respect to the plaintiffs' unlawful detention claim. A suit challenging the lawfulness of the plaintiffs' pretrial detention would not be inherently inconsistent with the prosecution of, or conviction on, the drug trafficking charges that were brought against them. Success on a challenge to the lawfulness of their detention would require a determination that there was no probable cause for the detention, and such a finding would imply the invalidity of the state court order authorizing the detention. But a suit challenging the lawfulness of the detention under the Fourth Amendment does not necessarily impugn the propriety of continuing to prosecute the charges that remain pending. Even in a case where it was discovered that probable cause to detain had been lacking, there might otherwise have been developed evidence sufficient to establish probable cause to support the charges going forward. But more fundamentally, as the Seventh Circuit has repeatedly held, lack of probable cause does not preclude a prosecution from going forward: 'there is no such thing as a constitutional right not to be prosecuted without probable cause.'. . For that reason, the Seventh Circuit expressly rejected Manuel's contention that a Fourth Amendment pretrial detention claim accrues only when the plaintiff's position regarding the charges has been vindicated. The wrong addressed by a Fourth Amendment claim is wrongful detention; a Fourth Amendment claim therefore accrues when the wrongful detention ends, even if the prosecution continues. Relatedly, in *Wallace v. Kato*, 549 U.S. 384, 393 (2007), the Supreme Court held that *Heck* applied only to convicted or sentenced plaintiffs, not to situations where an action would impugn an ***anticipated*** conviction. . . The Court clarified that false arrest claims can be filed while criminal charges are still pending and that district courts can avoid the issue of parallel litigation by staying the civil action until the criminal charges are resolved. At that point, the court can decide

if *Heck* requires dismissal of the civil action. . . Read together, *Wallace* and *Manuel II* stand for the proposition that the statute of limitations on a pretrial detention claim begins running as soon as the plaintiff is released from custody, regardless of whether criminal charges remain pending. . . Mayo and Burt also argue their claims could not be filed until the charges against them were dropped because they might have been reincarcerated. But according to *Manuel II*, the original wrong ended once they were released from detention. . . Reincarceration may have constituted a ***new*** Fourth Amendment wrong but would not have extended the original wrong. The Court therefore finds that the claim for unlawful pretrial detention accrued on June 11, 2015 when the plaintiffs were released from custody. Finally, the Court notes that the Seventh Circuit has recently suggested that some restrictions imposed as conditions of pretrial release may constitute seizures for purposes of the Fourth Amendment, *Mitchell v. City of Elgin*, 912 F.3d 1012, 1016 (7th Cir. 2019), and that a Fourth Amendment claim for detention without probable cause may therefore accrue at the time those restrictions are terminated. *Knox v. Curtis*, __ Fed. Appx. __ (7th Cir. 2019). The plaintiffs do not make such an argument here, nor do not allege any facts (beyond a conclusory allegation that their ability to travel while on bond was restricted) which would suggest that they were in fact 'seized' during that time. In any case, a docket entry from the plaintiffs' criminal case dated 6/19/2015 shows that when the plaintiffs were released from custody, the court allowed them to travel back to New Hampshire immediately. The only restriction placed on them was a requirement that they appear at a future date. . . This Court is unwilling to conclude that this obligation constitutes a seizure for Fourth Amendment purposes. A requirement to appear somewhere simply does not fit within the Supreme Court's test for whether a seizure has occurred, which looks to whether a reasonable person would have believed that he was free to leave. . . Accordingly, the clock on Mayo and Burt's pretrial detention claim started running when they were released from physical custody in June 2015.")

Roldan v. Town of Cicero, No. 17-CV-3707, 2019 WL 1382101, at *3-4 (N.D. Ill. Mar. 27, 2019) ("Defendants move to dismiss Plaintiff's Fourth Amendment claim (Count I) as time-barred. In *Manuel v. City of Joliet, Illinois (Manuel II)*, the Seventh Circuit held that a plaintiff's Fourth Amendment wrongful detention claim accrues at the end of the detention. . . Despite this holding, Defendants argue that Plaintiff's Fourth Amendment claim accrued on the date of conviction (at the latest). Defendants appear to be arguing that because the Fourth Amendment drops out once trial occurs, Plaintiff's Fourth Amendment wrongful detention claim accrued when he was convicted. Plaintiff counters that his entire detention was wrongful. Although the Fourteenth Amendment governs claims for wrongful detention after trial, . . . '§ 1983 cannot be used to contest ongoing custody that has been properly authorized.'. . 'The wrong of detention without probable cause continues for the duration of the detention. That's the principal reason why the claim accrues when the detention ends.'. . Plaintiff therefore could not have challenged his continued detention at the time of his conviction and thereafter. . . . Defendants further argue that Plaintiff fails to allege any pretrial detention beyond his initial arrest. However, Plaintiff alleges that he was detained and prosecuted because of Defendants misconduct. . . Although Plaintiff admits in his supplemental brief that he was released on bond sometime after his arrest and was taken back into custody on January 7, 2013, this is not alleged in Plaintiff's amended complaint and therefore is not properly

before the Court on Defendants' motion to dismiss. Regardless, it is unclear whether a person released on bond remains 'seized' for Fourth Amendment purposes. The Seventh Circuit recently declined to decide the issue, concluding that it was unable to do so based on the 'state of the record and briefing' before the court on the issue of first impression. . .In *Mitchell*, the Seventh Circuit recognized that sister circuits have held that 'pretrial release might be construed as a "seizure" for Fourth Amendment purposes if the conditions of that release impose significant restrictions on liberty.'. . Still, the Seventh Circuit recognized that other circuits have held that '[r]un-of-the-mill conditions of pretrial release do not fit comfortably within the recognized parameters of the term [seizure].'. . Because it was not yet known what conditions of release, if any, were imposed on the plaintiff in *Mitchell*, the Seventh Circuit declined to determine whether a person released on bond remains 'seized' for Fourth Amendment purposes. As in *Mitchell*, here too, it is not yet known what conditions of release, if any, were imposed on Plaintiff. In the absence of such information, Plaintiff's claim remains plausible. Defendants imply that it was Plaintiff's obligation to allege such facts in his complaint, but that misapprehends the pleading obligations under Rule 8. Those facts will be necessary to establish the length of Plaintiff's unjustified detention (which is relevant to the statute of limitations defense), but not to show the fact of his unjustified detention of any duration (which is a necessary element of his Fourth Amendment claim). . . .The Fourteenth Amendment's Due Process Clause is the relevant constitutional source for Plaintiff's claim that Defendants violated his right to a fair trial by failing to disclose the fact that Defendants agreed to assist J.T. in obtaining a U-visa in return for her false testimony at Plaintiff's trial.")

Melongo v. Podlasek, No. 13 C 4924, 2019 WL 1254913, at *17 (N.D. Ill. Mar. 19, 2019) ("Melongo acknowledges that *Lewis* limits her due-process claim; she contends, however, that '[f]abricated evidence contributing to an indictment and continued prosecution is an injury distinct from fabricated evidence contributing to pretrial detention.'. . But Melongo cites no case to support such a proposition, and *Lewis* does not appear to contemplate such a distinction. The Court of Appeals clarified in *Lewis* that its decision did not affect the viability of a due-process claim in a case resulting in a *conviction* and recognized that fabricated evidence that results in a conviction may form the basis of a claim under *Brady v. Maryland*, 373 U.S. 83 (1963); but it stopped there. . . Melongo's position ignores the fact that 'there is no such thing as a constitutional right not to be prosecuted without probable cause.'. . Because *Lewis* makes clear that, in cases not involving convictions, a pretrial detention claim sounds only in the Fourth Amendment, Melongo's due-process claim fails as a matter of law.")

Lattimore v. Klein, No. 17-CV-8683, 2019 WL 1028121, at *4–5 (N.D. Ill. Mar. 4, 2019) ("As the Supreme Court and Seventh Circuit have now made clear, . . . there is no such thing as a 'Fourth Amendment malicious prosecution' claim. Rather, to the extent that the plaintiffs allege that they were detained in custody based on fabricated evidence—and they do—they have a Fourth Amendment claim for a seizure unsupported by probable cause, not a 'malicious prosecution' claim. . . The plaintiffs allege that they were both 'transported to jail and were wrongfully incarcerated,'. . . presumably on the days they were arrested, and they supplement that allegation in their brief, noting that the plaintiffs were held in custody until they bonded out, Lattimore on

February 13, 2015, and Hutton-Lattimore on February 4, 2015. Those are the dates on which the statute of limitations for the plaintiffs' Fourth Amendment claims for unlawful seizure of their persons began to run. . . As the plaintiffs concede, the applicable limitations period is two years; their Fourth Amendment personal seizure claims were therefore untimely after February 13, 2017 (Lattimore) and February 4, 2017) (Hutton-Lattimore), respectively. The original complaint in this case was not filed until November 30, 2017, however, so the plaintiffs' Fourth Amendment seizure claims set forth in Count II are time-barred. . .The plaintiffs attempt to salvage their 'malicious prosecution' theory by asserting that notwithstanding *Manuel I*, *Manuel II*, and *Lewis*, they have a timely claim based on fabrication of evidence because the 'wrong' caused by the allegedly fabricated evidence continued until the charges against them were dismissed. In other words, they maintain that they have a due process claim based on the fabrication of evidence based not on their unlawful detentions but because they were wrongfully charged. That argument fails, however. As the Seventh Circuit has repeatedly explained, 'there is no such thing as a constitutional right not to be prosecuted without probable cause.'. . Absent a deprivation of liberty (which, per *Manuel I*, would be actionable only under the Fourth Amendment), there can be no due process deprivation caused by the use of fabricated evidence. . . . *Saunders–El* and *Alexander* foreclose the evidence-fabrication claim alleged in this case. Because the plaintiffs suffered no liberty deprivation, they suffered no due-process violation.")

McWilliams v. City of Chicago, No. 14 C 3902, 2018 WL 4404653, at *3, *5 (N.D. Ill. Sept. 17, 2018) ("Since briefing the motion, the Seventh Circuit resolved a similar dispute in *Manuel v. City of Joliet*, Case No. 14-1581, 2018 WL 4292913 (7th Cir. Sept. 10, 2018), holding that the accrual date for a Fourth Amendment claim involving wrongful detention without probable cause accrues on the day the individual is released from custody. Like the plaintiff in *Manuel*, McWilliams is challenging the propriety of his time spent in custody. As the Seventh Circuit observed, this type of claim accrues when the complained-of wrong ends. . . Although McWilliams does not plead precisely when he was released from custody, McWilliams alleges that he remained in jail from October 2013 through at least January 2014. . . McWilliams filed an amended complaint naming the Defendant Officers on January 29, 2016, which was within the two-year statute of limitations. Accordingly, defendant's motion to dismiss this claim as barred by the statute of limitations is denied. . . . Defendants assert that McWilliams's due process claim fails as a matter of law because he suffered no actionable liberty deprivation because the charges against him were *nolle prossed*, the evidence was never used against him at trial, and he was never convicted of any crime. McWilliams responds that liberty deprivations in fabricated evidence due process claims need not stem from a criminal conviction; pretrial deprivations of liberty are adequate. Since the briefing of this motion, the Supreme Court in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) held that claims of unlawful pretrial detention, including claims of pretrial detention based on fabricated evidence, are covered by the Fourth Amendment. . . Here, McWilliams has plausibly alleged a violation of the Fourth Amendment based on an unlawful pretrial detention. He alleges that the Defendant Officers fabricated evidence against him, particularly that he was obstructing traffic and was in possession of an unlawful weapon that was in plain view at the time of his arrest, and, later, that he had violated a court-imposed curfew by providing a false address. McWilliams also alleges that

the use of this fabricated evidence resulted in his pretrial detention. Further, McWilliams alleges that the criminal proceedings were terminated in his favor. In construing these well-pleaded facts as true and in considering all reasonable inferences in McWilliams's favor, the Court finds that McWilliams has sufficiently alleged a Fourth Amendment claim. Defendant's motion to dismiss on this basis is therefore denied.")

Eighth Circuit

Johnson v. McCarver, 942 F.3d 405, 410-11 (8th Cir. 2019) ("Whether the officers subjectively thought there was probable cause to arrest for trespass is irrelevant. . . We examine only the objective question whether the circumstances known to the officers established a fair probability that Johnson committed an offense. Johnson's refusal to leave after agents of the club revoked his license to remain established arguable probable cause to believe that he trespassed. Arguable probable cause that he had committed an offense inside the club continued to exist fifteen minutes later when the officers arrested Johnson. Whether the officers exercised poor judgment in electing to arrest Johnson after the original dispute was resolved is not pertinent to the objective probable-cause analysis under the Fourth Amendment. The officers also claim qualified immunity on Johnson's claim under the Due Process Clause. Johnson asserts that the officers deprived him of liberty without due process of law by falsifying a report of his arrest. Any deprivation of Johnson's liberty before his criminal trial, however, is governed by the Fourth Amendment and its prohibition on unreasonable seizures. *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017). (On this issue, *Manuel* abrogated *Moran v. Clarke*, 296 F.3d 638, 646-47 (8th Cir. 2002) (en banc).) Any *post-trial* claim based on the alleged false report requires a showing that the report was used to deprive Johnson of liberty in some way. *See Winslow v. Smith*, 696 F.3d 716, 735 (8th Cir. 2012). The jury acquitted Johnson, and he suffered no deprivation of liberty after the trial. Accordingly, there is insufficient evidence to support a finding that the officers violated Johnson's rights under the Due Process Clause. For these reasons, the officers are entitled to qualified immunity on Johnson's claims alleging false arrest under the Fourth Amendment, retaliatory arrest under the First Amendment, and deprivation of liberty in violation of the Due Process Clause.")

Conway v. Norris, No. 6:15-CV-06028, 2018 WL 1189408, at *4 (W.D. Ark. Mar. 7, 2018) ("The United States Supreme Court recently discussed accrual of a section 1983 claim for unlawful pretrial detention in violation of the Fourth Amendment, stating, '[i]n support of [the plaintiff's] position, all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a "favorable termination element" and so pegged the statute of limitations to the dismissal of the criminal case.'. . Defendants' reliance upon the *Jones* case is misplaced, and this Court declines to find that Plaintiff's claims are time-barred based on that precedent. Although the Eighth Circuit has not yet had the opportunity to address the recent *Manuel* case, the language used by the Supreme Court in support of the 'favorable termination element' is clear. . . Plaintiff's section 1983 claims accrued when he was acquitted of the murder charge on May 17, 2013. Plaintiff filed his case on May 30, 2015. Thus, the Court finds that his Complaint was filed well within the three-year personal injury statute of limitations set

forth by Arkansas law. . . .Since the *Manuel* case was decided, six federal district courts in other jurisdictions have cited it in support of the premise that a Fourth Amendment claim for malicious prosecution accrues when the underlying criminal case is favorably terminated. *See Clark III v. Wills*, Case No. 16-3119-SAC, 2017 WL 5598261 (D. Kan. Nov. 21, 2017); *Watson v. Mita*, Case No. 16-40133-TSH, 2017 WL 4365986 (D. Mass. Sept. 29, 2017); *Brown v. Louisville Jefferson Cnty. Metro Gov't*, Case No. 3:16-cv-460-DJH, 2017 WL 4288886 (W.D. Ky. Sept. 27, 2017); *Quintana v. City of Philadelphia*, Case No. 17-996, 2017 WL 3116265 (E.D. Pa. July 21, 2017); *Annan-Yartey v. Muranaka*, Case No. 16-00590, 2017 WL 1243499 (D. Hawai'i Apr. 3, 2017); *Nowacki v. Town of New Canaan*, Case No. 3:16-cv-00407(JAM), 2017 WL 1158239 (D. Conn. Mar. 28, 2017).")

Ninth Circuit

Brewster v. Beck, 859 F.3d 1194, 1196-97 (9th Cir. 2017) ("Because a 30-day impound is a 'meaningful interference with an individual's possessory interests in [his] property,'. . . the Fourth Amendment is implicated when a vehicle is impounded under section 14602.6(a). The district court found that such a seizure doesn't present a Fourth Amendment problem because 'the state has an important interest in ... keeping unlicensed drivers from driving illegally.' But that is beside the point. The Fourth Amendment 'is implicated by a delay in returning the property, whether the property was seized for a criminal investigation, to protect the public, or to punish the individual.'. . The Fourth Amendment doesn't become irrelevant once an initial seizure has run its course. *See Jacobsen*, 466 U.S. at 124 & n.25; *Lavan* v. *City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012); *see also Manuel* v. *City of Joliet*, 137 S. Ct. 911, 914, 920 (2017) (holding that the Fourth Amendment governed the entirety of plaintiff's 48-day detention). A seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force. Thereafter, the government must cease the seizure or secure a new justification. Appellees have provided no justification here. The only other circuit to address this specific issue is the Seventh. *See Lee*, 330 F.3d at 466. There, the City of Chicago seized Lee's vehicle for evidentiary purposes but failed to return it when it was no longer needed. . . The parties agreed that the initial seizure of the vehicle was reasonable. . . But Lee argued that 'the *continued* possession of the property by the government became a meaningful interference with his possessory interest and, thus, must be interpreted as a Fourth Amendment seizure.'. . The Seventh Circuit disagreed, holding that '[o]nce an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable.'. . Reasoning that 'Lee's car was seized when it was impounded,' the Seventh Circuit concluded that the City's continued possession of the vehicle 'neither continued the initial seizure nor began another.'. . . The 30-day impound of Brewster's vehicle constituted a seizure that required compliance with the Fourth Amendment. Appellees argue that this result frustrates the state legislature's intent to impose a penalty on unlicensed drivers. We have no occasion to decide whether this objective is lawful. . . The police could impound a vehicle under section 22651(p), which authorizes impoundment when the driver doesn't have a valid license. *See* Cal. Veh. Code § 22651(p). Section 22651(p) doesn't have a mandatory 30-day hold period, thus avoiding the Fourth Amendment problem presented by section

14602.6(a).")

Valle v. Morgado, No. 21-CV-05636-EMC, 2021 WL 5507180, at *3–6 (N.D. Cal. Nov. 24, 2021) ("The parties' competing arguments highlight that the question of the proper accrual date for a Fourth Amendment claim for unlawful post-process detention as recognized in *Manuel* remains an open question. In *Manuel*, the Supreme Court expressly left open the question of what the proper accrual date should be for § 1983 challenging post-process pretrial detention under the Fourth Amendment. The Court examined the rationales and limitations to analogizing to the false arrest context (where the accrual date would be immediately after the arrest) and to the malicious prosecution context (where the accrual date would be upon favorable termination of the underlying proceedings). . . But, the Court declined to answer the question of when a Fourth Amendment post-process claim accrues, and instead, left 'consideration of this dispute to the Court of Appeals.'. . On remand, the Seventh Circuit rejected both analogies, and held that the accrual date for a Fourth Amendment challenge to post-process detention was the date that the plaintiff was released from custody – in that case, pretrial custody. . . To date, the Seventh Circuit appears to be the only Court of Appeals to have addressed when a Fourth Amendment post-process claims accrues, and it does not appear that any federal district courts in California have opined on the issue. The Seventh Circuit's reasoning is persuasive. The Seventh Circuit reasoned that the *Wallace* rule setting the accrual date for Fourth Amendment claims at the moment that a person is arraigned was based on the premise that Fourth Amendment rights are extinguished once legal process begins—'but that line does not survive *Manuel* [*I]* which held that wrongful pretrial custody violates the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case.'. . Thus, the Seventh Circuit explained, '[w]hen a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends.' Similarly, the *Manuel II* Court rejected the analogy to malicious prosecution, because after the Supreme Court's decision in *Manuel I*, '[t]he problem is the wrongful custody' – '[t]here is no such thing as a constitutional right not to be prosecuted without probable cause.'. . 'But there *is* a constitutional right not to be held in custody without probable cause.'. . The Court continued, 'Because the wrong is the detention rather than the existence of criminal charges, the period of limitations also should depend on the dates of the detention.'. . This conclusion, the Seventh Circuit reasoned, flowed from the Supreme Court's analysis in *Manuel I,* which 'shows that the wrong of detention without probable cause continues for the length of the unjustified detention.'. . Finally, the Seventh Circuit explained that its rule is supported by the Supreme Court's principles, that 'a claim cannot accrue until the would-be plaintiff is entitled to sue, yet the existence of detention forbids a suit for damages contesting that detention's validity.'. . .Importantly, in *Manuel II,* after the Plaintiff was released from pretrial custody, he was not tried and was never convicted or incarcerated. Thus, the Seventh Circuit did not have to address the situation where as here Plaintiff alleges he was unlawfully subjected to pretrial detention under the Fourth Amendment and held through trial where he was maliciously prosecuted and wrongfully convicted in violation of due process. However, these factual difference as to the length of pretrial detention does not alter the fundamental analysis of the accrual date for Plaintiff's Fourth Amendment claim. Since Plaintiff's Fourth Amendment claim is not an assertion of the non-existent 'constitutional right not to be prosecuted without

probable cause,' but rather seeks vindication of his 'constitutional right not to be held in custody without probable cause,'. . . the accrual date for his Fourth Amendment claim is the date at which he was no longer detained without probable cause. . . . Here, Plaintiff's detention without probable cause ended when he was convicted on December 9, 2010. . . Once Plaintiff was convicted, his *conviction* became the legal basis for Plaintiff's incarceration; the conviction superseded the prior probable cause determination. While Plaintiff is entitled to challenge – and does challenge – his subsequent incarceration based on his allegedly wrongful conviction, that challenge is based on Due Process, not a Fourth Amendment claim of detention without probable cause. . . In sum, the accrual date of Plaintiff's Fourth Amendment claim runs from December 9, 2010. . . . The problem for Plaintiff, however, is that although he asserts his § 1983 claim would necessarily impugn his criminal conviction and his claim would be barred by *Heck*, he never filed such an action, and, thus, no court ever held that *Heck* applied and tolled the statute of limitations for his claim. The Ninth Circuit has held that tolling under *Heck* is not automatic. In *Mills v. City of Covina*, 921 F.3d 1161, 1168 (9th Cir. 2019), the court held *Heck* did not toll the claims because the plaintiff never obtained a judicial determination that *Heck* barred his claims. . . .*Mills* controls here. Plaintiff Valle's Fourth Amendment claim challenging his pretrial detention without probable cause accrued upon the date of his conviction, *i.e.,* the date on which he was no longer subject to *pretrial detention*. . . The statute of limitations for Plaintiff's Fourth Amendment Section 1983 claim began to run on the date of his conviction, December 9, 2010. Plaintiff Valle could have filed his Section 1983 claim within the statute of limitations, until December 9, 2012. If Plaintiff's Section 1983 claim impugned his conviction, the district court would have dismissed under *Heck*, and this would likely have tolled his claim until his conviction was reversed. . . If the district court determined that *Heck* did not apply, then Plaintiff could have proceeded to litigate his claim. . . Here, however, like in *Mills*, Plaintiff did not file a § 1983 action alleging violations of the Fourth Amendment until *after* the statute of limitations had run. No determination was ever made that *Heck* applied, and, thus, the claim was not tolled. . .Plaintiff does not distinguish *Mills* and his citations to *McDonough v. Smith*, 139 S. Ct. 2149 (2019) and *Roberts v. County of Riverside*, No. EDCV191877JGBSHKX, 2020 WL 3965027, at *6 (C.D. Cal. June 5, 2020) are inapplicable, as those cases do not analyze the accrual date of a *Fourth Amendment* claim under § 1983 nor the circumstances under which a *Fourth Amendment* claim is tolled. Rather, *McDonough* deals with a claim alleging fabricated evidence leading to conviction under the due process clause, . . . and *Roberts* assessed the accrual and tolling of state law claims[.] . . Plaintiff's Fourth Amendment claim is time-barred. Plaintiff's Count 2 is, thus, dismissed with prejudice.")

Pontillo v. County of Stanislaus, No. 116CV01834DADSKO, 2017 WL 6311663, at *3 (E.D. Cal. Dec. 11, 2017) ("Construing the allegations of plaintiff's SAC in keeping with that standard, the court concludes plaintiff has adequately alleged that defendant Jacobson presented false testimony and in doing so deprived plaintiff of his Fourth Amendment right to be free from detention without probable cause. *See Manuel v. City of Joliet*, ___ U.S. ___, ___, 137 S.Ct. 911, 917–20 (2017) (holding that pre-trial detention based on false evidence can be the basis of a Fourth Amendment violation). This is sufficient to state a cognizable claim for malicious prosecution.")

Garcia v. Cty. Of Riverside, No. EDCV13616JGBSPX, 2017 WL 3052981, at *4–5 & n.1 (C.D. Cal. July 17, 2017) ("[T]he Court reads *Manuel* to make clear that the Fourth Amendment *may* serve as the basis for a claim involving pretrial detention, not that it must or that it always does. Specifically—and the reason that this Court found it important to detail the facts in *Manuel* above—that case involved a situation where the *original arrest* was patently violative of the Fourth Amendment, involving as it did intentional fabrication of evidence (not to mention the potential use of excessive force). The continued detention then exacerbated the earlier deficiencies of the arrest when the government continued to prosecute the plaintiff despite affirmative evidence—i.e., the report concluding that the pills contained no controlled substances—that probable cause was lacking. The facts here are markedly different. As the Court explained in its 2013 order dismissing Plaintiff's Fourth Amendment claim, Plaintiff's original arrest did *not* violate the Fourth Amendment because the warrant was not constitutionally infirm. . . Rather—as the Ninth Circuit emphasized in its 2016 order—the constitutional violation here is predicated specifically on Plaintiff's incarceration where the County failed after the fact to conduct a reasonable investigation of his identity despite circumstances that demanded it. To put it differently, Manuel's Fourth Amendment claim was predicated on the plaintiff's deficient arrest, which 'contaminated' his later detention; there is no equivalent Fourth Amendment violation upon arrest here that would serve as the necessary hook for such a claim. Moreover, as Defendants point out, there is another—related—distinction that would counsel a different outcome here: the fact that the arresting agency is different from the detaining agency, where only the latter is a defendant. . . This fact bolsters the point above: *even if* the original arrest had violated the Fourth Amendment, this would not make such claims appropriate against Defendants, *who were not responsible for his arrest*. Consequently, even assuming that Plaintiff's detention originated in an unreasonable seizure, the unlawful arrest would not 'contaminate' the subsequent detention in the way that it did in *Manuel*, where the same agency that arrested the plaintiff was also responsible for his detention. Accordingly, the Court agrees with Defendants' conclusion that *Manuel* 'leaves intact well-established Ninth Circuit and Supreme Court authority holding that claims for mistaken pretrial detention on a warrant are governed exclusively by the Fourteenth Amendment.'. . . Neither is this conclusion affected by the Ninth Circuit's recent opinion in *Brewster v. Beck*, No. 15-55479, 2017 WL 2662202 (9th Cir. June 21, 2017), as Plaintiff urges in his supplemental response. . . In that case, the court held that the thirty-day impound of the plaintiff's vehicle constituted a seizure requiring compliance with the Fourth Amendment. . . However, as this Court noted with regard to *Manuel*, this only reaffirms that government conduct *may* constitute a violation of a Fourth Amendment even past the initial seizure—not that it always will, nor that it did under the—markedly different—facts of this case.")

Jones v. Keitz, No. 116CV01725LJOEPG, 2017 WL 1375230, at *8 n.4 (E.D. Cal. Apr. 17, 2017) ("The Supreme Court recently held that legal process does not extinguish a plaintiff's Fourth Amendment rights in a suit brought under § 1983 where plaintiff was arrested pursuant to a warrant issued without probable cause and held pending trial. *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 919-20 (2017). In that case, the judge issued a warrant for plaintiff's arrest based solely on the

false statements of law enforcement. . . The Court determined that plaintiff's claim that his subsequent pre-trial detention violated his Fourth Amendment rights could go forward in spite of the intervening legal process – the judge's determination of probable cause. In this case, the arrest followed the filing of a criminal complaint, . . . and was 'subsumed by a claim for malicious prosecution.'. . . As explained above, Plaintiffs failed to state a claim for malicious prosecution against the officers because they did not allege facts to rebut the presumption of prosecutorial independence. That analysis applies with equal force to Plaintiffs' false arrest claim, since the arrests took place after the prosecutor's decision to initiate criminal charges. . .Therefore, the Supreme Court's holding in *Manuel* is not implicated by the Court's analysis.")

Tenth Circuit

Margheim v. Buljko, 855 F.3d 1077, 1084-89 (10th Cir. 2017) ("As the Supreme Court recently reconfirmed, the Fourth Amendment provides a basis under § 1983 for challenging pre-trial detention. *Manuel v. City of Joliet*, 137 S. Ct. 911, 914-15 (2017). *Manuel* did not address whether the tort of malicious prosecution, as opposed to some other common law cause of action, . . . provides an appropriate framework for these Fourth Amendment § 1983 claims. . . *Manuel*'s discussion of Fourth Amendment rights enforceable in a § 1983 action is nevertheless instructive. The Court held that § 1983 can support a Fourth Amendment claim concerning pre-trial detention even after the institution of 'legal process,' which in *Manuel* was a judge's probable cause determination at the first appearance of the defendant (who later became the § 1983 plaintiff). . . We have said 'the issuance of an arrest warrant' is 'a classic example of the institution of legal process.'. .Although the Supreme Court has not addressed whether a § 1983 malicious prosecution claim can be used to enforce Fourth Amendment rights, '[w]e have repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be the Fourth Amendment's right to be free from unreasonable seizures.' *Becker v. Kroll*, 494 F.3d 904, 914 (10th Cir. 2007) (quotations omitted); *accord Sanchez v. Hartley*, 810 F.3d 750, 755 (10th Cir. 2016) (citing cases). . . Under our case law, whether a malicious prosecution claim for pre-trial detention can be brought depends on the initiation of legal process. 'Unreasonable seizures imposed *without* legal process precipitate Fourth Amendment false imprisonment claims. Unreasonable seizures imposed *with* legal process precipitate Fourth Amendment malicious-prosecution claims.'. . As mentioned above, our precedent recognizes five elements for a Fourth Amendment malicious prosecution claim under § 1983:
(1) the defendant caused the plaintiff's continued confinement or prosecution;
(2) the original action terminated in favor of the plaintiff;
(3) no probable cause supported the original arrest, continued confinement, or prosecution;
(4) the defendant acted with malice; and
(5) the plaintiff sustained damages.
. . . In a case like this one where the arrest was based on a warrant, the third element concerns the probable cause determination at the time the warrant was issued and thus supplies the link to legal process. . . The plaintiff's challenge to the process (not merely the confinement) is the mark of a

malicious prosecution claim. . . .[O]ur cases require us to look to the 'stated reasons for the dismissal as well as to the circumstances surrounding it' to determine if 'the dismissal indicates the accused's innocence.'. . '[A] plaintiff generally cannot maintain a malicious prosecution action unless his charges were dismissed in a manner indicative of innocence, even when he was entitled to dismissal on statutory or constitutional grounds.'. . . Dismissal of the Drug Case was not a favorable termination for malicious prosecution purposes. To count as favorable, 'the termination must in some way indicate the innocence of the accused.'. . Mr. Margheim won a suppression motion to exclude the drug evidence. The prosecutor, lacking this evidence, dismissed the case. Dismissal based on the suppression of evidence 'on "technical" grounds having no or little relation to the evidence's trustworthiness' is not 'favorable' under our case law to support a malicious prosecution claim. . . Mr. Margheim won his suppression motion because the arrest warrant that led to the search was invalid. He has not presented any information questioning whether he actually possessed the drugs or whether the substances found were anything other than illegal narcotics. . . Under these circumstances, the dismissal of the Drug Case was not a favorable termination. . . . Mr. Margheim has thus failed to establish one of the five elements necessary for his malicious prosecution claim.")

Sanchez v. Hartley, No. 13-CV-1945-WJM-CBS, 2017 WL 4838738, at *19–20 (D. Colo. Oct. 26, 2017) ("Through 42 U.S.C. § 1983, an individual may sue government officers for pretrial detention without probable cause, in violation of the Fourth Amendment. *Manuel v. City of Joliet*, 137 S. Ct. 911, 917–20 (2017). The Tenth Circuit refers to this as 'malicious prosecution,' and states that its elements comprise at least the following: '(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages.'. .The Tenth Circuit also holds that 'the Fourth Amendment prohibits officers from knowingly or recklessly relying on false information to institute legal process when that process results in an unreasonable seizure.'. . . The Tenth Circuit has never clearly stated where this requirement fits into the established elements of malicious prosecution. . . This Court has generally treated knowing or reckless reliance on false information as a fact which, if proven, establishes the malice element.")

Eleventh Circuit

Washington v. Durand, No. 20-12148, 2022 WL 355437, at *4–12 (11th Cir. Feb. 7, 2022) ("We have never addressed the 'contours and prerequisites[]'. . . of a Fourth Amendment claim in this precise circumstance—where a seizure based on a warrant was supported by probable cause but was later undermined by contrary exculpatory evidence. . . For a seizure through process, we have explained that a 'plaintiff must prove (1) that the defendant violated his Fourth Amendment right to be free from seizures pursuant to legal process and (2) that the criminal proceedings against him terminated in his favor.'. . In defining the 'contours and prerequisites' of these Fourth Amendment claims under section 1983, we are 'guide[d]' by well-settled '[c]ommon-law principles' that governed actions for malicious prosecution when Congress enacted section 1983 in 1871. . .

Washington cannot prove that Howard violated her Fourth Amendment right for three reasons. First, probable cause persisted throughout her detention. Second, Howard was entitled to rely on the facially valid and lawfully obtained warrant. And third, Howard did not affirmatively act to continue the prosecution against her. . . . Probable cause renders a seizure pursuant to legal process reasonable under the Fourth Amendment. . . Consequently, 'the presence of probable cause defeats' a claim that an individual was seized pursuant to legal process in violation of the Fourth Amendment. . . So, to prove a Fourth Amendment violation, Washington must prove that there was no probable cause for her continuing detention. . . . We have not always consistently articulated the probable-cause standard in the context of arrests. In 2018, the Supreme Court explained that probable cause exists when the facts, considering the totality of the circumstances and viewed from the perspective of a reasonable officer, establish 'a probability or substantial chance of criminal activity.'. . . We conclude that the correct legal standard to evaluate whether an officer had probable cause to seize a suspect is to 'ask whether a reasonable officer could conclude ... that there was a substantial chance of criminal activity.'. . Here, Washington argues that probable cause dissipated after her encounter with Heard because his later in-person statement negated his earlier photograph identification. She seems to assert that Heard's in-person retraction was, if anything, more reliable than his photograph identification, so the information Howard had gained from Heard up to that point was at most neutral. And analyzing the tip alone, she argues that it was not specific enough to support even arguable probable cause. Although Heard's statement—if true—was exculpatory, Howard was not required to believe it or to weigh the evidence in such a way as to conclude that probable cause did not exist. . . .[E]ven crediting Washington's account that Heard said, '[T]hat's not her,' during their encounter, probable cause supported her continued detainment. . . . On the strength of a tip from a reliable confidential informant and an identification by a co-conspirator who appeared to be fully cooperating with the police before his later in-person contradiction, which there were many reasons to not take at face value, a reasonable officer 'could [have] conclude[d] ... that there was a substantial chance' Washington was involved. . . Because probable cause supported Washington's detention even after Heard's statement, her continued detention was reasonable under the Fourth Amendment. . . . In *Manuel v. City of Joliet*, the Supreme Court held that, 'if the [probable-cause] proceeding is tainted ... by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the' Fourth Amendment. . . . An officer who intentionally or recklessly makes material misstatements or omissions to or fabricates evidence and puts it before a 'neutral and detached magistrate,'. . . violates the Fourth Amendment because '[l]egal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement.'. . An officer might also violate the Fourth Amendment if he "should have known that his application failed to establish probable cause" and nevertheless obtained the warrant. . .In contrast with the invalid probable-cause determination in *Manuel*, a valid and lawfully obtained warrant shields an officer from liability because the officer's reliance on the magistrate's probable-cause determination renders the officer's actions reasonable. . . . To be sure, a police officer cannot lie or omit material evidence in later testimony to continue detention, such as at an arraignment, indictment, or bond hearing. . . But the discovery of exculpatory evidence after a determination of probable cause does not undermine the validity of a detention based on a judicial order. . .Washington cannot prove that

Howard violated her Fourth Amendment right because she cannot prove that the warrant was facially invalid or unlawfully obtained. Washington does not dispute that Howard detained her pursuant to an arrest warrant, and Howard does not dispute that he participated in procuring the warrant by discussing the investigation with Durand who then obtained the warrant. And Washington cannot prove—nor does she argue—that the warrant was facially invalid because it was materially irregular, was issued by a court without jurisdiction, or did not purport to authorize her detention. With respect to obtaining the warrant, Washington's counsel conceded at oral argument that neither Howard nor Durand lied to the magistrate. Washington also makes no argument that there were material omissions or that it was unreasonable for Howard to believe that there was probable cause at the time Durand applied for the warrant. And it is of no moment that she was later exonerated. . . The well-settled common-law principles that governed the tort of malicious prosecution in 1871 when Congress enacted section 1983 and that 'guide' us further support our conclusion. . . At common law, for the tort of malicious prosecution, an officer who detained an individual pursuant to a warrant—with a few exceptions—had a complete defense to liability for the arrest and detention. . . So, unless an accused could prove that one of the exceptions applied, the warrant that caused his detention served as 'a complete bar to the action.'. . .Here, because Howard both procured the warrant and detained Washington pursuant to it, he was justified in detaining her based on that warrant unless it was facially invalid or procured unlawfully. It was neither. Because Howard was entitled to rely on the warrant, Washington cannot prove that Howard 'violated her Fourth Amendment right to be free from seizures pursuant to legal process.'. . . Washington alleges that Howard violated her Fourth Amendment right because he continued to detain her pursuant to a warrant and to investigate the crime after probable cause had dissipated. She contends that Howard should have returned to the magistrate with the new information and requested that the warrant be rescinded. We disagree. The Fourth Amendment imposes no affirmative duty on an investigator to return to the magistrate after every twist and turn of the investigation. . . Instead, the officer is allowed to defer to the prosecutor, who has the power to determine whether to proceed with the prosecution and whether to seek continued pretrial detention based on the evidence collected. At least two of our sister circuits have rejected arguments similar to Washington's. . . To be sure, a police officer cannot intentionally or recklessly make material misstatements or omissions in later testimony to continue detention, such as at an arraignment, indictment, or bond hearing. . . And an officer's failure to disclose exculpatory evidence to the prosecutor might violate the Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). . . But neither of these constitutional requirements impose on investigators a duty to return to the magistrate after discovering exculpatory evidence. Because well-settled principles that governed the common-law tort of malicious prosecution when Congress enacted section 1983 in 1871 'guide' us, *Manuel*, 137 S. Ct. at 921, we add that our conclusion—that the Fourth Amendment requires an affirmative act to continue the prosecution—is supported by a similar requirement at common law. At common law, courts focused primarily on the initiation of a prosecution as the act giving rise to liability for malicious prosecution. A plaintiff had to prove that the information available and known to the 'prosecutor' at the institution of the proceeding did not provide probable cause. . . Conversely, if the prosecutor had probable cause to initiate the prosecution

based on the information then known to him, and information exculpating the accused later came to the prosecutor's attention, the accused could not sustain an action for malicious prosecution based on the initiation of the action. . . To be sure, if, after discovering exculpatory information, the prosecutor continued to prosecute the action, the defendant could, in some circumstances, maintain an action for malicious prosecution.")

Williams v. Aguirre, 965 F.3d 1147, 1159-68 (11th Cir. 2020) ("Whether the any-crime rule extends to malicious prosecution is unsettled. Our sister circuits have split on the question. [collecting cases] And although we have assumed that the any-crime rule applies to malicious prosecution, we did so only under the erroneous premise that a seizure without legal process, which implicates the rule, could sustain a claim of malicious prosecution. . . As we recently explained, the relationship between the any-crime rule and malicious prosecution is 'unresolved in our case law pertaining to § 1983 malicious prosecution claims.'. . The Supreme Court has articulated a two-step approach to 'defining the contours and prerequisites of a § 1983 claim.' *Manuel*, 137 S. Ct. at 920. We first examine the common-law principles that governed the most analogous tort to the constitutional violation at issue. . . Although we have at times looked to modern tort law when adjudicating claims of malicious prosecution under section 1983, . . . the Supreme Court has clarified that the relevant common-law principles are those that were 'well settled at the time of [section 1983's] enactment[.]'. . After identifying the historical common-law rule most analogous to the alleged constitutional violation, we must consider whether that rule is compatible with the constitutional provision at issue. . . Because malicious prosecution is the common-law analogue to the constitutional violation that Williams alleges, . . . we first examine the probable-cause element of malicious prosecution as it existed when Congress enacted section 1983. We then consider, in the light of the Fourth Amendment, whether we should apply that principle to claims of malicious prosecution under section 1983. . . . Regardless of its applicability to warrantless arrests, the any-crime rule does not apply to claims of malicious prosecution under the Fourth Amendment. Centuries of common-law doctrine urge a charge-specific approach, and bedrock Fourth Amendment principles support applying that approach in the context of the charges that justified a defendant's seizure. We reject the officers' argument to the contrary. . . . [W]arrantless arrests concern whether the facts known to the arresting officer establish probable cause, while seizures pursuant to legal process concern whether the judicial officer who approved the seizure had sufficient information to find probable cause. Notwithstanding the distinction between seizures with and without legal process, our malicious-prosecution caselaw is not always consistent about what information is relevant when determining whether probable cause exists for a seizure pursuant to legal process—even before considering whether probable cause would exist without any allegedly false information. [court discusses different lines of precedent] In sum, we can reconcile our precedents by clarifying a plaintiff's burden to prove 'a violation of her Fourth Amendment right to be free of unreasonable seizures.'. . To meet this burden, a plaintiff must establish (1) that the legal process justifying his seizure was constitutionally infirm and (2) that his seizure would not otherwise be justified without legal process. We turn next to the application of that reconciled rule. . . . We agree with Williams that the record presents a genuine dispute about whether the misstatement in the warrant application was 'made either intentionally or in reckless

disregard for the truth.'. . Although the question whether Williams pointed a gun at the officers is distinct from whether the officers lied, the two are closely linked in this appeal. The officers detail a multi-step progression of events between when Williams allegedly drew his gun and when Aguirre shot Williams—under one account, for example, Williams first pointed the gun at each officer, then went on his knees in response to Aguirre's commands, and then pointed his gun again at Aguirre. But almost none of these events could have occurred if Williams is correct that he never drew his gun or pointed it at the officers. And the chances are low that both officers were subjectively mistaken about every event in this series. In other words, the record supports an inference that *someone* is lying. And if the jury credits Williams's testimony that he did not draw his gun, then it could also infer that the officers' accusations were intentionally false. That the officers failed to maintain a consistent narrative reinforces this conclusion. On the day of the shooting, the officers stated that Williams pointed a gun at each of them once before Aguirre shot him—specifically, that Williams first pointed a pistol at Haluska and then at Aguirre, which led Aguirre to shoot Williams. These statements, which reported that Williams 'backed up and pointed a pistol' and later 'went down' or 'fell to the ground' after Aguirre shot him, also could be read to suggest that Williams was standing when shot. The officers' narrative shifted after they saw the video, which revealed that Williams was on his hands and knees when Aguirre shot him. Haluska then stated that Williams pointed the gun at each officer when on his knees or that Williams pointed his gun at each officer when standing and then pointed his gun at Aguirre a second time when he was on his knees. Aguirre stated that he shot Williams after Williams 'sat the bag down' and 'came up with' a pistol that he pointed at both officers, which suggests that Williams was standing. And yet, Aguirre also insisted that Williams was on the ground when the shooting occurred. A reasonable jury could infer from these inconsistencies that the officers' statements were intentionally false. The jury could find that the initial statements differed from the video in ways that suggest more than a reasonable mistake, such as whether Williams was standing when Aguirre shot him. It also might find that the officers' shifting narratives reflected an attempt to reconcile their statements with the video footage. In short, a reasonable jury could find that the officers lied when they accused Williams of pointing a gun at both of them. . . We also agree that the misstatement in the affidavit was necessary to establish probable cause. Indeed, probable cause evaporates 'after deleting the misstatement[ ],'. . . because it was the only fact in the affidavit supporting probable cause for attempted murder. Of course, an affidavit does not support probable cause if it lacks any facts that suggest a crime occurred. . . Williams's pretrial detention also could not be justified as a warrantless arrest. Although the officers argue at length that they had at least arguable probable cause to arrest Williams for attempted murder, we need not resolve whether they are correct. Even if the officers had probable cause to arrest Williams for attempted murder, Williams's seizure was far too long to be justified without legal process. . . And because a genuine dispute of material fact exists about whether the warrant was invalid as to at least one charge in the arrest warrant, we hold that Williams has met his burden to establish a genuine dispute of fact about whether he was seized in violation of the Fourth Amendment. . . . We acknowledge that a grand-jury indictment also justified part of Williams's detention, and we have not resolved whether an indictment will sever liability for an officer who lied to obtain an arrest warrant. Indeed, dicta in our precedent suggests different conclusions. . . Although grand-jury witnesses are

absolutely immune from liability based on their testimony, . . . the Supreme Court has suggested that a plaintiff could maintain a claim under the Fourth Amendment for a seizure that followed an indictment, *see Manuel*, 137 S. Ct. at 920 n.8. Likewise, other circuits allow claims for seizures that follow a grand-jury indictment if the officer's nontestimonial actions tainted the indictment. *See, e.g.*, *King v. Harwood*, 852 F.3d 568, 584 (6th Cir. 2017); *Coggins v. Buonora*, 776 F.3d 108, 113 (2d Cir. 2015). That said, we need not resolve the effect of the indictment in this appeal. Because Williams, like the plaintiff in *Jones*, was seized pursuant to the purportedly invalid warrant *before* the district attorney obtained the indictment, the arrest warrant was the sole justification for his initial seizure pursuant to legal process. So the effect of the indictment is a question of damages, which are not determinative of qualified immunity.")

[Note: the following cases pre-date the Supreme Court's decision in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), *abrogating Newsome v. McCabe and Llovet v. City of Chicago*]

Cordova v. City of Albuquerque, 816 F.3d 645, 661-66 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) ("The plaintiff seeks damages first and foremost because, he says, local law enforcement officials violated his Fourth or maybe his Fourteenth Amendment rights (we're never told which) by committing the common law tort of malicious prosecution. The defendants accept the premise that the Constitution somewhere (they too never say where) contains something resembling a malicious prosecution tort. Both sides even agree that proof of a 'favorable termination' is an essential element of their constitutionalized tort and they disagree only over how favorable that termination must be. The plaintiff argues that a procedural victory should suffice while the defendants contend that any termination must speak more clearly to the plaintiff's innocence. Respectfully, I would decline the parties' invitation to their fight. We are not in the business of expounding a common law of torts. Ours is the job of interpreting the Constitution. And that document isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning. If a party wishes to claim a constitutional right, it is incumbent on him to tell us where it lies, not to assume or stipulate with the other side that it must be in there *someplace.* To be sure, the parties are not the only ones to blame here. The question of malicious prosecution and its place (or not) in the Constitution is 'one on which there is an embarrassing diversity of judicial opinion.'. . One on which this 'circuit has not always written consistently.'. . And one the Supreme Court has only recently agreed to revisit. *Manuel v. City of Joliet,* 590 F. App'x 641 (7th Cir.2015), *cert. granted,* No. 14–9496, 2016 WL 205942 (U.S. Jan. 15, 2016). So the fact the parties tiptoe gingerly around the subject is hardly surprising. Indeed, I respectfully suggest that any effort to enter the arena and consider the question carefully is likely to leave you looking for the exits. Consider the alternatives most frequently offered as contenders, the Fourth and Fourteenth Amendments. In *Albright,* the opinions were various and varied but at least seven justices of the Supreme Court seemed to agree that the 'substantive' component of the Fourteenth Amendment's due process clause contains nothing like this tort. . . Of course, this much might leave you wondering if the 'procedural' component of the due process guarantee remains a potential candidate after *Albright.* But it's long since settled that even when a state deprives a

person of life, liberty, or property, it does not violate an individual's procedural due process rights so long as it provides an adequate remedy for the deprivation. . . And there's no question in our case that state tort law provides adequate remedies to resolve the plaintiff's complaint. Indeed, we know that New Mexico enjoys a rich common law, one that provides a well-defined tort against the 'malicious abuse of process.' We even know that under the terms of New Mexico tort law it's settled that a plaintiff doesn't need to prove any kind of favorable termination at all. . . Given all this, there's just no reason to think a plaintiff might possibly be 'due' any more process than the State of New Mexico already provides. . . That leaves the Fourth Amendment. Here the story is longer but there's strong reason to suspect it ends the same way. The plurality in *Albright* expressly left open the possibility that the Fourth Amendment might provide a home for something like a tort of malicious prosecution. . . But the Amendment as originally understood focused on restraining police action before the invocation of judicial processes. . . And textually the relevant language of the Amendment speaks to 'unreasonable searches and seizures.' Meanwhile, the tort of malicious prosecution has traditionally concerned itself not with police practices—with searches or restraints on physical liberty before the invocation of judicial proceedings—but with the misuse of judicial proceedings. Indeed, many plaintiffs claiming malicious prosecution (including the plaintiff here) seek damages for a defendant's wrongful use of legal processes even many years after any search or seizure and while the plaintiff remains at liberty awaiting trial. So it's just pretty hard to see how you might squeeze anything that looks quite like the common law tort of malicious prosecution into the Fourth Amendment. . . The only apparent way around this problem appears to invite more problems of its own. While the tort of malicious prosecution focuses on the misuse of judicial proceedings, some have suggested the Fourth Amendment might too because a criminal defendant remains 'seized' for Fourth Amendment purposes not just during the pendency of his arrest but throughout the life of a criminal prosecution—even while he is at liberty on bond awaiting trial. *See, e.g., Albright,* 510 U.S. at 277–79 (Ginsburg, J., concurring). But in light of the Amendment's history and text, we've long conceived of seizures as intentional and effectual restraints on liberty that suffice to lead 'a reasonable person ... to conclude that he is not free to "leave."'. . If we were to amend this understanding at this late date, so that someone free to leave on bond remains 'seized' all the same, what about the defendant awaiting trial on his own recognizance? Or someone served only with a petty citation or summons to appear at trial? And what about the victim of maliciously employed civil process? Or the witness served with a subpoena compelling his appearance? No less than the bonded defendant, all these persons are subject to a seizure if they fail to appear at trial. Yet we've never considered any of them 'seized' simply by virtue of a *conditional* threat of a seizure. To do so now would seem (again) to require us to cast a blind eye to the historical (police action) concerns of the Fourth Amendment and the ordinary meaning of its terms. . . Indeed, for reasons like these, several courts of appeals (this one included) have already rejected the continuing seizure theory. . . And I would have thought that enough to resolve this case. For even if we overlook the parties' failure to identify a constitutional home for their putative cause of action, our own precedent would appear to preclude either of the obvious (Fourth or Fourteenth Amendment) alternatives they might pursue. You would have to wonder, too, if bending the history and language of the Fourth Amendment in new and procrustean ways to embrace a malicious prosecution tort might invite some unintended consequences. What

would a Fourth Amendment right look like when expanded to parties and witnesses at liberty awaiting trial? Might every trial subpoena contest now assume constitutional dimension—and if not, why not? Might expanding the Amendment's reach at least marginally disincentivize the use of liberty-protecting, pre-trial citation processes previously thought sufficient to avoid the Amendment's application? . . . And how might this new understanding of the Fourth Amendment be squared with existing Supreme Court jurisprudence, which has traditionally treated the post-arraignment, pre-trial detention process as the province of the Fifth and Fourteenth—and not the Fourth—Amendment? . . Neither is that the end to the nettles lining the Fourth Amendment path. Anyone wanting to claim a place in the Fourth Amendment for something like a malicious prosecution tort would, of course, have to decide its elements. And that task would surely invite disagreement among the circuits and tension with state law. Indeed, it's far from obvious that a Fourth Amendment-based cause of action would wind up looking anything like a common law claim for malicious prosecution, for the tort traditionally has required proof of malice (while the Fourth Amendment has historically been thought to involve objective 'reasonableness' tests) and the institution of legal proceedings (something the Amendment has never demanded before a violation is found). . . These are, as well, hardly the only themes on which we might expect variations and disputes. Our case offers one more example among what are sure to be many. The defendants contend for a rule requiring the plaintiff to prove not just that a prior criminal action against him was terminated in his favor, but that it was terminated in a way suggesting his innocence on the merits. The court today adopts that standard and claims to do so as a matter of constitutional imperative. But no one has directed us to any other circuit to have gone so far as a matter of constitutional law. Meanwhile, many states do not require so much as a matter of common law, holding that terminations won on procedural grounds, like the speedy trial dismissal in this case, suffice. . . Still other states have concluded that speedy trial dismissals may be procedural but *do* reflect the merits—and reflect them in the plaintiff's favor. . . In fact and as we've seen, the very state in which the actions at issue in this case took place (New Mexico) requires no proof of favorable termination at all. And if (as might be hoped) we take seriously the idea that we are expounding the Fourth Amendment's original public meaning, anyone claiming a malicious prosecution tort can be found in the Amendment might at least want to cast a curious eye to the elements of the cause of action as they existed at the time the Amendment was adopted—yet it's something no one has attempted here and something that would not (at least at a glance unaided by any briefing) seem to support the court's decision today. . . If all these brambles lining the Fourth Amendment path don't leave you doubting the wisdom of venturing that way, perhaps they at least leave you wondering about the necessity of the attempt. After all, out of respect for considerations of judicial modesty, efficiency, federalism, and comity, the Supreme Court in procedural due process cases generally encourages federal courts to abstain in favor of state common law remedial processes rather than try to recreate them in the name of the Constitution. And it's pretty hard to see why we should ignore those same considerations and that same option simply because someone might claim something like the malicious prosecution tort might find a home in the Fourth rather than the Fourteenth Amendment. Carefully devised, tested, and often pretty ancient state tort law is readily available to address the plaintiff's claimed injury in this case. Neither can it come as a surprise that existing state common law courts will usually supply a sound

and sufficient remedy when claims (possibly) of constitutional dimension are at stake: the whole point of the common law as it evolved in England and this country through the centuries was to vindicate the rights thought fundamental to the enjoyment of life, liberty, and property. Before barreling down the constitutional road, why not at least pause to consider the possibility of abstaining in favor of common law proceedings? Asking first: is there really a need to decide any matter of constitutional gravity or might the common law already supply whatever remedy the parties seek to project onto the Constitution? To be sure, *Parratt* abstention doctrine is often said to have originated in the procedural due process setting (though there's good reason to question that account, *see Browder v. City of Albuquerque,* 787 F .3d 1076, 1085 (10th Cir.2015) (Gorsuch, J., concurring)). But even accepting the premise I cannot think of a good reason why the doctrine should be limited to that or any particular class of cases—why abstention should turn on the question which amendment the plaintiff might happen to invoke (or hope we might invoke) as the source of his right rather than on the question whether state law is adequate to vindicate the injury he alleges—as it indisputably is here. . . The objections to abstention are familiar but unpersuasive. Some have argued that § 1983 authorizes federal courts to remedy constitutional injuries so federal courts must decide any claim brought under its auspices. . . Some have also seemed to suggest that state courts cannot be trusted to apply their own common law fairly to their own citizens in suits against state officials. . . But, respectfully, it's long since settled that the statutory power to proceed does not always entail the duty to do so, for federal courts not infrequently abstain when they have the power to decide. . . And even if there may be some circumstances when federal courts have to act because state courts are unable or unwilling to intervene, no one suggests anything like that in this case or in the mine run of cases like it. To the contrary, every indication in this case is that the plaintiff would have fared much better under state tort law than he does under our constitutionalized facsimile of state tort law—and it is surely at least a little ironic that in the name of protecting individual rights we not infrequently wind up in cases like this one effectively diminishing them. . .In the end, all the difficulties and doubts associated with finding a home for a tort of malicious prosecution in the Constitution confirm for me the obvious: that 'some questions of ... tort law are best resolved by' tort law. . . When the parties cannot be bothered to identify the source of their supposedly constitutional complaint, when the avenues to a constitutional home are lined with doubt, and when there's a perfectly free and clear common law route available to remedy any wrong alleged in this case, I just do not see the case for entering a fight over an element of a putative constitutional cause of action that may not exist and no one before us needs. Often judges judge best when they judge least—and, respectfully, I believe this is such a case.")

See also ***King v. Harwood***, 852 F.3d 568, 580 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 640 (2018) ("We recognized in *Sykes* that 'malicious prosecution' was a misnomer: unlike the common-law tort of malicious prosecution, which has malice as an element, we noted that the constitutional tort of malicious prosecution that is actionable in our circuit as a Fourth Amendment violation under § 1983 does not require a showing of malice at all, and might more aptly be called 'unreasonable prosecutorial seizure.'. . Nevertheless, we continued to call the constitutional tort 'malicious prosecution,' concluding that we were 'stuck with that label' in part because of its use by the Supreme Court and other circuits."); ***Avery v. City of Milwaukee,*** 847 F.3d 433, 438-39

(7th Cir. 2017) ("We begin with Avery's challenge to the Rule 59(e) ruling. In their motion the detectives argued that the claims on which the jury found them liable were actually impermissible coerced-confession claims, not genuine evidence-fabrication claims. The judge rejected this argument, concluding instead that a due-process claim 'sounds' in malicious prosecution and therefore Avery's claims were 'knocked out' as a matter of law because Wisconsin law provides a remedy for that tort. He also held that the detectives' testimony at trial—and *not* their act of fabricating evidence—caused Avery's injury and that witnesses at a criminal trial are absolutely immune from suit for damages flowing from their testimony. . . .It's clear that Avery's due-process claims are factually grounded in acts of evidence fabrication by the detectives—evidence that was later used to convict and imprison him. 'We have consistently held that a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of [his] liberty in some way.'. . On the other hand, a claim that an officer coerced a witness to give incriminating evidence does not, at least standing alone, violate the wrongly convicted person's due-process rights. . . . Falsified evidence will *never* help a jury perform its essential truth-seeking function. That is why convictions premised on deliberately falsified evidence will always violate the defendant's right to due process. What's relevant is not the label on the claim, but whether the officers 'created evidence that *they knew to be false*.'. . The jury found that Detectives Phillips and Hernandez knew their reports of Avery's confession were false when they wrote them; those reports—and the fake confession—were used at trial to convict him. The detectives can't escape liability for this due-process violation by shifting the focus to the background facts about the tactics they used to interrogate him. This brings us to the two grounds on which the judge actually rested his Rule 59(e) decision. First, and primarily, the judge held that an evidence-fabrication claim 'sounds' in malicious prosecution and therefore Avery's due-process claims were 'knocked out' by Wisconsin's common-law remedy for that tort. This reasoning traces to *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), which in turn relied on Justice Kennedy's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994). . . . *Newsome* read Justice Kennedy's opinion as the narrowest ground of decision in *Albright*. . . Applying the *Parratt* principle, *Newsome* construed *Albright* as rejecting a constitutional claim of malicious prosecution where state law provides a meaningful remedy for that tort. . . But *Albright* must be understood in the context of its facts. As we explained at length in *Armstrong*, *Albright* has nothing at all to say about a deprivation of the due-process right to a fair trial. . . That is, *Albright* did not involve a plaintiff who claimed he was wrongfully *convicted* of a crime in a trial tainted by falsified evidence, known perjury, or the deliberate destruction of exculpatory evidence. . . That kind of claim is 'grounded in the due process guarantee of fundamental fairness in criminal prosecutions' and has long been recognized. . . The *Parratt* doctrine, we explained in *Armstrong*, doesn't apply in this context. . . The availability of a state-law remedy for malicious prosecution doesn't defeat a federal due-process claim against an officer who fabricates evidence that is later used to obtain a wrongful conviction. . .So it was a mistake for the judge to set aside the verdict on this ground. That Wisconsin provides a remedy for malicious prosecution is irrelevant to the viability of Avery's § 1983 claims for deprivation of his right to a fair trial. The jury found that Detectives Phillips and Hernandez manufactured the confession that featured prominently in his trial and contributed to his wrongful conviction for Griffin's murder."); ***Cairel v. Alderden***, 821 F.3d 823,

831, 833 (7th Cir. 2016) ("Even assuming for the purposes of summary judgment that defendants fabricated evidence, plaintiffs still could not prevail on this claim. For such a claim, the plaintiff must have suffered a deprivation of liberty. See *Saunders–El v. Rohde,* 778 F.3d 556, 561 (7th Cir.2015); see also *Alexander v. McKinney,* 692 F.3d 553, 557 (7th Cir.2012). The need to appear in court and attend trial does not constitute such a deprivation. . .We held in *Saunders–El* that a plaintiff who had been released on bond following his arrest and who was later acquitted at trial could not maintain a due process claim for fabrication of evidence. . . Plaintiffs' evidence-fabrication claims are foreclosed by our holding in *Saunders–El.* Plaintiffs were quickly released on bond following their arrests. Of course, they were never actually tried, but this, if anything, reduces any burden plaintiffs may have faced. . . . We assume that civil *Brady* claims will be viable most often when a defendant has been wrongfully convicted and imprisoned as a result of the *Brady* violation. See, e.g., *Bianchi v. McQueen,* No. 14–1635, ––F.3d ––––, 2016 WL 1213270, at *8 (7th Cir. March 29, 2016). As we explained in *Armstrong,* however, the key to a civil *Brady* claim is not a conviction or acquittal but a deprivation of liberty. . . Under other circumstances, such as where an accused is held in pretrial custody before acquittal or dismissal, a failure to disclose exculpatory evidence may cause the type of deprivation of liberty required for a *Brady* claim even if the case ends without a trial or conviction."); ***Bianchi v. McQueen***, 818 F.3d 309, 319-20, 323 & n.6 (7th Cir. 2016) ("Bianchi and his colleagues suffered no deprivation of liberty; they were acquitted at trial. That brings this case squarely within the holding of *Saunders–El v. Rohde,* 778 F.3d 556 (7th Cir.2015). . . .*Saunders–El* and *Alexander* foreclose the evidence-fabrication claim alleged in this case. Because the plaintiffs suffered no liberty deprivation, they suffered no due-process violation. When pressed on this point at oral argument, the plaintiffs' attorney conceded the controlling force of *Saunders–El* and grudgingly accepted the impossibility of prevailing on this claim. So even if acts of evidence fabrication could be proved, qualified immunity applies. . . .The Sixth, Tenth, and Eleventh Circuits have definitively held that an acquittal extinguishes a *Brady* claim. . . So even assuming the truth of the allegations about evidence suppression, no *Brady* violation occurred because the plaintiffs suffered no prejudice. Qualified immunity bars this claim too. (Indeed, absolute immunity bars the *Brady* claim against McQueen.) . . . .Importantly, the Court in *Wallace* specifically declined to address whether a malicious-prosecution claim is *ever* cognizable as a Fourth Amendment violation remediable under § 1983. . . The plaintiff in *Wallace* had expressly abandoned that issue, which was left unresolved in the Court's split decision in *Albright v. Oliver* . . . .Although some circuits have recognized such a claim, *see Hernandez–Cuevas v. Taylor,* 723 F.3d 91, 99 (1st Cir.2013) (collecting cases), this circuit has not, *see, e.g., Welton v. Anderson,* 770 F.3d 670, 673–75 (7th Cir.2014); *Bielanski,* 550 F.3d at 638; *Newsome v. McCabe,* 256 F.3d 747, 750–52 (7th Cir.2001). With the law this unsettled, qualified immunity applies.[6] [fn.6 The Supreme Court has recently granted certiorari to address whether a claim for malicious prosecution is cognizable under the Fourth Amendment where the plaintiff alleges that he was held in pretrial detention without probable cause. *See Manuel v. City of Joliet,* 590 F. App'x 641 (7th Cir.2015), *cert. granted* ––– U.S. ––––, 136 S.Ct. 890, 193 L.Ed.2d 783 (Jan. 15, 2016) (No. 14–9496). *Manuel* will be heard next term. The Court's decision will not affect this case; here the plaintiffs were not held in pretrial detention.] Finally, *even if* this claim were cognizable as a Fourth Amendment violation, McQueen

and the investigators would *still* be entitled to qualified immunity. Because the plaintiffs were immediately released on bond and were neither seized nor detained, they suffered no Fourth Amendment injury. So any way you slice it, the district judge was right to apply the qualified-immunity bar. The Fourth Amendment claim was properly dismissed."); ***Saunders-El v. Rohde***, 778 F.3d 556, 558-62 (7th Cir. 2015) ("A criminal's due process rights may be violated—actionable by way of 42 U.S.C. § 1983—when the evidence against him is fabricated. However, due process is not implicated when, as here, the defendant is released on bond following his arrest and acquitted at trial. And this rule cannot be circumvented, as Saunders–El attempts to do, simply by re-framing such an allegation as a *Brady* claim—that is, by alleging that the police officers who supposedly fabricated the evidence failed to reveal their misconduct to the prosecution. Accordingly, we affirm the judgment of the district court, but on other grounds. . . . In *Newsome,* we established that the existence of a state law claim for malicious prosecution renders unavailable § 1983 as a vehicle for bringing a federal malicious prosecution claim. . . In *Brooks,* we affirmed the dismissal of plaintiff's allegation that 'criminal proceedings were instituted against him based on false evidence or testimony,' remarking that 'such a claim "is, in essence, one for malicious prosecution, rather than a due process violation."'. . Finally, in *Fox,* we counseled against 'shoehorning into the more general protections of the Fourteenth Amendment claims for which another amendment provides more specific protection.'. . There, we deemed the plaintiff's allegation that the defendants violated his due process rights by causing him to be falsely arrested, imprisoned, and prosecuted by 'deliberately fabricat[ing] false statements and ... obstruct[ing] justice' to be a hybrid of a malicious prosecution claim and a Fourth Amendment claim, rather than a due process claim. . .None of these decisions—individually or as a collection—stands for the proposition that fabricating evidence does not violate a defendant's due process, actionable pursuant to § 1983. Instead, they merely establish that allegations that sound in malicious prosecution must be brought pursuant to state law. To the extent that these decisions may have rendered the law in this area uncertain, our more recent decisions have been explicit. In *Whitlock v. Brueggemann,* 682 F.3d 567, 580 (7th Cir.2012), we expressly stated that 'a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of [his] liberty in some way.' We have reiterated this position several times since then. For instance, just two weeks before the district court issued its opinion in this case, we decided *Fields v. Wharrie,* 740 F.3d 1107 (7th Cir.2014) ("*Fields II* "), wherein we made clear that fabricating evidence, including witness testimony, violates a clearly established constitutional right, such that qualified immunity does not shield the manufacturers of such evidence from liability. . . Accordingly, the district court erred in holding, *categorically,* that a claim of evidence fabrication cannot form the basis of a due process claim under § 1983 and must instead be brought as a state law malicious prosecution claim. Not every act of evidence fabrication offends one's due process rights, however-a point we elucidated in *Alexander v. McKinney,* 692 F.3d 553, 557 (7th Cir.2012). . . . Saunders–El, released on bond following his arrest and acquitted at trial, falls squarely within our holding in *Alexander,* and, accordingly, cannot make out an evidence fabrication-based due process violation. He may have an Illinois state law malicious prosecution claim, the elements of which are: (1) the defendants commenced judicial proceedings, (2) for which there was no probable cause, (3) the proceeding were instituted or continued

maliciously, (4) the proceedings were terminated in the plaintiff's favor, and (5) the plaintiff sustained an injury. . . But, as outlined above, that claim must be brought in state court. . . . [O]ur case law makes clear that *Brady* does not require the creation of exculpatory evidence, nor does it compel police officers to accurately disclose the circumstances of their investigations to the prosecution. Accordingly, Saunders–El's *Brady* claim is more appropriately characterized as a claim for malicious prosecution—that is, a claim that the officers commenced his prosecution without probable cause—which cannot form the basis of a constitutional tort. In any event, it would be entirely incongruous for us to endorse Saunders–El's *Brady* theory, in light of our holding in *Alexander.* Since, as *Alexander* holds, a police officer does not violate an acquitted defendant's due process rights when he fabricates evidence, it would defy any semblance of logic to conclude that the same officer subsequently violates the defendant's constitutional rights simply by remaining silent about that fabrication (and thus, without taking any additional affirmative action). In essence, Saunders–El's so-called *Brady* claim is simply a recast of his evidence fabrication claim, and our precedent establishes that such a claim is not cognizable on account of his acquittal."); ***Myvett v. Chicago Police Detective Edward Heerdt***, 232 F.Supp.3d 1005, 1015-19 (N.D. Ill. 2017) ("The Court rejected Almdale's challenge to the due process claim in denying the defendants' motion for summary judgment, noting that the Seventh Circuit has repeatedly recognized the viability of a due process claim asserting that a defendant's fabrication of evidence caused a deprivation of liberty. . . In support of his renewed challenge, Almdale relies on the analysis set forth by Judge Feinerman in *White v. City of Chicago*, 149 F. Supp. 3d 974 (N.D. Ill. 2016), which concluded that, notwithstanding these cases, circuit authority does not permit a plaintiff who was not convicted at trial to pursue a due process claim premised on the fabrication of evidence. . . Although the analysis in *White* does an admirable job of attempting to reconcile seemingly divergent lines of authority that bear on the viability of a due process claim premised on the fabrication of evidence, it does not persuade this Court to deviate from the unequivocal direction the Seventh Circuit provided to district courts in *Saunders-El*. In that case, the Court of Appeals expressly rejected any interpretation of circuit precedent suggesting 'that evidence fabrication-based due process claims can never form the basis of a constitutional tort.'. . The Court explained that this erroneous interpretation was 'inaccurate' and based on a misunderstanding of prior cases, such as *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), *Brooks v. City of Chicago*, 564 F.3d 830 (7th Cir. 2009), and *Fox v. Hayes*, 600 F.3d 819 (7th Cir. 2010). Those cases, the Court explained, confirmed only that malicious prosecution claims—that is, claims premised on the initiation of criminal proceedings without probable cause—could not be pursued under § 1983 where state law provides a tort remedy. . . Due process claims premised on post-arrest deprivations of liberty are a different animal, however, and the Seventh Circuit stated that '[n]one of these decisions—individually or as a collection—stands for the proposition that fabricating evidence does not violate a defendant's due process, actionable pursuant to § 1983.'. . The Court of Appeals therefore held in *Saunders-El* that the district court had 'erred in holding, *categorically,* that a claim of evidence fabrication cannot form the basis of a due process claim under § 1983.'. . *White* does not go quite so far as to say that fabrication of evidence claims can never give rise to a due process claim; instead, it sought to reconcile *Whitlock* with *Newsome* and *Fox* by limiting *Whitlock*'s recognition of due process evidence fabrication claims to cases in which 'the

deprivation results from a criminal conviction.' . . But, respectfully, that holding rests on a distinction between pre- and post-trial deprivations of liberty that is both untenable as a matter of logic (surely one held in custody on the basis of fabricated evidence used against him before trial is no less aggrieved than one held in custody after a conviction secured with the aid of fabricated evidence) and which was squarely rejected by *Saunders-El.* There, the Seventh Circuit concluded that the plaintiff had no due process claim, but not just because he was acquitted at trial; Saunders-El had no due process claim both because he had been acquitted at trial and because he had been 'released on bond following arrest.'. . *White* does not address this aspect of *Saunders-El*, citing it only for the uncontroversial, but irrelevant, proposition that a state law malicious prosecution claim renders § 1983 unavailable as a vehicle for bringing a federal malicious prosecution claim. . . The question here is not whether a plaintiff may bring a federal claim for *malicious prosecution*, but for *a violation of due process*. As to that question, *Saunders-El* unequivocally instructs that, when evidence fabrication works a significant deprivation of liberty, the answer is yes. . . Other cases from the Seventh Circuit have made the same point. [discussing cases] Judge Feinerman's opinion in *White* appropriately cautions against concluding that older Circuit precedent has been overruled by more current precedent when the Circuit has not said as much. Respectfully, however, in this instance the Circuit has said as much. In *Saunders-El*, the panel expressly said that its recognition of due process claim predicated upon fabricated evidence that leads to a significant deprivation of liberty was not foreclosed by, or inconsistent with, cases like *Newsome* and *Fox*. In *Bianchi*, the court of appeals similarly confirmed that '[a]llegations of evidence fabrication may state a colorable due-process claim in the wake of our decisions in *Whitlock* and *Fields II*.'. . Due respect for circuit precedent, then, requires this Court to recognize such a cause of action to the extent those cases do so. And those cases recognize that both pre- and post-trial deprivations of liberty occasioned by fabricated evidence give rise to a due process claim which may be pursued under § 1983. What is perhaps this Circuit's most complete exegesis of the rationale for recognizing due process deprivation of liberty claims under § 1983 can be found in *Armstrong v. Daily*, 786 F.3d 529 (7th Cir. 2015). There, the Seventh Circuit expressly rejected the rationale underlying *White*, namely that the *Parrat* doctrine bars due process claims premised on fabricated evidence because state law claims for malicious prosecution provide an adequate remedy. . . . The *Armstrong* plaintiff's claims of fabrication and destruction of evidence fell within Justice Kennedy's recognized limitations of *Parratt* because such claims involved rights essential to the fairness of criminal prosecutions. . .Thus, the underlying justification of *Parratt* discussed previously—that pre-deprivation notice and hearing were simply not feasible in cases of random and unauthorized misconduct—is inapposite where, as here, the plaintiff seeks to vindicate substantive due process protections rather than procedural safeguards. . . *White* rejects *Armstrong*'s relevance because it 'did not even address an evidence fabrication claim,'. . . and because the plaintiff had previously spent some 29 years in prison before his conviction was vacated. But the holding of the case has nothing to do with the prior incarceration; the issue at bar was the viability of the due process claim for Armstrong's continued pretrial detention while the state assessed whether to retry him. The defendants argued that because that second trial never happened, and thus he was only subject to pretrial detention, no due process violation occurred. . .The Seventh Circuit flatly rejected that argument, noting that although 'the most common liberty deprivation cases are based on post-trial

incarceration after a wrongful conviction, the essential elements of this constitutional claim are more general and not limited to wrongful convictions.'. . The court went on to add that a '[due process claim] should not be limited to its most common version by a too-narrow requirement that the accused have been tried and convicted.'. . Thus, it follows that if the accused does not need to be tried and convicted for a deprivation to occur, something short of a conviction—such as pretrial detention—is sufficient. Accordingly, this Court concludes that the Seventh Circuit has affirmed, repeatedly, that a due process claim will lie when fabricated evidence is used to deprive a criminal defendant of liberty, even when the prosecution of that defendant is ultimately unsuccessful. Myvett's due process claim therefore passes muster."); ***Lamb v. Mcmillen***, No. CV 16-3004, 2016 WL 4706926, at *6 (C.D. Ill. Sept. 8, 2016) ("The Seventh Circuit, in *Washington*, cited by Plaintiff, suggests that a federal claim for malicious prosecution may exist under the Fourth Amendment. However, the Seventh Circuit later withdrew that suggestion in *Washington* (and similar dicta in other cases) and affirmatively held that no federal constitutional claim for malicious prosecution exists at all, unless Plaintiff has no such remedy under state law. *See Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). Still, other circuits do allow such a claim and the United States Supreme Court recently granted certiorari to address the question. *See Manuel*, 590 Fed.Appx. 641. However, even if the Supreme Court overrules *Manuel* and finds that Plaintiff may bring a malicious prosecution claim based on the Fourth Amendment, Plaintiff does not allege facts that state such a claim because Plaintiff does not allege that he was detained after charges were filed. *See Townsend v. Wilson*, ___ Fed.Appx. ____, 2016 WL 3262630, at *3 n.1 (7th Cir. 2016) (noting the possibility that the Supreme Court may find a malicious prosecution claim under the Fourth Amendment but holding that if the plaintiff was 'not detained after charges were filed, he did not suffer a Fourth Amendment injury that would support' such a claim). Therefore, Plaintiff does not state a claim for malicious prosecution under § 1983."); ***Collier v. City of Chicago***, No. 14 C 2157, 2015 WL 5081408, at *6-7 (N.D. Ill. Aug. 26, 2015) ("For a time, it was believed that fabrication of evidence did not give rise a cognizable due process claim in the Seventh Circuit. . .More recently, however, the Seventh Circuit has put that view to rest. As the law now stands in the Seventh Circuit, 'a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of her liberty in some way.'. .That is not to say that 'every act of evidence fabrication offends one's due process rights.'. . To sustain a due process claim based on fabricated evidence, the plaintiff must have been deprived of his liberty in some way, and the Seventh Circuit has said that a plaintiff who was 'released on bond following his arrest and acquitted at trial ... cannot make out an evidence fabrication-based due process violation.'. . If the plaintiff is not released on bond, however, his pretrial detention may satisfy this requirement even if he is ultimately acquitted. . . Collier contends that the defendants fabricated evidence by planting the keys and submitting police reports they knew to be false. Such conduct satisfies the Seventh Circuit's definition of fabrication of evidence. . .Collier has also offered evidence from which a reasonable jury could find that the fabricated evidence resulted in a liberty deprivation. Specifically, he was in custody for 15 months while awaiting trial, and the evidence would permit a reasonable jury to find that absent the allegedly fabricated evidence, he would not have been charged and thus would not have suffered a deprivation of his liberty. The Court therefore denies defendants' request for summary judgment

on the fabricated evidence due process claim. Collier also contends that defendants violated due process by 'deliberately exclud[ing] evidence implicating other suspects and exculpating [him].'. . His brief is less than crystal clear on this point, but he appears to be referring to the fact that the police reports do not mention that his personal items indicated that he resided at an address other than 149 W. 74th Street and that there was mail found in the apartment that was addressed to 149 W. 74th Street but did not list Collier as the recipient.The Court understands this to involve a contention that defendants violated Collier's due process rights under *Brady v. Maryland,* 373 U.S. 83 (1963). .. Although the Seventh Circuit has repeatedly expressed doubt 'that an acquitted defendant can ever establish the requisite prejudice for a *Brady* violation,' it has not entirely foreclosed a claim in this scenario. . . Specifically, the Seventh Circuit has 'entertained the possibility that prejudice could be established if an acquitted defendant showed that disclosure of the suppressed evidence would have altered the decision to go to trial.'. . But defendants did not advance any argument in their summary judgment brief about the effect of this evidence on the decision to try Collier. Rather, they argued only that Collier's acquittal, without more, undermines a *Brady* claim. Because that appears to be an overstatement of the law as it now stands, and because defendants have made no effort to show the absence of effect of the suppressed evidence on the decision to try Collier, they are not entitled to pare the *Brady* allegations from Collier's due process claim on this basis."); ***Lofton v. Eberle***, No. 14 C 898, 2015 WL 507472, at *3-4 (N.D. Ill. Feb. 5, 2015) ("[T]ogether, *Brooks* and *Alexander* hold that a section 1983 plaintiff may state a due process claim based on the fabrication of evidence only when the fabricated evidence is used at trial and he or she is subsequently convicted. . . As stated succinctly in *Saunders–El v. Rohde,* '[n]ot every act of evidence fabrication offends one's due process rights....'. . . Here, the state dropped the charges against Lofton via a *nolle prosequi* motion prior to trial. Because the purportedly fabricated evidence was never used against Lofton at trial and he was never convicted of the charges, Lofton fails to state a due process claim based on the alleged fabrication of evidence, and the Court grants Defendants' motion to dismiss Count I."); ***Harris v. City of Chicago***, No. 14-CV-4391, 2015 WL 1331101, at *4-5 (N.D. Ill. Mar. 19, 2015) ("Defendants argue that the existence of a state law malicious prosecution claim disposes of any fabrication of evidence claim. That argument is not persuasive. As the Seventh Circuit has recently held, 'fabrication can support a due process claim under § 1983.'. . A due process claim does not arise when criminal proceedings are based on false evidence or testimony because such a claim is one for malicious prosecution. . . . However, when evidence is manufactured against a criminal defendant and used to deprive her liberty, due process rights are violated. . . This applies equally to evidence manufactured by police officers and/or by prosecutors acting in an investigatory capacity. . . Plaintiff alleges that Defendant Officers fabricated a confession and coerced her into making the fabricated confession. Defendants argue that Plaintiff's claim is more accurately portrayed as a coerced confession. The Seventh Circuit has drawn a distinction between coerced testimony and fabricated testimony. 'Coerced testimony is testimony that a witness is forced by improper means to give; the testimony may be true or false. Fabricated testimony is testimony that is made up; it is invariably false.'. . Fabricated testimony is deliberately inaccurate and, therefore, always false. . . A coerced confession does not lead to a cognizable due process claim, as opposed to a fabricated confession where there is a cognizable claim. . . This is not to say that the two are

unrelated, indeed 'coercion (which in an extreme case could amount to torture) may be an essential tool in "persuading" a witness to fabricate testimony.'. . Here, Plaintiff alleges that her confession was both fabricated and coerced, the very situation contemplated in *Fields II*. Defendants argue that the situation is more like *Petty,* where the Seventh Circuit held that a witness coerced into falsely identifying a defendant in a lineup was more accurately described as a coercion case and not a fabrication case.")

See also ***Black v. Montgomery County***, 835 F.3d 358, 369-72 & n.12 (3d Cir. 2016) ("The legal question before us is whether a plaintiff may pursue a fabricated evidence. . . claim against state actors under the due process clause of the Fourteenth Amendment even if the plaintiff was never convicted. While we held in *Halsey* that a fabricated evidence claim could proceed when a plaintiff was convicted at trial, we explicitly left open the question of whether such a claim would be viable if a plaintiff was acquitted. Consistent with other Courts of Appeals that have considered this question, as well as our reasoning in *Halsey*, we now hold that such a stand-alone fabrication of evidence claim can proceed if there is no conviction. . . .We see no reason to require a conviction as a prerequisite to a stand-alone due process claim against a state actor for fabrication of evidence. The harm we were concerned with in *Halsey* — corruption of the trial process — occurs whether or not one is convicted. It would be indeed anomalous if an attentive jury correctly saw through fabricated evidence, and its acquittal categorically barred later relief to the criminal defendant. Such a result would insulate the ineffective fabricator of evidence while holding accountable only the skillful fabricator. Fabricated evidence is an affront to due process of law, and state actors seeking to frame citizens undermine fundamental fairness and are responsible for 'corruption of the truth-seeking function of the trial process.'. . .Others Courts of Appeals have permitted plaintiffs to pursue due process claims predicated on the fabrication of evidence notwithstanding the fact, as here, that the plaintiff was not convicted of criminal charges. [collecting cases] Two Courts of Appeals appear to require a conviction as a prerequisite to a stand-alone due process claim. *See Saunders-El v. Rohde*, 778 F.3d 556, 562 (7th Cir. 2015) ("[A] police officer does not violate an acquitted defendant's due process rights when he fabricates evidence."); *Massey v. Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014) ("Fabrication of evidence alone is insufficient to state a claim for a due process violation; a plaintiff must plead adequate facts to establish that the loss of liberty — i.e., his conviction and subsequent incarceration — resulted from the fabrication."). While the *Massey* court provided very little analysis to support its holding, the *Saunders-El* court noted that the only ' "liberty deprivation"' in a fabricated evidence case where one is acquitted ' "stems from his initial arrest."'. . . The *Saunders-El* court rejected the view that ' "the burden of appearing in court and attending trial, in and of itself, constitute[s] a deprivation of liberty [because] [i]t would be anomalous to hold that attending a trial deprives a criminal defendant of liberty."'. . As explained in Subsection III(A) supra, however, we take a broader view of the liberty deprivations occasioned by the criminal process. Further, considering our Court's concern in *Halsey* and in this decision with the corruption of the truth-seeking process of trial, we disagree with *Saunders-El*. . . .Accordingly, we hold that an acquitted criminal defendant may have a stand-alone fabricated evidence claim against state actors under the due process clause of the Fourteenth Amendment if there is a reasonable likelihood that, absent that fabricated evidence, the defendant

would not have been criminally charged. . . .We conclude that Black's acquittal does not preclude her claim that the defendants intentionally fabricated evidence in violation of the due process clause of the Fourteenth Amendment. Accordingly, we will vacate and remand the District Court's dismissal of Black's fabrication of evidence claim.")

Compare ***Castellano v. Fragozo,*** 352 F.3d 939, 957, 958 (5th Cir. 2003) (en banc) ("At their most fundamental level, the values sought to be vindicated here are core commands of our United States Constitution − undiluted and unblurred by any blend of state tort law that would either enhance or diminish its force. Unlike defamation and malicious prosecution, this constitutionally secured right of an accused in a criminal case was not seeded in the common law of tort where duties are the product of judicial choice with no roots in the value choices of our organic law. We need not agree with the Seventh Circuit's statement that Justice Kennedy's concurring opinion is the holding of *Albright* to agree that there are fundamental rights, albeit few in number, secured by due process that differ in kind from those at issue in *Albright* and which are beyond the reach of *Parratt.* Justice Stevens made the point as well, observing, '[e]ven if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony ... simply does not comport with the requirements of the Due Process Clause.' This is no more than the line drawn by the *Parratt* line of cases and the handful of cases decrying conduct so destructive of a fair trial that it cannot be justified by procedures. As Chief Justice Rehnquist put it in *Daniels,* the Due Process Clause protects against arbitrary acts of government by promoting fairness in procedure and by barring certain government actions regardless of the fairness of the procedures used to implement them.' As we have indicated, we find the reasoning employed in dismissing Castellano's due process claims flawed. Castellano's contention that the manufacturing of evidence and knowing use of perjured testimony attributable to the state is a violation of due process is correct. Nevertheless, on remand Castellano will face the well-established rule that prosecutors and witnesses, including police officers, have absolute immunity for their testimony at trial. Courts have also held that non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity because they are not part of the trial. Thus, while Castellano's due process claims are not properly rejected by the principles of *Albright* and *Parratt,* whether they survive the absolute immunity given witnesses in a criminal trial or whether the fabrication of the tapes could have been a legally sufficient cause of the wrongful conviction, we leave to the district court on remand.' [footnotes omitted]) *with* ***Castellano v. Fragozo,*** 352 F.3d 939, 969, 970 (5th Cir. 2003) (en banc) (Barksdale, J., joined by Emilio M. Garza, J., concurring in part and dissenting in part) ("The conduct about which Castellano complained in district court constitutes a procedural due process violation for which state law provides an adequate post-deprivation remedy. Remember, Castellano is not seeking a new criminal trial because his trial was fundamentally unfair. The state courts provided habeas relief, and the State did not re-prosecute. Instead, Castellano is seeking damages for alleged wrongs − now only by Sanchez and Fragozo − that occurred before and during his criminal trial. In such instances, the state post-deprivation remedies are the 'best the state can do' to allow injured individuals recovery after injury has occurred. . . Such state remedies are sufficient to address due process violations that are 'random and unauthorized' and therefore violate procedural due

process. . . . Again, the conduct at issue here − alleged witness fabrication of evidence and perjury − is precisely the sort of 'random and unauthorized' conduct to which *Parratt* applies; therefore, the existence of adequate post-deprivation state remedies, such as through a malicious prosecution claim, bars a § 1983 procedural due process claim. . . . [A] due process claim can bypass *Parratt* in only *two* ways: (1) the claim is substantive; or (2) it is procedural, but available state remedies are inadequate. There is no dispute that Castellano has neither pleaded nor proved the inadequacy of state remedies. Apparently this is why the majority finds it necessary to provide cover for the only possible claim − substantive due process. But, because Castellano argued to the magistrate judge against construing his claim as substantive, the majority labels it, simply, 'due process'.").

See also ***Morgan v. Chapman***, 969 F.3d 238, 245-50 (5th Cir. 2020) ("In *Castellano v. Fragozo*, an *en banc* majority of this court extinguished the constitutional malicious-prosecution theory. . . *Castellano* explained that claims under § 1983 are only 'for violation[s] of rights locatable in constitutional text.'. . This makes sense: the people have a constitutional right to be free from unreasonable searches and unreasonable seizures. In so far as the defendant's bad actions (that happen to correspond to the tort of malicious prosecution) result in an unreasonable search or seizure, those claims may be asserted under § 1983 as violations of the Fourth Amendment. But that makes them Fourth Amendment claims cognizable under § 1983, not malicious prosecution claims. There is a constitutional right to be free of unreasonable searches and seizures. There is no constitutional right to be free from malicious prosecution. Therefore, qualified immunity bars Morgan's § 1983 malicious prosecution claims against Chapman and Kopacz. . . . We recognize that previous decisions of this court may have left open the possibility that the freedom-from-abuse-of-process right lay hidden in the constitutional ether. . . We close the door on that possibility. Putting together *Beker*, *Brown*, and *Castellano*, we observe that facts that constitute the state tort of abuse of process can also constitute an unreasonable search, unreasonable seizure, or violation of another right 'locatable in constitutional text.'. . Such claims, rooted in the violation of constitutional rights, are actionable under § 1983. But those claims 'are not claims for [abuse of process] and labeling them as such only invites confusion.'. . Because there is no constitutional right to be free from abuse of process, the district court erred by failing to grant defendants qualified immunity on that claim. . . . The *Zadeh* search violated the Fourth Amendment even if pain management clinics were a closely regulated industry, we explained. Nonetheless, we concluded that the law was not clearly established at the time, because 'the defendants reasonably could have believed that the administrative scheme here provided a constitutionally adequate substitute for a warrant.'. . The *Zadeh* court also concluded, under an alternative theory, that the searches at issue were not pretextual. . . A search is not really administrative if it is used solely to find evidence of criminal wrongdoing. . . Neither the closely regulated industry holding nor the pretextual search analysis would stop Morgan's claims. In *Zadeh,* the defendants received qualified immunity because the law of *instanter* searches of closely regulated pain management clinics was unclear. . . Here, accepting the plaintiff's allegations as true, it is uncontroverted that Morgan was *not* operating a pain management clinic. Indeed, he alleges that he 'has never obtained, stored, maintained or dispensed any controlled substances of any kind from either medical practice.' Because Morgan was not operating a pain

management clinic, the qualified immunity available to the defendants in *Zadeh* would be inapplicable here. The pretext analysis in this case also departs from *Zadeh*. In *Zadeh*, we concluded that the searches were not pretext for criminal investigation because there was no evidence that the 'investigation resulted in a criminal prosecution' and because the TMB took 'subsequent administrative action against' the physician. . . Therefore, we reasoned, the search was not pretextual because it 'was not performed "solely to uncover evidence of criminality."'. . Here, neither of those two facts are present. The search *did* result in a criminal prosecution, and TMB did *not* take any subsequent administrative action against Morgan. Based on this case law, we cannot say it would be futile for Morgan to add a Fourth Amendment claim for an unreasonable search. . . . A Fourth Amendment unreasonable seizure claim arising from Morgan's arrest on false charges would also be familiar. We recently concluded that an unlawful seizure claim was cognizable and qualified immunity did not apply where a plaintiff 'was wrongfully arrested due to the knowing or reckless misstatements and omissions' in a law enforcement officer's affidavits. . . . We also must address whether it would be futile to remand to allow the district court to consider a due process claim. This court recently announced that there is a 'due process right not to have police deliberately fabricate evidence and use it to frame and bring false charges against a person.' *Cole v. Carson*, 802 F.3d 752, 771 (5th Cir. 2015) ("*Cole I"), cert. granted, judgment vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016) *and opinion reinstated in part,* 935 F.3d 444 (5th Cir. 2018) (en banc). And, although *Cole* had a peripatetic procedural history, that holding is binding Fifth Circuit precedent today. . . Given the on-point *Cole* holding, the due process claim would similarly not represent a futile amendment. Remand to allow the district court to consider that claim would not be futile. . . It would not be *futile* on the merits for Morgan to pursue an unreasonable search, unreasonable seizure, or due process claim. But the decision as to whether Morgan *should* be allowed to amend is not ours to make. It is unclear what legal theories the plaintiff presented in the district court. And his claims seem to have transformed on appeal. We remand for the district court to consider amendment and, if necessary, issues of waiver and forfeiture."); ***Travis v. City of Grand Prairie***, No. 15-10860, 2016 WL 3181392 (5th Cir. June 7, 2016) (not published) ("We have recognized that the Fourth Amendment's protections extend to preclude unreasonable seizure throughout the pretrial events of a prosecution, although we have discussed it as a Fourth Amendment claim and have rejected the notion that a freestanding malicious prosecution claim absent a Fourth Amendment violation is cognizable under § 1983. *See Castellano v. Fragozo*, 352 F.3d 939, 945-54 (5th Cir. 2003) (en banc). We note that the Supreme Court has granted a petition for a writ of certiorari to review the Seventh Circuit's holding in *Manuel v. City of Joliet*, 590 F. App'x 641 (7th Cir. 2015), *cert. granted*, 136 S. Ct. 890 (2016), that the Fourth Amendment does not give rise to a claim for malicious prosecution.")

In ***McKinney v. Pate***, 20 F.3d 1550 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 898 (1995), the Eleventh Circuit addressed the issue of "whether, under the Fourteenth Amendment, a government employee possessing a state-created property interest in his employment states a substantive due process claim, rather than a procedural due process claim, when he alleges that he was deprived of the employment interest by an arbitrary and capricious non-legislative government action." *Id*. at 1553. The court unanimously held that "in

non-legislative cases, only procedural due process claims are available to pretextually terminated employees." *Id*. at 1560. *See also* ***Lewis v. Brown***, 409 F.3d 1271, 1273 (11th Cir. 2005) ("Applying the *McKinney* test, Brown's decision affects only a limited class of persons, namely, the Lewises. The decision to deny the Lewises' application to re-zone their property does not 'generally apply to larger segments of − if not all of − society.'. . Rather, it was an administrative decision by Brown to enforce the current property designation to the economic detriment of the Lewises. This is a textbook 'executive act.'"); ***Nicholas v. Pennsylvania State Univeristy***, 227 F.3d 133, 142 (3d Cir. 2000) (holding tenured public employment is not a fundamental property interest entitled to substantive due process protection); ***Singleton v. Cecil***, 176 F.3d 419, 427 (8th Cir. 1999) (en banc) (agreeing with "sister circuits [that] have refused to allow discharged public employees to proceed with substantive due process claims against their former employers"); ***Zorzi v. County of Putnam***, 30 F.3d 885, 895 (7th Cir. 1994) ("[A]ny cause of action for the deprivation of occupational liberty would be confined to a claim under procedural due process; there is no such cause of action under substantive due process."); ***Kantner v. Martin County***, 929 F. Supp. 1482, 1486-87 (S.D. Fla. 1996) ("The Court finds that *McKinney* is applicable to zoning decisions since the rights created in the zoning context arise under state law rather than the Constitution."), *aff'd*, 142 F.3d 1283 (11th Cir. 1998); ***Sullivan Properties, Inc. v. City of Winter Springs***, 899 F. Supp. 587, 596 (M.D. Fla. 1995) (interpreting *McKinney* "as overruling the cases that provide a substantive due process cause of action for plaintiffs complaining of wrongful executive zoning decisions").

See also ***Hillcrest Property, LLP v. Pasco County***, 915 F.3d 1292, 1293, 1297-98, 1302 (11th Cir. 2019) ("The question before us is whether a litigant in this Circuit has a substantive-due-process claim under the Due Process Clause of the Fourteenth Amendment when the alleged conduct is the unlawful application of a land-use ordinance. The answer to that question is a resounding 'no'—an answer that this Court delivered in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), 24 years ago and has reaffirmed ever since. We held in *McKinney* that executive action never gives rise to a substantive-due-process claim unless it infringes on a fundamental right. A land-use decision is classic executive, rather than legislative, action—action that, at least here, does not implicate a fundamental right under the Constitution. . . . Hillcrest does not allege denial of any fundamental right. As we made clear in *McKinney*, fundamental rights in the constitutional sense do not include 'state-created rights.'. . . *McKinney* applies to Hillcrest's land-use claim that is the subject of this suit. We explained in *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956 (11th Cir. 1997) (per curiam), that 'land use rights, as property rights generally, are state-created rights.'. . Under circuit precedent, then, this seems to be an open-and-shut case. . . . We cannot be clearer on this point: regardless of how arbitrarily or irrationally the County has acted with respect to Hillcrest, Hillcrest has no substantive-due-process claim."); ***Hillcrest Property, LLP v. Pasco County***, 915 F.3d 1292, 1303-04, 1309-11 (11th Cir. 2019) (Newsom, J., concurring in the judgment) ("About 20 years ago now, an insightful (and hilarious) lawyer friend of mine said to me—and because this is a family show, I'll clean it up a bit—'Not everything that s[tink]s violates the Constitution.' If ever a case proved the truth of that little nugget, this is it. . . . By permitting Hillcrest to invoke substantive due process to pursue what was

in substance a Takings Clause claim—a claim that, for its own reasons, Hillcrest had dropped from the lawsuit and would eventually settle for good money—the district court clearly erred. . . . Back to the beginning, then: Why aren't we talking about the Takings Clause? And why *are* we talking about substantive due process? Because although Hillcrest initially brought a takings claim, it then dismissed that claim (pending the resolution of parallel litigation in state court) and then eventually settled it for $4.7 million. Having done so, Hillcrest now wants a second bite at the apple—in essence, a chance to recover again—under the auspices of substantive due process. No way. The way I see it, Hillcrest's substantive-due-process claim fails as a matter of law because, whatever else it may currently be permitted to do, substantive-due-process doctrine cannot be permitted to stand in for a failed or forfeited Takings Clause claim. And it certainly can't be deployed to allow a litigant to double-dip and cash in on a takings claim and then relitigate what is for all intents and purposes the exact same claim under another label. Accordingly, albeit by a different route, I too conclude that the district court's decision must be reversed. . . .I agree that Hillcrest is challenging non-legislative, executive conduct here—it's pressing an as-applied claim against the enforcement of Ordinance No. 11-15. Accordingly, I also agree that under our precedent Hillcrest enjoys no substantive-due-process protection. And of course I've already confessed my view that substantive due process is a dubious doctrine that should be cabined, not expanded. Having said that, though, I further confess that I don't fully understand the distinction that we've drawn between legislative and executive action. . . . What I don't understand is why we should think that the Constitution provides *less* protection against executive than legislative infringements. There's certainly no textual basis for the distinction; the Due Process Clause says that no 'state'—presumably meaning any branch thereof—shall 'deprive any person of life, liberty, or property, without due process of law.'. . Nor, so far as I'm aware, have we ever tried to justify the legislative-executive distinction on historical grounds. And worse, as a practical matter, the distinction that we've drawn—such that the Clause protects against arbitrary and irrational legislative acts, but not against abusive executive conduct—arguably gets matters precisely backwards. As between the two, it seems to me, executive action—which, by its nature, is individual, targeted, and one-off, rather than broadly and generally applicable—holds the greater potential for abuse. If a piece of arbitrary legislation threatens to gore many oxen at once, the ox owners have a fighting chance of exercising enough political muscle to stop it; the lonely individual whose ox is gored by abusive executive action has next to none.")

But see ***Beckwith v. City of Daytona Beach Shores***, 58 F.3d 1554, 1563 (11th Cir. 1995) ("[A]lthough a retaliatory discharge claim by a state employee involves the denial of the state-created benefit of employment, the right upon which a retaliatory government employment decision infringes is the right to free speech, not the right to a job. *McKinney* has no impact on such claims."); ***Noyes v. Moccia***, No. CIV. 98-19-M, 1999 814376, at *8 (D.N.H. June 24, 1999) (not reported) ("A number of other circuits have held that occupational deprivations potentially implicate only procedural, not substantive, due process. [citing cases] The Supreme Court, however, has not expressly addressed the issue, and this court must follow First Circuit precedent which, as it now stands, seems to recognize (albeit hardly unarguably) substantive due process

rights in employment-related liberty. *See Aversa* [*v. United States*, 99 F.3d 1200, 1215 (1st Cir.1996)].").

4. While state law may create a property or liberty interest, whether that interest is constitutionally protected and the matter of what procedural safeguards must attend the deprivation of a constitutionally protected interest are matters of federal law. ***Vitek v. Jones***, 445 U.S. 480, 491 (1980). *See, e.g.,* ***Van Orden v. Stringer***, 937 F.3d 1162, 1168-69 (8th Cir. 2019) ("The residents insist that once the State adopted the Act, they enjoyed 'state-created liberty interests' that could not be infringed. This argument confuses procedural due process and the concept of substantive due process. '[S]tate statutes may create liberty interests that are entitled to the *procedural* protections of the Due Process Clause of the Fourteenth Amendment.' [citing *Vitek v. Jones*] The residents, however, claim a *substantive* due process right to certain actions by state officials. Fundamental rights or liberties that are protected by substantive due process are those implicit in the concept of ordered liberty or derived from our Nation's history and tradition; they are not created by States. . . The residents also contend that a periodic review requirement under state law was a 'key reason' why the Supreme Court upheld a civil commitment scheme for sexually violent predators in *Hendricks*, so periodic review of the sort they demand must be required by substantive due process. The Court in *Hendricks*, however, cited periodic review as evidence that the Kansas statute was not 'punitive' for purposes of a different claim under the Double Jeopardy Clause. . . The residents here invoke only substantive due process in their appeal, and they have not demonstrated the violation of a fundamental right under that rubric."); ***Forgue v. City of Chicago***, 873 F.3d 962, 970 (7th Cir. 2017) ("Forgue contends that he has a cognizable property interest in receiving a Retirement Card, and that his right to that benefit was deprived without due process. According to CPD policy, a retired employee receives a Card if he retires in good standing. It is undisputed that the determination as to whether an officer retires in good standing is at the discretion of the CPD Superintendent. This does not mean, however, that such discretion can be arbitrary or totally unfettered. Indeed, Forgue alleges in his complaint that it was 'the policy and practice' of the CPD and the Superintendent to issue Cards to police officers. Making all reasonable inferences in favor of Forgue—as we must when considering a 12(b)(6) motion to dismiss—Forgue pleads a plausible claim that the CPD has an unwritten, *de facto* custom to grant virtually all retiring employees a Card. Thus, Forgue sufficiently alleges that he has a legitimate entitlement and cognizable property interest in receiving a Retirement Card. We must therefore reverse the district court's decision to dismiss Forgue's procedural due process claim."); ***Albrecht v. Treon***, 617 F.3d 890, 892, 893, 896 (6th Cir. 2010) ("The district court was faced with the question of whether the Albrechts had a constitutionally protected property interest in their son's brain after it was removed and retained for legitimate investigative purposes. As this was a question of first impression in Ohio, the district court certified the question to the Ohio Supreme Court. The Ohio Supreme Court answered the question in the negative, stating that there is no constitutionally protected property interest in human remains retained by the state of Ohio for criminal investigation purposes. The district court consequently held that the Albrechts had no property interest in the brain, and, thus, Defendants were entitled to judgment on the pleadings. The Albrechts argue that the Sixth Circuit's ruling in *Brotherton v. Cleveland, M.D.,* 923 F.2d 477

(6th Cir.1991), holding that a spouse had a protected property interest in her husband's corneas, which were removed for donation purposes, should rule this case, as opposed to the Ohio Supreme Court's answer to the certified question. . . . As previously explained above, the states define 'property,' 'property rights,' and 'property interest.'. .Whether that 'property interest' is constitutionally 'protected,' however, is a matter of federal law. . .Thus, there are two questions in determining whether a plaintiff has a constitutionally protected property interest sufficient to support a § 1983 claim: first, is there a property interest, stemming from 'an independent source such as state-law rules' and second, whether that interest, if any, 'rises to the level of a constitutionally protected property interest.'. . Obviously, if the first question is answered in the negative, the second question is moot."). *See also* ***Jones v. Lehmkuhl***, No. 11–cv–02384–WYD–CBS, 2013 WL 6728951, 20 (D. Colo. Dec. 20, 2013) ("Because I find that Colorado's medical marijuana regime does not implicate a fundamental liberty or property right, there is no need to address the due process element.").

See also ***Memphis A. Philip Randolph Inst. v. Hargett***, 978 F.3d 378, 410-13, 418 (6th Cir. 2020) (Moore, J., dissenting) ("Having concluded that Plaintiffs are likely to prove that there is a constitutionally protected, Tennessee-law created liberty interest in voting absentee by mail, I would accept Plaintiffs' invitation to address the second step of the procedural due process inquiry, which the district court eschewed. 'Once it is determined that due process applies, the question remains what process is due.'. . Courts answer that question using the familiar balancing test from *Mathews*, which directs us to balance the private interest at stake 'against the government's interest in avoiding additional or substitute process, in light of "the risk of an erroneous deprivation" of a [liberty] interest "and the probable value, if any, of additional or substitute procedural safeguards."'. . These considerations uniformly favor Plaintiffs. . . . Tennessee's absentee voting law fails to provide these fundamental protections against the risk of erroneous rejections of absentee ballots on account of perceived signature invalidity. Presently, Tennessee law requires election officials to notify absentee voters if their ballot is rejected, apparently including where there is a signature verification issue. . . However, *the state does not afford the voter an opportunity to cure* the signature issue before the rejection occurs. . . Plaintiffs seek, primarily, a procedure that would provide for pre-rejection notice, and an opportunity to cure any signature defect before their absentee ballot is rejected. I begin with notice. The Tennessee statute does provide notice, but only after election officials have rejected the ballot. Post-deprivation notice is appropriate in only limited circumstances that do not apply here—this is not an emergency situation requiring immediate action, and Tennessee cannot effectively remedy an erroneously rejected absentee ballot once the election is over. . . Thus, the notice provided by Tennessee law is legally insufficient. As for an opportunity to be heard, Tennessee provides none. . . . In sum, Tennessee's absentee ballot signature verification procedures fail to provide even the baseline protections required by due process. As a result, Plaintiffs would be likely to succeed on the merits even if their liberty interest were minimal and the state's interests were significant. The opposite is true here—Plaintiffs' interests are significant and the state's interests are not substantial—further demonstrating Plaintiffs' likelihood of success on their procedural due process claim. The district court erred in concluding otherwise, and the majority erred further in evading the question.

. . . On its own, today's ruling may not—likely *will* not—change the course of this election. But it is another drop in the bucket that is the degradation of the right to vote in this country. . . I fear the day we come out from behind the courthouse doors only to realize these drops have become a flood. I dissent."); ***Richardson v. Texas Sec'y of State***, No. 20-50774, 2020 WL 6127721, at *8–9 (5th Cir. Oct. 19, 2020) ("Given the failure of the plaintiffs and the district court to assert that voting—or, for that matter, voting by mail—constitutes a liberty interest, along with the absence of circuit precedent supporting that position, the Secretary is likely to prevail in showing that the plaintiffs' motion for summary judgment on their due process claim should have been denied. . . Finally, we reject the district court's reasoning regarding any state-created liberty interest. The court concluded that because 'Texas has created a mail-in ballot regime ... the State must provide those voters with constitutionally-sufficient due process protections before rejecting their ballots.'. . That notion originated in *Raetzel*, in which the District of Arizona acknowledged that absentee voting 'is a privilege and a convenience,' and yet concluded—without citation—'[y]et, such a privilege is deserving of due process.'. . In its defense, *Raetzel*'s reasoning resembles the principle animating *Goss v. Lopez*, 419 U.S. 565 (1975). *Goss* concluded that, '[h]aving chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures ....' . . . Although several district courts have regurgitated *Raetzel*'s reasoning, . . . the plaintiffs and the district court point to no circuit court that has embraced it. And properly so. There is a problem with grafting *Goss*'s reasoning onto the voting context: *Goss* found two cognizable due process interests, namely a 'property interest in educational benefits' and a 'liberty interest in reputation.'. . In context, *Goss*'s language about the state's '[h]aving chosen to extend' benefits and being thus bound by due process came from its analysis of a 'protected *property* interest.'. . *Raetzel*, however, concluded that 'the right to vote is a "*liberty"* interest.'. . Thus, *Raetzel* grafted the Supreme Court's reasoning concerning property interests onto a claimed liberty interest without providing any authority justifying that extension. We decline to adopt *Raetzel*'s extrapolation of Supreme Court precedent. The Secretary is likely to show that the plaintiffs have alleged no cognizable liberty or property interest that could serve to make out a procedural due process claim. The Secretary is therefore likely to succeed in the dismissal of plaintiffs' due process claims. . . Even supposing that voting is a protected liberty or property interest, the Secretary is likely to show that the district court used the wrong test for the due process claim. The court applied *Eldridge*, 424 U.S. at 335, which provides the 'general[ ]' test for determining what process is due. . . On the other hand, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992) announce a test to address '[c]onstitutional challenges to specific provisions of a State's election laws' under 'the First and Fourteenth Amendments.'. . Neither *Anderson* nor *Burdick*, however, dealt with procedural due process claims, and both instead based their approach on the 'fundamental rights strand of equal protection analysis.'")

In ***Mathews v. Eldridge***, 424 U.S. 319 (1976), the Court set out certain factors for consideration on the question of what procedural safeguards must accompany the deprivation of a constitutionally protected interest:

> [I]dentification of the specific dictates of Due Process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Judge Posner describes the ***Mathews*** test as a "cost-benefit approach...which asks essentially whether the particular procedural safeguard that the plaintiff is urging would save more in costs of legal error than it would add in administrative or other costs." ***Tavarez v. O'Malley***, 826 F.2d 671, 676 (7th Cir. 1987).

Compare ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ (6th Cir. 2020) (McKeague, J., concurring), *cert. denied*, 141 S. Ct. 2716 (2021) ("I join the majority opinion in full. I write separately because I conclude that even if there were no *Monell* problem here, Nichols would still lose on the merits. Nichols asks us to apply the *Mathews* factors to determine whether the municipalities were constitutionally required to provide a continued-detention hearing before the ultimate forfeiture proceedings. . . The Second Circuit applied those factors in *Krimstock v. Kelly* and held that due process required New York City to afford plaintiffs 'a prompt post-seizure, pre-judgment hearing' 'to test the probable validity of the City's deprivation of their vehicles *pendente lite*, including probable cause for the initial warrantless seizure.'. . On the other side, the municipalities argue, and the district court found, that this continued-detention hearing was not constitutionally required under the Supreme Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986). . . I think the municipalities have the better argument. Under *Von Neumann*, the municipalities do not need to provide a continued-detention hearing because that hearing is not necessary to a timely forfeiture proceeding. . . . Applying *Von Neumann*, I conclude that the Due Process Clause guarantees only a timely forfeiture hearing, that timeliness being measured, as the Supreme Court has held, by the factors announced in *Barker v. Wingo*. Because Nichols is not constitutionally entitled to an *additional* continued-detention hearing—between the seizure and the forfeiture hearing—there was no due process right for the municipalities to violate.") *with* ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ (6th Cir. 2020) (Moore, J., dissenting in part), *cert. denied*, 141 S. Ct. 2716 (2021) ("There are many things the majority does not deny about Stephen Nichols's case. It does not deny that he was wrongfully deprived of the use of his car for three years. It does not deny that he had a due-process interest in the use—not just the ownership—of his vehicle. It does not deny that he has plausibly alleged that the municipal defendants failed to afford him any opportunity to seek temporary repossession of his car. It does not deny that these defendants had the discretion to do so under the relevant statutory scheme. Nor does it deny that our caselaw forecloses qualified immunity as a defense for municipal defendants when the injury for which they are allegedly liable was caused by municipal act itself. Yet it denies Nichols recourse because Nichols's lawyer stated at oral argument that there were multiple ways for the government to go about affording his client due process. Even if

I were inclined to decide serious constitutional cases based on 'gotcha' moments at oral argument, this would not be one of them. Nichols did not concede a flaw in his claim—to the contrary, he confirmed just how modest a due-process right he seeks. In my view, Nichols has adequately stated a constitutional claim, and we should allow this case to proceed. . . . Without any precedent resolving the issue before us, I would follow the Second Circuit's unanimous opinion in *Krimstock v. Kelly*—the only published, appellate opinion on point. . . in concluding that the failure to provide some sort of retention hearing for purported owners of seized property violates the Constitution. In *Krimstock*, then-Judge Sotomayor wrote for a unanimous panel that New York City's vehicle-forfeiture scheme, which allowed the city to 'seize a motor vehicle following an arrest for the state-law charge of driving while intoxicated ('DWI') or any other crime for which the vehicle could serve as an instrumentality' without any sort of subsequent retention hearing, violated the Fourteenth Amendment[.] . . Under the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court reasoned that the private interest in the ownership and use of a vehicle was significant, the risk of erroneous deprivation was 'reduced' given the 'context of DWI owner-arrestees,' and the government's interest was low, given alternative methods—such as the posting of bond in exchange for a seized vehicle—in preventing an owner from absconding with this property. . . 'Balancing the *Mathews* factors,' the Second Circuit concluded that due process of law required a hearing in which a claimant could demonstrate that 'means short of retention of the vehicle can satisfy the City's need to preserve it from destruction or sale during the pendency of proceedings.'. . . On balance, here the private interest is substantial, the erroneous risk of deprivation is moderate, there is considerable value in additional safeguards, and the government's interest is low. Accordingly, the *Mathews* balancing test tips in Nichols's favor. For these reasons, I would follow the Second Circuit in holding that vehicle owners must be afforded a prompt, postseizure hearing before a neutral decisionmaker to determine whether 'means short of retention of the vehicle can satisfy the [government's] need to preserve it from destruction or sale during the pendency of proceedings.'")

See also ***Bethel v. Jenkins***, 988 F.3d 931, 943-44 (6th Cir. 2021) ("We have not yet determined whether *Sandin* applies to property interests, but we have cited *Sandin* to hold that an inmate does not have a protected interest in prison employment. . . But we need not decide whether *Sandin* applies to property interests because, even assuming Bethel had a protected interest, the magistrate judge correctly found in the alternative that Bethel received sufficient process as to that interest. . . . . In the present case, the magistrate judge noted that Bethel received written notice that the books were withheld as well as notice of the reason why they were withheld, that he was able to use CCI's grievance process to seek further review, and that Defendants allowed Bethel to either have the publications destroyed or sent back to the third party who ordered them. Applying the balancing test under *Mathews*, these procedures were adequate as the private interest in receiving the books pursuant to the third-party orders was minimal as compared to the significant government interest in preventing contraband from entering the prison. . . The risk of erroneous deprivation was small because Bethel could acquire the publications through alternate means. The value of additional procedures was also limited given the lack of complexity in the withholding decision, and it was outweighed by the burden on the prison of expending resources

on further proceedings. Even assuming Bethel had a protected property interest in receiving the withheld publications, he received sufficient process from CCI regarding the deprivation."); ***Serrano v. Customs & Border Patrol***, 975 F.3d 488, 500-01 & n.17 (5th Cir. 2020) ("Given the broad allegations in the complaint and our balancing of the *Mathews* factors, we conclude that Serrano has failed to state a claim for a procedural due process violation. As identified in the CBP's seizure notice, a claimant is notified of the seizure and provided options for challenging the CBP's action, both administratively and judicially. Serrano has not sufficiently alleged the constitutional inadequacy of the existing procedures, nor has he shown that the available processes are unavailable or patently inadequate. Moreover, our conclusion that the additional process Serrano seeks is not constitutionally required in this context is consistent with *Von Neumann.* There, the Supreme Court recognized that 'implicit' in its 'discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, *without more*, provides the postseizure hearing required by due process to protect [claimant's] property interest in the car.'. . The parties dispute the relevance of *Von Neumann*. . . We agree that *Von Neumann* is not dispositive of Serrano's due process challenge; however, the Court's reasoning is pertinent to our due process analysis. *Von Neumann* specifically notes that a claimant's 'right to a forfeiture proceeding meeting the *Barker.* . . test satisfies any due process right with respect to the car and the money.'. . And neither the Supreme Court nor the Fifth Circuit has held that the Due Process Clause requires an additional post-seizure, pre-forfeiture judicial hearing. . . . The Supreme Court in *$8,850* and *Von Neumann* applied the *Barker* test to a due process challenge to the Government's delay in instituting a civil forfeiture proceeding. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which addressed a defendant's right to a speedy trial, propounded a four-part test to be used as a guide 'in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.'. . Courts have expressed confusion about whether to analyze a due process challenge to a forfeiture procedure under *Barker* or *Mathews*. . . We agree with the parties that *Mathews* is more applicable here because the harm alleged is the lack of an interim hearing rather than delay preceding an ultimate hearing on the merits."); ***Walsh v. Hodge***, 975 F.3d 475, 482-85 (5th Cir. 2020) ("To assess Walsh's claim, we turn to the *Mathews v. Eldridge* sliding scale. The first *Mathews* factor, Walsh's private interest, is significant: the loss of his employment. . . Moreover, the termination for sexual assault necessarily impacts future employment opportunities as an academic in a medical school, as a charge of sexual harassment inevitably tarnishes Walsh's reputation. . . The third *Mathews* factor, the University's interest, is also significant. . . . In this case, where credibility was critical and the sanction imposed would result in loss of employment and likely future opportunities in academia, it was important for the Committee to hear from Student #1 and Walsh should have had an opportunity to test Student #1's credibility. The University's interests in protecting victims of sexual harassment and assault are important too. But we are persuaded that the substitute to cross-examination the University provided Walsh—snippets of quotes from Student #1, relayed by the University's investigator—was too filtered to allow Walsh to test the testimony of his accuser and to allow the Committee to evaluate her credibility, particularly here where the Committee did not observe Student #1's testimony. We conclude in this circumstance that the Committee should have heard Student #1's testimony. . . As Student #1 was a graduate

student presumably in her mid-twenties, we believe that being subjected to additional questions from the Committee would not have been so unreasonable a burden as to deter her and other similar victims of sexual harassment from coming forward. We are not persuaded, however, that cross examination of Student #1 by Walsh personally would have significantly increased the probative value of the hearing. Such an effort might well have led to an unhelpful contentious exchange or even a shouting match. Nonetheless, the Committee or its representative should have directly questioned Student #1, after which Walsh should have been permitted to submit questions to the Committee to propound to Student #1. In this respect, we agree with the position taken by the First Circuit 'that due process in the university disciplinary setting requires "some opportunity for real-time cross-examination, even if only through a hearing panel."'. . We stop short of requiring that the questioning of a complaining witness be done by the accused party, as 'we have no reason to believe that questioning ... by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.'"); ***Worthy v. City of Phenix City, Alabama***, 930 F.3d 1206, 1223-24 (11th Cir. 2019) (After doing *Mathews* balancing test, court concludes that City ordinance establishing enforcement scheme for red-light camera system and civil penalties for violations captured by red-light cameras did not violate procedural due process rights of motorists who received citations for running red lights pursuant to that ordinance); ***Henry v. City of Middletown, Ohio***, 655 F. App'x 451, 464 (6th Cir. 2016) (applying *Mathews* and concluding that "the City's custom and practice of disposing of vehicles seized under these circumstances and not claimed by payment within ten days under § 4513.62, without offering any post-impoundment process, violates Due Process."); ***Murphy v. Raoul***, No. 16 C 11471, 2019 WL 1437880, at *21–23 (N.D. Ill. Mar. 31, 2019) ("The question becomes. . . whether the language and structure of the supervised release system in Illinois creates an expectancy of release, which would entitle releasees to conditional liberty. . . Here, the answer is that it is common ground between the parties that the PRB [Prisoner Review Board] in fact granted the plaintiffs their release. . . In so doing, the PRB essentially promised these individuals a form of statutory liberty that the IDOC could not thereafter 'revoke' without appropriate procedures. . . Accounting for *Turner*, the defendants neglected to identify conditions under which their interests outweigh a releasee's conditional liberty. True enough, the government's need to protect the community does not necessarily diminish over time. . . The problem, though, is that the facts here come very close to sounding like preventive detention, which the Supreme Court has sanctioned 'only when limited to specially dangerous individuals and subject to strong procedural protections...In cases in which preventive detention is of potentially indefinite duration, [the Supreme Court] [has] also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.'. . The government cannot hold a citizen indefinitely because he or she at one time committed a crime and therefore remains dangerous. . . It is not difficult to posit that the State's need to pursue legitimate correctional goals may more significantly limit the procedural protections the sooner after the PRB grants an indigent, homeless sex offender release rather than later. . . But here the defendants have detained at least two plaintiffs since their release dates in 2011, or, for over eight years. In other words, the IDOC may elect not to liberate a PRB-approved indigent, homeless sex offender for some period, albeit not indefinitely. . . . Having determined that state law recognizes this liberty interest, the Court must

next address what procedural protections are necessary to ensure that IDOC's decision to not release an individual already granted release is neither arbitrary nor incorrect. . . This evaluation requires courts to weigh several factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The utilization of the foregoing analytical model in this setting requires the Court to accommodate the plaintiffs' liberty interests in serving their mandatory supervised release terms in the community and the defendants' interests in facilitating the plaintiffs' reintegration into society while ensuring public safety. . . . The coercive power of the state is awesome, but it is not absolute. The defendants cannot chalk everything up to discretion and call it a day. Discretion without procedure leads to arbitrary governance, and eventually, the loss of liberty. That is what the Due Process Clause guards against. That is also what the separation of powers guards against. . . . Notwithstanding the foregoing discussion, the record still remains riddled with disputed facts, so a trial will be necessary to determine whether the defendants offer the plaintiffs any procedure to determine whether a parole agent's rejection of a proposed host site was proper or not. Only then will the Court be able to decide whether that process is constitutionally sound. Accordingly, the Court denies both parties' cross-motions for summary judgment . . . as to the procedural due process claim (Count III).").

See also ***Mascow v. Bd. of Educ. of Franklin Park Sch. Dist. No. 84***, 950 F.3d 993, 996-97 (7th Cir. 2020) ("Post-*Arnett* decisions such as *Loudermill* routinely treat substance as a matter of state law and hold that, if state law creates a legitimate claim of entitlement, then federal law alone determines whether a hearing is required. . . . Neither the district judge nor the parties' briefs in this court address just how teachers can obtain review of their ratings and whether those opportunities satisfy the constitutional need for '*some* kind of hearing.'. . Neither the district judge nor the litigants has attempted to apply the approach prescribed by *Mathews v. Eldridge*. . .for determining what kind of process is due in a given situation. It would be inappropriate for an appellate court to try to resolve these subjects without briefs focused on the vital issues. They should be considered first by the district court."); ***Francis v. Fiacco***, 942 F.3d 126, 142, 145 (2d Cir. 2019) ("[W]hile a valid conviction subjects a defendant to a constitutional deprivation of his liberty, the determination of his sentence, and the state's compliance therewith, remain subject to due process protections. It follows naturally that a prisoner's liberty interest in freedom from detention implicates the Due Process Clause not only when a jury convicts him or when a court initially sentences him, but also when prison officials interpret and implement the sentence that the trial court has imposed. In the typical case, implementation of the prisoner's sentence follows straightforwardly from the sentencing court's commitment order. But Francis's was not the typical case. The sentencing court issued a directive that Francis's state sentence should run concurrently with a future sentence from a different jurisdiction. The State Defendants, however, concluded that New York law did not authorize the sentencing court to issue that directive and that they therefore

could not follow it. As a result, Francis's sentence as implemented by the State Defendants diverged from the sentence originally pronounced by the sentencing court. Regardless of whether the State Defendants' course of conduct was legally justified (or perhaps even legally required), their decision to implement Francis's sentence in a manner that diverged from the sentence pronounced by the sentencing court implicated a liberty interest of the highest order. Therefore, when the State Defendants declined to implement the sentencing court's directive of concurrency, filed the consecutive detainer with the BOP, and retained custody of Francis upon expiration of his federal sentence, the Due Process Clause required them to provide certain procedural protections to safeguard Francis's liberty interest in avoiding future incarceration. . . .To review our *Mathews* analysis: The private interest at stake here is Francis's interest in freedom from detention, a liberty interest that sits at the very heart of the Due Process Clause. The 'risk of an erroneous deprivation' of that interest under the procedures followed in this case is unacceptably high, and the 'probable value ... of [the] additional or substitute procedural safeguards' we have proposed is substantial. . . Finally, the fiscal or administrative burdens that the government will sustain as a result of this additional process are at most negligible; more likely, assuming future compliance with state law, DOCCS will sustain no burden at all. We thus hold that prison officials implementing a sentence that, as pronounced, appears to be in error under applicable law must, at a minimum, promptly inform the prisoner, the sentencing court and the attorneys for both parties of their determination that the sentence as pronounced by the sentencing court cannot be lawfully implemented. The reasons for this conclusion should also be provided. In the circumstances of Francis's case, the State Defendants violated the Due Process Clause by failing to provide these basic procedural protections.")

Generally, due process requires notice and a meaningful opportunity to be heard prior to the deprivation of a protected interest. ***Cleveland Bd. of Educ. v. Loudermill***, 470 U.S. 532, 542 (1985).

Compare ***Jones v. Governor of Florida***, 975 F.3d 1016, 1048-49 (11th Cir. 2020) (en banc) ("The felons also argue that Florida has denied them procedural due process. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). They assert a liberty interest in the right to vote and argue that Florida has deprived them of that interest without adequate process. We may assume that the right to vote is a liberty interest protected by the Due Process Clause. . . Even so, this argument fails because any deprivation of that right was accomplished through the legislative process and the process for adopting a constitutional amendment, which provide more than adequate procedures for the adoption of generally applicable rules regarding voter qualifications. In deciding what the Due Process Clause requires when the State deprives persons of life, liberty or property, the Supreme Court has long distinguished between legislative and adjudicative action. *See, e.g.*, *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915). The State often deprives persons of liberty or property through legislative action—general laws that apply 'to more than a few people.'. . When the State does so, the affected persons are not entitled to *any* process beyond that provided by the legislative process. . . In contrast, the Due Process Clause may require individual process when a State deprives persons of liberty or property through adjudicative

actions—those that concern a 'relatively small number of persons' who are 'exceptionally affected, in each case upon individual grounds,' by the state action. . . To determine the process due for adjudicative deprivations, courts apply the familiar balancing test of *Mathews v. Eldridge*[.] . . The felons were deprived of the right to vote through legislative action, not adjudicative action. Under its Constitution, Florida deprives all felons of the right to vote upon conviction. . . This constitutional provision is a law 'of general applicability' that plainly qualifies as legislative action. . . And even if we accept the argument that Amendment 4 and Senate Bill 7066 deprive felons of the right to vote by conditioning reenfranchisement on the completion of all terms of sentence, those laws also qualify as legislative acts. . . The legislative and constitutional-amendment processes gave the felons all the process they were due before Florida deprived them of the right to vote and conditioned the restoration of that right on completion of their sentences. The felons complain that it is sometimes difficult to ascertain the facts that determine eligibility to vote under Amendment 4 and Senate Bill 7066, but this complaint is only another version of the vagueness argument we have already rejected. The Due Process Clause does not require States to provide individual process to help citizens learn the facts necessary to comply with laws of general application. To avail themselves of the *Mathews v. Eldridge* framework, the felons were obliged to prove a deprivation of liberty based on *adjudicative* action. . . But the felons do not challenge any individual voter-eligibility determinations that could qualify as adjudicative action, so *Mathews* does not apply. And in any event, Florida provides registered voters with adequate process before an individual determination of ineligibility. Before being removed from the voter registration system, voters are entitled to predeprivation notice and a hearing. . . And any voter who is dissatisfied with the result is entitled to *de novo* review of the removal decision in state court. . . These procedures provide more than adequate process to guard against erroneous ineligibility determinations. . . The injunction the district court entered looks nothing like a remedy for a denial of due process. It does not require additional procedures for any existing adjudicative action that deprives felons of a liberty interest in voting. Instead, it *creates* an adjudicative process to aid felons in complying with nonvague laws of general application. States are certainly free to establish such a process—indeed, Florida has done so through its preregistration advisory-opinion process and accompanying immunity from criminal prosecution. But the notion that due process *mandates* this kind of procedure in the absence of any adjudicative action is unprecedented. The injunction did not remedy any denial of due process, so we cannot affirm it on that ground. A fundamental confusion in this litigation has been the notion that the Due Process Clause somehow makes Florida responsible not only for giving felons notice of the standards that determine their eligibility to vote but also for locating and providing felons with the *facts* necessary to determine whether they have completed their financial terms of sentence. The Due Process Clause imposes no such obligation. States are constitutionally entitled to set legitimate voter qualifications through laws of general application and to require voters to comply with those laws through their own efforts. So long as a State provides adequate procedures to challenge individual determinations of ineligibility—as Florida does—due process requires nothing more.") *with* ***Jones v. Governor of Florida***, 975 F.3d 1016, 1059-60, 1065 (11th Cir. 2020) (en banc) (Martin, J., joined by Wilson, Jordan, and Jill Pryor, J., JJ., dissenting) ("Once a State promises its citizens restoration of their right to vote based on defined, objective criteria, it has created a due-process

interest. . . . [W]hen a State promises its citizens an entitlement based upon the satisfaction of objective criteria, it creates a due process right for those citizens. Florida did just that, here. . . . We know, as the Supreme Court has told us, that Florida could have withheld the franchise from people with felony convictions for all eternity. But once 65% of the people of Florida decided that these returning citizens would be allowed to exercise their right to vote upon 'completion of all terms of sentence,'. . . and the Florida Legislature set objective criteria for what it means to 'complet[e] all terms of sentence,' a due-process interest was born. . . . [T]he State confuses the right to enfranchisement with the right to reenfranchisement. Deprivation of enfranchisement was lawfully done upon conviction. But deprivation of the right to reenfranchisement occurs when a returning citizen is stymied in his efforts to vote because he does not know when or how he can complete all terms of his sentence. That is what the Plaintiffs allege happened here, and what they proved in the District Court. . . . Having established allegations amounting to the deprivation of a due-process interest in reenfranchisement, I next examine whether the State's process is, in fact, inadequate. . . Whether the State-provided process is constitutionally adequate requires balancing '(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake.'. . . Sixty-five percent of Florida voters conferred the right to reenfranchisement upon returning citizens once they completed all terms of their sentence. With its Constitution amended in this way, Florida gained an obligation to establish procedures sufficient to determine the eligibility of returning citizens to vote, and to notify them of their eligibility in a prompt and reliable manner. The majority's decision to vacate the District Court's injunction and reverse its holding on procedural due process grounds relieves the State of Florida of this obligation expected of it by its people. For this reason, as well as those articulated by Judge Jordan, I dissent from the majority's decision.") *and* ***Jones v. Governor of Florida***, 975 F.3d 1016, 1066, 1091-93, 1107 (11th Cir. 2020) (en banc) (Jordan, J., joined by Wilson, Martin, and Jill Pryor, JJ., dissenting) ("The evidence showed, and the district court found, that since the passage of Amendment 4 Florida has demonstrated a 'staggering inability to administer' its LFO [Legal Financial Obligations] requirement. . . That is an understatement. Florida cannot tell felons—the great majority of whom are indigent—how much they owe, has not completed screening a single felon registrant for unpaid LFOs, has processed 0 out of 85,000 pending registrations of felons (that's not a misprint—it really is 0), and has come up with conflicting (and uncodified) methods for determining how LFO payments by felons should be credited. . . To demonstrate the magnitude of the problem, Florida has not even been able to tell the 17 named plaintiffs in this case what their outstanding LFOs are. . . So felons who want to satisfy the LFO requirement are unable to do so, and will be prevented from voting in the 2020 elections and far beyond. Had Florida wanted to create a system to obstruct, impede, and impair the ability of felons to vote under Amendment 4, it could not have come up with a better one. Incredibly, and sadly, the majority says that Florida has complied with the Constitution. So much is profoundly wrong with the majority opinion that it is difficult to know where to begin. . . . Though the Constitution permits states to disenfranchise felons, . . . Florida's citizens chose through Amendment 4 to provide a right to vote for felons who have completed all terms of their sentences, thereby creating a liberty interest. And when a state chooses to create a liberty interest, 'the Due Process Clause requires fair procedures for its vindication.'. . . As the district court found, and Florida does not

contest, the Division of Elections has processed 0 out of 85,000 pending registrations of felons. So, for those 85,000 registrants—and all those who will surely follow—the statutory requirement of notice and a hearing is completely illusory. Those appalling numbers, unfortunately, mean nothing to Florida or to the majority.Second, should any of these 85,000 registrants choose to vote in the upcoming election—as they may believe, in good faith, they have a right to do—they risk criminal prosecution if they turn out to be wrong about their eligibility. Given Florida's lack of clarity regarding how to calculate outstanding LFOs, this will surely be the case for at least some felons. The truth is that many of these registrants will not vote to avoid the risk of prosecution, even if they are in fact eligible, creating a de facto denial of the franchise. . . Florida ignores this reality, and the majority is blind to it. Third, there is no procedure for a felon to determine his eligibility to vote *before* registering—even though the voter registration form requires registrants to sign an oath affirming that they are qualified to vote. Florida says that felons who wish to vote may access their records through the county clerk's office or call clerks to obtain information. . . But the record belies that claim, and reflects that such inquiries are usually fruitless. . . . Fourth, if a felon registers based on the belief that he is eligible to vote, and then turns out to be wrong, he may be prosecuted for making a false affirmation in connection with voting. Florida downplays this risk, proclaiming that felons should rest assured that they will not be convicted if they registered in good faith because willfulness must be shown to prove a violation of Fla. Stat. § 104.011. But that comforting assurance—tactically made for an advantage in litigation—is useless, as it does not tell us how the state's prosecutors will choose to prosecute possible or alleged violations of the law. . . .Our predecessor, the former Fifth Circuit, has been rightly praised for its landmark decisions on voting rights in the 1950s and 1960s. *See generally* Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges Who Translated the Supreme Court's *Brown* Decision Into a Revolution for Equality 259–77 (1981). I doubt that today's decision—which blesses Florida's neutering of Amendment 4—will be viewed as kindly by history.") *and* ***Jones v. Governor of Florida***, 975 F.3d 1016, 1107, 1112 (11th Cir. 2020) (en banc) (Jill Pryor, J., joined by Wilson, Martin, and Jordan, JJ., dissenting) ("Nearly a century has passed since Langston Hughes pined for an America where 'opportunity is real' and '[e]quality is in the air we breathe.'. . In Florida, people convicted of felonies who have paid all the societal debts they can possibly pay were on the threshold of that America, welcomed home by Florida's electorate. Florida's voters had decided on their own initiative that the franchise should be restored to their fellow citizens. But Florida's legislature slammed the door shut, barring perhaps a million would-be voters from any real and equal opportunity to rejoin their fellow Floridians and denying the electorate their choice to grant that opportunity. The legislature's action abrogated the protections of the Fourteenth and Twenty-Fourth Amendments on the right to vote, as Judge Martin and Judge Jordan eloquently explain in their dissents. I join their dissents in full. I write separately only to add context and echo the outrage of my fellow dissenting colleagues. . . . The majority today deprives the plaintiffs and countless others like them of opportunity and equality in voting through its denial of the plaintiffs' due process, Twenty-Fourth Amendment, and equal protection claims. I dissent.")

See also ***Roberts v. Winder***, No. 20-4082, 2021 WL 4955462, at *8–9 (10th Cir. Oct. 26, 2021) ("Roberts was afforded sufficient pre-deprivation process. As Roberts concedes, Undersheriff Carver and Chief Deputy Hudson informed Roberts that his rank and pay would be reduced and that he would be reassigned to patrol duties. . . That meeting provided the minimal requirements of pre-deprivation notice. . . Sheriff Winder also provided Roberts' counsel a letter rejecting Roberts' grievance and explaining that Roberts was transferred within his merit rank 'under [Winder's] sole discretion as Sheriff.'. . That letter evidenced the minimal requirements of an opportunity to be heard. Thus, Roberts received sufficient pre-deprivation process."); ***Wright v. Beck***, 981 F.3d 719, 730-31, 734 (9th Cir. 2020) ("Despite these minor limitations on the notice requirement, no court has held—at least under the circumstances presented here—that notice can be altogether abandoned. To the contrary, under almost every conceivable scenario, there is 'no doubt' that the government must take reasonable steps to provide notice. . . Given the wealth of precedent—and the safeguards notice provides—the right to notice has been rightfully regarded as 'elementary,' 'fundamental,'. . . and 'rudimentary[.]". . The right cannot reasonably be disputed. Defendants nonetheless argue that the notice requirement was satisfied at the time the firearms were seized, and Wright was not entitled to any further notice thereafter. To address the merits of Defendants' argument, we divide up the chronology and nature of the deprivations. Wright was deprived of his property *twice*. The first occurred when LAPD officers seized his firearms during the execution of a search warrant. That was a temporary deprivation that is not at issue. The second deprivation occurred when the LAPD destroyed Wright's property amid ongoing negotiations between Wright and the LAPD. Key to this claim is that, without notice to Wright, Edwards sought an order from the Los Angeles Court granting permission to destroy Wright's firearms. Wright alleges that Edwards sought this order while the parties were still informally resolving the ownership dispute, as encouraged by the Ventura Court. The subsequent destruction of Wright's firearms constituted a permanent deprivation and underscores the need for notice. We have no problem concluding that a rational trier of fact could find a due process violation under these circumstances. The wealth of precedent suggests that by failing to provide Wright with notice and the opportunity to be heard before the court issued the destruction order, Edwards denied Wright the most basic and fundamental guarantees of due process . . . . In sum, taking the evidence in the light most favorable to Wright, a reasonable jury could find that Edwards violated Wright's due process right to notice when he applied for a destruction order without giving Wright notice."); ***Johnson v. Morales***, 946 F.3d 911, 921-22, 925, 937, 940 (6th Cir. 2020) ("It is the general rule that due process 'requires some kind of a hearing *before* the State deprives a person of liberty or property.'. . But there are exceptions to this rule. . . . None of these exceptions apply to Johnson's case. Defendants do not contend that the decision to suspend Johnson's license was a 'random' or 'unauthorized' act. And Johnson specifically disputes that, at the time of the suspension, any type of emergency or exigent circumstance required the immediate suspension of her license. But relevant here, we have said that '[t]he failure to provide a hearing prior to a license or permit revocation does not per se violate due process.' [citing *United Pet Supply*] Thus, the balancing test from *Mathews v. Eldridge*. . . determines whether the government must provide some type of hearing before suspending a business license. . . . The government and private interests are both weighty. So this factor tips the *Mathews* balance in Johnson's favor. At this stage of the litigation,

we cannot know whether the government ensured that there were reasonable grounds to suspend Johnson's license without affording her a pre-suspension hearing. And, under these circumstances, the value of a pre-suspension hearing in mitigating the risk of an erroneous deprivation was likely high. Thus, we hold that Johnson has stated a viable procedural due process claim based on the government's failure to provide her some type of hearing before suspending her license. . . . Given the nature of the right involved, . . . a post-deprivation hearing in which the suspension is presumed to be warranted and Johnson bore the burden to prove the opposite fails to provide the meaningful procedure mandated by due process. We emphasize that our holding is narrow. Due process does not require that the burden of proof always be placed on the party seeking relief. However, due process does require a meaningful opportunity to be heard in order to 'prevent, to the extent possible, an *erroneous* deprivation of property.'. . Johnson has plausibly alleged that the procedures afforded to her here fell short of those requirements. Accordingly, we reverse the district court's order dismissing Johnson's burden-shifting claim. . . .We emphasize that this is an appeal from a dismissal on the pleadings and a denial of leave to amend. We accept all of Johnson's well-pleaded facts as true and draw all inferences in her favor. We reverse the district court's dismissal of Johnson's burden-shifting, substantive-due-process, and equal-protection claims. We concur in Judge Nalbandian's opinion in all other respects."); ***J. Endres v. Northeast Ohio Medical University Board of Trustees***, 938 F.3d 281, 301-02 (6th Cir. 2019) ("When a university student faces a serious sanction like dismissal over allegations of disciplinary misconduct, he is entitled to a 'fundamentally fair hearing.'. . Endres received a hearing. But his allegations, which we must take as true at this stage, reveal that hearing was far from fair. For one, the student has a 'right to be present for all significant portions of the hearing,' provided the hearing is live. . . And even when the hearing is not live, the university must 'provide the accused with the opportunity to "respond, explain, and defend."'. . Endres, however, alleges he was not allowed in the room while Emerick presented her case to the CAPP panels. That alone establishes a due process violation, but Endres's allegations do not end there. *Doe* also says that the university must provide the student with 'an explanation of the evidence' against him, but Endres's allegations show that NEOMED repeatedly failed on this front. . . .Endres has alleged more than enough to establish a due process violation, but that does not end the matter. Because Emerick has claimed qualified immunity, Endres must also show that the constitutional rights Emerick violated were clearly established when the violation occurred. . . . Emerick alleges that the law defining Endres's due process rights was not clearly established, and on this front, she is correct. To be sure, the Supreme Court's decisions in *Goss* and *Horowitz* make clear that a student facing a serious sanction for disciplinary misconduct is entitled to a fair hearing, but neither those cases nor our own decisions have articulated a bright-line rule to distinguish academic from disciplinary matters. Moreover, clearly established law 'must be "particularized" to the facts of the case,' yet no case from the Supreme Court or this court has held that cheating is a disciplinary matter warranting more robust procedures under the Due Process Clause. . . And because no precedent clearly established that Endres was even entitled to a hearing, it follows that his right to be present at the hearing and to hear the evidence against him was not clearly established, either. We therefore hold that Emerick is entitled to qualified immunity. We note, however, that qualified immunity '"only immunizes defendants from monetary damages"—not injunctive

or declaratory relief.'. . Thus, our ruling shields Emerick from monetary damages. But the qualified immunity doctrine does not preclude Endres from continuing to pursue the injunctive and declaratory relief that he has also requested in his § 1983 claim."); ***Haidak v. University of Massachusetts-Amherst***, 933 F.3d 56, 71-73 (1st Cir. 2019) ("While it lasts, a suspension more or less deprives a student of all the benefits of being enrolled at a university. The Supreme Court has held that a deprivation of this sort requires notice and a hearing. . . What type of notice and what type of hearing turn on the interests implicated in each particular case. . . As a general rule, both notice and a hearing should precede a suspension. . . On occasion, though, exigencies may properly provide an exception to this general rule. . .Here, however, the record belies any claim of exigency. The university waited thirteen days after learning about the continued contact to issue the suspension order. And the university offers no evidence suggesting that it was infeasible to provide some type of process during the available thirteen days before it imposed a suspension. The university did allow Haidak to respond to the charges both orally and in writing fifteen days after Gibney complained and two days after the suspension took effect. Given the apparent absence of any perceived exigency, that process came too late to serve as an opportunity to be heard *before* the suspension began. And it was, in any event, insufficient to provide, by itself, due process in connection with a five-month suspension that ran through most of a semester. Importantly, the university knew that on the key issue justifying a lengthy suspension -- whether the continued communication represented a threat to the university community -- Haidak directly disputed Gibney's account in a manner that could be verified. The university could easily have confronted Gibney with the information provided by Haidak, and even a rudimentary hearing would have revealed that Haidak's contact with Gibney was welcomed and reciprocated. When a state university faces no real exigency and certainly when it seeks to continue a suspension for a lengthy period, due process requires 'something more than an informal interview with an administrative authority of the college.'. . But 'an informal interview' is all Haidak received. Certainly, a university may proceed in stages. A university can first ask a student to respond to the charge. And if the response offers no plausible defense, then the need for further inquiry diminishes, much like the manner in which a guilty plea eliminates the need for further proceedings. But when the response leaves the matter turning on credibility, the interests at stake are as substantial as those implicated by an extended suspension, and no perceived exigency exists, a university must do more than presume one version to be correct."); ***ODonnell v. Harris County, Texas***, 892 F.3d 147, 158-61 (5th Cir. 2018) (on panel rehearing) ("Texas state law creates a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance. Yet, as noted, state law forbids the setting of bail as an "instrument of oppression." Thus, magistrates may not impose a secured bail solely for the purpose of detaining the accused. And, when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order. Accordingly, such decisions must reflect a careful weighing of the individualized factors set forth by both the state Code of Criminal Procedure and Local Rules. Having found a state-created interest, we turn now to whether the procedures in place adequately protect that interest. . . .As the district court found, the current procedures are inadequate—even when applied to our narrower understanding of the liberty interest at stake. The court's factual findings (which are not clearly erroneous) demonstrate that secured bail orders are

imposed almost automatically on indigent arrestees. Far from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'. . .The sheer number of bail hearings in Harris County each year—according to the court, over 50,000 people were arrested on misdemeanor charges in 2015—is a significant factor militating against overcorrection. With this in mind, we make two modifications to the district court's conclusions regarding the procedural floor. First, we do not require factfinders to issue a written statement of their reasons. While we acknowledge 'the provision for a written record helps to insure that [such officials], faced with possible scrutiny by state officials ... [and] the courts ... will act fairly,'. . . such a drastic increase in the burden imposed upon Hearing Officers will do more harm than good. We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process. . . . [S]ince the constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees, requiring magistrates to specifically enunciate their individualized, case-specific reasons for so doing is a sufficient remedy. Second, we find that the district court's 24-hour requirement is too strict under federal constitutional standards. . . .We conclude that the federal due process right entitles detainees to a hearing within 48 hours. Our review of the due process right at issue here counsels against an expansion of the right already afforded detainees under the Fourth Amendment by *McLaughlin*. We note in particular that the heavy administrative burden of a 24-hour requirement on the County is evidenced by the district court's own finding: the fact that 20% of detainees do not receive a probable cause hearing within 24 hours despite the statutory requirement. Imposing the same requirement for bail would only exacerbate such issues. The court's conclusion was also based on its interpretation of state law. But while state law may define liberty interests protected under the procedural due process clause, it does not define the procedure constitutionally required to protect that interest. . . . Accordingly, although the parties contest whether state law imposes a 24- or 48-hour requirement, we need not resolve this issue because state law procedural requirements do not impact our federal due process analysis. The district court's definition of ODonnell's liberty interests is too broad, and the procedural protections it required are too strict. Nevertheless, even under our more forgiving framework, we agree that the County procedures violate ODonnell's due process rights."); ***Cannon v. Vill. of Bald Head Island, N. Carolina***, 891 F.3d 489, 502-06 (4th Cir. 2018) ("In the context of a claim that a governmental defendant violated a former employee's Fourteenth Amendment rights by publicly disclosing the reasons for the employee's discharge, as here, this Court has held that this opportunity to be heard 'must be granted at a meaningful time.'. . This is because, as we further held, '[a]n opportunity to clear your name *after* it has been ruined by dissemination of false, stigmatizing charges is not "meaningful."'. . .With this legal framework in mind, we now must determine (1) whether, under clearly established law, the Officers were deprived of a protected liberty interest and (2) if so, whether, under clearly established law, the Officers were deprived of that interest without due process of law. . . . '[H]arassment,' 'sexual harassment,' and 'detrimental personal conduct' amount to 'significant character defects,'such as 'immorality,'. . . and therefore stigmatize the Officers' reputation in a constitutionally cognizable manner. Additionally, the Officers' evidence

shows that after the Department released the relevant documents, each Officer either had difficulty securing a job or accepted a job with less significant responsibilities and lower pay, thereby creating a reasonable inference that the claims in the termination letters did, in fact, place a stigma on the Officers' reputations with prospective employers. . . . This Court decided *Sciolino*, *Ledford*, *Ridpath*, and the other cases cited above years before the Department discharged the Officers and disclosed the grounds for their termination. Accordingly, under our qualified immunity analysis, it was clearly established at the time of the disclosures that the disclosed allegations would place a constitutionally cognizable stigma on the Officers' reputations. . . .In sum, under our qualified immunity analysis, at the time of the disclosures this Court's precedent clearly established that the allegedly stigmatizing statements were made public by Peck. . . . In sum, we conclude that under clearly established precedent, Peck made public false and stigmatizing charges regarding the grounds for the Officers' termination. This satisfies *Sciolino*'s four prongs, thus demonstrating deprivation of the Officers' constitutionally cognizable liberty interests under clearly established law. . . . Having concluded that this Court's decisions clearly established that Peck deprived the Officers of a liberty interest, we now must determine whether, under clearly established law, the Officers were deprived of that interest 'without due process of law.'. . As explained above, when a governmental employer places an employee's reputation 'at stake' by publicly disclosing defamatory charges, the employee is entitled to a hearing 'to "clear [his] name" against [the] unfounded charges.'. . Here, the Officers *never* received a name-clearing hearing. Accordingly, Peck has denied the Officers due process of law. Peck nonetheless asserts that the failure to afford the Officers a name-clearing hearing does not amount to a violation of clearly established law for two reasons: (1) he 'w[as] not required to provide [the Officers] with an adversarial pre-termination hearing,'. . . and (2) '[the Officers] had alternative processes to contest the contents of the termination letter[s][.]'. . We disagree. . . . In *Sciolino*, this Court clearly established that '[a]n opportunity to clear your name *after* it has been ruined by dissemination of false, stigmatizing charges *is not* "*meaningful*."'. . Accordingly, regardless whether the Fourteenth Amendment obliged Defendants to afford the Officers an adversarial, *pre-termination* name-clearing hearing, *Sciolino* established that the Fourteenth Amendment required Defendants to afford the Officers a constitutionally adequate name-clearing hearing before *publicly disclosing* false information regarding the basis for the Officers' termination that, in fact, restricted their ability to obtain new employment."); ***Breuder v. Bd. of Trustees of Cmty. Coll. Dist. No. 502***, 888 F.3d 266, 270-71 (7th Cir. 2018) ("The Board's members contend that the validity of Breuder's contract was at least uncertain, so that they could not have violated any clearly established rule. There are two problems with this contention. The first is that, when discharging Breuder without giving him an opportunity for a hearing, the Board issued a statement declaring that he had committed misconduct. *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), holds that even a person who has no property interest in a public job has a constitutional entitlement to a hearing before being defamed as part of a discharge, or at a minimum to a name-clearing hearing after the discharge. See also *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). The Board has not offered that opportunity to Breuder, and the members insist that they need not do so. The law is clearly established against them. The second is that a hearing is required whenever the officeholder has a 'legitimate claim of

entitlement'. . . to keep the job. Breuder, who had a written contract for a term of years, assuredly had a legitimate *claim* of entitlement to have the Board honor its promise. The claim may have failed in the end, but that did not eliminate the claim's existence. . . . When the decision is made by a body's governing board, it would be hard to contend that the action is random and unauthorized for the purpose of *Parratt v. Taylor* . . . and its successors."); ***Mancini v. Northampton County***, 836 F.3d 308, 310, 316-19 (3d Cir. 2016) ("This case requires us to consider whether there is an exception to the ordinary requirements of procedural due process when a government employee with a protected property interest in her job is dismissed as part of a departmental reorganization that results in the elimination of her position. We have not previously considered this so-called 'reorganization exception.' We hold that a reorganization exception to constitutional procedural due process cannot apply as a matter of law where, as here, there is a genuine factual dispute about whether the reorganization was pretext for an unlawful termination. . . . Northampton contends it was not required to provide Mancini with any procedural due process before, or after, it terminated her, because once the reorganization of the Solicitor's Office occurred, Mancini's position no longer existed. Any challenge to the injustice of Mancini's dismissal would have been 'futile,' according to Northampton, because as a factual matter there was no longer room for her in the County government. . . We have not previously considered the existence of this so-called 'reorganization exception' to procedural due process, and we decline to apply any exception to Northampton's conduct in this case. Because the jury could have reasonably concluded that the reorganization of the Solicitor's Office was pretext for unlawfully terminating Mancini, we do not reach the question of whether there are exceptions to the requirements of procedural due process where the government engages in a legitimate person-neutral reorganization. Although the jury was not directed to make a specific finding on pretext, the jury found that Northampton violated Mancini's due process rights, and we agree with the District Court that Mancini presented sufficient evidence of pretext to support that finding. Mancini presented evidence from which a jury could reasonably conclude that the Defendants' purported concern for cost-savings did not actually animate the reorganization. There was ample evidence that the Defendants decided to eliminate the two full-time assistant county solicitor positions, and replace them with part-time positions, based not on identity-neutral, cost-driven reasons, but based on their knowledge of Mancini and the people who would come to occupy the part-time positions. . . .Finally, we reject Northampton's argument that a 'due process claim is not available if a layoff was made pursuant to a reorganization in fact, regardless of a possible improper motive behind the reorganization.'. . We are aware of no court that has permitted the government to subvert the requirements of the Fourteenth Amendment with a sham reorganization. If the government were allowed to undertake sham reorganizations to dismiss an employee who was otherwise entitled to due process, Northampton's proposed 'reorganization exception' would eviscerate a public employee's procedural due process rights altogether. In conclusion, we will not permit the government to target an individual for dismissal and then violate that individual's procedural due process rights under the guise of a reorganization. . . . There was sufficient evidence from which the jury could conclude that the reorganization was a pretext for targeting Mancini. Northampton was therefore not exempt from providing Mancini, a protected career service employee, with procedural due process when it selected her for dismissal."); ***Rebirth Christian Academy***

Daycare, Inc. v. Brizzi, 835 F.3d 742, 746-49 (7th Cir. 2016) ("We. . .begin with the question whether the law clearly established that Rebirth had a property interest in its registration as a child care ministry. We conclude that the answer is yes. This question is not a close one, as the law on this issue has been clearly established for decades. . . . Thus, any reasonable government official would have understood that Rebirth had a property interest in its registration as a child care ministry. . . .Numerous Supreme Court decisions reinforce our conclusion that, because Rebirth was entitled to retain its registration unless it violated state law, Rebirth's ability to operate a registered child care ministry was a clearly protected property right at the time that the defendants revoked its registration. . . .These decisions thus demonstrate that the question whether Rebirth had a protected property interest in its registration was beyond debate. . . . It has long been clearly established that the 'root requirement' of due process is that a person 'be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'. . .Rebirth was clearly entitled to a pre-deprivation opportunity to challenge the proposed loss of its registration. We agree with the district judge's assessment—unchallenged by the appellees—'that the interest at stake here, to wit, [Rebirth's] interest in the continued operation of its child care business, is an important one.'. . Moreover, the appellees have not identified any governmental interest that might have arguably justified their failure to provide Rebirth with an opportunity to be heard *before* depriving it of this significant property interest. The fact that the Bureau did not revoke the registration until two weeks after it gave Rebirth notice of the revocation further undermines any potential argument that the Bureau was responding to some perceived emergency necessitating that it quickly rescind Rebirth's registration without first giving it a chance to challenge the Bureau's allegations. We therefore conclude that, by revoking Rebirth's registration without first providing the organization with an opportunity to be heard, the appellees violated clearly established law and are not entitled to qualified immunity. The appellees argue that the proper inquiry is not whether Rebirth had a clearly established right to be heard before its registration was revoked but whether it had a clearly established right to an administrative appeal of the type available to license holders. We reject this argument. Contrary to the appellees' assertions, this is not a case about 'what amount of process is due.' Rather, this is a case in which due process clearly required *some* pre-deprivation opportunity to be heard and the appellees provided *no* opportunity for a hearing, though nothing prevented them from doing so. . . .[A]lthough the appellees are correct that no statutory provision requires an administrative appeal before the revocation of a registration, this does not mean that Brizzi and Gargano are excused from providing Rebirth with due process. True, the statutory scheme did not require that registered child care ministries receive an administrative appeal of the type afforded to license-holders, but neither did it prohibit the appellees from providing registered child care ministries with *some* type of pre-deprivation hearing. The issue then is whether Rebirth adequately alleged that the appellees personally decided to withhold from Rebirth the pre-deprivation hearing that they could have provided. We conclude that Rebirth's complaint plausibly alleges that Brizzi and Gargano were personally involved in depriving Rebirth of an opportunity for a pre-deprivation hearing, and thus the complaint satisfies the requirements of notice pleading. . . . In sum, we do not decide the type of pre-deprivation hearing that Rebirth was entitled to or that Rebirth shall now

recover damages. We conclude only that Rebirth's complaint alleges that the appellees personally violated clearly established law by depriving Rebirth of a property interest (its registration) without first providing Rebirth with *any* opportunity to be heard. Rebirth will, of course, need more than allegations to prevail on these claims; it will need evidence proving that these defendants were personally involved in the constitutional violation. Given the procedural posture of this case, the district court should, if necessary, provide Rebirth with an opportunity for additional discovery so that it may obtain such evidence."); ***Thompson v. District of Columbia (Thompson III),*** 832 F.3d 339, 345 (D.C. Cir. 2016) ("[T]he argument that Thompson was 'reclassified' rather than 'transferred' rests on a distinction without a difference. The bottom line of our holding in *Thompson II* was that Thompson, as a career civil servant, was stripped of his property interest when he was placed in a position that had previously been marked for elimination. We will not revisit that legal conclusion now. . . Whether Thompson was 'transferred' or 'reclassified' into this position, he was effectively terminated at that time because the Security Officer position had already been slated for elimination. For our purposes, it is the substance of a constructive termination, and not the semantics of a 'transfer' or 'reclassification,' that matters in determining whether Thompson was deprived of his protected property interest in his job. We likewise reject the District's argument that Thompson received all of the process that he was due. In support, the District points to the notice that Thompson received of his right to challenge the elimination of his *new* position in the reduction in force. But, as we explained in *Thompson II*, Thompson was constructively terminated at the time of his transfer, not when this new position was eliminated. He thus had a right to notice of that transfer and a hearing to challenge his transfer before it was made. . . The District does not contend that Thompson received any such notice or opportunity to contest the transfer. And, although the Supreme Court has indicated that a hearing may be postponed in 'extraordinary situations where some valid governmental interest is at stake,'. . . the District does not argue that any such circumstances existed in this case. At a minimum then, Thompson's pre-deprivation right to due process was violated when the District assigned him to a position scheduled for imminent elimination without notice or a hearing."); ***Warren v. Pataki***, 823 F.3d 125, 141 (2d Cir. 2016) ("The plaintiffs were constitutionally entitled only to 'notice and an adversarial hearing prior to civil commitment.'. . Principles of due process did not require the defendants to provide the plaintiffs with a hearing conducted pursuant to Correction Law § 402, nor were they constitutionally entitled to call a physician, psychiatrist, or expert witnesses favorable to them, no matter that their ability to call such witnesses might have rendered the proceedings fairer. Thus, in establishing their 'no harm, no foul' defense, the defendants were not required to present evidence—either through expert testimony or otherwise—establishing that the plaintiffs would have been confined under Correction Law § 402 or under Article 10, or that the plaintiffs would have been committed in the face of testimony by favorable witnesses. Rather, the defendants needed only to have presented *some* evidence sufficient to enable a jury to conclude that the plaintiffs would have been civilly committed following an adversarial proceeding on notice."); ***Oyama v. Univ. of Hawaii***, 813 F.3d 850, 875 (9th Cir. 2015) ("Here, the University's denial of Oyama's student teaching application satisfied the due process requirements set forth in *Horowitz.* As in *Horowitz,* the University 'fully informed [Oyama] of the faculty's dissatisfaction' with his performance: multiple professors told Oyama about their concerns regarding his

suitability for the teaching profession. The University's decision was also 'careful and deliberate.' The University initially explained the reasons for its decision in Dr. Moniz's detailed letter to Oyama. The University then provided Oyama a robust process for appealing its initial decision: Dean Sorensen formed a multidisciplinary committee, which interviewed Oyama and three professors of his choice and prepared a detailed report reviewing the Dr. Moniz's decision. Dean Sorensen then provided Oyama another letter explaining the committee's findings and affirming the University's decision to deny his application. This process was sufficiently careful and deliberate to meet the requirements of the Due Process Clause."); ***Rivera-Corraliza v. Morales***, 794 F.3d 208, 223-24 (1st Cir. 2015) ("Normally due process requires notice and a hearing of some sort before the government takes away property—the state, in other words, usually must say what it intends to do and then give affected persons the chance to speak out against it. . . 'Normally' and 'usually' are words that suggest exceptions. And that is the case in this corner of the law, because due process is a 'flexible' concept not governed by any '[r]igid taxonomy.'. . . Plaintiffs' right to preseizure process—an issue on which they bear the burden, . . . turns on whether the pined-for process is a reasonable requirement to impose. And that requires comparing the benefit of the procedural protection sought—which involves the value of the property interest at issue and the probability of mistaken deprivations if the protection is not provided—with the cost of the protection; this is known in legal circles as the *Mathews* test. . . Dooming plaintiffs' due-process claim is their failure to say anything on this all-important test, giving us zero case analysis to help us see how this benefit/cost comparison would shake out. What they have done is not the type of serious effort needed on a complex issue—especially when their briefs present a slew of other legally intricate claims. And we will not do their work for them. . . So their complaint about not getting preseizure process is waived."); ***Shinault v. Hawks***, 782 F.3d 1053, 1058 (9th Cir. 2015) ("The results of the *Mathews* balancing test point to the need for a pre-deprivation hearing prior to freezing Shinault's funds. Compared to the cases above, the State's interest does not require such prompt action that a pre-deprivation hearing is infeasible. While state officials could temporarily suspend individuals from their jobs without a hearing in order to preserve the integrity of those regulated professions and protect the public, the integrity of Oregon's prison system does not diminish if a hearing precedes a freeze of inmate assets, particularly because the funds in fact remain in the State's control. Nor does the financial viability of the correctional system require immediate recoupment of inmate costs given their insignificance in relation to ODOC's overall budget. In other words, Oregon's interest in administering cost-effective and safe prisons is significant, but recouping incarceration costs does not rise to a level which would obviate the need for a pre-deprivation hearing in advance of action. Given Shinault's substantial interest, the risk of erroneous deprivation, and the ability to provide a hearing without compromising a significant government interest, we hold that a state must provide a hearing prior to freezing a significant sum in the inmate's account. Thus, we conclude that Shinault received insufficient due process as the result of Oregon's actions."); ***Montanez v. Sec'y Pennsylvania Dep't of Corr.,*** 773 F.3d 472, 484-85 (3d Cir. 2014) ("Unlike the cases in which we have held that pre-deprivation process is unnecessary, there is nothing about the DOC Policy that requires the DOC to take immediate action to deduct funds from inmate accounts to satisfy court-ordered obligations. Any short delay that might result from offering inmates an opportunity to be heard on application of the DOC Policy

before it is applied would not seriously undermine the Commonwealth's ability to recover costs. . . . In sum, considering the factors required by *Mathews,* the government's interest in collecting restitution, fines, and other costs from convicted criminals does not overcome the default requirement that inmates be provided with process before being deprived of funds in their inmate accounts. The District Court therefore erred in holding that the DOC's postdeprivation grievance procedures were all that the Constitution required."); ***Schmidt v. Creedon***, 639 F.3d 587, 589, 590 (3d Cir. 2011) ("We now hold that, except for extraordinary situations, under Pennsylvania law, even when union grievance procedures permit a policeman to challenge his suspension after the fact, a brief and informal pre-termination or pre-suspension hearing is necessary. However, because this rule was not clearly established at the time of Schmidt's suspension, we conclude that appellees are entitled to qualified immunity.")

See also ***Santiago v. City of Chicago***, No. 19 C 4652, 2020 WL 1304753, at *5, *8 (N.D. Ill. Mar. 18, 2020) ("Santiago alleges that the City's practice of sending notice by mail only after it tows and impounds an allegedly abandoned vehicle has deprived her and the proposed Tow Class of their procedural due process rights. The City seeks the dismissal of this claim because, it contends, Santiago has failed to allege that it provided Santiago with sufficient notice; the ordinance is not facially unconstitutional; and she has failed to adequately allege an official policy that deprived her of due process. . . .[After doing *Mathews* analysis, court concludes] Santiago has plausibly alleged that the City denied her and the members of the Tow Class procedural due process by towing their allegedly abandoned vehicles without first providing notification by mail.")

See also ***Fritz v. Evers***, 907 F.3d 531, 535-36 (7th Cir. 2018) (Hamilton, J., concurring) ("Wisconsin's public designation of a teacher as 'under investigation' for suspected 'immoral conduct' can inflict a stigma that makes a teacher unemployable, as a matter of fact if not law, until the investigation is resolved. If that's correct, the teacher may well be entitled at least to notice of the charge being investigated and a name-clearing hearing—and within a reasonable time. . . . Plaintiff Fritz was not charged with or convicted of any such crimes. He resigned from his last teaching job. The only statutory basis for reporting and investigating him was his former employer's 'reasonable suspicion' that his resignation related to his having engaged in 'immoral conduct.' Under the statute, 'immoral conduct' includes a teacher's use of school computers for pornography, assisting child predators with obtaining school positions, or otherwise 'endanger[ing] the health, safety, welfare, or education of any pupil' by violating 'commonly accepted moral or ethical standards.'. . The broad definition is nearly as broad as the allegations that Socrates was corrupting the youth of Athens. But given the statutory emphasis on possible sexual abuse of school children, the stigma of an investigation for someone in Fritz's shoes should be apparent. To use an example from the state's brief, what administrator in her right mind, in deciding to hire a new teacher, would cross her fingers and hope that a teacher under investigation might have only given a cigarette to a high-school student when it is possible he engaged in sexual

activity with a child? When a teacher comes under reasonable suspicion of abusing students, the state's interests are obvious and powerful. Everyone has an interest in resolving the situation accurately, fairly, and quickly. But that leads us to two problems under state law that surfaced in Fritz's case. State law requires that a report be made promptly, within just 15 days after an administrator learns of the basis for the report. . . Once a teacher has been reported, however, the statutes impose no time limit on the department to determine whether probable cause supports the report and whether to initiate license revocation proceedings. . . Also, when the department begins an investigation, it is supposed to 'Notify the licensee that an investigation is proceeding, the specific allegations or complaint against the licensee, and [allow] the licensee [to] respond to the investigator regarding the complaint or allegation.'. . Fritz alleges here that he did not receive the required notice. As a result, Fritz was in limbo indefinitely and did not know why. Wisconsin has the power to suspend a teacher's license, of course. That formal step would require due process, at least in the minimal form of notice and a timely and meaningful opportunity to be heard. . . . Publicly listing accused teachers as 'under investigation' appears to be an easier and cheaper alternative to license suspension, but with similar practical consequences. It effectively suspends some teachers' careers, but without a prompt and fair opportunity to be heard and to clear their names. The reasoning of *DuPuy* may well apply to this system. It is disingenuous for the state to contend here that an 'under investigation' designation is *not* meant to affect a teacher's status. The department tells school administrators to use the designation when making hiring decisions. . . The department assures administrators that its website 'will indicate in red type at the top of the page if a person's license [is] under investigation.'. . The department further encourages administrators to cooperate in investigations so as not to 'allow[ ] potentially dangerous persons to remain in the classroom.'. .Wisconsin undoubtedly has the power and duty to license teachers and so to act as the gatekeeper to state education employment. With that power comes the responsibility to be fair to teachers, too, which includes complying with state law and resolving these cases promptly. If another teacher has an experience under this system similar to Fritz's, it might add up to a federal due process violation, calling at least for timely injunctive relief as in *DuPuy v. Samuels*. But complying with state law would go a long way toward avoiding such problems.")

But see ***Gilbert v. Homar***, 117 S. Ct. 1807 (1997) (holding that a State does not violate the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.); ***Lunon v. Botsford***, 946 F.3d 425, 430-32 (8th Cir. 2019) ("Lunon's claim is that defendants had an affirmative constitutional duty to learn that he was Bibi's owner, a duty they breached by failing to scan Bibi's microchip. . . .We conclude that longstanding Arkansas law is highly relevant, indeed arguably controlling on the due process issue in this case. . . .Lunon concedes that defendants had the right to seize Bibi as a stray dog under the Pulaski County ordinance, and to impound, adopt out, and spay the dog under the City of North Little Rock Municipal Code. But, he argues, defendants violated his procedural due process right to affirmative notice before Bibi was adopted out and spayed. The Supreme Court of Arkansas expressly rejected this claimed procedural right in *Howell v. Daughet* and *Fort Smith v. Dodson*. If one views those decisions as defining the dimensions of Lunon's procedural due

process property interest under *Board of Regents v. Roth*, then he has no due process claim. If those decisions are instead viewed as declaring 'what process is due,' that is a federal question so they are not controlling precedents. . .We agree with the Supreme Court of Arkansas that affirmative pre-deprivation notice is not constitutionally required in this situation, when an animal shelter holds a stray dog for more than five days and then adopts out and spays the dog after the owner fails to file a claim. . . . [T]here is no *constitutional* duty to scan a stray dog for a microchip, and '[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.'. . Lunon had a claim under state law (barred by statutory immunity) that Dupree's negligent failure to scan Bibi proximately caused Lunon's loss of the dog's substantial economic value, but 'the Due Process Clause is simply not implicated by a *negligent* act of an official.'"); ***Straub v. City of Spokane***, 738 F. App'x 392 (9th Cir. 2018) ("Here, we find that the *timing* of the proposed name-clearing hearing satisfied due process. Straub certainly had an interest in holding such a hearing prior to the press release and the loss of his position. However, Defendants were removing the head of their police department—an important, high-profile position—and had a stronger interest in quickly executing that decision and communicating its rationale to the public. Indeed, if due process required a pre-deprivation hearing in such circumstances, public employers would have an incentive to terminate at-will employees without public explanation. Moreover, there is no merit to Straub's contention that Defendants have failed to establish that the proposed hearing's *content* would have been procedurally adequate. Defendants offered Straub a name-clearing hearing in writing on four occasions, and extended the opportunity, through counsel, to 'discuss timing and appropriate process' for the hearing. The record is devoid of any indication that Straub ever sought to schedule the hearing or negotiate its content. We therefore find that Defendants did not violate Straub's right to due process. In any event, the individual defendants are entitled to qualified immunity. Straub has failed to cite any precedent that would have, 'beyond debate,' informed them that due process mandated a *pre*-deprivation hearing under these circumstances."); ***Recchia v. City of Los Angeles Dep't of Animal Servs.***, 889 F.3d 553, 561-62 (9th Cir. 2018) ("Recchia's birds were seized under the auspices of California Penal Code § 597.1(a)(1), which provides for the immediate seizure of animals where '[a]ny peace officer, humane society officer, or animal control officer' has 'reasonable grounds to believe that very prompt action is required to protect the health or safety of the animal or the health or safety of others.' Accordingly, the relevant question is whether § 597.1 provides for adequate process, in light of the interests it serves, not whether this particular seizure was proper. . . . It does not matter whether Recchia's pigeons were properly seized under the statute or whether there was an emergency here. . . For the purposes of the Fourteenth Amendment analysis, we are not assessing whether this particular seizure was proper, but instead whether the statute provides due process. . . We hold that it does and so affirm the district court's grant of summary judgment on the Fourteenth Amendment claim as to the Officers."); ***Roybal v. Toppenish Sch. Dist.***, 871 F.3d 927, 933 (9th Cir. 2017) ("In its order, the district court determined Roybal did not receive due process because Toppenish violated state law. Specifically, the district court concluded that Toppenish did not comply with Washington Revised Code § 28A.405.300, which entitles an employee to a predeprivation probable cause hearing. Toppenish's failure to comply with section 28A.405.300

does not resolve the issue currently before us: whether Toppenish violated federal due process, a question of federal, not state, law. . . Federal due process does not necessarily entitle a plaintiff to the same procedures provided by state law. Rather, under federal law, what process is due is determined by context, to be analyzed in accordance with the three-part balancing test described in *Mathews v. Eldridge*[.] . . . We recognize that a violation of state law causing the deprivation of a federally protected right may form the basis of a § 1983 action. But this rule does not apply where, as here, the state-created protections reach beyond that guaranteed by federal law. . . Under Washington law, employees are entitled to notice and a trial-like predeprivation hearing to determine whether the adverse employment action is supported by probable cause. . . As part of the hearing, the parties may conduct discovery and call witnesses. . . To satisfy federal due process minimums, by contrast, employees need only receive notice and an opportunity for a hearing before being deprived of their property interest. . . To that end, employees are entitled to 'oral or written notice of the charges ..., an explanation of the employer's evidence, and an opportunity [for employees] to present [their] side of the story.'. . Washington law, therefore, provides greater protection than federal law and the district court erred in resting its analysis on a violation of state law."); ***Panzella v. Sposato***, 863 F.3d 210, 219 (2d Cir. 2017) ("We conclude that Panzella's proposed alternative to an Article 78 proceeding—a prompt, post-deprivation hearing consistent with the conditions set forth in *Razzano* [*v. Cty. of Nassau,* 765 F. Supp. 2d 176 (E.D.N.Y. 2011)]––would prevent the unjustified deprivation of a person's property interest, and would not be unduly burdensome or costly to the government. Such a hearing would provide Panzella with a timely and inexpensive forum to challenge the County's retention of her longarms and would avoid placing on Panzella the burdens that inhere in an Article 78 proceeding.We therefore hold, consistent with the district court's decision in the instant case, and the decision in *Razzano*, that persons in Panzella's situation are entitled to a prompt post-deprivation hearing under the four conditions set forth by the district court in this case and in *Razzano*.); ***Mickelson v. Cty. of Ramsey***, 823 F.3d 918, 923-27, 930 (8th Cir. 2016) ("Our court . . . must determine whether the district court correctly held that the county did not violate the arrestees' constitutional rights by collecting the $25 fee at booking without affording a pre-deprivation hearing. . . . Although this booking-fee policy presents an issue of first impression in our circuit, other courts have passed upon the constitutional validity of collecting a similar fee at booking. . . . As written, this policy allows for the correction of any errors inherent in the overinclusive system of upfront collection. If all deprived arrestees who are not convicted can recoup their $25 simply by sending in a form, the risk of error is minimal, limited only to the possibility that some arrestees temporarily will lose the use of $25. We do not discern any constitutionally significant value in the appellants' proposed alternative—delaying collection until after conviction—that would outweigh the state's valid interest in upfront collection of the fee. . . .Although Mickelson and Statham correctly note that the current system places the onus on the deprived arrestee to complete and submit a refund form before the county returns the booking fee, the appellants' complaint contains no allegation that this facially minor imposition is so cumbersome as to undermine the constitutional adequacy of this post-deprivation refund process. . . .With the *Sickles* and *Markadonatos* decisions in mind, we conclude that Mickelson and Statham did not plead facts sufficient to establish that Ramsey County's booking-fee policy fails to pass constitutional muster simply because it provides a post-deprivation remedy instead of a pre-

deprivation hearing. The county has in place a coordinated refund process, and the modest private interest at stake does not approach those interests found to warrant a full-fledged pre-deprivation hearing. . . The district court thus correctly concluded that the county's interest in ensuring it can collect the statutorily authorized fee outweighs the minimal paperwork and temporary deprivation imposed on wrongfully deprived arrestees. . . Accordingly, we conclude that the *Mathews* factors show that a pre-deprivation hearing is not required and that a post-deprivation remedy may suffice. . . .In sum, in view of the modest private interests at stake, the substantial state interests in the current withholding system, and the appellants' failure to complete the existing refund process and demonstrate its alleged inadequacies, we conclude that Mickelson and Statham have not stated a plausible claim that the booking fee posed a violation of constitutional rights that is actionable under 42 U.S.C. § 1983."); ***Moody v. Michigan Gaming Control Bd.***, 790 F.3d 669, 678-79 (6th Cir. 2015) ("[A]lthough a state statute 'does not affront the Due Process Clause by authorizing summary suspensions' of horse-racing licenses 'without a presuspension hearing,' *Barry,* 443 U.S. at 63, *we* do not need to apply the *Mathews* criteria to the harness drivers, because the *Supreme Court* already has done so: a suspended harness-horse trainer (and so, we presume, a harness driver) is due the process of 'a prompt postsuspension hearing,' *id.* at 66. The harness drivers received a postsuspension hearing in Michigan state court. Whether or not plaintiffs ought to have received, as matter of Michigan state law, an additional hearing in front of an administrative agency does not affect the federal constitutional analysis. So we affirm the district court's grant of summary judgment insofar as it held that the defendants' suspension of plaintiffs did not violate the plaintiffs' due-process rights."); ***Tucker v. Williams***, 682 F.3d 654, 661 (7th Cir. 2012) ("There is only one property deprivation here: Williams' initial seizure of the backhoe. Due process did not require that Tucker be given a predeprivation hearing; Tucker's consent validated the seizure under the Fourth Amendment. When a predeprivation hearing is not required, due process only requires that the government provide meaningful procedures to remedy erroneous deprivations. . . .Here, adequate postdeprivation procedures were available to Tucker; he could have brought a claim for conversion or replevin. . . What Tucker was entitled to, and got, was the right to seek relief against that seizure, and he had that by virtue of Illinois tort laws. We do not find a due process violation."); ***Gonzalez-Droz v. Gonzalez-Colon***, 660 F.3d 1, 14 (1st Cir. 2011) ("[W]e give great weight to the proposition that when the state reasonably determines that a license-holder poses a risk to patient safety, pre-deprivation process typically is not required. . . In these circumstances, moreover, the need for a pre-deprivation hearing is further diminished by the state's strong interest in upholding 'the integrity of [a] state-licensed profession[ ].'. . Neither the possible risk of an erroneous deprivation nor the possible benefit of additional safeguards shifts the balance. Especially in cases involving public health and safety and the integrity of professional licensure, the force of these factors is significantly diminished by the ready availability of prompt post-deprivation review. . . In this case, the provisional suspension did not take effect until May 2, 2007. The plaintiff was afforded a hearing roughly two weeks later (prior to the Board's decision to make the suspension final). Given this chronology, we do not believe that the lack of a pre-deprivation hearing offended due process."); ***Smith v. Jefferson County Bd. of School Com'rs***, 641 F.3d 197, 217 (6th Cir. 2011) (en banc) ("Because the Board engaged in legislative activity when it made the budgetary determinations that eliminated the alternative school, we hold that the Board did not violate the

teachers' procedural-due-process rights. The Board's decision to abolish the alternative school and contract with Kingswood in order to save money was the result of weighing budgetary priorities, a legislative activity. . . Thus, because the Board was engaged in a legislative activity, there was no requirement that the teachers be given notice or an opportunity to be heard prior to the Board's decision to abolish the alternative school. . . In such circumstances, 'the legislative process provides all the process that is constitutionally due' when a plaintiff's alleged injury results from a legislative act 'of general applicability.'. . Therefore, we hold that the Board's actions did not violate the teachers' procedural-due-process rights."); ***Duncan v. State of Wisconsin Department of Health and Family Services***, 166 F.3d 930, ___ (7th Cir. 1999) ("We find the situation before us to be closely analogous to the one in *Gilbert*: there, the state was vindicating an interest to have only persons of high integrity on the police force; here, the state is trying to employ only individuals who can control their anger and keep a level head working with youthful offenders. In short, the process Duncan received during the period of his suspension without pay complied with the standards set out in *Gilbert*.").

See also ***City of Los Angeles v. David,*** 123 S. Ct. 1895, 1897, 1898 (2003) (per curiam) (30-day delay in holding a hearing after car was towed and stored for alleged parking violation Areflects no more than a routine delay substantially required by administrative needs. Our cases make clear that the Due Process Clause does not prohibit an agency from imposing this kind of procedural delay when holding hearings to consider claims of the kind here at issue."); ***City of West Covina v. Perkins***, 525 U.S. 234, 240, 241(1999) ("When the police seize property for a criminal investigation, . . . due process does not require them to provide the owner with notice of state law remedies. . . . Once the property owner is informed that his property has been seized, he can turn to . . . public sources to learn about the remedial procedures available to him. The City need not take other steps to inform him of his options."). *See also* ***Gardner v. Evans***, 920 F.3d 1038, 1061-62 (6th Cir. 2019) ("Here, it is undisputed that details concerning the appeals process were available to the public on the City of Lansing's website. But that does not necessarily settle the matter. It is not a foregone conclusion that the mere posting of information on a city's website is a 'reasonably calculated' way, under all the circumstances, to apprise persons evicted from their homes that they may appeal the red tagging. To begin, evictions are a particularly significant deprivation, arguably more so than the temporary deprivation of certain pieces of property contemplated by the Supreme Court in *West Covina*. . . An eviction becomes all the more serious when, as here, a resident is evicted with no prior notice. . . .In this way, the case is more like *Memphis Light* than *West Covina*. Even so, the City points out that the red-tag notices provided the name and phone number of the inspector to call with questions. Thus, according to the City, if plaintiffs were curious about their options after the red tagging, all they needed to do was call the number. . . .We agree that the red tags provided adequate notice to the homeowners but disagree as to the tenants and other occupants of the homes who were forced to immediately evacuate the homes due to the red taggings. . . . On balance, a jury could find that the City's mere reliance on its website and the limited language of the red tag notices was not reasonably calculated to notify evicted tenants of their right to appeal and their 20-day window to do so. We therefore reject the district court's basis for granting summary judgment to the City and the inspectors on

the post-deprivation notice claims."); ***Gardner v. Evans***, 811 F.3d 843, 846-48 (6th Cir. 2016) ("First, we address whether a constitutional violation occurred. The Tenants argue that the Inspectors violated their due process rights by failing to provide constitutionally sufficient notice of their ability to appeal the red-tag evictions. . . In response, the Inspectors assert that the telephone number and the offer to answer questions was sufficient to satisfy the constitutional notice requirement. . . They also assert that, because the Lansing Housing and Premises Code was extant and available to the public, the Tenants had constructive notice of the appeals process. . . The district court agreed with the Tenants, holding that our precedent in *Flatford* clearly established that direct and clear notice of an appeals process is necessary to satisfy the constitutional notice requirement. . . .For purposes of deciding this case, we need not determine whether the red-tags provided by the Inspectors meet the constitutional notice standard that we have just outlined. Even if we assume, without deciding, that the Tenants are correct and that the red-tags were constitutionally infirm, the Tenants cannot satisfy the second prong of the qualified immunity analysis, namely, whether this constitutional notice requirement was clearly established. . . .*Flatford* stands for the principle that the tenant is entitled to the same notice that is afforded to the landlord. But it does not clearly establish the particularity or specificity required for such notice. A diversity of precedent highlights this general lack of clarity regarding the notice requirement for a post-deprivation appeals process. . . . *Flatford* did not clearly establish that a notice of eviction must include an explicit reference to the availability of any post-deprivation appeals process and the manner in such an appeal may be pursued. The case law is not so clear on this point as to render the Inspectors' actions unreasonable."); *But see* ***Grayden v. Rhodes,*** 345 F.3d 1225, 1244 (11th Cir. 2003) (Distinguishing *West Covina* and holding "that when the tenants of Lafayette Square were evicted from their leasehold interests based on exigent circumstances and were given less than thirty-six hours to vacate the premises, they were entitled under *Mathews* and *Mullane* to affirmative, contemporaneous notice of their right to challenge the condemnation order but they were not entitled to a pre-deprivation hearing. By 'affirmative' notice, we mean that they were entitled to notice above and beyond that provided by § 30A.11 of the City Code. By 'contemporaneous' notice, we mean that they were entitled to notice of their right to challenge the condemnation at the same time they were provided with the notice to vacate the premises.").

See also ***Jauch v. Choctaw County***, 874 F.3d 425, 429-32, 435 (5th Cir. 2017), *cert. denied,* 139 S. Ct. 638 (2018) ("We address only the Fourteenth Amendment and hold that this excessive detention, depriving Jauch of liberty without legal or due process, violated that Amendment; for that reason, her motion for summary judgment should have been granted as to the Fourteenth Amendment Due Process claim. . . . While this appeal was pending, the Supreme Court issued *Manuel v. City of Joliet*, which held that a defendant seized without probable cause could challenge his pretrial detention under the Fourth Amendment. . . *Manuel* does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that *only* the Fourth Amendment is available to pre-trial detainees. For example, even when the detention is legal, a pre-trial detainee subjected to excessive force properly invokes the Fourteenth Amendment. . . So, too, may a legally seized pre-trial detainee held for an extended period without further process. This Court has already addressed the interplay between

the Fourth and Fourteenth Amendment, and *Manuel* fits with these prior cases. In 1996, we held the Fourth Amendment inapplicable to the usual pretrial detainee who was *properly arrested* and awaiting trial. . . When confronted with a defendant held upon probable cause who spent nine months in pretrial detention, we found the Fourth Amendment inapplicable and the due process clause of the Fourteenth Amendment implicated. *See Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000). The Fourth Amendment could not have been violated, we explained, because the plaintiff was originally arrested 'pursuant to a valid court order,' but the 'alleged nine month detention without proper due process protections' would amount to a due process violation if proven. . . By contrast to these cases, where a claim of unlawful detention was accompanied by allegations that the initial arrest was not supported by valid probable case, we held that analysis was proper 'under the Fourth Amendment and not under the Fourteenth Amendment's Due Process Clause.' *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 441 (5th Cir. 2015); *see also Castellano v. Fragozo*, 352 F.3d 939, 953 (5th Cir. 2003) (en banc). Just like *Manuel*. . . . *Jones* is binding, but it did not state whether the due process violation was of the procedural or substantive variety. Other circuits appear split on the question. *Compare Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) (substantive due process); *Hayes v. Faulkner Cnty., Ark.*, 388 F.3d 669 (8th Cir. 2004) (substantive due process), *with Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) (procedural due process); *see also Armstrong v. Squadrito*, 152 F.3d 564, 575 & n.4 (7th Cir. 1998) (specifically rejecting *Oviatt* and its procedural due process approach). We find the answer from Supreme Court cases. 'The touchstone of due process is protection of the individual against arbitrary action of government.' *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). This is true with respect to both procedural and substantive due process. . . . Here, we deal with a deprivation of a protected liberty interest due to an allegedly unfair procedural scheme. The Constitution itself protects physical liberty. . . As a matter of procedure, defendants held in Choctaw County on capias warrants are held without an arraignment or other court proceeding until the circuit court that issued the capias next convenes. Our task is to determine the constitutionality of this procedure, and we are satisfied that Jauch's right to procedural due process is most squarely implicated. Without deciding whether substantive fundamental unfairness may support a due process holding with little procedural deficiency, we hold that prolonged-detention cases do raise the immediate question of whether the pre-trial detainee's procedural due process rights have been violated. . . . Ordinarily, '[t]he starting point for any inquiry into how much "process" is "due" must be the Supreme Court's opinion in *Mathews v. Eldridge*,' and we would consider the private interest at stake, the risk of erroneous deprivations under existing procedures in light of available alternative or additional procedures, and the government's interest. . . .The Supreme Court subsequently clarified the law, holding "that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which ... are part of the criminal process," reasoning that because the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure," the Due Process Clause "has limited operation" in the field.' *Kaley v. United States*, ––U.S. ––––, 134 S.Ct. 1090, 1101, 188 L.Ed.2d 46 (2014) (quoting *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 2576, 120 L.Ed.2d 353 (1992)) (alterations in original). . . . .This is not a case about presumptions, evidence, or any workaday aspect of the process-in-action. This is a case about confinement with

process deferred. . . .There is thus room to argue that the *Mathews* test is more appropriate under the circumstances. Ultimately, we again follow the Supreme Court's example, choosing not to decide which test applies 'because we need not do so.'. . The *Medina* test represents the 'narrower inquiry' and is 'far less intrusive than that approved in *Mathews.*'. . 'A rule of criminal procedure usually does not violate the Due Process Clause unless it (i) "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or (ii) "transgresses any recognized principle of "fundamental fairness" in operation."'. . . Even under the deferential *Medina* test, the indefinite-detention procedure violated Jauch's right to procedural due process. . . . For the following reasons, we conclude that indefinite pre-trial detention without an arraignment or other court appearance offends fundamental principles of justice deeply rooted in the traditions and conscience of our people. The same traditions that birthed our Sixth Amendment right to a speedy trial and Eighth Amendment prohibition of excessive bail condemn the procedure at issue. . . . Here, the challenged procedure denies criminal defendants their *enumerated* constitutional rights relating to criminal procedure by cutting them off from the judicial officers charged with implementing constitutional criminal procedure. . . This is unjust and unfair.")

See also ***Moya v. Garcia***, 895 F.3d 1229, 1245-50 (10th Cir. 2018) (McHugh, J., concurring in the result in part and dissenting in part) (*amended opinion on denial of rehearing en banc*), *cert. denied*, 139 S. Ct. 1323 (2019) ("Properly understood, Plaintiffs' alleged injury is the unconstitutional deprivation of their liberty through overdetention. As to causation, Plaintiffs' argument is straightforward: they allege the sheriff and wardens jointly held the keys to their jail cells. By keeping Plaintiffs behind bars—day after day after day—the sheriff and wardens were deliberately indifferent to their constitutional right to freedom pending trial. In finding causation lacking, the majority focuses on the state court's conduct, rather than the Defendants' conduct. As portrayed by the majority, Mr. Moya and Mr. Petry 'blame the sheriff and wardens for the delays in the arraignments.'. . Because the sheriff and wardens had no power to schedule the arraignments, the majority's thinking goes, the sheriff and wardens had no power to prevent or cure the alleged constitutional violations. . . .On my reading of the complaint, Plaintiffs are not seeking to hold the sheriff and wardens accountable for the court's scheduling decisions; instead, they are seeking to hold them accountable for the lengthy detentions that no court authorized. . . Again, a timely bail hearing is a means to securing Plaintiffs' protected liberty interests, not an end unto itself. . . .By focusing on the arraignment rather than the detention, the majority naturally finds that the causal force lies with the state court's conduct, rather than with the jailers' conduct. And by focusing on the state court's conduct, rather than the jailers' conduct, the majority reaches a result heretofore unseen in an overdetention case. As best I can tell, our decision today puts us at odds with every circuit to consider the apportionment of blame between state courts and state jailers where a § 1983 plaintiff alleges that he or she was overdetained. [collecting cases] The majority's chosen approach, moreover, comes with troubling implications. By (a) looking to state law to determine the scope of state officials' responsibility to ensure prompt bail hearings, and (b) conceptualizing Plaintiffs' liberty interest as an interest in a state court proceeding, rather than in liberty itself, the majority sanctions a system by which states could regularly violate detainees' constitutional rights

by holding them indefinitely on account of untimely state courts, without any fear of their collaborating municipalities or state officials ever incurring monetary penalties under § 1983. Such an outcome is not farfetched. We know from *Jauch* that, in at least one part of Mississippi, the only court empowered to set bail would sometimes go months between sessions. And, accepting Plaintiffs' allegations as true, as we must, we can infer that courts in Santa Fe County—New Mexico's third-most populous—routinely fail to schedule arraignments with any earnest. . . . To be sure, I agree with the majority that New Mexico sheriffs and wardens are powerless to force New Mexico courts to schedule bail hearings in a timely fashion. Only New Mexico courts can do that. But the solution is not to grant jailers refuge behind judges cloaked with absolute immunity, enabling the jailers to violate the Constitution with impunity. . . The better solution is to hold state officials and municipalities responsible for the constitutional violations they themselves commit. True, the effect could be that New Mexico sheriffs and wardens respond by releasing pre-trial detainees, some of whom may have been arrested for alleged violent acts or pose a risk of flight, without the deterrence of bail. But it is our role to assure that New Mexico runs its criminal-justice system with the timeliness that the Fourteenth Amendment commands. If it does not, there should be consequences: either pre-trial detainees go free pending trial, or they will be entitled to civil damages against the state's officials and municipalities so that they may be compensated for the violations of their civil rights.")

5. The composite picture of procedural due process doctrine painted by the ***Parratt/Hudson*** and ***Mathews/Logan*** case law requires the State to provide constitutionally sufficient predeprivation procedural safeguards to attend officially sanctioned deprivations, as well as adequate postdeprivation remedies to redress random, unauthorized departures from those safeguards by state actors. Under these cases, only where the established state procedure is deficient under ***Mathews***, or where constitutionally sufficient procedure is wrongfully ignored or departed from by state actors, and no adequate redress is provided by state law, will a plaintiff have a procedural due process claim. *See, e.g.,* ***Zar v. South Dakota Bd. of Examiners of Psychologists***, 976 F.2d 459, 465 (8th Cir. 1992) ("A state provided post-deprivation remedy is sufficient when the deprivation was unpredictable, when a pre-deprivation process was impossible, and where the conduct of the state actors was unauthorized.").

Under this scheme, a properly pleaded procedural due process claim based on a failure of local government officials to provide constitutionally sufficient predeprivation safeguards, would always involve a ***Monell***-type claim. This unavoidable convergence of procedural due process doctrine with municipal liability doctrine was recognized in ***Wilson v. Civil Town of Clayton, Ind.***, 839 F.2d 375, 380 (7th Cir. 1988):

In a procedural due process case . . . resolution of the ***Monell*** issue will also resolve the ***Parratt*** issue . . . . Therefore, a complaint asserting municipal liability under ***Monell*** by definition states a claim to which ***Parratt*** is inapposite.

See also ***Association for Los Angeles Deputy Sheriffs v. County of Los Angeles***, 648 F.3d 986, 993 (9th Cir. 2011) ("Plaintiffs allege that Defendants have adopted a policy of denying post-suspension hearings to employees who resigned after the suspension was imposed but before the hearing was completed. As discussed above, due process requires that an employee suspended solely on the basis that felony charges were filed against him must be granted a post-suspension hearing. Because plaintiffs Wilkinson and Sherr were denied any post-suspension hearing at all, pursuant to Defendants' policy, they have sufficiently stated a *Monell* claim. . . . Summary suspensions with minimal or no pre-suspension due process are constitutional only if followed by adequate post-suspension procedures. Take away those post-suspension procedures, and the suspensions are no longer constitutional under the Due Process Clause. . . The issue is not whether the Commission had jurisdiction, but whether Wilkinson and Sherr received sufficient post-suspension process to satisfy constitutional requirements. They did not receive such process, based on Defendants' policy to deny hearings to retired employees, and thus Wilkinson and Sherr have successfully stated a *Monell* claim."); ***Woodward v. Andrus***, 419 F.3d 348, 354 (5th Cir. 2005) ("Woodard's well pleaded allegation establish that she was deprived of a property right without due process of law. Woodard has also shown the requisite state actor participation needed to state a due process claim. For the reasons already stated, Woodard has also established that Andrus' conduct was the custom or practice of the local municipality. Thus, Woodard has established that she was deprived of her property without due process of law through the custom or practice of a state agent acting under the color of state law. Because the *Parratt* /*Hudson* doctrine is not applicable and because Woodard has stated a valid due process claim, the district court erred in dismissing Woodard's due process claim under Rule 12(b)(6)."); ***Brooks v. George County***, 84 F.3d 157, 165 (5th Cir. 1996) ("Where a municipal officer operates pursuant to a local custom or procedure, the *Parratt/Hudson* doctrine is inapposite: actions in accordance with an 'official policy' under *Monell* can hardly be labeled 'random and unauthorized.'"); ***Boalbey v. Whiteside County Board***, 1992 WL 373038, *3 (N.D. Ill. Dec. 4, 1992) (not reported) ("[A] complaint alleging municipal liability by definition states a claim to which *Parratt* is inapposite because a municipality's 'policy' or 'custom' involves conduct that could never be random and unauthorized.").

The logic of this developing "'new' due process methodology," Nahmod, ***Due Process, State Remedies, and Section 1983***, 34 U. Kan. L. Rev. 217, 217 (1985),was arguably upset by ***Zinermon v. Burch***, 110 S. Ct. 975 (1990).

In ***Zinermon***, respondent claimed that he had been deprived of liberty without due process when he was admitted to a state hospital as a "voluntary" patient, under circumstances indicating that he was incompetent to give informed consent. *Id*. at 977-981.

In concluding that respondent's complaint was sufficient to state a procedural due process claim, the majority in ***Zinermon*** first made clear that "the fact that a deprivation of liberty is involved . . . does not automatically preclude application of the ***Parratt*** rule." 110 S. Ct. at 987. The Court went on to hold, however, that the ***Parratt/Hudson*** analysis did not apply where the

erroneous deprivation was foreseeable, where predeprivation process was practicable, and where the challenged conduct could be characterized as "authorized," in the sense that it was an abuse by state officials of "broadly delegated, uncircumscribed power to effect the deprivation at issue." 110 S. Ct. at 989.

Justice O'Connor viewed the complaint as asserting conduct that could be characterized only as a random and unauthorized departure from established state law, thus invoking application of ***Parratt*** and ***Hudson***. *Id*. at 990-997 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting).

In ***Zinermon***, the majority explicitly disavowed treating the claim as one for a deprivation of due process pursuant to established state procedure, thus invoking the ***Logan*** exception to the ***Parratt***/***Hudson*** doctrine, and requiring an assessment of whether the procedural safeguards provided by state law against erroneous deprivations in this context were constitutionally sufficient under ***Mathews***.

The Court noted that "[t]he broader questions of what procedural safeguards the Due Process Clause requires in the context of an admission to a mental hospital, and whether Florida's statutes meet these constitutional requirements, are not presented in this case." *Id.* at 979.

Nor did the majority decide whether the complaint was sufficient to state a custom or practice, since the plurality opinion of the Eleventh Circuit did not rely on such an interpretation in denying the motion to dismiss. *Id*. at 981 n.9.

As the dissent in ***Zinermon*** notes, 110 S. Ct. at 996-97 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting), the Court applied the ***Mathews*** balancing test in ***Washington v. Harper***, 494 U.S. 210, 110 ' 1028 (1990), a case decided the same day as ***Zinermon***. In ***Washington***, a mentally ill state prisoner challenged the prison's administration of antipsychotic drugs to him against his will without a judicial hearing to determine the appropriateness of such treatment. The prison policy required the treatment decision to be made by a hearing committee consisting of a psychiatrist, psychologist, and the prison facility's Associate Superintendent. The Court applied the ***Mathews*** balancing test and found the established procedure constitutionally sufficient. 110 ' at 1040-44.

Recognizing that the application of ***Mathews*** to Florida's admissions procedures "would have required a strained reading of respondent's complaint and arguments . . . ," the dissent in ***Zinermon***, nonetheless, would have preferred to reach the result arrived at by the Court through a straightforward assessment of the constitutionality of Florida's established procedure under ***Mathews***, rather than by way of "the strained reading of controlling procedural due process law that the Court adopts today." 110 S. Ct. at 997 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting). As the dissent concludes, the majority in ***Zinermon*** construes the complaint to state a claim that is governed neither by the ***Mathews*** analysis, nor by the ***Parratt/ Hudson*** doctrine. *Id*. at 995-96.

Zinermon suggests that plaintiffs can make out procedural due process claims even where the deprivation has not been pursuant to any formally established state procedure, indeed, even where the conduct effecting the deprivation arguably is in violation of or contrary to formally enacted state procedures. *See, e.g.,* ***Bradley v. Village of University Park, Illinois***, 929 F.3d 875, 878-80, 885-86 (7th Cir. 2019) ("The parties agree that Bradley had a protected property interest in his continued employment. They agree that the mayor and the village board are the policymakers for their municipality on the subject. And everyone agrees that although there was ample opportunity for a hearing, Bradley received no pretermination notice or hearing. Those points of agreement suffice to prove a due process claim under § 1983 against the individual officials and the village itself, where the village acted through high-ranking officials with policymaking authority. . . The defendants seek to avoid this straightforward conclusion. They urge us to follow a line of cases that excuses liability for the absence of predeprivation due process if the deprivation is the result of a 'random, unauthorized act by a state employee, rather than an established state procedure,' and 'if a meaningful postdeprivation remedy for the loss is available.'. . Defendants reason that because the village's top officials decided as a matter of village policy to deny an employee due process in a way that also violated state law, their policy decision should be treated as a 'random and unauthorized act ... beyond the control of the State,'. . . leaving Bradley to pursue remedies only under state law. In other words, defendants argue that by intentionally violating plaintiff's federal due process rights in a way that also violated state law, they insulated their actions from federal liability. This argument is foreclosed for several reasons. First, the Supreme Court has never suggested that the pragmatic but narrow rule of *Parratt* applies to employee due process claims where predeprivation notice and an opportunity to be heard could be provided in a practical way. Public employers' decisions to violate both state and federal procedural requirements have never been treated as grounds to excuse federal due process liability. In addition, in this case, the decision to fire Bradley was made by the top municipal officials. This court has held squarely that 'a complaint asserting municipal liability under *Monell* by definition states a claim to which *Parratt* is inapposite.' *Wilson v. Town of Clayton*, 839 F.2d 375, 380 (7th Cir. 1988). That holding is consistent with other circuits and accords with common sense. A municipality cannot be held liable under a respondeat superior theory of liability. It can be held liable for a constitutional violation only if the violation resulted from a formal policy, an informal custom, or a decision 'made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'. . In cases alleging due process violations by municipal policymakers, there is no need to inquire separately into whether an employee's actions were 'random and unauthorized.' In addition, defendants' expansive interpretation of *Parratt*, *Hudson* and *Easter House* is at odds with the Supreme Court's explication of *Parratt* and *Hudson* in *Zinermon v. Burch*, . . . which explained that the Court had 'rejected the view that § 1983 ... does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law,' and that 'overlapping remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.' Excusing top municipal officials from federal liability when they violate constitutional due process rights, so long as they also violate state laws and the state provides some post-deprivation recourse, would (1) undermine public employees' due process rights and remedies under *Loudermill* and its progeny; (2) conflict with *Monroe v.*

Pape, . . . and its progeny, which hold that a state or local official may be sued under § 1983 for actions taken 'under color of state law' even though the official's actions also violate state or local law and a remedy exists under state law; and (3) conflict with *Patsy v. Board of Regents*, . . . which held that § 1983 plaintiffs need not exhaust state-law remedies before asserting their federal rights. There is no indication in *Parratt*, *Hudson*, *Zinermon*, or our en banc decision in *Easter House* of an intention to undermine or overrule so much bedrock § 1983 law or to intrude on *Monell* doctrine in cases against municipalities. Those decisions should not be read to provide a defense to Bradley's due process claim. Where predeprivation procedures are both required and practicable, municipal policymakers expose the municipality and themselves to liability under § 1983 if they deliberately disregard an individual's constitutional due process rights. This is true even when state law also offers postdeprivation remedies. We therefore reverse the judgment of the district court and remand for further proceedings. . . . The mayor and the board concede that they had sole discretion and authority to fire Bradley. . . . Under *Monell*, the actions of the mayor and village board in firing Bradley are, by virtue of the defendants' authority as policymakers, automatically considered actions of the municipality itself under § 1983. Their decision to deprive Bradley of due process is the municipal policy that forms the basis for defendants' liability. . . .It makes no sense to speak of such official policymaking as 'random and unauthorized' in terms of *Parratt*. That's why the Supreme Court has never suggested that *Parratt* can be extended to defend against an otherwise valid *Monell* claim. The defendants' proposed exception is not necessary given *Monell*'s test for liability. And accepting defendants' argument would conflict directly with *Monroe*, *Monell*, *Pembaur*, *Owen*, and *Bryan County*. We would have to reach the improbable conclusion that a municipality is *not* liable for its highest officials' decision to deprive a person of his federal constitutional rights. Finally, even if the *Parratt* exception were relevant here, neither Supreme Court precedent nor our decision in *Easter House* supports defendants' theory that, so long as municipal policymakers violate both the federal Constitution and state law, and some state remedy exists, the municipality is excused from § 1983 liability. In the past we have disparaged similar attempts to evade municipal liability, dismissing as 'extravagant' a claim that the 'acts of [a] Mayor ... are merely acts of an errant employee.'. . Defendants' proposal would also undermine (1) the constitutional protection for public employees in *Roth*, *Sindermann*, and *Loudermill*, while creating a direct conflict with (2) the *Monroe v. Pape* line of cases recognizing that state or local officials may be liable under § 1983 for actions taken 'under color of state law,' even if the official's actions also violate state or local law, as well as (3) *Patsy v. Board of Regents*' holding that § 1983 plaintiffs need not exhaust state-law remedies before asserting their federal rights. We see no reason to avoid Supreme Court precedent or to read our precedent in such a disruptive manner.") *See also* ***Easter House v. Felder***, 910 F.2d 1387, 1410-13 (7th Cir. 1990) (en banc) (Cudahy, J., joined by Cummings, J., and Posner, J., dissenting). *See also* ***Summers v. State of Utah***, 927 F.2d 1165, 1170 (10th Cir. 1991) (suggesting procedural due process claim may exist against individual officer who had effected deprivation in manner inconsistent with established state procedures).

Nor does ***Zinermon*** require that the deprivation be linked to an official custom, pattern or practice or an established state procedure. Finally, the officials authorized to effect the deprivation

need not be policymaking officials whose decisions might be attributable to the entity as official policy. 110 S. Ct. at 994.

The question of whether a "status-conscious exception" to the ***Parratt/ Hudson*** doctrine should be recognized, which would equate conduct and decisions of policymaking officials with established state procedure, has been fully explored in a number of decisions from the Seventh Circuit Court of Appeals.

There is clearly some sentiment on that court for refusing to dismiss on ***Parratt/Hudson*** grounds when the deprivation results from conduct of a final policymaker, even where such conduct might be directly contrary to formally enacted law. *See, e.g.,* ***Swank v. Smart***, 898 F.2d 1247, 1257 (7th Cir. 1990) (*Swank I*) (procedural due process claim stated where discharge of plaintiff took place at policymaking level of town government), *cert. denied*, 498 U.S. 853 (1990); ***Matthiessen v. Board of Education of North Chicago Community High School District 123***, 857 F.2d 404, 407 n. 3 (7th Cir. 1988) ("[T]he single act of a sufficiently highranking policymaker may equate with or be deemed established state procedure . . . .[,]" making ***Parratt*** inapplicable); ***Tavarez v. O'Malley***, 826 F.2d 671, 677 (7th Cir. 1987) (procedural due process claim sufficient to withstand dismissal where deprivation resulted from conduct of senior county and town officials). *Accord* ***Sample v. Diecks***, 885 F.2d 1099, 1114 (3d Cir. 1989) (due process violation stated when policymaking official establishes a constitutionally inadequate state procedure for depriving people of protected interest).

In ***Easter House v. Felder***, 879 F.2d 1458 (7th Cir. 1989) (*en banc*), *vacated and remanded*, 494 U.S. 1014 (1990), *aff'd and modified*, 910 F.2d 1387 (7th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 1067 (1991), however, the Seventh Circuit clarified the circumstances under which the conduct of a policymaker would be tantamount to established state procedure.

A decision by a policymaker will represent the state's position only where that policymaker "establishes policy and procedure on an informal basis without the aid of formal policy and procedure guidelines . . . ." *Id*. at 1472. Where, however, the state's position is set out in formal rules, regulations, and statutes, a deviation from formally established state procedure, even by a policymaking official, will be viewed as random and unauthorized conduct from the state's perspective. *Id*.

Accord ***Johnson v. Louisiana Department of Agriculture***, 18 F.3d 318, 322 (5th Cir. 1994) ("The State of Louisiana could not predict that [defendant] would violate statutory provisions against bias, ex parte contacts, and solicitation. . . . Simply because [defendant] is a high state official does not mean that his actions are automatically considered established state procedure that would take the case outside of the *Parratt/Hudson* doctrine."); ***Swank v. Smart***, 898 F.2d 1247, 1261-62 (7th Cir. 1990) (*Swank I*) (Manion, J., concurring in part, dissenting in part) (high-ranking officials' deviations from City's formally enacted termination procedures are random and unauthorized); ***Fields v. Durham***, 856 F.2d 655, 657 (4th Cir. 1988), *vacated and*

remanded, 494 U.S. 1013 (1990), *affirmed on other grounds*, 909 F.2d 94 (4th Cir. 1990) (fact that high-ranking officials were involved does not by itself make ***Parratt/Hudson*** inapplicable).

See also ***Tri County Industries, Inc. v. District of Columbia***, 104 F.3d 455, 460 (D.C. Cir. 1997) ("In this case . . . the District has not only failed to argue *Parratt* but has explicitly thrown the point away, 'assum[ing], for purposes of this appeal, that the doctrine of *Parratt* ... does not apply to actions by the Director of a government agency acting within the general scope of his authority.' In fact, there is a circuit split on this issue. *Compare Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir.1990) (en banc) (*Parratt* does apply to actions of high officials); *id*. at 1408-10 (Easterbrook, J., concurring), with *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir.1985) (en banc) (*Parratt* does not apply). It being inappropriate for us to resolve this sharply contested issue in a case where the parties appear to resolutely agree, we do not take that approach.").

The debate continues in the Seventh Circuit. *Compare* ***Bradley v. Village of University Park, Illinois***, 929 F.3d 875, 891-94 (7th Cir. 2019) ("Moving forward from *Easter House*, it is important to acknowledge what *Easter House* did not do. It did not address *Monroe v. Pape*'s holding that a state official acts under color of state law for purposes of § 1983 even if he violates state law. It also did not address *Loudermill* or *Roth* or the due process rights of public employees who have property interests in their jobs. The *Easter House* majority did not even mention *Monell* or the major differences under § 1983 between state and local governments. In addition, as explained further below, we and other circuits have squarely rejected efforts to apply *Parratt* to *Monell* claims. *Easter House* did not criticize, let alone overrule, the line of our cases rejecting *Parratt* defenses to due process claims against municipal policymakers, such as *Matthiessen*, *Wilson*, and *Tavarez*. . . .The village contends that Bradley's firing without notice or opportunity to be heard presents a 'single act of employee misconduct' that cannot 'automatically become[ ] the state's new position' and lead to liability because the State of Illinois has not authorized the action. . . This argument focused on *state* policy might have more force (apart from its conflict with canonical § 1983 precedent such as *Monroe v. Pape*) if the State of Illinois were somehow a defendant here, or perhaps if a village department had been acting as the State's agent in administering a state benefits program (the issue in *Clifton*). But for the last four decades, different rules of liability under § 1983 apply to municipalities making and carrying out their own policies. The Supreme Court has never suggested that *Parratt* could apply to a *Monell* claim. The test for liability under *Monell* is already designed to identify conduct that is attributable to the municipality itself—which includes actions taken by an official with policymaking authority. There is no need to impose a separate inquiry as to whether a municipal policymaker's conduct is 'random and unauthorized.' *Parratt*, *Hudson*, and *Zinermon* were all decided after *Monell*, and they either did not cite *Monell* at all or merely noted that it overruled the portion of *Monroe v. Pape* rejecting any form of municipal liability under § 1983. *Parratt* and its progeny also did not cite any of the Supreme Court cases holding that a single act of a municipality or one of its high-ranking or policy-making officials can be sufficient for § 1983 liability under *Monell*, including *Owen v. City of Independence*, . . . *City of Newport v. Fact Concerts* . . . or *Pembaur v. City of Cincinnati*[.] . . Conversely, the Supreme Court's *Monell* line of

jurisprudence, including *Bryan County* and *Pembaur,* has never even suggested importing the *Parratt* framework, despite facts often showing concurrent violations of state law and available state remedies. Because it does not make sense to treat a municipal policymaker's actions as 'random and unauthorized,' and absent any indication from the Supreme Court that *Parratt* and its progeny were intended to upend the *Monell* framework, we have flatly rejected efforts to apply *Parratt* defenses to *Monell* claims. . . . The actions of the defendants as municipal policymakers simply cannot be deemed 'random and unauthorized' within the meaning of *Parratt*. Their actions against Bradley *were* village policy. *Monell* provides the applicable legal standard, and it is satisfied here.") *with* ***Bradley v. Village of University Park, Illinois***, 929 F.3d 875, 902-14 (7th Cir. 2019) (Manion, J., dissenting) ("*Easter House* established that (1) *Zinermon*'s limitation of the *Parratt* doctrine does not apply when state employees ignore procedural safeguards guaranteed under state law; and (2) when they violate state procedural statutes, even high-ranking officials can commit random and unauthorized acts from the perspective of the State. To put it differently, a wrongful decision may be predictable and authorized from the State's perspective only when state law does not cabin an official's discretion to grant pre-deprivation process. . . . Bradley alleges he was fired from his position as Chief of Police of the Village of University Park without any process. But like the plaintiffs in *Easter House*, *Clifton*, *Germano*, and *Michalowicz*, he has not alleged the mayor and Village Board had unfettered discretion to fire him without a hearing. Rather, his complaint acknowledges the mayor and Board's actions as alleged would violate Illinois law. Put another way, he alleges the mayor and the Village Board did something that, as far as the State is concerned, was random and unauthorized. Nothing the legislature in Springfield could dream up could have stopped this conduct. Illinois law already 'circumscribed any discretion [the Village actors] might have had over the decision' to fire Bradley without process. . . Therefore, Bradley's claim falls within the scope of *Parratt* and *Easter House*. So long as Illinois provides an adequate post-deprivation remedy, a § 1983 procedural due process claim will not lie. . . . According to the court's decision today, if a municipality is liable for its policymaker's actions under *Monell*, then *Parratt* by definition does not apply. This conclusion can only result, however, from an improper conflation of official municipal policy with established state procedures. . . . While it is true that the actions in cases like *Michalowicz* and this one would certainly rise to the level of a municipal policy under *Monell*, such a policy would still be random and unauthorized as far as the *State* is concerned. Even the official policy of a municipality established through acts of high-ranking officials is unpredictable from the State's perspective if such policy contravenes established state procedures. . . As we said in *Clifton*, 'a single act of a state official—even a high-ranking state official—that violates that established [state] policy is random and unauthorized from the state's perspective.'. . This is especially true when the high-ranking official is a municipal official acting on behalf of the municipality as opposed to a high-ranking state official. We've applied this reasoning to a county board in *Germano* and a village board in *Michalowicz*. The decisionmakers in this case are not materially different from those. . . . It makes no difference whether the defendant is a high-ranking municipal employee creating municipal policy through his action or a state official acting with the authority imbued in his office by state law. The actions may still be random and unauthorized from the State's perspective if the defendant's authority has been circumscribed and regulated by state law. . . .Whoever the 'person'

acting under color of state law is—be it a municipality via its policymakers, a prison official, a state agency, or someone else entirely—it is still necessary to determine if the State could have predicted and prevented the deprivation. If not, and if the State has provided sufficient post-deprivation remedies, then there is no justification to supplant the State's authority and subvert federalism by allowing the plaintiff to pursue a federal due process claim instead of the State's provided remedies. . . .In sum, *Monell*'s test for determining whether a high-ranking official's actions amount to official policy such that they are attributable to the municipality is and should be maintained as a separate inquiry from *Parratt*'s question of random and unauthorized acts. The former focuses on the relationship between a municipality and its high-ranking official and answers whether the municipality may be liable for an act. . . The latter focuses on the relationship between the State and a person clothed with state authority and answers whether the State could have predicted or prevented a deprivation caused by such a person. . . Even if some of this circuit's pre-*Easter House* cases and those of other circuits seemingly confuse these two inquiries (in contrast to our more recent cases properly separating the inquiries and focusing on the State's perspective instead of the actor's, such as *Germano* and *Michalowicz*), we should not completely eradicate that distinction as the court does today by proclaiming indelibly that *Parratt* is simply irrelevant to all *Monell*-type claims. The fact that the mayor and Village Board's actions may represent the Village's official policy under *Monell* does not mean those actions were not random and unauthorized from the State of Illinois' perspective. . . . [A] proper understanding of the *Monell* municipal-liability inquiry and the *Parratt* random-and-unauthorized-acts inquiry demonstrates that the one does not foreclose the other. Rather than engage in further refutation of these contentions, I will simply point to *Easter House*'s binding interpretation of *Parratt* and *Zinermon* as the answer to the court's concerns. Applying *Parratt* to *Monell*-type claims would no more eliminate public employees' procedural protections or municipal liability under § 1983 than *Easter House*'s rule eliminates due process claims against all state agency employees. Instead, where the State has conferred broad, unfettered discretion on an actor (whether that actor is a state employee, municipality, or other person), a deprivation committed by that actor cannot be said to be random and unauthorized. In such a case, the State could predict the deprivation would occur and could have prevented it through additional procedural safeguards. That was the case in *Zinermon* and, as I have pointed out, in *Tavarez*, *Wilson*, and *Breuder*. That was not the case, however, in *Easter House*, *Germano*, or *Michalowicz*; nor is it Bradley's case. . . .Since our *en banc* decision in *Easter House*, the law of this circuit has been clear: an individual deprived of property without pre-deprivation process by the random and unauthorized act of a state actor may not maintain a due process action in federal court so long as the State provides an adequate post-deprivation remedy. Whether that state actor is a municipality or some other person clothed with authority by the State does not change the essential inquiry of whether the act was predictable and preventable by the State. We had a chance 28 years ago to adopt the broader reading of *Zinermon* that Judge Cudahy and others. . . advocated, but we rejected it. Today, the court seeks to change direction. Yet we are now bound by *Easter House*. Under that decision—and with a proper understanding of municipal liability under *Monell* and the relevance of the State's perspective under *Parratt*—the outcome of this case is clear: Bradley cannot maintain a due process claim in federal court. Contrary to the court's concerns, the failure of Bradley's federal

claim does not mean he has no opportunity for redress. If Bradley's allegations are true, he will have a remedy under the Illinois Administrative Review Act. . . . Today's decision undermines federalism, embraces a misunderstanding of the separate inquiries established by *Monell* and *Parratt*, and will sow confusion among the lower courts by muddying the clear waters of *Easter House* and its progeny. I would instead affirm the judgment below.")

6. Post-*Zinermon* Decisions

In the aftermath of ***Zinermon***, predictable confusion was evident in decisions from the lower courts. As Judge Edith H. Jones put it, "*Zinermon* undoubtedly complicated an already overloaded procedural due process jurisprudence." ***Caine v. Hardy***, 905 F.2d 858, 863 (5th Cir. 1990) (Jones, J., dissenting), *opinion superseded by* ***Caine v. Hardy***, 943 F.2d 1406 (5th Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 1474 (1992).

In ***Caine v. Hardy***, 905 F.2d 858 (5th Cir. 1990), a panel of the Fifth Circuit Court of Appeals, noting that "the controlling constitutional authority has changed . . . . ," found ***Zinermon*** rather than ***Parratt/Hudson*** to be dispositive in upholding the procedural due process claim of a doctor whose staff privileges were terminated by officials who were allegedly motivated by personal animosity against the plaintiff. *Id*. at 861-63. No challenge was made to the hospital's procedural regulations.

The court employed a ***Zinermon*** analysis to conclude that the deprivation effected by the officials was predictable and authorized, since the officials involved were delegated power by the state to effect the suspension and termination of staff privileges. *Id*.The dissent disagreed that ***Zinermon*** worked a substantial change in the framework of due process analysis and that ***Parratt/ Hudson*** dismissal was inappropriate. *Id*. at 865-67 (Jones, J., dissenting).

On rehearing, *en banc*, the Fifth Circuit adopted the position espoused by Judge Jones in her panel dissent, suggesting that ***Zinermon*** may represent a "sui generis situation." ***Caine v. Hardy***, 943 F.2d 1406, 1415 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1474 (1991). The court found the preconditions for application of the ***Parratt/Hudson*** doctrine to exist: (1) the deprivation alleged was unpredictable or unforeseeable; (2) the state actors' particular conduct in ***Caine*** was wanton and intentional and could not have been countered by predeprivation procedures adopted by the state, and; (3) the conduct was "unauthorized" in that it was not within the officials' express or implied authority. *Id*. at 1413-1414.

As the court observed in ***Caine***, "[N]one of the courts as yet called upon to apply ***Zinermon*** has found a procedural due process violation in claims of particular regulatory abuses carried out within the framework of controlling regulations." *Id*. at 1415.

In ***Charbonnet v. Lee***, 951 F.2d 638 (5th Cir. 1992), *cert. denied*, 112 S. Ct. 2994 (1992), Judge Wisdom, noting that "***Caine*** reads ***Zinermon*** to effect only a 'wrinkle' on the ***Parratt/Hudson*** doctrine," *id*. at 642, acknowledged that ***Caine*** "does much to swing shut the door

of the federal courts to suits for individual violations of procedural due process. Yet those doors remain open to a plaintiff...if the actions of the official were the result of some established municipal procedure, or if the state does not offer an adequate remedy elsewhere." *Id*. at 645.

In ***Easter House v. Felder***, 910 F.2d 1387 (7th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 1067 (1991), the court reconsidered its first *en banc* decision, ***Easter House v. Felder***, 879 F.2d 1458 (7th Cir. 1989) (*en banc*), *vacated and remanded*, 494 U.S. 1014 (1990), in light of ***Zinermon***. The court reaffirmed its holding that Easter House had no procedural due process claim based on a decision to withhold renewal of its state operating license by state employees alleged to have acted in concert with a rival adoption agency. *Id*. at 1408.

Relying on ***Zinermon***, Easter House argued that because the officials involved in effecting the deprivation were high-ranking, their conduct must be viewed as both predictable and authorized, as opposed to random and unauthorized.

The Seventh Circuit rejected the "contention that there is a *per se* exception to the application of ***Parratt*** in situations where the state actor occupies a "high ranking" position in the state hierarchy." 910 F.2d at 1400. The court concluded that the predictability of an erroneous deprivation is a function not only of the rank of the official to whom the power to effect the deprivation has been delegated, but also of the degree to which that power or exercise of discretion has been circumscribed by the state. *Id.* at 1400-02.

See also ***Long v. City of Marengo***, No. 93 C 20167, 1994 WL 11719, *5 n.3 (N.D. Ill. Jan. 6, 1994) (not reported) ("After *Zinermon* . . . , the *Parratt* rule only applies where the deprivation of liberty or property is "random and unauthorized" and not where it is "predictable and authorized." [citing *Easter House*] Central to this analysis is determining whether the deprivation was within the discretion given to the actor or whether the actor abused its discretion. [cite omitted] In the former situation, where a deprivation occurs within the actor's discretion, a violation of procedural due process might occur regardless of the adequacy of postdeprivation remedies if that discretion is not found to be circumscribed by adequate statutory or other predeprivation safeguards. [cite omitted] In the present case, [plaintiff] has not made such allegations that the deprivation was predictable and authorized, being within the actor's discretion and that discretion being inadequately circumscribed, and therefore the court applies *Parratt*."); ***Sweeney v.Bausman***, 1992 WL 390773, *5 (N.D. Ill. Dec. 14, 1992) (not reported) ("[T]he key inquiry is not the state official's rank in the state hierarchy; rather, the key ingredient focuses on whether the state official's discretion is 'uncircumscribed.'").

The court in *Easter House* likewise rejected the related argument that conduct or decisions by highranking, policymaking officials should always be equated with "established state procedure," making ***Parratt/Hudson*** inapplicable under the ***Logan*** rationale. Where official policy is established "through a deliberative, or even legislative, process which culminates in a certain concrete position expressed in a formal pronouncement," a single deviation from that formally

enacted statement of policy, even by a policymaker, should not be viewed as an embracement of the deviation by the state as a new policy. 910 F.2d at 1402-04.

Thus, the Seventh Circuit concluded that where the state had in place a formally enacted set of procedures designed to protect against the type of deprivation experienced by the plaintiff, procedures intended to carefully define and circumscribe the power delegated to the responsible officials, the only process constitutionally required to be provided by the state for an isolated and unauthorized deviation from these procedures was an adequate postdeprivation remedy. *Id*. at 1405-06.

See also ***Jones v. Doria***, 767 F. Supp. 1432, 1439-40 (N.D. Ill. 1991) (relying on ***Zinermon*** and ***Easter House*** to conclude that § 1983 should not be employed to remedy deprivations which occur at the hands of a state employee who is acting contrary to the state's established policies and procedures); ***Duenas v. Nagle***, 765 F. Supp. 1393, 1399 (W.D. Wis. 1991) (where "Wisconsin established comprehensive disciplinary procedures strictly limiting prison staff discretion .... thirty-one separate alleged violations of [the] established state procedure ... directed at one person over a short period of time ... were ... unpredictable, undiscoverable and unauthorized by the state ....").

Accord ***Raditch v. United States***, 929 F.2d 478, 480 (9th Cir. 1991) (where Office of Workers' Compensation Programs had requisite procedures in place, termination of plaintiff's benefits without those procedures was unauthorized); ***PFZ Properties, Inc. v. Rodriguez***, 928 F.2d 28, 31 (1st Cir. 1991) (where Regulation and Permits Authority of the Commonwealth of Puerto Rico illegally departed from Puerto Rico's proscribed procedures in effecting deprivation of plaintiff's property, adequate postdeprivation remedy was all that was required); ***New Burnham Prairie Homes v. Village of Burnham***, 910 F.2d 1474, 1480 (7th Cir. 1990) (procedural due process claim fails where state provides adequate remedy to cure 'random and unauthorized' denial of permit); ***McClendon v. Turner***, 765 F. Supp. 251, 254 (W.D. Pa. 1991) (whether action belongs in state court will depend on whether conduct was random and unauthorized; "Authorization might depend on number of factors, including...extent of the discretionary or supervisory power invested in the defendant,...the foreseeability of the type of deprivation at issue,...whether the action was taken in departure of procedural rules ...or the existence of a custom or common usage.").

Judge Cudahy, joined by Judges Cummings and Posner, engaged in a vigorous dissent in ***Easter House***, concluding that the majority had "unfortunately misse[d] the point of ***Zinermon***" 910 F.2d at 1410 (Cudahy, J., joined by Cummings, J., and Posner, J., dissenting). According to the dissent, a due process violation can occur even though the challenged conduct is not authorized by state law, indeed, even though the state has laws and regulations which, if followed, would have provided all the process due. *Id*. at 1411-12.

See also ***Johnson v. City of Saginaw***, 980 F.3d 497, 508-09 (6th Cir. 2020) ("Here, the record does not support the conclusion that the deprivation was random or unpredictable. . . Stemple estimated that he has shut off water service to a dozen businesses in response to similar

situations and that no notices or hearings were provided. Stemple testified that the '[p]ractice and policy has been consistent throughout' the water suspensions. . . . Thus, it appears that Johnson's water service was ordered suspended in accordance with an established practice. . . In most cases, '[w]hen a deprivation occurs through an established state procedure, "then it is both practicable and feasible for the state to provide pre-deprivation process, and the state must do so regardless of the adequacy of any post-deprivation remedy."'. . But in some exceptional circumstances—when the 'necessity of quick action' renders pre-deprivation process 'impossible or impracticable'—pre-deprivation process may be excused even when an action is neither random nor unauthorized. . . This is not one of those exceptional cases. As we observed in the context of Johnson's business-license suspension, '[g]iven that the City held a hearing within three days of the shooting (after suspending Johnson's license), it does not appear as though it would have been impractical for the City to have held a hearing before suspending her license.' *Johnson v. Morales*, 946 F.3d 911, 923 (6th Cir. 2020). The record reveals no reason why the same is not true of the water suspension. . . . Here, the circumstances support that Appellants could be reasonably expected to provide predeprivation process. Lastly, the suspension of Johnson's water service was not the type of 'unauthorized' conduct contemplated by *Parratt*. In *Zinermon v. Burch*, the Supreme Court limited the applicability of the *Parratt* doctrine. . . . Similarly, here, Appellants cannot now claim that their actions, which they initially argued were reasonable and in accordance with the City's policies, were random and unauthorized in order to defeat Johnson's procedural due process claim. . . The deprivation was not random, unpredictable, or unauthorized in the *Parratt* sense and pre-deprivation process was not impossible or impracticable. Therefore, the *Parratt* doctrine is inapplicable."); ***Schulkers v. Kammer***, 955 F.3d 520, 548 & n.6 (6th Cir. 2020) ("Under *Zinermon*, Plaintiffs' procedural due process claim is not barred by the *Parratt-Hudson* doctrine. First, the deprivation that occurred here, as in *Zinermon*, was in no way 'unpredictable.'. . Defendants went to the hospital in order to investigate Holly's presumptive positive test result, and they were aware that they might be imposing a Prevention Plan (as evidenced by their taking the form with them). Moreover, Defendant Campbell testified that the stamped language on the Plan providing that foster care is the planned arrangement absent effective preventative service is stamped on *every* prevention plan that the CHFS provides. Similarly, affording the Schulkers predeprivation procedures before imposing the supervision restrictions, or at the very least once the subsequent negative testing revealed that the initial result was a false positive, would not have been 'impossible.'. . . Defendants in this case have not presented any reason why they were not fully capable of providing the Schulkers with predeprivation procedures. As the district court correctly found, 'the facts do not indicate that any exigency existed.'. . This is especially true after the Schulkers left the hospital and St. Elizabeth notified Defendants that both the confirmatory urine test and the umbilical cord test results were negative. Still, without providing any process, Plaintiffs allege that Defendants left the supervision restrictions in place for approximately two months. Lastly, and for similar reasons to those just discussed, Defendants' choices here do not constitute the type of 'random and unauthorized' conduct that *Parratt* and *Hudson* contemplate. Like the delegation in *Zinermon*, the Commonwealth of Kentucky has delegated to Defendants the authority to inject themselves into the otherwise private realm of family life in order to further the commendable and necessary goals of investigating and

ending child maltreatment. . . By such delegation, Defendants at times are required to interfere with family relations, often by justifiably depriving parents and children of certain liberties. Therefore, Defendants cannot now claim that their actions in this case, which they initially argue were reasonable and in accordance with their own policies, were 'random and unauthorized' in order to defeat Plaintiffs' procedural due process claim.[6] **[fn. 6:** For similar reasons, this Court has found that the applicability of the *Parratt-Hudson* doctrine 'is irrelevant to the clearly established prong of the qualified immunity analysis.' *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 901 (6th Cir. 2014). 'Granting immunity based on the lack of clarity as to whether the *State* bears responsibility would turn the qualified immunity doctrine on its head. The official would in effect be seeking immunity based on a "reasonable" belief that his conduct was so wrong—i.e., it was "random and unauthorized"'—that it could not provide the basis for a procedural due process claim.'. . In other words, '[i]t would undermine [qualified immunity's] purpose to find a due process violation but provide no remedy because the defendant could have thought that *Parratt* would let him (and the state) off the hook for his violation of clearly established due process law.'")**]**; ***South Allegheny Pittsburgh Restaurant Enterprises, LLC v. City of Pittsburgh***, 806 F. App'x 134, ___ (3d Cir. 2020) ("Applying *Zinermon*'s three-factor test here, it is plausible that the City's decision to shutter Mother Fletcher's was not a random, unauthorized act by City employees. SAPRE's deprivation occurred at a predictable point in the government's process—when a decision is made whether to invoke the Code's standard or emergency procedures to address a violation (keeping in mind here there was no confirmed violation, but at most the suspicion of a possible violation). And to repeat, there was no competent evidence of exigent circumstances. Thus pre-deprivation process was possible. In this context—the lack of exigent circumstances, and the Code's established pre-deprivation procedures for non-emergency violations—SAPRE meets *Zinermon*'s first two criteria to establish that pre-deprivation process was required. At the motion-to-dismiss stage, it is also plausible that Mariani was authorized by the Zoning Code to decide whether to invoke emergency procedures. The Code directs 'the Chief of the Bureau of Building Inspection or the appropriate Code Official' to determine reasonably whether an emergency is underway. . . On the night the City closed Mother Fletcher's, the Director of DPLI, Kennedy, instructed Mariani to inspect the business and to 'close [it] if he discovered any dangerous life/safety issues.'. . Given her title and the alleged facts, Kennedy may have been an appropriate 'Code Official' with the authority to cause the deprivation, and her instructions to Mariani may have extended her authority to his action. Hence it is plausible that the Code delegated to Mariani the power and authority 'to effect the very deprivation complained of here, ... and also delegated to [him] the concomitant duty to initiate the procedural safeguards set up by [City] law to guard against unlawful [deprivations].'. . Further, the deployment of considerable City resources to shut down Mother Fletcher's is evidence of state action beyond a rogue employee's 'unauthorized act.' The platoon of police at a place with no commotion (in fact, no patrons)—there have been smaller SWAT teams called in to curb violence—implies a coordinated effort to shut down a business despite the lack of exigent circumstances. In sum, the City 'cannot escape § 1983 liability by characterizing [its employees'] conduct as a "random, unauthorized" violation of [City] law which [it] was not in a position to predict or avert ....'. . . Indeed, there is no competent evidence before us to show that Mariani undertook a random, unauthorized act or reasonably believed that

an emergency was underway. Thus, the constitutionally required process—a pre-deprivation hearing—did not occur. We accordingly vacate the District Court's dismissal of SAPRE's due process claim for failing to provide pre-deprivation process as required by the Fourteenth Amendment and remand for further proceedings, including fact-finding regarding whether Mariani and Kennedy are 'appropriate Code Official[s]'."); ***Simpson v. Brown County***, 860 F.3d 1001, 1007-10 (7th Cir. 2017) ("[A]ny license revocation that is 'random and unauthorized' will be an aberration. The existence of a license or permit implies the existence of a legal framework with revocation guidelines, even if those guidelines are unduly broad. To trigger the *Parratt-Hudson* exception in the licensing context, a rogue government official would have to violate the licensing scheme in an unpredictable way. . . .The random, rogue behavior by the licensing officials in *Easter House* distinguished that case from *Zinermon*, where the conduct of the state actors in committing the plaintiff for in-patient mental health treatment was 'not only "authorized", but also, under the circumstances of that case, highly "predictable."'. . . Simpson's third amended complaint, construed in the light most favorable to him, does not allege 'random and unauthorized' actions by County officials. Rather, it alleges official conduct sanctioned by the County. The County had a septic ordinance that plainly described the process for the placement of septic installers on a register and (not so plainly) described the process for their removal. When County Health Officer Page revoked Simpson's license, he acted pursuant to his broadly delegated powers derived from the ordinance. By its terms, the ordinance gave Page as agent for the Board of Health broad discretion to remove any person who had demonstrated "inability or unwillingness to comply" with the ordinance. Page was not acting unpredictably or breaking the rules: he did exactly what the ordinance told him to do. The possibility of license revocation without due process was not unforeseeable. It was authorized in the ordinance itself. . . .As alleged, there were no random acts by county officials and no public health emergency. There were only County officials acting pursuant to broadly delegated power. Brown County cannot give its Health Officer unfettered discretion to decide when, how, and why he revokes licenses, and then claim that he was acting so unpredictably that it would be impossible to provide pre-revocation notice. . . . Under the *Mathews v. Eldridge* balancing test, Simpson has plausibly alleged that he was denied the pre-deprivation process he was due before his license could be revoked.")

See, e.g., ***Prison Legal News v. Sec'y, Fla. Dep't of Corr.,*** 890 F.3d 954, 976-77 (11th Cir. 2018) ("PLN must receive notice and an opportunity to be heard each time the Department impounds an issue of the magazine. . . .When the Department impounds an issue of a publication, the rule requires that it send the publisher a notice form listing the 'specific reasons' for the impoundment of that issue. . .The Literature Review Committee reviews every impoundment decision, . . . and the publisher can independently appeal an impoundment decision to that committee[.] . .Those procedures, if applied, would have ensured that for each impounded issue PLN received a notice form listing the reasons for the impoundment. As the Department acknowledges, however, that did not happen for 26 out of the 62 monthly issues (42%) impounded between November 2009 and December 2014. That failure rate increases to 87% when we take into account defective notice forms that did not list the reasons for the impoundment. Despite that remarkable failure rate, the Department argues that the Secretary cannot be enjoined because there

is no evidence that the failure to send the forms was a result of a Department policy or custom to deprive PLN of notice. . . The Department asserts that PLN should find the mailroom workers who are responsible for the failure to provide notice and sue them. No. PLN doesn't have to hunt and peck throughout Florida's correctional system for negligent mailroom workers to sue. The buck stops with the Secretary. . . This is not a case of one or two notice letters lost in the mail or mailroom. PLN did not receive notice forms for 42% of the impounded issues, and many forms it received for other issues were defective. PLN's effort to enjoin the ongoing violation of its right to due process is appropriate, and it seeks only prospective relief against the Department. . . . The Department's concerns with the ads in *Prison Legal News* are reasonably related to its legitimate interests in prison security and public safety, so we defer to its decision and hold that the impoundments of *Prison Legal News* under Rules (3)(*l*) and 3(m) do not violate the First Amendment. But with the power to impound *Prison Legal News* comes the duty to inform PLN of the reasons for the impoundments. The Department did not do that, which is why the district court did not abuse its discretion in entering an injunction to require the Department to adhere to its own notice rules."); ***Winters v. Board of County Commissioners***, 4 F.3d 848, 857 (10th Cir. 1993) ("Because the Sheriff's Department authorized the release of the ring without adhering to the applicable procedures which would have ensured due process, the pawnshop maintains a viable 1983 action against the Department."); ***Rodi v. Ventetuolo***, 941 F.2d 22, 29 (1st Cir. 1991) (without discussing ***Zinermon***, court found procedural due process claim stated where state law mandated constitutionally sufficient procedures, but procedures were "swept under the rug" in plaintiff's case); ***Anglemyer v. Hamilton County Hospital***, 848 F. Supp. 938, 941 (D. Kan. 1994) ("Some courts have held that if the state mandates procedures for termination of government employees and the relevant state actor fails to follow those procedures, then the *Parratt/Hudson* doctrine applies, and adequate post-deprivation remedies satisfy the requirements of due process ... However, that analysis would not defeat plaintiff's procedural due process claim in this case . . . . [T]he Tenth Circuit has indicated that it will not apply *Parratt/Hudson* merely because the deprivation violated state law." *citing* ***Wolfenbarger v. Williams***, 774 F.2d 358, 363 (10th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).); ***Loukas v. Hofbauer***, 784 F. Supp. 377, 382-83 (E.D. Mich. 1992) (prison officials' failure to provide predeprivation hearing as required by regulation gave rise to due process claim); ***Roach v. City of New York***, 782 F.2d 261, 265 (S.D.N.Y. 1992) (claim stated where "a predeprivation procedure was provided for by state law but not followed.").

At the heart of the dispute in ***Easter House*** is the question of whether procedural due process violations require that the challenged action be taken not only *under color of* state law, but also, *pursuant* to state law.

While the majority focuses on the role of the state in authorizing the deprivation without the requisite procedural safeguards, either through formally deficient procedures or through the delegation of uncircumscribed or undefined power to effect the deprivation, the dissent focuses on the abuse of power by one who was given authority and obligated by state law to provide predeprivation process.

In ***Easter House***, where the claims were against state officials, there was no complication involving the convergence of ***Monell*** and ***Parratt*** case law. The question was simply whether there had been a deprivation of procedural due process so as to give rise to a fourteenth amendment right enforceable under § 1983 against the individual state official(s).

If the analysis of the majority and the dissent in ***Easter House*** were applied in a case with a municipal defendant, the majority view would necessitate a finding of local government liability under ***Monell*** in order to establish the underlying due process violation.

The dissent would not find these concepts necessarily intertwined. Instead, the dissent's approach in ***Easter House*** would allow for a procedural due process violation with no municipal liability, where conduct in violation of official law, custom or policy amounts to a denial of predeprivation process by an official entrusted by the government with the authority and responsibility for providing such process.

See ***Sturgess v. Negley***, 761 F. Supp. 1089, 1098-99 (D. Del. 1991) ("[E]ven if [high-ranking officials] did actually violate plaintiffs' constitutional rights by terminating them without providing procedural due process, their actions are not chargeable to the municipality . . . . to the extent that [the officials] departed from official policy . . . ."). *See also* ***DeSouto v. Cooke***, 751 F. Supp. 794, 799 (E.D. Wis. 1990) ("In ***Zinermon***, . . . while the Court did not reject the ***Parratt*** rule, it narrowed its scope; the Court reaffirmed the general rule that the general constitutional requirement is a predeprivation hearing.).

In ***Fields v. Durham***, 856 F.2d 655 (4th Cir. 1988) (***Fields I***), the Fourth Circuit had affirmed the district court's dismissal of a community college dean's claim against certain officials, alleging that he was discharged without due process. The court had concluded that the alleged conduct was a random and unauthorized occurrence and that adequate postdeprivation remedies were available under state law. 856 F.2d at 657.

On remand from the Supreme Court, the court reached the conclusion that although the plaintiff's suit was not barred by ***Parratt***, Fields had been afforded all the process he was due under the Fourteenth Amendment. ***Fields v. Durham***, 909 F.2d 94, 99 (4th Cir. 1990) (***Fields II***), *cert. denied*, 498 U.S. 1068 (1991).

While an erroneous deprivation of a public education official's constitutionally protected job interest was foreseeable, the state of Maryland had prescribed sufficient procedural safeguards to guard against such a deprivation. *Id*. at 98-99.

The Fourth Circuit reached a similar result in ***Plumer v. State of Maryland***, 915 F.2d 927 (4th Cir. 1990), concluding that although ***Parratt*** did not bar plaintiff's claim, Maryland's license revocation procedures provided all the process required. *See also* ***Snider Intern. Corp. v. Town of Forest Heights, Md.***, 739 F.3d 140, 149, 150 (4th Cir. 2014) ("Appellants received constitutionally sufficient notice of the citation and potential penalty, and they could elect a trial

prior to being assessed the penalty. The notice set forth the basis for the adverse action. The trial, like the hearing in *Plumer,* permitted Appellants to call witnesses and rebut the state's evidence with their own. Appellants' interest is arguably less than that at stake in *Plumer*—driving privileges cannot be affected under the speed camera program and the $40 civil penalty is not subject to additional monetary penalties for nonpayment. . .It is difficult to see how additional process could significantly reduce the chance of erroneous deprivation, especially given the trial mechanism already in place. The state's interest in efficiently enforcing traffic laws would be greatly burdened were we to require additional procedural safeguards, exhausting significant fiscal and administrative resources, that would provide little, if any, additional protection above and beyond that afforded by a trial in the state courts. In fact, the mere availability of a trial in which to present their grievances undermines Appellants' argument. Notwithstanding the fact that Appellants predicate their challenge on a violation of state law rather than federal law, 'the availability of state procedures [to address Appellants' arguments] is fatal' to their procedural due process claims. . . Appellants had adequate opportunity in the state courts to argue the sufficiency of electronically-signed citations as an affidavit or otherwise admissible evidence. Having forgone the opportunity to object to the use of electronically-signed citations as evidence, Appellants may not first cry foul in a federal court on this issue. . . .We find that the notice and hearing afforded by Maryland's speed camera statute satisfy due process. Notice sent by first-class mail was reasonably calculated to provide actual notice of the speeding violation and civil penalties. The availability of a trial in state court, upon Appellants' election, provided adequate opportunity to be heard on any objections prior to imposition of the statutory penalties. Any flaws in the citation or enforcement process could have been challenged in the state courts, and Appellants failed to do so.")

See also ***Mananioba v. Fairmont Housing Authority***, 922 F.2d 836 (4th Cir. 1991) (Table) (Where risk of erroneous eviction was foreseeable, where predeprivation process was possible, and where state had delegated to defendants the power to effect the very deprivation complained of, predeprivation process required under ***Zinermon***).

Compare ***Bogart v. Chapell***, 396 F.3d 548, 563 (4th Cir. 2005) ("The teaching of *Zinermon*, it seems, is that where, as in this dispute, state employees do not have broad authority (or, indeed, any authority) to deprive persons of their property or liberty, and do not have a duty to provide the procedural safeguards required before a deprivation occurs, the *Parratt /Hudson* doctrine still bars a § 1983 procedural due process claim based on the employees' random and unauthorized conduct. But where, as in *Zinermon*, state employees do have broad authority to effect deprivations, as well as the duty to provide predeprivation procedural safeguards, the *Parratt /Hudson* doctrine is inapplicable. . . . Therefore, we can only conclude that, under the *Parratt /Hudson* doctrine, the random and unauthorized euthanization of Bogart's animals by the Defendants − however atrocious − did not constitute a violation of Bogart's procedural due process rights because a meaningful postdeprivation remedy for the loss is available.") *with* ***Bogart v. Chapell***, 396 F.3d 548, 568 (4th Cir. 2005) (Williams, J., dissenting) ("Unfortunately, we are bound by the broad interpretation of *Zinermon* contained in *Plumer* and *Fields*. Thus, although I

agree that the majority's interpretation of *Zinermon* is the preferable one, and perhaps even 'the best estimate of the course a majority of the [Supreme] Court will take' to resolve the '[i]nconsistent lines of precedent,' . . . I believe that we, as a panel, should refrain from muddying the clear law of this circuit by adding to our body of precedents an opinion that relies upon the legalist model. By doing so today, the majority creates an inconsistent line of precedents in our circuit. If we wish to follow the narrow interpretation of *Zinermon* used in the Fifth and Seventh Circuits, we must first overrule *Plumer* and *Fields* in an en banc session. Because we have not done so, I would reverse the district court and allow Bogart to proceed with her procedural due process claim. Accordingly, I respectfully dissent.").

7. Summary on *Parratt/Hudson* Doctrine

Where state law leaves little latitude in the exercise of discretionary powers and carefully circumscribes the authority and responsibility of an official, decisions made pursuant to that authority will reflect "established state procedure." Isolated departures from the well-defined procedure should be viewed as random, unauthorized conduct, for which adequate postdeprivation state remedies should suffice.

See, e.g., ***S. Commons Condo. Ass'n v. Charlie Arment Trucking, Inc.***, 775 F.3d 82, 86-89 (1st Cir. 2014) ("The need for speed . . . permits the government to take action that may cause a loss to property without first notifying the owner of the property or waiting to hear what that owner has to say, even though the government might have saved itself from making a costly mistake by taking the time to give notice and to wait for a response. . . . True, this case involves a demolition, which was not at issue in either *Herwins* or *San Gerónimo.* But while a demolition may cause a loss more total (if not always more costly) than a delayed start to construction or a temporary order to vacate, the drastic nature of that response does not make the justification for departing from the ordinary means of ensuring due process any less persuasive. If a building is so badly damaged it must be demolished immediately to protect life and limb, then it surely poses a serious danger to the public safety that must be addressed with dispatch. . . . But section 7 does not confer 'broadly delegated, uncircumscribed power' to proceed in summary fashion. . . The statute instead marks off 'an exception to be used only in emergency situations.'. . The City may carry out a summary demolition only upon a determination a damaged property is so dangerous to life and limb that immediate demolition is required to protect 'the public safety.'. . Section 7 thus renders impractical the provision of advance notice and an opportunity to be heard. Such up-front processes would impede the City from doing what needs to be done to protect the public from the immediate danger the summary demolition procedure is designed to address. Nor, we note, is the application of this triggering standard left solely to the local inspector who—under the statute—first learns of the danger a building presents. Rather, under section 7 and its attendant regulations, a summary demolition may occur only if an actor directly accountable to the voters concludes the standard for summary action has been met. . . For that reason, too, the law considered in *Zinermon* is far removed from the one we consider here. Of course, under Massachusetts law, an official may conclude in a particular case that there is an immediate need to address a danger—and thus proceed

in the summary fashion section 7 allows—when, in hindsight, there was no need to rush. But an emergency standard must be written to be of practical use. An official applying that standard must make an on-the-spot judgment about how best to protect the public from the immediate danger a badly damaged building poses. Such a practicably workable standard is sure to be imprecise enough to require the official to make judgment calls about the urgency of the need to act. That some such calls may be mistaken does not show that the process for making them was constitutionally improper. For that reason, it does not matter if the owners are right that the City violated section 7 because the 'public safety' did not in fact require the 'immediate' demolition that occurred. The Supreme Court has made clear that government officials do not commit a federal procedural due process violation simply by erroneously applying a state law that, if followed, would survive a procedural due process challenge. That is because '[t]he state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.'. . So long as a state has not set up a scheme so open-ended it invites unwarranted uses of summary process, . . . and so long as a state provides an adequate after-the-fact remedy for any wrongful summary action, . . . allegations of the kind of 'random and unauthorized' mistakes in application that those who work in government sometimes make are not enough to state a procedural due process claim. . . . And thus, the alleged state law error—if error it was—cannot save the owners' procedural due process claim, at least so long as an adequate, post-hoc remedy is available. We thus now turn to a consideration of whether Massachusetts makes available an adequate after-the-fact remedy for any wrongs the City may have committed in carrying out the summary demolition. In both *San Gerónimo* and *Herwins,* we found the state did provide such a remedy. . . .And we find the same to be the case here."); ***Connor B. ex rel. Vigurs v. Patrick***, 774 F.3d 45, 60 (1st Cir. 2014) ("[T]he plaintiffs' evidence does not suffice to establish a violation of any federal procedural due process right. The plaintiffs do not allege that DCF's policies regarding these rights are inadequate. When DCF deviates from those policies, it is a mistake. Such mistakes under state law do not constitute a violation of federal due process, especially in light of the state's fair hearings. *See, e.g., San Gerónimo Caribe Project, Inc. v. Acevedo–Vilá,* 687 F.3d 465, 478–81 (1st Cir.2012) (en banc)."); ***San Geronimo Caribe Project, Inc. v. Acevedo-Vila***, 687 F.3d 465, 486, 490 (1st Cir. 2012) (en banc) ("[W]e reject the argument that the emergency statute allowed such unfettered discretion as to remove this case from the reach of *Parratt–Hudson.* ARPE was not provided with 'broad power and little guidance,' or 'broadly delegated, uncircumscribed power.'. . . Sufficient guidance was provided to ARPE, and ARPE's discretion was so limited, such that this case does not fall within *Zinermon.* . . . Moreover, the view of this court has long been that *Zinermon* is best viewed as a case where the state statutory scheme conferred so much discretion on state officials so as to authorize the state officials' actions in deprivation of procedural rights. [collecting cases] We therefore reject SGCP's opening premise that *Zinermon* involved a case of violation of state law. Here, the state statutory scheme did not authorize ARPE's actions, and a mere mistake by officials in exceeding the limits of their defined authority is not the stuff of a federal due process claim. . . . .In sum, none of the grounds SGCP offers for distinguishing *Parratt–Hudson* has merit. The erroneous judgment by ARPE was exactly the type of 'random and unauthorized conduct' encompassed by *Parratt–Hudson.* The Puerto Rico Supreme Court stated that ARPE simply 'made a mistake' in invoking the emergency provisions.

That court did find that the ARPE's judgment was wrong, but that does not remove the case from *Parratt–Hudson;* it instead establishes that this case fits firmly within *Parratt–Hudson.* That is the very kind of unanticipated mistake that is due to individual error, not induced by the statute. . . . We clarify that we do not hold that whenever an official's conduct violates state law the *Parratt–Hudson* doctrine necessarily applies. Under *Zinermon,* there may be certain circumstances warranting the conclusion that such violations do not fall within the *Paratt–Hudson* doctrine. . . . To the extent that dicta in our precedent suggests otherwise, [citing *PFZ Props., Inc.*] that dicta is overruled."); ***Tinney v. Shores***, 77 F.3d 378, 382 n.1 (11th Cir. 1996) (per curiam) ("The question is whether the state can anticipate and therefore control the action of a state employee. [cite omitted] Once a state has established procedures for the effectuation of an attachment − which Alabama undisputedly has − it cannot predict whether or not, in a given situation, those procedures will be followed or ignored. Thus, as with an employee's negligence or an employee's intentional wrongful act, Appellants' actions in this case were not preventable beforehand by the state. Therefore, under *Parratt* and *Hudson*, no procedural due process violation occurs unless the state fails to provide the opportunity to redress the situation after the fact."); ***Copeland v. Machulis***, 57 F.3d 476, 479 (6th Cir. 1995) ("[T]he unpredictable and unauthorized departures from prison policy directives were beyond the State's reasonable control and the state tort remedy is all the process [Plaintiff] is due. Any predeprivation procedural safeguards that Michigan did provide, or could have provided, would not address the risk of this kind of deprivation."); ***Lolling v. Patterson***, 966 F.2d 230, 234 n.6 (7th Cir. 1992) ("[A]lthough Sheriff . . . exercised discretion and authority in disciplining Deputy. . .,that discretion was not 'uncircumscribed' or otherwise unregulated. Unlike the state actors in *Zinermon*, the Sheriff's acts could not have been predicted by the State or prevented through the implementation of additional predisposition procedural safeguards."); ***Lowe v. Scott***, 959 F.2d 323, 343 (1st Cir. 1992) (defendant, Chief Administrative Officer of Board of Medical Licensure and Discipline, was not authorized to misrepresent the position of the Board, nor did he have discretion to decide whether to follow the procedural safeguards expressly contemplated under the Consent Order); ***Parratt/Hudson*** applied to plaintiff's procedural due process claim); ***G.M. Engineers and Associates v. West Bloomfield Township***, 922 F.2d 328, 331 (6th Cir. 1990) (where state law circumscribes discretion of state officials to point where certain conduct is mandatory, contrary conduct is unauthorized, not pursuant to any established state procedure, and claim is subject to ***Parratt*** doctrine); ***Simmons v. Chemung County Dept. of Social Services***, 770 F. Supp. 795, 800 (W.D.N.Y. 1991), *aff'd*, 948 F.2d 1276 (2d Cir. 1991) (Table) (Where discretion of defendants was not uncircumscribed, the State could not have predicted or prevented alleged transgressions of established procedures defendants were statutorily required to follow).

See also ***Thiel v. Korte***, 954 F.3d 1125, 1129-30 (8th Cir. 2020) ("Thiel claims that Korte violated his procedural-due-process rights when he refused to return seized property. The district court identified a procedure Thiel could invoke to obtain the return of his property—filing a motion under Mo. Rev. Stat. § 542.301. On appeal, Thiel does not contend that a motion under § 542.301 is unavailable to him or would not afford him due process, so we do not consider those questions. He instead argues that he did not need to file such a motion before he could pursue his federal

claim. But as the Supreme Court has explained, a procedural-due-process violation does not occur 'unless and until the State fails to provide due process.' *See Zinermon v. Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Since adequate process was available here, or at least Thiel does not challenge the determination that it was, we reject his claim."); ***Chandler v. Village of Chagrin Falls***, No. 07-3169, 2008 WL 4523585, at *7 (6th Cir. Oct. 8, 2008) ("Even assuming all of the facts alleged by Chandler to be true, that in fact the Village violated its ordinances and that she was required to expend time and money to secure her building permit, she has not established, nor does she argue, that process afforded her was insufficient to meet the constitutional mandates of due process. Rather, like *Depiero* and *Eaton*, the sole basis of Chandler's due process claim is that the Village failed to comply with its own ordinances. Like *Depiero* and *Eaton*, such a basis is insufficient to establish that the Village provided insufficient procedural due process when Chandler was otherwise provided notice and an opportunity to be heard."); ***Hadfield v. McDonough***, 407 F.3d 11, 20 (1st Cir. 2005) ("Our cases establish that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law. . . In other words, conduct is 'random and unauthorized' within the meaning of *Parratt-Hudson* when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself. . . . We have applied this doctrine in the public employment context. [citing cases] Here, Hadfield was denied a hearing because the due process defendants erred (if they erred at all) by misapplying Massachusetts civil service law. This determination was not discretionary or governed by a formal or informal policy. . . Rather, if error, it was simply a missaprehension [sic] of state law. This is the sort of random and unauthorized conduct to which *Parratt-Hudson* applies."); ***Mard v. Town of Amherst,*** 350 F.3d 184, 194 (1st Cir. 2003) ("We agree with the conclusion of the district court that Dr. Donahue's alleged failure to accept or consider Mard's medical information was random and unauthorized by the Town. Mard does not claim that § 111F delegated to Town-designated physicians broad authority to perform unprofessional or inadequate medical examinations. Nor does she suggest that Dr. Donahue's alleged conduct constituted a form of regular practice among physicians who perform § 111F independent medical examinations at the Town's request. . . As Mard herself suggests, § 111F contemplates that examining physicians will provide injured firefighters with an opportunity to present medical evidence and discuss their condition during the examination in order to guard against an erroneous determination that they are capable of returning to work. Insofar as Dr. Donahue failed to 'initiate procedural safeguards to protect against the unconstitutional deprivation of section § 111F benefits,' his conduct was in breach of the duty that ran 'concomitant' to his statutory authority. This alleged, unprofessional conduct, which was not authorized by the statute and did not form a regular pattern among § 111F physicians, did not violate Mard's due process rights so long as the Town provided an adequate post-deprivation remedy. . . As we have noted, Mard does not challenge the adequacy of the post-termination procedures provided under the collective bargaining agreement. Consequently, with respect to Mard's claims concerning the adequacy of her pre-termination hearing, we find that the post-termination grievance procedures provided Mard all the process that was due."); ***O'Neill v. Baker***, 210 F.3d 41, 50 (1st Cir. 2000) ("The *Parratt-Hudson* doctrine might have been undermined by the Supreme Court's later decision in *Zinermon v. Burch*, . . . but this court has already rejected

that view. *See Herwins*, 163 F.3d at 19. In *Herwins*, we viewed *Zinermon* as a case in which state law did authorize the procedure followed (albeit unconstitutionally), so that the act of the officials could not be described as 'random and unauthorized'; *Zinermon* does, however, require that 'courts scrutinize carefully the assertion by state officials that their conduct is Arandom and unauthorized,'' . . . and it is well to remember that the *Parratt-Hudson* doctrine is directed only to claims that due process was denied and not to other kinds of constitutional violations. Nevertheless, the *Parratt-Hudson* doctrine plays an important part in allowing procedural claims to be resolved in state forums where states do provide adequate remedies."); ***Herwins v. City of Revere***, 163 F.3d 15, 19 (1st Cir. 1998) ("[A]s a result of [defendant's] substantive decision, Herwins suffered a wrongful shutdown of his building. But the city provided all of the procedural protection it could in requiring a prior hearing for closures based on non-emergency violations. Where an official errs in declaring an emergency, the only feasible procedure is a post-deprivation remedy, which the city also provided."); ***Brown v. Hot, Sexy and Safer Productions, Inc.***, 68 F.3d 525, 536-37 (1st Cir. 1995) ("The plaintiffs contend that the deprivation cannot be characterized as 'random and unauthorized' because the performance was planned well in advance. This contention ignores both the nature of the deprivation and the relevant caselaw. The deprivation alleged here is not the staging of the Program itself, but rather the defendants' failure to follow the procedures mandated by the Sex Education Policy . . . . [T]he Sex Education Policy states that '[p]ositive subscription, with parental permission, will be a prerequisite to enrolling,' and, accordingly, vested no discretion in school officials. We therefore conclude that the failure to follow the Sex Education Policy was a 'random and unauthorized' act within the confines of the *Parratt-Hudson* doctrine."); ***Pomeroy v. Ashburnham Westminster Regional School District,*** 410 F.Supp.2d 7, 17, 18 (D.Mass. 2006) ("Defendant essentially asks the Court to assume that if the procedures employed in disciplining James violated his due process rights, those procedures were nonetheless a random, isolated, and unauthorized occurrence. However, the Court must view the facts in the light most favorable to the plaintiff. A liberal reading of the complaint suggests that plaintiff alleges that the procedures employed were the standard custom or practice in the Ashburnham-Westminster Regional School District. For the purpose of this motion, plaintiff has satisfied the causation requirement as well, as the alleged denial of procedural protections relates directly to James's inability to rebut the case against him at his expulsion hearing. Defendant further contends that even if a due process violation occurred, plaintiff cannot prevail because state law provides an adequate post-deprivation remedy. . . . But the requirement that the state's conduct be random and unauthorized makes the *Parratt-Hudson* doctrine inapposite to the present claim. Plaintiff's *Monell* claim alleges a policy or custom of unconstitutional conduct; actions that conform with a policy or custom are not 'random or unauthorized.' . . . Accordingly, plaintiff's *Monell* claim will not be dismissed for failure to state a claim."); ***McSorley v. Richmond,*** 242 F. Supp.2d 24, 28 n.4 (D. Me. 2002) ("In *O'Neill v. Baker*, the First Circuit Court of Appeals suggested in dicta that a state actor's failure to follow procedures established by state law might amount to 'random and unauthorized' conduct under the *Parratt-Hudson* doctrine. . . However, the doctrine applies in only two relatively narrow circumstances, where there is 'the necessity of quick action by the State' or where the provision of meaningful predeprivation process is otherwise impractical. . . The facts of this case do not give rise to any exigency, nor would pre-deprivation

process be impractical considering that pre-deprivation process was called for by state law. Thus, the point of departure for *Parratt-Hudson* appears to be whether a meaningful pre-deprivation procedure could be followed rather than whether an existing pre-deprivation procedure was followed. If compliance with the due process clause requires that pre-deprivation procedures be provided, the availability of post-deprivation remedies is irrelevant. Thus, in *Zinermon v. Burch*, the Supreme Court recognized a procedural due process claim where pre-deprivation procedures were appropriate and available, but were not provided, even though meaningful post-deprivation remedies may have existed."); ***Learnard v. Inhabitants of the Town of Van Buren,*** 164 F.Supp.2d 35, 42, 43 (D. Me. 2001) ("To invoke the *Parratt-Hudson* defense, it is incumbent upon Defendants to demonstrate that the alleged actions unforeseeably violated 'established procedure.' . . . If the town charter authorizes Defendants to dismiss public employees prior to a hearing, then Defendants cannot argue that their conduct was random or unauthorized. Furthermore, it is not clear that it was random or unauthorized when Defendants rescheduled the first hearing for March 29, 2000; Defendants point to no established procedure compelling town councils to set hearings at times convenient to claimants' lawyers. . . Quite simply, the Court cannot rule that Defendants violated established procedures without the parties informing the Court as to what those established procedures were. . . . If Defendants can demonstrate that the alleged actions were random and unauthorized departures from established procedures, then the *Parratt-Hudson* doctrine may defeat Plaintiff's due process claim.A); ***Lumpkin v. City of Lafayette***, 24 F. Supp.2d 1259, 1264, 1265 (M.D. Ala. 1998) ("If Mr. Lumpkin had alleged that the mayor and council members acted pursuant to the city's procedures, or in the absence of any procedures, the violation of his procedural due process rights would have been complete at the moment of his termination, assuming that due process entitled him to notice and a hearing. That is not what Mr. Lumpkin alleges. Mr. Lumpkin does not attack the City of Lafayette's established procedure. He asserts that the mayor and council members ignored the city's established procedure when they eliminated his position without notice or a due process hearing. . . . The Alabama courts were available to hear Mr. Lumpkin's claim that the city officials failed to follow established procedures requiring notice and a hearing before his termination.").

But see ***Coggin v. Longview Independent School District,*** 337 F.3d 459, 466 (5th Cir. 2003) (en banc) ("If the Commissioner does not abide the prescribed scheme, Texas gives an aggrieved school employee the right to appeal to a state district court, thereby providing constitutional due process. [footnote omitted] If the mandated procedure is followed, an employee will also have been afforded constitutional due process when a school board makes its final termination decision. When a school board disregards the statutory scheme, here depriving the employee of his right to appeal, however, it may subject itself to liability, not for the act of another but for its own act. To the point, had the school board given Coggin the statutorily allotted time to appeal the Commissioner's decision, there would have been no denial of due process."). *See also* ***Brockton Power LLC v. City of Brockton***, No. 12–11047–LTS, 2013 WL 2407220, *13, *14, *20 (D. Mass. May 30, 2013) ("Although proving a procedural due process violation in the land-use context is no simple task, the plaintiffs have alleged sufficient facts to avoid dismissal at this point in the proceedings. First, this is not a case where the plaintiffs complain about one or two discrete

permit denials or other obstructive acts that were subsequently remedied by state courts. . . Instead, the plaintiffs allege repeated summary denial—or refusal to even consider—a series of applications and submissions necessary throughout the course of the project, requiring repeated resort to the state courts to obtain relief. . . The systemic nature of the defendants' refusal to provide any meaningful pre-deprivation process sets this case apart from those previously considered by courts in this jurisdiction, and suggests the defendants were not misinterpreting or misapplying the law, but were collectively determined not to follow it. . . . Such a widespread, concerted effort to ignore the law and defeat the project by consistently denying the plaintiffs proper consideration of their submissions (absent a court order), and then to undermine the fairness of state post-deprivation proceedings—especially in a project requiring numerous permits and approvals—goes beyond the typical circumstances in which the First Circuit previously has rejected procedural due process claims in this context. Accordingly, the defendants' motions are denied with respect to Count I, insofar as it alleges a procedural due process violation. . . . The plaintiffs have done enough, at this stage in the proceedings, to distinguish their allegations from the sort of 'run of the mill' land-use claims often brought by disappointed developers and rejected by federal courts in this jurisdiction. The defendants have cited no decisions—and the Court has located none—in which a court within the First Circuit has confronted a conspiracy involving a pattern of conduct of the magnitude alleged here. The alleged ongoing refusal of the defendants to even consider the plaintiffs' submissions—in other words, the systemic denial of any pre-deprivation process at all despite repeated reversals by the state courts—constitutes the sort of 'fundamental procedural irregularity' that has been absent in many previous cases; it is the very definition of 'arbitrary and capricious' conduct. In particular, the summary denial of the plaintiffs' application for an extension of the previously granted drinking water approval, and the actions allegedly taken by various moving defendants to secure that denial, rise to the level of a 'truly horrendous situation' which implicates the substantive due process doctrine. The denial of this fundamental right, guaranteed to all property owners under state law, essentially renders the plaintiffs unable to develop their land for any purpose, and not just the lawful use contemplated here. The conscience-shocking nature of the alleged conspiracy as a whole is underscored by allegations that the defendants often acted against the advice of legal counsel, to further their own personal and political interests, and while knowing there was no legal justification for their actions. This adequately alleges government action that the substantive due process clause forbids. . . Under these circumstances, the plaintiffs have pleaded facts sufficient to warrant discovery on their substantive due process claim.")

If departures from the formal procedures are persistent and widespread, then knowledge of and acquiescence in such behavior would be imputed to official policymakers. *Accord*, ***Duenas v. Nagle***, 765 F. Supp. 1393, 1399 (W.D. Wis. 1991) ("If defendants had committed the same rule violations with respect to many prisoners...and there were an indication that the state had an opportunity to learn of the continued violations but ignored them, the argument could be made that the state had permitted the initiation of new policy, rendering the acts neither random nor unauthorized.")

Where an official acts under a "standardless grant of authority," ***Bigford v. Taylor***, 834 F.2d 1213, 1222 (5th Cir. 1988), *cert. denied*, 488 U.S. 851 (1988), such actions may be viewed as official policy if the official is a final policymaker within the meaning of ***Pembaur***, ***Praprotnik***, and ***Jett***. *See, e.g.,* ***Xu v. City of New York***, No. 16-4079, 2017 WL 4994477, at *1–2 (2d Cir. Nov. 2, 2017) (not published) ("Assuming without deciding that Xu possessed a property interest in her position, Xu has stated a plausible claim that her procedural due process rights were violated by Municipal Defendants. Though it is well settled that a postdeprivation hearing may satisfy due process when the claim is 'based on random, unauthorized acts by state employees,'. . . a postdeprivation remedy may not suffice when the alleged violation was perpetrated by 'officials with final authority over significant matters, which contravene the requirements of a written municipal code, [and] can constitute established state procedure[.] We have reasoned that 'categorizing acts of high-level officials as "random and unauthorized" makes little sense because the state acts through its high-level officials.'. . We believe Xu has alleged sufficient facts to state a facially plausible claim that her firing was the result of decisions made by 'officials with final authority over significant matters,' *Burtnieks*, 716 F.2d at 988, who may properly be considered 'high-level officials' for the purposes of that exception, *DiBlasio*, 344 F.3d at 302. Xu was improperly fired without a predeprivation hearing because Municipal Defendants wrongly believed her to be a probationary employee who was not entitled to such a hearing. Xu alleges that her firing was approved by Brenda McIntyre, who was the Assistant Commissioner and Director of the Bureau of Human Resources for the Department of Mental Health and Hygiene. At this early stage of the litigation, these allegations are sufficient to state a facially plausible claim that the 'high-level official' exception should apply to this case."); ***New Windsor Volunteer Ambulance Corps, Inc. v. Meyers***, 442 F.3d 101, 115, 116 (2d Cir. 2006) ("The Town also contends that even if the ambulances and other equipment were property of the Corps protected by the Due Process Clause, the Corps received all the process it was due because it could have brought a proceeding under Article 78 of New York's C.P.L .R. or 'a plenary contract action' after the seizure . . . . We disagree. In general, 'the Constitution requires some kind of a hearing before the State deprives a person of liberty or property.'. . . Although postdeprivation remedies can provide constitutionally sufficient process in circumstances where the deprivation was caused by a state agent's conduct that was 'random' and 'unauthorized,'. . . on the rationale that the state cannot reasonably anticipate such conduct, . . .the principle does not apply where the deprivation was caused by high-ranking officials who had 'final authority over the decision-making process[.]'. . . Here, the district court found that the seizure was ordered not by any low-ranking employee, but by Meyers, . . . who was the Town's highest ranking official, chairman of the Town's governing body, and a 'policymaking official[.]'. . . Meyers's actions cannot be termed random or unauthorized; his actions with respect to the Corps were the 'actions of the Town itself'. . . . Accordingly, the Corps was entitled to notice and an opportunity to be heard before the Town seized its property. It received neither."); ***Messick v. Leavins***, 811 F.2d 1439, 1442-1443 (11th Cir. 1987) (where final decision as to matter left to discretion of superintendent of public works, his conduct represents official city policy and deprivation of plaintiffs' property was pursuant to established state procedure); ***Kassim v. City of Schenectady,*** 255 F.Supp.2d 32, 39 (N.D.N.Y. 2003) ("Clearly, [Corporation Counsel for City] had the requisite final authority over the decision

as to how much notice, if any, was to be given to plaintiff. Thus, his actions were not random and unauthorized within the meaning of *Hudson* and *Parratt*, and instead amount to an established state procedure of using his discretion to determine how much, if any, advance notice is to be given. As such, barring impracticality or emergency circumstances, plaintiff was entitled to pre-deprivation process.").

The Sixth Circuit has interpreted *Zinermon* as creating a category of procedural due process claims that falls outside "two clearly delineated categories: those involving a direct challenge to an established state procedure or those challenging random and unauthorized acts." ***Mertik v. Blalock***, 983 F.2d 1353, 1365 (6th Cir. 1993). The court explained:

> [I]t is not necessarily the case that a due process challenge to state action not involving an 'established state procedure' must automatically come within the *Parratt* and *Hudson* rule governing random and unauthorized acts. . . . *Zinermon* . . . counsels that a court look to the nature of the deprivation complained of and the circumstances under which the deprivation occurred to determine whether the rule of *Parratt* and *Hudson* applies to defeat a procedural due process claim.

Id. at 1365-66. *See also* ***King v. Montgomery County, Tennessee***, 797 F.3d 949, ___ (6th Cir. 2020) ("Deprivations that result from concrete governmental policies require a more demanding due process inquiry. . . But that is not what King alleges. She does not, for instance, cite a Montgomery County policy that provides for impounded animals being given up for adoption immediately upon seizure. Rather, she characterizes the adoption here as simply occurring before a hearing was possible. In other words, she alleges a one-off instance of purported misconduct the County was largely powerless to anticipate. In that irregular circumstance, one driven more by human error than by adherence to a flawed governmental policy, before we intervene, we require that the plaintiff demonstrate that the state in which the error occurred—here Tennessee—affords her no adequate remedy. . . .King has not shown why she is unable to seek relief under state law to regain possession of the dog, or why such relief, if she could pursue it, would be inadequate under the Fourteenth Amendment. Her claim therefore fails."); ***Daily Services, LLC v. Valentino***, 756 F.3d 893, 907, 909, 910 (6th Cir. 2014) ("Courts may dismiss a procedural due process claim if the state provides an adequate postdeprivation remedy and '(1) the deprivation was unpredictable or "random"; (2) predeprivation process was impossible or impracticable; and (3) the state actor was not authorized to take the action that deprived the plaintiff of property or liberty.'. . Our court has explained that, in this analysis, '"unauthorized" means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law.'. . . Daily Services argues that the defendants' actions were 'authorized' because they were taken by high-ranking officials who abused their positions. But we need not resolve whether acts by certain high-ranking officials should never be considered 'random and unauthorized,' as the Second Circuit has held. . . Regardless of their positions, the defendants were not authorized to effect deprivations in the way the *Zinermon* defendants were. In light of the three *Zinermon* factors, 'postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could

be expected to provide.'. . The *Parratt* doctrine therefore applies, and Daily Services' procedural due process claims fail if Ohio provides an adequate postdeprivation remedy. . . Daily Services' complaint does not allege that Ohio's postdeprivation remedies are inadequate. Moreover, '[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.' *Parratt,* 451 U.S. at 544. In other words, Daily Services must explain why the ability to be heard in state court and to vacate the wrongful judgment and liens, even in the absence of damages, is insufficient to remedy the defendants' process violations. A convincing argument on this point might exist, but Daily Services has not offered it. Thus, under *Parratt,* Daily Services' complaint does not state a claim for a procedural due process violation.") *with id.* At 910-11 (Karen Nelson Moore, J., concurring in part and dissenting in part) ("I agree entirely with the majority's well-written and well-reasoned explanation of the relationship between the *Parratt* and qualified-immunity doctrines. However, I cannot concur in the majority's ultimate conclusion that the *Parratt* doctrine applies in this case, because I do not believe that the defendants' actions were 'unauthorized' as defined by the Supreme Court in *Zinermon v. Burch,* 494 U.S. 113, 138 (1990). As a result, I must respectfully dissent from Part II.C.3 of the lead opinion. . . .The case here is similar to *Zinermon.* Section 4123.37 of the Ohio Revised Code grants the Bureau power to present the Court of Common Pleas clerk with the Bureau's assessment of premiums in arrears and to cause a judgment to be entered against the noncompliant employer. Ohio law also imposes upon the Bureau, and its employees, the responsibility to follow the procedural safeguards set forth in § 4123.37 to protect the due-process rights of the noncompliant employers. The fact that the defendants failed to follow the state-mandated procedures does not mean that they were not legally empowered to effect those deprivations. As a result, I would hold that the defendants' actions were authorized and, therefore, that the *Parratt* doctrine does not apply. Plaintiff should be able to proceed on its claim based on a denial of predeprivation process, and defendants' motion for judgment on the pleadings should be denied. Because the majority sees this close question differently, I must respectfully dissent.")

See also ***DiLuzio v. Vill. of Yorkville, Ohio***, 796 F.3d 604, 614-15 (6th Cir. 2015) ("Mayor DiFilippo responds that if he acted in bad faith, then his decision to demolish DiLuzio's building was a 'random and unauthorized' act, such that predeprivation due process was unnecessary, pursuant to *Parratt.* An official's act is 'random and unauthorized' if it was unpredictable and he was 'not acting pursuant to any established state procedure.'. . Here, Mayor DiFilippo claims to have acted pursuant to Ohio Revised Code § 715.26(B), which authorizes municipalities to demolish private buildings '[i]f an emergency exists, as determined by' the municipality. Thus, DiFilippo's decision was not 'random or unauthorized,' regardless of whether he acted with 'intent to injure' DiLuzio or in bad faith as to whether an emergency actually existed."); ***Stotter v. University of Texas At San Antonio***, 508 F.3d 812,822 (5th Cir. 2007) ("Here, the deprivation was both predictable and foreseeable. In fact, not only was it *possible* for Dr. Bailey to provide a pre-deprivation remedy in this case, he attempted to do so by sending Dr. Stotter a letter giving him an opportunity to remove any personal items from his lab. Moreover, UTSA and Dr. Bailey specifically authorized the deprivation. . . In short, because the alleged deprivation was authorized,

the deprivation was foreseeable, Dr. Bailey had an opportunity to provide a pre-deprivation remedy, and he failed to give Dr. Stotter sufficient time to collect his personal items prior to allegedly discarding them, the district court erred in dismissing Dr. Stotter's procedural due process claim on the basis of the availability of an adequate post-deprivation remedy."); ***Women's Medical Professional Corp. v. Baird***, 438 F.3d 595, 613 (6th Cir. 2006) ("In this case, a pre-deprivation hearing would not have been unduly burdensome, especially given the property interest at stake, namely continued operation of business. Further, Ohio cannot argue that it was 'truly unable to anticipate and prevent a random deprivation of a liberty interest' given that it issued a cease-and-desist letter that served to close the Dayton clinic. Under the reasoning in *Zinermon*, the post-deprivation remedy of a hearing on the proposed license denial does not satisfy procedural due process. We conclude that Director Baird violated WMPC's procedural due process rights when he ordered the Dayton clinic closed. Because he issued a cease-and-desist order that required the clinic to immediately cease operations, he effectively prevented WMPC from obtaining a pre-deprivation hearing on the proposed license denial."); ***Warren v. City of Athens***, 411 F.3d 697, 709(6th Cir. 2005) ("Under circuit precedent, a § 1983 plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either: (1) an established state procedure that itself violates due process rights, or (2) a 'random and unauthorized act' causing a loss for which available state remedies would not adequately compensate the plaintiff. . . A plaintiff alleging the first element of this test would not need to demonstrate the inadequacy of state remedies. . . If the plaintiff pursues the second line of argument, he must navigate the rule of *Parratt v. Taylor*, . . . which holds that a state may satisfy procedural due process with only an adequate postdeprivation procedure when the state action was 'random and unauthorized.' . . In this context, 'unauthorized' means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law. . . Whether seen as an attack on an established state procedure or as an attack on a 'random and unauthorized' act, the Warrens' claim is not subject to the *Parratt* rule. It clearly would not have been 'impossible' for the City to grant a predeprivation hearing to the Warrens. . . Moreover, even if the *Parratt* rule did apply, it is not clear that any state remedies were available to the Warrens. . . Thus, if the City's action was a 'random and unauthorized act,' then the Warrens' claim prevails. If, alternatively, the City's action was the result of an established state procedure, then the question would be whether that procedure violated due process rights. The Warrens have shown that the state procedure in this case violated their rights."); ***Honey v. Distelrath***, 195 F.3d 531, 534 (9th Cir. 1999) ("[A]s the *Armendariz* and *Zinermon* courts acknowledged, even acts in violation of established law may be considered 'authorized.' We hold that the acts at issue in this case were not random and unauthorized because the defendants in this case had the authority to effect the very deprivation complained of, and the duty to afford Honey procedural due process. Appellees Distelrath, the Chief of Police, and Starbird, the City Manager, were in positions with substantial discretionary powers. They were responsible for the procedurally deficient termination hearings, and thus the deprivation was foreseeable because it was their intent for it to occur. . . Thus, we find that this case fits squarely within the *Zinermon/Armendariz* exception to the *Parratt* rule. Additionally, this circuit does not apply *Parratt* where a deprivation occurs because officials are acting according to established procedures − even if those established procedures violate other

state or federal laws."); ***Hamlin v. Vaudenberg***, 95 F.3d 580, 584 (7th Cir. 1996) ("Evaluating conduct to determine whether it is random and unauthorized involves determining whether the conduct was predictable. . . Predictability is determined by the amount of discretion afforded the state actor, and whether that discretion is uncircumscribed. . . If state procedures allow unfettered discretion by state actors, then an abuse of that discretion may be predictable, authorized, and preventable with pre-deprivation process. Under Wisconsin law, the Committee must follow the applicable procedures and lacks discretion in determining how to carry out those procedures. Thus, given the Committee's failure to adhere to the correct procedures, Hamlin's alleged deprivation was in spite rather than because of state procedures."); ***Alexander v. Ieyoub***, 62 F.3d 709, 712 (5th Cir. 1995) ("We disagree with the Defendants' contention that their actions were unpredictable, intentional violations of state law that fell within the ambit of the *Parratt/Hudson* doctrine and therefore foreclosed [plaintiff's] § 1983 claim. Although the Louisiana statute providing for a forfeiture proceeding gives the DA the authority to institute the proceeding, it does not specify a time period within which the DA should act. [footnote omitted] The Defendants therefore had discretion to institute the proceeding whenever they wanted, and their actions in delaying for nearly three years, although unreasonable, were not in conflict with their authority under state law."); ***Cushing v. City of Chicago***, 3 F.3d 1156, 1165 (7th Cir. 1993) (termination of plaintiff's medical benefits was not random or unauthorized where City did not "disavow knowledge of [defendants'] actions, and [did] not suggest either individual contravened the provisions of the collective bargaining agreement, much less municipal or state law."); ***Ezekwo v. New York City Health & Hospitals Corp.***, 940 F.2d 775, 784 (2d Cir. 1991) (resident, denied Chief Residency position due to changes made in selection procedures, stated procedural due process claim where directors of program had the authority "to effect the very deprivation complained of here," and possessed "essentially unrestricted" discretion), *cert. denied*, 112 S. Ct. 657 (1991); ***Independent Coin Payphone Association, Inc. v. City of Chicago***, 863 F. Supp. 744, 753 (N.D. Ill. 1994) ("When an official behaves in a random and unauthorized manner during the course of established predeprivation procedures, as alleged here, such conduct may, or may not, fall within the rule of *Parratt* and warrant consideration of the available state remedies. Where the alleged violation is properly considered to be random or unauthorized, additional predeprivation procedure would be irrelevant, and courts should consider the availability of adequate postdeprivation remedies before permitting a due process claim to go forward. [cite omitted] On the other hand, where the wrong is effectively authorized, then the predeprivation process is at issue and the court need not evaluate the postdeprivation options available to plaintiff. [citing *Zinermon*] . . . . In both *Zinermon* and the case at hand, the official who allegedly behaved wrongfully was vested with the power to deprive the plaintiffs of the property at stake. As such, the charged deprivation was foreseeable, occurred at a predictable juncture, and could not be said to be 'unauthorized.'"); ***Arosena v. Coughlin***, No. 92-CV-0589E(F), 1994 WL 118298, *6 and n.5 (W.D.N.Y. March 16, 1994) (not reported) (Noting that *Zinermon* "abandoned the categorical distinction between established procedures and unauthorized acts[,]" the court reads *Zinermon* to hold *Parratt/Hudson* inapplicable where state officials have authority to effect a deprivation and power to provide a pre-deprivation hearing. Fact that defendants failed to follow delineated procedural safeguards did not make conduct "random and unauthorized" for *Parratt* purposes.);

Crownhart v. Thorp, 1992 WL 332298, *6, *7 (N.D. Ill. Nov. 9, 1992) (not reported) (removal of plaintiff from wrecker rotational list was not "random and unauthorized" where chief of police had "unbridled discretion to remove wreckers from the list without following any procedure."); ***Smith v. McCaughtry***, 801 F. Supp. 239, 243 (E.D. Wis. 1992) (where state officials had uncircumscribed power to effect the deprivation, state can hardly claim that such an erroneous deprivation was unpredictable or unauthorized).

NOTE on *McKinney:* In *Zinermon*, the Supreme Court stated that in procedural due process cases, "[t]he constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." 494 U.S. at 126. As one court has noted, "[t]his statement by the Supreme Court seems to implicate that procedural due process violations may be 'cured' by the state through a later constitutionally correct procedure." ***Reyes-Pagan v. Benitez***, 910 F. Supp. 38, 44 n.1 (D.P.R. 1995).

In ***McKinney v. Pate***, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) the court determined that "the state may cure a procedural deprivation by providing a later procedural remedy: only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *See also* ***Lakoskey v. Floro***, No. 19-12401, 2021 WL 5860460 (11th Cir. Dec. 10, 2021) (not reported) (" '[A] [section] 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.'. . If Ms. Lakoskey had a constitutionally adequate process to remedy the deprivation of her property interest in her daughter's remains, then she has not been denied procedural due process and we don't have to decide the qualified immunity or municipal liability issue. . . As to the constitutionally inadequate process element, Ms. Lakoskey argues 'that the continued retention of [her] personal property'—her daughter's remains—'violate[d] [her] procedural due process rights.'. . . Ms. Lakoskey 'ha[s] failed to state a valid procedural due process claim because [she] ha[s] not alleged that [Florida] law provided [her] with an inadequate post[ ]deprivation remedy.'. . Her complaint, in fact, alleged the opposite: that she had an adequate postdeprivation remedy for violations of her property interest in her daughter's remains. Ms. Lakoskey alleged that Drs. Floro, Arruza, Walsh-Haney, and Rao's outrageous conduct in keeping the remains caused her severe emotional distress that was actionable under Florida tort law. We've 'held that a judicial post[ ]deprivation cause of action satisfies due process.'. . Even if 'the state's remedial procedure [does] not provide all relief available under section 1983,' 'as long as the remedy "could have fully compensated [Ms. Lakoskey] for the property loss [s]he suffered," the remedy satisfies procedural due process.'. . Ms. Lakoskey's complaint seeks essentially the same relief—mainly compensatory and punitive damages—for her procedural due process claims as she does for her outrageous infliction of emotional distress claims against the same individual defendants for the same conduct. Her complaint shows that she has an adequate postdeprivation remedy available to her: the tort claims she brought alongside her section 1983 claims. And Florida law recognizes the cause of action Ms. Lakoskey alleged in her complaint—outrageous infliction of emotional distress when the alleged misconduct involves a dead body. . . Ms. Lakoskey argues,

quoting *Zinermon v. Burch*, 494 U.S. 113 (1990), that '[i]n situations where the [s]tate feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.'. . But, as the Supreme Court explained in *Parratt* and *Hudson*, 'an unauthorized intentional'—or even 'negligent'—'deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the 14th Amendment if a meaningful post[ ]deprivation remedy for the loss is available.'. . 'Pre[ ]deprivation process is impractical "where a loss of property is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure," because "the state cannot know when such deprivations will occur."'. . Here, Ms. Lakoskey alleged in her complaint that Drs. Floro, Arruza, Walsh-Haney, and Rao acted negligently or intentionally when they deprived her of her daughter's remains. . . . Drs. Floro, Arruza, Walsh-Haney, and Rao were not acting pursuant to an established state procedure when they kept and transferred Tina's remains; Ms. Lakoskey alleged that they were acting outrageously and recklessly and contrary to the established state procedure. . . . Because Ms. Lakoskey alleged that Drs. Floro, Arruza, Walsh-Haney, and Rao negligently or intentionally deprived her of her daughter's remains by violating the Act, predeprivation hearings would have been impracticable. Here, '[a]ll that due process requires ... is a post[ ]deprivation "means of redress for property deprivations satisfying the requirements of procedural due process."'. . Ms. Lakoskey has that in the state tort claims she set out in her complaint. . . .In essence, Ms. Lakoskey argues that the impact rule and sovereign immunity will make her recovery more challenging in state court. But a plaintiff's ability or inability 'to recover under [state law] remedies the full amount which [s]he might receive in a [section] 1983 action is not ... determinative of the adequacy of the state remedies.'. . While recovery might be challenging, it is not impossible; a plaintiff can still achieve adequate relief. . . . As the Supreme Court explained in *Parratt*, our decision today avoids turning 'the Fourteenth Amendment [into] a font of tort law to be superimposed upon whatever systems may already be administered by the [s]tates.'. . .We agree with the district court that Ms. Lakoskey failed to state a claim for relief under section 1983. She could not establish that she received constitutionally inadequate process because she had an adequate postdeprivation state law remedy. Although we sympathize deeply with her loss and regret the ordeals she experienced surrounding her daughter's remains, we affirm the district court's dismissal of her federal claims."); ***Carruth v. Bentley***, 942 F.3d 1047, 1060 (11th Cir. 2019) ("A terminated government employee cannot bring a procedural due process claim 'before the employee utilizes appropriate, available state remedial procedures.'. . And even '[w]hen a state procedure is inadequate, no procedural due process right has been violated unless and until the state fails to remedy that inadequacy.'. . Assuming that Carruth had a property right in his continued employment . . . Carruth also must show that state law does not afford him an adequate remedial procedure for the deprivation of his rights. To prevail, then, Carruth must allege that he has attempted to make use of whatever state law avenue for relief is available to him and that the remedial procedure is inadequate. By statute, Alabama law provides for judicial review of a conservatorship decision *and* of a decision by the ACUA Board to suspend an employee. . . . Carruth has offered us no reason to conclude or even suspect that this procedure would be inadequate to protect his due process rights. Carruth's claim for reinstatement under Alabama law is being heard in a

competent court of law. In short, he has not shown a clearly established violation of his right to due process."); ***Foxy Lady, Inc. v. City of Atlanta,*** 347 F.3d 1232, 1239 (11th Cir. 2003) ("[W]e conclude that sufficient state process exists to correct any alleged deficiency in the City's liquor license revocation process afforded under ' 30-27. Because an adequate post-deprivation process is in place under state law, no federal procedural due process claim exists.")**;** ***Cotton v. Jackson***, 216 F.3d 1328, 1331-33 (11th Cir. 2000) ("Assuming a plaintiff has shown a deprivation of some right protected by the due process clause, we − when determining if a plaintiff has stated a valid procedural due process claim − look to whether the available state procedures were adequate to correct the alleged procedural deficiencies. . . . If adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process. . . And, to be adequate, the state procedure need not provide all the relief available under section 1983. . .Instead, the state procedure must be able to correct whatever deficiencies exist and to provide plaintiff with whatever process is due. . . . Because we believe that the writ of mandamus would be available under state law to Plaintiff, and because we believe that mandamus would be an adequate remedy to ensure that Plaintiff was not deprived of his due process rights, . . . we conclude that Plaintiff has failed to show that inadequate state remedies were available to him to remedy any alleged procedural deprivations."); ***Bell v. City of Demopolis***, 86 F.3d 191, 192 (11th Cir. 1996) ("The controlling factor in *McKinney* . . . was that the state had a mechanism in place which appears adequate to remedy any procedural due process violations."); ***Wright v. Glynn County Board of Commissioners***, 932 F. Supp. 1476, 1480 (S.D. Ga. 1996) (finding all due process defects cured by later county action); ***Moore v. City of Tallahassee***, 928 F. Supp. 1140, 1145 (N.D. Fla. 1995) ("All that procedural due process requires is a post-deprivation means of redress to correct any error which may have resulted from conflict of interest or bias.").

But see ***Barr v. Johnson***, 777 F. App'x 298, ___ (11th Cir. 2019) ("On appeal, Barr argues that the district court wrongfully applied the Eleventh Circuit's holding in our seminal due process case of *McKinney v. Pate* in finding that the state satisfied its due process obligations by making a postdeprivation remedy available to Barr in the form of judicial review in the state court system. . . Generally speaking, procedural due process requires that the state give the individual notice and an opportunity to be heard before a deprivation. . . Barr argues that because the decision to shutter her businesses was made in the normal course of the defendants' business, predeprivation notice was practicable and thus required under the Supreme Court's holding in *Zinermon v. Burch*[.] . . Because of this, the exceptions to predeprivation due process recognized by the Supreme Court in the *Parratt/Hudson* doctrine are inapplicable. . . Instead, Barr argues, the district court should have analyzed the three-factor test in *Mathews v. Eldridge* to conclude that the City of Center Point should have provided her with predeprivation procedural due process. . . . The defendants hinge a large portion of their argument on the basis of *McKinney*'s remark that an actionable § 1983 claim requires a refusal of the state to provide a remedy. . . However, *McKinney*'s applicability is limited here: The *McKinney* plaintiff alleged that the board overseeing his predeprivation hearing was biased against him. . . Because bias is an intentional wrong, the *Parratt* rationale applied, and all that was necessary was postdeprivation process. . . By contrast, the Supreme Court has held that

the general rule of procedural due process is that the state must attempt to provide a hearing before it deprives one of life, liberty, or property. . . . As the *Zinermon* court went on to note, the *Parratt* test, mentioned at great length in the parties' briefs, is thus an application of the *Mathews* balancing test, which concluded that providing a predeprivation remedy was practically impossible when an employee of the state acted in an unauthorized manner. . . We conclude that *Zinermon* rather than *McKinney* is more illuminating in this case. The defendants fail to rebut the fact that, although the second and third closures of Barr's businesses may have happened after officials provided sufficient due process, the first closure occurred with no predeprivation notice whatsoever. The district court, in fact, made this factual finding as well, noting that the City Council lacked either a resolution or a court order permitting the August 26 closure. Because of this, and because the defendants fail to explain how this deprivation might fall into some sort of exception akin to *Parratt/Hudson*, Barr successfully demonstrates an actionable procedural due process claim. Less clear, however, is what to make of the second and third closures. The record does show that Barr was provided with hearings before the second and third closures, but they may have been constitutionally inadequate, especially given the JCBC's failure to follow state statutory requirements requiring notice and comment. Because we reverse and remand on the basis of the first closure and the defendants' failure to comply with *Zinermon*, we decline to address the merits of the procedures utilized for the second and third closures. More fundamentally, the defendants' proffered application of *McKinney* is largely unworkable. If *McKinney* were directly applicable to this scenario, then we would be gutting any notions of predeprivation due process and blanketly holding that a state can effectuate any and all deprivations under a 'shoot first, ask questions later' mentality, so long as it offers *ex post facto* recourse. Such a reading would allow the *Parratt/Hudson* exceptions to swallow the rules articulated in *Zinermon* and *Mathews*. The facts of *McKinney* are mostly inapposite to this case, and we decline to apply it in such a manner that eliminates notions of predeprivation procedural due process.")

Compare ***Georgia Muslim Voter Project v. Kemp***, 918 F.3d 1262, 1275-76 (11th Cir. 2019) (Pryor (Jill), J., concurring) ("[T]o my knowledge we have never applied *Parratt* to a facial procedural due process challenge to an existing statutory or administrative scheme, and there is good reason not to, at least in this context. Indeed, my dissenting colleague appears not to disagree: he invokes *Parratt* only after opining (incorrectly, I think) that GMVP's claim can only be construed as an as-applied claim. In *Parratt*, *Hudson*, and their progeny, *see, e.g.*, *McKinney v. Pate*, 20 F.3d 1550, 1562-63 (11th Cir. 1994) (en banc), the state actor whose actions were challenged was acting contrary to established state customs or policies. . . . Here, the state actor whose actions are challenged—the Secretary—is not alleged to have acted contrary to Georgia's customs or policies. Rather, he is alleged to have followed them. . . Second, and relatedly, I disagree with the dissent's characterization of signature mismatch determinations as ' "random and unauthorized act[s] by a state employee."'. . The Supreme Court expressly has stated that *Parratt* does not apply where the state actor—here, the Secretary—'delegated to [its employees] the power and authority to effect the' alleged deprivation and the 'concomitant duty to initiate the [state-law] procedural safeguards.'. . These are precisely the circumstances here. The

Secretary has delegated to the county elections officials reviewing absentee ballot application and absentee ballot signatures the power and authority to reject, without predeprivation procedures, perceived signature mismatches. In so doing, the elections officials, rather than engaging in random and unauthorized acts, are following procedures established and authorized by Georgia law—that is, comparing signatures on absentee ballot applications and absentee ballots to the signatures on electors' voter registration cards. . . Those same elections officials initiate the postdeprivation processes in place for rejecting absentee ballot applications and absentee ballots and providing instructions on how to vote despite the rejection. Thus, '[u]nlike in *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged.'. . For these reasons, I cannot agree that *Parratt* applies to this case or in any way bars GMVP from obtaining relief.") *with* ***Georgia Muslim Voter Project v. Kemp***, 918 F.3d 1262, 1284-85 (11th Cir. 2019) (Tjoflat, J., dissenting) ("This case falls squarely within *Parratt* because it would be impracticable for Georgia to provide additional pre-deprivation procedures. . . To state the obvious, the Statutes do not authorize election officials to deprive eligible voters of the right to apply for and to vote by mail-in ballot. Indeed, the very fact that the Secretary would remove election officials shown to perform erroneous signature reviews reveals that election officials 'lack[ ] the state-clothed authority to deprive persons of constitutionally protected interests.'. . I have no doubt, of course, that election officials make erroneous determinations. But the relevant question under *Parratt* is whether it is *practicable* for the state to do more. The volume of signatures at issue in this case provides a ready answer to that question. As of November 2, 2018, 184,925 mail-in ballots had been returned statewide. . . And another 85,398 were still outstanding. . . That's 270,323 ballots. Recall, too, that a mail-in ballot does not issue before an application, which also requires a signature review. . . In short, Georgia's election officials were in for 540,646 signature reviews this past election cycle. It is simply not practicable to provide pre-deprivation notice and an opportunity to be heard when so many signature reviews are at issue. . . Plaintiffs have a remedy; it just isn't a federal one. Georgia superior courts, the state's courts of general jurisdiction, provide Plaintiffs a forum in which to sue the election officials. . . Plaintiffs, moreover, have a procedural due process claim under the state constitution, which prohibits the deprivation of 'life, liberty, or property except by due process of law,'. . . and which confers a private right of action[.]In short, I have no doubt that a suit in state court would make Plaintiffs whole—in other words, that they would be able to vote by mail-in ballot. . . When, as here, it is impracticable for a state like Georgia to provide predeprivation process for erroneous signature reviews because the state must conduct over half a million reviews in short order, a post-deprivation suit against election officials in state court is a constitutionally sufficient remedy.")

See also ***Martinez v. City of Cleveland***, No. 16-4200, 2017 WL 5171254, at *2 (6th Cir. Nov. 8, 2017) (not reported) ("The remaining question is whether Martinez received adequate process. Neither side disputes that the department did not give Martinez notice or a hearing before promoting lower-scoring candidates over him. But lack of *pre*-deprivation process is not dispositive—*post*-deprivation process may suffice. . . And in

the procedural due process context, an adequate remedy available under state law constitutes post-deprivation process. . . Here, Martinez had numerous state-law remedies available to him. . . For example, he could have brought a declaratory judgment action to determine his rights to a promotion or a breach of contract suit, requested an investigation and hearing before the civil service commission, or sought a writ of mandamus. . . And while Martinez disputes whether some of these remedies were available or adequate, he sought a writ of mandamus in this very action. Because Martinez had at least one adequate state-law remedy available to him, no due-process violation occurred."); ***Figgs v. Dawson***, 829 F.3d 895, 906-07 (7th Cir. 2016) ("Figgs had a constitutionally-protected liberty interest in being released from prison before the end of his term for good behavior. . . To prove a deprivation of procedural due process, Figgs must show: (1) the deprivation occurred; (2) it occurred without due process of law; and (3) Dawson subjected him to the deprivation. . . . Figgs claims that Dawson violated his procedural due process rights by deferring action on Figgs's grievance until resolution of the state-court mandamus proceeding. In granting summary judgment in Dawson's favor, the district court relied on *Toney–El* and *Armato* and held that not only did Figgs have available and adequate state-court remedies, he took advantage of them by filing the mandamus proceeding. Figgs asserts on appeal, as he did before the district court, that the mandamus proceeding was inadequate because it was pending for several months until he was able to obtain a ruling that led to his release. In *Toney–El*, this court found that the state-court habeas corpus remedy was adequate despite the fact that the prisoner plaintiff had been held for 306 days past his lawful term of incarceration. Like Toney-El, Figgs did not utilize his state-court remedy until well after the point in time when he maintains he was deprived of his liberty. Figgs cites no authority for the proposition that because he did not obtain immediate relief, his mandamus remedy was inadequate. Accordingly, we agree with the district court that the state-court remedy, which Figgs utilized, precludes his claim against Dawson for procedural due process.")

See also ***Horton v. Bd of County Commissioners of Flagler County,*** 202 F.3d 1297, 1299, 1300 & n.3 (11th Cir. 2000) ("The district court mistakenly thought the rule of our *McKinney* decision is based on ripeness or exhaustion principles and turns on whether the federal procedural due process claim in a particular case has been presented to the state courts by the plaintiff seeking to pursue that claim in federal court. But the *McKinney* rule does not turn on whether a plaintiff has presented the claim to the state courts, because the rule is not based on ripeness or exhaustion principles. . . Instead, *McKinney* is based on a recognition that the process a state provides is not only that employed by the board, agency, or other governmental entity whose action is in question, but also includes the remedial process state courts would provide if asked. . . The *McKinney* rule is not micro in its focus, but macro. It does not look to the actual involvement of state courts or whether they were asked to provide a remedy in the specific case now before the federal court. Instead, the *McKinney* rule looks to the existence of an opportunity − to whether the state courts, if asked, generally would provide an adequate remedy for the procedural deprivation the federal court plaintiff claims to have suffered. If state courts would, then there is no federal procedural due process violation regardless of whether the plaintiff has taken advantage of the state remedy or attempted to do so. If state courts generally would not provide an adequate remedy for that type

of procedural deprivation, then the federal court determines whether the Fourteenth Amendment Due Process Clause requires such a remedy, and if it does, the federal court remedies the violation. Either way, the federal court decides the federal procedural due process claim; that claim is not sent back to state court. . . . Faced with a § 1983 complaint alleging that a board, agency, or other entity acting under state law has deprived a plaintiff of a procedural guarantee protected by the Fourteenth Amendment, a federal district court could put the following question to the defendants: 'If the evidence proves the claimed deprivation, does the plaintiff have an adequate state law remedy, and if so, what is it?' If the defendants answer 'no,' and the court is convinced that answer is correct, then the court should proceed with adjudication of the federal due process claim just as though *McKinney* had never been decided. If, however, the answer to the question about an adequate state remedy is 'yes,' then the federal district court can proceed to adjudicate the state law claims over which it will have supplemental jurisdiction.").

Compare ***Clukey v. Town of Camden***, No. 12–1555, 2013 WL 2158654, *8-*10 (1st Cir. May 21, 2013) ("Here, we are not dealing with a contractual dispute over compensation for past work performed analogous to *Ramírez* or *Lujan.* The property right at issue in this case is the right to be employed if certain conditions are met. *Lujan* made clear that the right 'to pursue a gainful occupation ... cannot be fully protected by an ordinary breach-of-contract suit.'. . In fact, there is a long history of case law in this circuit holding that public employees who have been deprived of a property interest in employment without due process may bring a § 1983 claim in federal court regardless of the availability of a state law breach-of-contract claim. . . .The Town also argues that the availability of post-deprivation grievance procedures in the CBA forecloses Clukey's claim. It is true that where the grievance procedures contained in a collective bargaining agreement satisfy constitutional due process minimums, aggrieved employees have little room to claim that they were deprived of a property interest without due process of law. . . The mere fact that a collective bargaining agreement contains a hearing procedure, however, does not mean that constitutional due process minimums are satisfied. Rather, grievance procedures extinguish a plaintiff's due process claim only if the procedures meet or exceed constitutional standards. . .Here, we have already determined that the Town's procedures, as described in the complaint, are constitutionally inadequate insofar as they fail to provide any notice whatsoever to Clukey of recall positions. Thus, the Town cannot use the theoretical availability of grievance procedures to shield themselves from Clukey's claims. . . . In the posture of this case, an appeal from a judgment granting the Town's motion to dismiss, we conclude that Clukey has alleged facts establishing that he had a protected property interest in his right to be recalled to employment with the police department. When a specific position became open within the department, Clukey had a legitimate claim of entitlement to that position, unless he was found to be unqualified. As such, when the Town decided to fill openings in the department with new hires rather than Clukey, the Town had a constitutional obligation to provide Clukey notice that he had been found unqualified and an opportunity to challenge that determination. The Town's alleged failure to provide Clukey with any notice at all, either before or after filling open positions with new hires, states a claim for a procedural due process violation. That injury cannot be fully redressed by recourse to a state law breach of contract claim or the grievance procedures in the Collective Bargaining Agreement. If the specifics of the

process required to afford Clukey due process remain in dispute after remand, those specifics can only be determined on the basis of a more fully developed record, analyzed pursuant to the *Mathews* balancing test. For these reasons, we *vacate* the district court's dismissal of Clukey's complaint, and *remand* for further proceedings consistent with this opinion."); ***Christiansen v. West Branch Community School Dist.***, 674 F.3d 927, 935, 936 (8th Cir. 2012) ("[W]e have held that a government employee who chooses not to pursue available post-termination remedies cannot later claim, via a § 1983 suit in federal district court, that he was denied post-termination due process. . . That said, we have also held that 'it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process.'. . Thus, the effect of a government employee's failure to pursue available post-termination remedies depends on whether the employee alleges the deprivation of pre-termination process or post-termination process. In this case, Christiansen failed to pursue available post-termination process. So, the district court properly dismissed Christiansen's procedural due process claims under *Riggins* and *Winskowski* to the extent they allege the denial of *post-termination* due process. But, Christiansen's complaint also alleges the denial of *pre-termination* process and, under *Keating,* the district court should not have dismissed such claims on the basis of Christiansen's failure to pursue post-termination remedies. . . We need not reverse the district court's judgment on this basis, however, because Christiansen's complaint fails to plausibly plead a deprivation of pre-termination process."); ***Baird v. Bd. of Educ. for Warren Community Unit School Dist. No. 205,*** 389 F.3d 685, 689-92, 695 (7th Cir. 2004) ("The issue here is whether a state breach of contract suit provides due process if the pre-deprivation hearing does not. We also turn to the question whether a public employee waives the right to challenge a pre-termination hearing on due process grounds when he attends the hearing only to object to its procedures. . . . The issue in the case before us is whether a post-termination lawsuit for breach of contract can remedy the full due process deficiency in the pre-termination proceedings. . . . The postdeprivation remedies appropriate to the deprivation of an interest to which there is a present entitlement are characterized by promptness and by the ability to restore the claimant to possession. The underlying concept seems to be that the remedy is available before the loss has become complete and irrevocable. A state law breach of contract action is not an adequate post-termination remedy for a terminated employee who possesses a present entitlement and who has been afforded only a limited pre-termination hearing. . . . Thus, when a public employee terminated for cause has a present entitlement, and when the only available post-termination remedy is the opportunity to bring a state breach of contract suit, the pre-termination hearing to which such an employee is entitled must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirements of notice and an opportunity to be heard. . . . Although the issue may be close, we conclude that Baird did not waive his right to contest the adequacy of the hearing on due process grounds. The obvious deficiency of the procedures offered in the instant case, and the fact that Baird did appear to state his objection to these procedures, distinguishes it from *Fern* and similar cases. Seventh Circuit authority establishes only that the right to object to an arguably deficient hearing is waived when an employer offers a pre-termination hearing and a public employee facing termination fails to accept the offer by failing to appear."); ***Dailey v. Vought Aircraft Company***, 141 F.3d 224, 230 (5th Cir. 1998) ("The

record unequivocally shows that the district court did not provide Collie with notice or an opportunity to be heard before disbarring her. . . . Collie's unsuccessful appeal of the disbarment order to the chief judge of the district did not repair the district court's violation of her rights to due process under the Constitution and the court rules. Prior to an attorney's disbarment, he or she is entitled to notice of the charges made and an opportunity to explain or defend (except for extreme misconduct occurring in open court, in the presence of the judge)."); ***Cotnoir v. University of Maine Systems***, 35 F.3d 6, 12-13 (1st Cir.1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation. Thus even where a discharged employee receives a post-termination hearing to review adverse personnel action, the pretermination hearing still needs to be extensive enough to guard against mistaken decisions, and accordingly, the employee is entitled to notice, an explanation of the employer's evidence, and an opportunity to present his side of the story. If an employee is fired without these pre-termination protections, normally the constitutional deprivation is then complete. Thus, the post-termination grievance procedures which the individual defendants provided to Cotnoir could not compensate for a lack of pre-termination process afforded Cotnoir." citations omitted) *and* ***Stallworth v. City of Evergreen***, 680 So.2d 229, 234-35 (Ala. 1996) ("[T]he Eleventh Circuit's reliance on [*Parratt*] to buttress its conclusion in *McKinney* that a denial of due process at the pretermination level can be fully remedied by a procedurally adequate post-termination hearing is questionable. . . . To hold that a procedurally adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pretermination hearing completely devoid of due process of law would be to render the United States Supreme Court's holding in *Cleveland Board of Education* a nullity. Furthermore, no matter how fair and adequate the procedures at the post-termination hearing may be, the initial decision made after the pretermination hearing inevitably will have diminished significantly the employee's chances of prevailing at the post-termination hearing.") *with* ***Dailey v. Vought Aircraft Company***, 141 F.3d 224, 232 (5th Cir. 1998) (Jerry E. Smith, J., dissenting) ("I agree with the majority that the district court's failure to give Collie a hearing prior to her suspension was constitutionally infirm because due process requires that an attorney be given notice and an opportunity to be heard before he is suspended or disbarred, not after. The majority and I part company, however, when it comes to whether the district court successfully cured that violation through the subsequent hearing before the chief judge. . . . I do not disagree with the majority that Collie was entitled to a hearing before suspension. Had she. . . suffered some distinct, quantifiable harm for the period between deprivation and hearing, she would be entitled to a remedy. . . But the majority appears to hold that a hearing subsequent to suspension can never act as a cure because the cure comes after the deprivation. The very definition of a 'cure,' however, is a procedurally sufficient hearing that comes after a procedural due process violation has occurred, that is, after the deprivation has taken place.").

See also ***Luna v. Valdez***, No. 3:15-CV-3520-D, 2018 WL 684897, at *8 (N.D. Tex. Feb. 2, 2018) ("Defendants move for summary judgment on Luna's procedural due process claim on the ground that he had other remedies available to him, including, *inter alia*, a writ of *habeas corpus*—a remedy he ultimately used to secure his release—and a suit based on the state tort of

false imprisonment. They argue that '[g]iven these several remedies available to [Luna] to secure his own release ('he held the keys to his freedom') or obtain compensation, under the *Parratt/Hudson* doctrine he has no claim actionable under the Fourteenth Amendment.'. . The court agrees. Although Luna argues in his response that he 'made several attempts after his court-ordered release date to obtain his freedom, continuously, verbally requesting Defendants' officers for assistance with his release, to which they responded with indifference,'. . . he does not contend or adduce any evidence that the procedures available under Texas law (including a writ of *habeas corpus* or a state tort claim for false imprisonment) would not have afforded him an adequate post-deprivation remedy. Accordingly, the court grants defendants' motion for summary judgment on Luna's Fourteenth Amendment procedural due process claim.")

8. Note on *Sandin v. Conner*

In ***Sandin v. Conner***, 515 U.S. 472 (1995), the Court held, in the context of a procedural due process claim raised by an inmate placed in disciplinary segregation for thirty days, that, despite the mandatory language of the applicable prison regulation, a constitutionally protected liberty interest will generally be "limited to freedom from restraint which. . . imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life." *Id*. at 484.

See also ***Memphis A. Philip Randolph Inst. v. Hargett***, 978 F.3d 378, 406-09 (6th Cir. 2020) (Moore, J., dissenting) ("'Protected liberty interests spring from two possible sources, the due process clause itself and the laws of the state involved.' . . Plaintiffs' primary argument is that Tennessee law establishes a liberty interest in exercising the right to vote absentee by mail and to have that vote counted. . . Because I agree, I would decline to rule on Plaintiffs' secondary argument: that the Constitution itself establishes a liberty interest in the absentee voting context sufficient to trigger due process requirements. This court synthesized the standard for determining whether state law creates a protected liberty interest in *Tony L. By and Through Simpson v. Childers*:

State-created liberty interests arise when a state places 'substantive limitations on official discretion.' A state substantively limits official discretion 'by establishing "substantive predicates" to govern official decisionmaking ... and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.' The state statutes or regulations in question also must use 'explicitly mandatory language' requiring a particular outcome if the articulated substantive predicates are present. Finally, the statute or regulation must require a particular substantive outcome. State-created procedural rights that do not guarantee a particular substantive outcome are not protected by the Fourteenth Amendment, even where such procedural rights are mandatory. . . . In these circumstances, Tennessee has created a liberty interest in voting absentee by mail sufficient to trigger due process protection. . . . *Sandin* does represent a change in the legal framework for analyzing the existence of state-law created liberty interests in the context of prison regulations, shifting the inquiry from one focused on the language of the regulation (as is the case for the typical state-created interest analysis) back to one focused on the 'nature of the deprivation' relative to the strictures of prison life. . . But *Sandin* did not purport to displace the established

standard for determining whether a state law establishes a liberty interest triggering due process requirements outside of the context of prison regulations. Instead, the Court expressly limited its inquiry to 'the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause.'. . Indeed, the Court emphasized the unique position of prison litigation, reiterating its view that in the context of prisoner litigation 'federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.'. . Moreover, the considerations that motivated the Court—a desire to avoid 'disincentives for States to codify prison management procedures' while affording state officials the flexibility to 'fine-tun[e] ... the ordinary incidents of prison life'—have no bearing when considering procedural due process claims that do not involve prison regulations or incarcerated prisoners. . . The Court recognized as much, remarking that a focus on mandatory language 'may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public' but that '[i]t is a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison.'. . Although this court has embraced *Sandin* in the context of prisoner litigation, it has done so while reiterating the same unique concerns implicated by prisoner litigation that motivated the Court in *Sandin*. . . Indeed, this court has tacitly rejected the applicability of *Sandin* outside the prison litigation context, applying the usual state-law created interests standard outside of that context.")

One federal district court has predicted that, "[w]hatever else may be said with regard to the *Sandin* majority, it will not take a Brandeis brief to establish that the real workload of the federal trial judiciary will be greatly increased as the result of the *Sandin* decision, although clearly such was not the intent or purpose of its majority." ***McKinney v. Hanks***, 911 F. Supp. 359, 361 (N.D. Ind. 1995).

See also ***Sealey v. Giltner***, 197 F.3d 578, 585 (2d Cir. 1999) ("We agree with the Magistrate Judge that the ultimate issue of atypicality is one of law, but that does not always mean that it need not be submitted to the jury. The content of the *Sandin* standard of 'atypical and significant hardship' is an issue of law, but if the facts concerning the conditions or the duration of confinement are reasonably in dispute, the jury (where one is claimed) must resolve those disputes and then apply the law of atypicality, as instructed by the Court. In appropriate cases, the trial court might consider submitting interrogatories to the jury and then itself applying the law of atypicality to the facts as found by the jury.").

See also ***Lisle v. Welborn***, 933 F.3d 705, 721 (7th Cir. 2019) ("When considering whether disciplinary segregation imposes atypical and significant hardships, we look to both the duration of the segregation and the conditions endured. . . First, the duration of segregation was not an atypical or significant hardship. We have found that, depending on the conditions of confinement and whether there were any additional punishments, a period of segregation considerably shorter than four months may satisfy this requirement. . . However, we have also found longer durations did not. . . A sentence of four months in segregation for the discovery of contraband is not so atypical and significantly harsh that it creates a liberty interest. Second, Lisle has not shown that

the conditions of his confinement in segregation themselves imposed atypical and significant hardships. Lisle needed to show that the conditions of his confinement in his segregated cell deviated substantially from the ordinary conditions of prison life. . . We agree with the district court that Lisle did not offer evidence that would allow a reasonable jury to find the conditions of his segregation imposed atypical and significant hardships. The vague description of his cell, including rust on the bars and 'corroded feces' in the toilet, does not itself reveal much. Regardless, a jury could not reasonably infer that these conditions were unique to cells in the segregation unit or that these conditions caused Lisle any significant hardship. Lisle is correct that we do not find conditions are typical and acceptable merely because they do not rise to the most extreme conditions, but he needed to offer some evidence that would allow a jury to determine that the conditions in segregation deviated substantially from ordinary conditions of his confinement. Lisle further argues that placing an inmate in a cell that exacerbates his depression and suicidal urges without providing a crisis team implicates his liberty interest. We need not decide whether this is correct because the record does not reflect Lisle's mental health crisis was exacerbated by the conditions of his confinement. Instead, the record shows Lisle attributes his frustration with the disciplinary hearing and the grievance process as the trigger for his worsening mental health."); ***Waldman v. Conway***, 871 F.3d 1283, 1290 (11th Cir. 2017) ("A prisoner can be deprived of his liberty such that due process is required in two contexts: (1) 'when a change in the prisoner's conditions of confinement is so severe that it essentially exceeds the sentence imposed by the court'; or (2) 'when the state has consistently bestowed a certain benefit to prisoners, usually through statute or administrative policy, and the deprivation of that benefit imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."'); ***Martin v. Duffy***, 858 F.3d 239, 253-54 (4th Cir. 2017) ("[A] prisoner claiming a violation of his right to procedural due process must show: (1) that there is a 'state statute, regulation, or policy [that] creates such a liberty interest,' and (2) that 'the denial of such an interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."'. . An inmate who fails to satisfy these two requirements '*cannot* "invoke the procedural protections of the Due Process Clause."'. . . In his complaint, Martin alleged that he remained in segregation for 110 days without receiving a hearing. Because South Carolina Department of Corrections procedure mandated review of Martin's placement in pre-hearing detention or 'segregation' within seventy-two hours of his initial placement and prescribed an initial detention of up to thirty days—with the option of a single thirty-day extension. . .—the complaint adequately alleged the existence of a state policy creating a protected liberty interest. . . Turning to the second prong, we observe that '[w]hether confinement conditions are atypical and substantially harsh "in relation to the ordinary incidents of prison life" is a "necessarily ... fact specific" comparative exercise.'". . . Although Martin's complaint included the conclusory allegation that he 'suffered an atypical and significant hardship' as the result of his placement in segregation, . . . the complaint did not identify any conditions Martin experienced that gave rise to his alleged hardship. Such '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice [to state a plausible claim to relief]. ... While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.'. . Because Martin's complaint does not include any factual allegations establishing that he experienced conditions during his temporary placement in

segregation that 'were atypical and significantly harsh compared to [those of] the general population,'. . . Martin failed to allege sufficient facts to state a plausible due process claim."); ***Incumaa v. Stirling***, 791 F.3d 517, 527 (4th Cir. 2015) ("Because there is uncontroverted evidence that the Department policy here mandates review of Appellant's security detention every 30 days, we have no trouble concluding that Appellant has met the first prong of his burden under *Sandin* and its progeny. The predominant question in this case, rather, is whether Appellant established that the conditions he experienced during his two decades in solitary confinement present atypical and significant hardship in relation to the ordinary incidents of prison life."); ***Clark v. Wilson***, 625 F.3d 686, 691, 692 (10th Cir. 2010) ("Although *Sandin* addresses liberty interests, we interpret it to extend the same analysis to protected property interest inquiries. . . We have since applied the *Sandin* analysis beyond the context of prison conditions. In *Steffey v. Orman*, for example, we held that a prisoner did not have a protected property interest in a money order sent to him by another prisoner's mother. . . . Because it is based on the 'legitimate expectations' methodology expressly abrogated by *Sandin, Gillihan's* holding that prisoners have a protected property interest in the funds in their prison trust accounts is no longer good law and, hence, not 'clearly established' in this circuit. . . As in *Steffey,* we cannot find Clark had a protected property interest in the frozen funds without first applying the *Sandin* test to his claim. But we have never before addressed the question of whether freezing a prison account in response to a garnishment summons imposes an atypical and significant hardship on an inmate in relation to the ordinary incidents of prison life. Neither did any Supreme Court decision on point or clearly established authority from other circuits exist at the time of Wilson's actions. . . In sum, because neither the Supreme Court nor any court of appeals had applied *Sandin's* 'atypical and significant hardship' test to the freezing of a prison account by 2007, Wilson did not violate a clearly established constitutional right and hence is entitled to qualified immunity."); ***Steffey v. Orman***, 461 F.3d 1218, 1221, 1222 n.4 (10th Cir. 2006) ("This court has ruled that property interest claims by prisoners are also to be reviewed under *Sandin's* atypical-and-significant-deprivation analysis . . . . The Second and Fifth Circuits have held that *Sandin* applies only to liberty interests claims. [citing cases] As we noted in *Cosco*, the Sixth and Ninth Circuits have suggested, but not explicitly held, that *Sandin* does not govern prisoner property interest claims."); ***Cosco v. Uphoff***, 195 F.3d 1221, 1224 (10th Cir. 1999) ("Appellants claim in the case at hand that mandatory language in the regulations governing what the prisoners could keep in their cells created a property interest or entitlement and ensured them a continuation of the same interest absent due process. That is precisely the methodology rejected by the Supreme Court in *Sandin*. The regulation of type and quantity of individual possession in cells is typical of the kinds of prison conditions that the Court has declared to be subject to the new analysis set forth in *Sandin*. Applying the Court's analysis, we cannot say that the new regulations promulgated in this case present 'the type of atypical, significant deprivation [of their existing cell property privileges] in which a State might create a [property] interest.'").

In ***Keenan v. Hall***, 83 F.3d 1083, 1089 (9th Cir. 1996), a panel of the Ninth Circuit Court of Appeals observed:

> In this case, the district court on remand will be on the cutting edge of this process. We suggest that if it finds conditions in the IMU that violate the Eighth Amendment, the transfer to the IMU would impose "atypical and significant hardship." We do not suggest, however, that the new test is synonymous with Eighth Amendment violation. What less egregious condition or combination of conditions or factors would meet the test requires case by case, fact by fact consideration. The *Sandin* Court seems to suggest that a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing.

See also ***Wagner v. Hanks***, 128 F.3d 1173, 1175-76 (7th Cir. 1997):

> [U]nder *Sandin* the key comparison is between disciplinary segregation and nondisciplinary segregation rather than between disciplinary segregation and the general prison population. . . . We do not think that comparison can be limited to conditions in the same prison, unless it's the state's most secure one. . . . [T]he courts have held that the transfer of a prisoner from one prison to another is not actionable as a deprivation of constitutionally protected liberty even if the conditions of confinement are much more restrictive in the prison to which the prisoner is being transferred. . . . To have held otherwise would as a matter of logic have required the courts to adjudicate transfers within a prison − to determine, for example, whether the petitioner had been deprived of liberty by being transferred from a large cell to a small one. Federal judges would have been plunged deep into the minutiae of prison administration, much as if they were managing a hotel chain. When *Sandin* is interpreted in light of the transfer cases, it becomes apparent that the right to litigate disciplinary confinements has become vanishingly small. . . . The question whether the comparison group includes other prisons did not have to be answered in *Sandin*, and is not discussed in either the majority opinion or any of the separate opinions. We consider ourselves bound by the Court's logic as well as its narrow holding, but we would welcome clarification of the issue by the Court. A subsidiary issue on which authoritative guidance would also be most welcome is whether the comparison group can be confined to a single state. Indiana points out that it frequently swaps prisoners with other states pursuant to an interstate compact to which it is a party. . . The logic of *Sandin* implies that the conditions of Wagner's disciplinary segregation are atypical only if no prison in the United States to which he might be transferred for nondisciplinary reasons is more restrictive.

and ***Bryan v. Duckworth***, 88 F.3d 431, 434 (7th Cir. 1996):

> Read together, *Meachum* and *Sandin* lay the groundwork for an argument that Bryan must show that segregated confinement worked an "atypical, significant deprivation" in comparison with the ordinary conditions of Indiana's most secure

> prison. Maybe that is where he is, in which event the two approaches collapse into one − as in *Sandin* itself, where the petitioner was a prisoner in a maximum security prison. That is a matter for exploration on remand and a reason for us not to attempt to decide which approach is correct − comparison with the conditions of the general population of the petitioner's prison or comparison with the conditions of the general population of the harshest prison in the state. If the district judge finds on remand either that the conditions of the segregation unit in which Bryan was confined were not substantially harsher than his normal prison environment, or that they were substantially harsher than that of the normal prison environment of Indiana's most secure prison, the judge will not have to decide the proper interpretation of *Sandin*. If, however, she finds that the conditions of Bryan's confinement, while substantially harsher than the normal conditions in his prison, were not substantially harsher than those in Indiana's most secure prison, she will then have to decide what the proper comparison is. We leave that question open because it may very well wash out on remand. . . and because it is a difficult question on which the district judge's view may be helpful to us.

In ***Wilkinson v. Austin***, 125 S. Ct. 2384, 2394, 2395 (2005), the Court noted:

> In *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. . . This divergence indicates the difficulty of locating the appropriate baseline, an issue that was not explored at length in the briefs. We need not resolve the issue here, however, for we are satisfied that assignment to OSP [Ohio State Penitentiary] imposes an atypical and significant hardship under any plausible baseline. . . . For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. . . . While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.

Compare ***Apodaca v. Raemisch***, 139 S. Ct. 5, 8, 10 (2018) (Statement of Justice Sotomayor respecting the denial of certiorari) ("Two Justices of this Court have recently called attention to the broader Eighth Amendment concerns raised by long-term solitary confinement. See *Ruiz v.*

Texas, 580 U.S. ——, ——-—— (Breyer, J., dissenting from denial of stay of execution); *Davis v. Ayala,* 576 U.S. ——, ——-—— (2015) (Kennedy, J., concurring). Those writings came in cases involving capital prisoners, but it is important to remember that the issue sweeps much more broadly: whereas fewer than 3,000 prisoners are on death row, a recent study estimated that 80,000 to 100,000 people were held in some form of solitary confinement. . . . Courts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners like Apodaca, Vigil, and Lowe in 'near-total isolation' from the living world, . . . in what comes perilously close to a penal tomb.") *and* ***Davis v. Ayala***, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("[P]rison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price. . . In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.") *with id.* (Thomas, J., concurring) ("I write separately only to point out, in response to the separate opinion of Justice KENNEDY, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.").

Compare ***Prieto v. Clarke***, 780 F.3d 245, 251-54 (4th Cir. 2015) ("The Eighth Amendment requires a court to examine whether prison conditions impose cruel and unusual punishment. The Due Process clause requires a court to determine whether a state has provided prisoners with adequate process in applying prison regulations and policies. Treating *Sandin* and *Wilkinson* as holding that confinement conditions alone trigger a Due Process claim—without regard to whether a state policy or regulation provides the basis to challenge such conditions—would elide that critical distinction. Prieto thus errs in contending that harsh and atypical confinement conditions in and of themselves give rise to a liberty interest in their avoidance. . . .The record is clear that under Virginia law, a capital offender has no expectation or interest in avoiding confinement on death row. A written Virginia policy requires all capital offenders to be housed on death row prior to execution, without any possibility of reclassification. . . .[A] court cannot conclude that death row inmates have a state-created interest in consideration for non-solitary confinement when the State's established written policy expressly precludes such consideration. . . .Nor can Prieto establish that the conditions of his confinement impose an atypical and significant hardship in relation to the ordinary incidents of prison life. . . . [N]either *Wilkinson* nor *Beverati* involved a discrete class of inmates who had been *sentenced to death* and *for that reason* were required by state law to be confined under particular conditions. . . Rather, *Wilkinson* and *Beverati* found confinement conditions that were *not* required by a particular conviction and sentence to impose an atypical and significant hardship. These holdings certainly do not mean that similar conditions pose an atypical and significant hardship where, as here, state law does mandate that a particular conviction and sentence require confinement under such conditions. When determining the

baseline for atypicality, a court must consider whether the confinement conditions are imposed on a prisoner *because of* his conviction and sentence. For conditions dictated by a prisoner's conviction and sentence are the conditions constituting the 'ordinary incidents of prison life' for that prisoner. . . .[W]e simply recognize, as we must, that in the unusual instances in which state law mandates the confinement conditions to be imposed on offenders convicted of a certain crime and receiving a certain sentence, those confinement conditions are, by definition, the 'ordinary incidents of prison life' for such offenders. Virginia law mandates that all persons convicted of capital crimes are, upon receipt of a death sentence, automatically confined to death row. Thus, in Virginia the ordinary incidents of prison life for those inmates, including Prieto, include housing on death row.") *with* ***Prieto v. Clarke****,* 780 F.3d 245, 255-56, 258-59 (4th Cir. 2015) (Wynn, J., dissenting) ("The Supreme Court found the conditions in *Wilkinson* sufficiently egregious that 'taken together[,] they impose an atypical and significant hardship within the correctional context ... [and thereby] give rise to a liberty interest in their avoidance.'. . In other words, the restrictive conditions could be imposed-but not without procedural safeguards such as notice and an opportunity to be heard. This case presents conditions of confinement strikingly similar to, and arguably more egregious than, those in *Wilkinson.* I would therefore follow *Wilkinson* and find Plaintiff Alfred Prieto entitled to at least some modicum of procedural due process. In my view, the majority opinion reads *Wilkinson* unnecessarily narrowly in signing off on Prieto's automatic, permanent, and unreviewable placement in the highly restrictive conditions of Virginia's death row. Accordingly, I respectfully dissent. . . .In sum, taking the Supreme Court at its word, it told us that we are not to parse written regulations but rather that the 'touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life.'. . Here, as in the strikingly similar *Wilkinson,* the conditions are sufficiently egregious that 'taken together[, they] impose an atypical and significant hardship within the correctional context' when compared to 'any plausible baseline' and thus 'give rise to a liberty interest in their avoidance.' . . .At the end of the day, all of this ink is being spilled over whether Virginia needs to provide minimalist procedural safeguards like those in *Wilkinson* to less than ten prisoners—the current number of inmates on Virginia's death row. Again, the 'harsh conditions may well be necessary and appropriate' for these prisoners. . . But that 'does not diminish' the conclusion that 'the conditions give rise to a liberty interest in their avoidance'—and that all that would be required to comport with due process would be informal notice and an informal opportunity to be heard. . . These procedural safeguards, in my view, Prieto should have.").

Compare ***Hamner v. Burls***, 937 F.3d 1171, 1179-80 (8th Cir. 2019) ("Hamner argues that his Fourteenth Amendment rights were violated when prison officials placed him in administrative segregation for 203 days without affording him proper procedural avenues for challenging his classification. Prisoners have a liberty interest in freedom from conditions of confinement that impose 'atypical and significant hardship' relative to 'ordinary incidents of prison life.'. . The duration and degree of restrictions bear on whether a change in conditions imposes such a hardship. . . Hamner contends that the conditions of his confinement in administrative segregation departed

materially enough from his experience in general population to trigger a liberty interest. He also claims that prison officials afforded him inadequate process by failing to articulate a clear justification for his placement in administrative segregation and to afford meaningful periodic review of his classification thereafter. Hamner identifies no circuit precedent holding that an inadequate justification for administrative segregation or shortcomings in review of a prisoner's placement violate the Due Process Clause. Instead, he attempts to derive a set of legal rules from cases in which we have held that prisoners did *not* allege a sufficient liberty interest. . . . None of the cited cases, however, clearly establishes the 'violative nature of [the] *particular* conduct' in question here. . . Our precedents have said that 'a demotion to segregation, even without cause, is not itself an atypical and significant hardship,'. . . and held that nine months in administrative segregation did not deprive a mentally ill prisoner of a liberty interest. . . While it is possible in this fact-specific area that a combination of circumstances involving solitary confinement could curtail a liberty interest, *e.g.*, *Incumaa v. Stirling*, 791 F.3d 517, 531-32 (4th Cir. 2015); *Williams v. Norris*, 277 F. App'x 647, 648-49 (8th Cir. 2008) (per curiam), it is not beyond debate that the defendant officials did so by segregating a prisoner with Hamner's particular medical condition for 203 days under the conditions alleged. Where Hamner's only remaining claim is for damages, we conclude that the officials are entitled to qualified immunity.") *with* ***Hamner v. Burls***, 937 F.3d 1171, 1180-81 (8th Cir. 2019) (Erickson, J., concurring) ("I concur in the majority's analysis, but write separately to express my concerns about Hamner's placement in administrative segregation and our reluctance to meaningfully address the significant hardship imposed on inmates placed in isolation, particularly those with pre-existing mental health issues. In light of the detrimental and devastating effects that placement in administrative segregation has on the human psyche, I am troubled in this case by both the prison administrators' lack of process and their failure to comply with their own policies. While I agree that there is currently no precedent in our court establishing a due process violation for failing to provide adequate procedural protections in the context of administrative segregation, I believe that the Constitution requires, at a minimum, an opportunity for meaningful review when prison administrators impose restrictions on an inmate as significant and as potentially injurious as placement in administrative segregation. I also believe that the time has come to revisit our precedent that ignores the known negative effects of segregation and isolation. Hamner alleged that the Arkansas Department of Corrections violated its own policies and the Due Process Clause by failing to provide an adequate justification for administrative segregation and by allowing a review process that essentially provided no meaningful review. Hamner was denied a probable cause hearing required by prison policy to take place within 72 hours of placement in administrative segregation. When the hearing actually occurred, Hamner was neither given advance notice of it nor an opportunity to appear. By the time Hamner was allowed to appear, more than a dozen days had passed. Hamner further alleged that prison policy provides for review hearings every seven days for the first two months. Documentation of the first seven-day review hearing in the record is dated May 13, 2015, when Hamner had been in administrative segregation for six weeks. It is uncontroverted that the check-the-box form completed by prison officials following the hearing gave no reason for Hamner's initial assessment or continued placement in administrative segregation. In fact, the forms completed following the review hearings contained no rationale for the initial placement or justification for continued

placement in administrative segregation until August 12, 2015 (more than four months after Hamner was originally placed in administrative segregation) and then the form only contained the handwritten words 'security concerns.' Hamner disputes that he ever expressed a security concern. No findings were made that evidenced the nature of the alleged security concern. Hamner was inexplicably confined in administrative segregation for nearly five months without any explanation. During the almost seven months he was held in administrative segregation, he was given no meaningful opportunity to challenge his placement in isolation. As noted by the majority, we have consistently said that placement in administrative segregation, even without cause, is not itself an atypical and significant hardship. Given the developing science of mental health and what is now known – that is, the profound detrimental and devastating impact solitary confinement has on an inmate's psyche, particularly an inmate with pre-existing mental illnesses – we can only reach the conclusion that this type of isolation is, as a matter of law, not an atypical and significant hardship if we ignore reality. The majority acknowledges that '[s]cholarly literature about negative effects of segregation may influence prison administrators and future court decisions.' I suggest the time has come to consider that literature and reverse the precedent that stands for the proposition that isolation is not a significant hardship with constitutional implications. If we also factor in the prison administrators' failure to provide any explanation for Hamner's placement in administrative segregation for nearly five months and the hollow review process afforded him, I believe Hamner has shown a sufficient hardship to trigger a liberty interest. But, because I reluctantly conclude that our precedent precludes a finding of the existence of a clearly established constitutional right giving sufficient notice to prison administrators, I concur.")

See also ***Butler v. S. Porter***, 999 F.3d 287, 296-97 (5th Cir. 2021) ("We look specifically at the severity and duration of restrictive conditions to decide whether a prisoner has a liberty interest in his custodial classification. . . The Supreme Court has recognized that there are circumstances where solitary confinement, in conjunction with indefinite duration and disqualification from parole, can constitute such hardship. . . Regarding the duration of the restrictive confinement, we have said 'that two and a half years of segregation is a threshold of sorts for atypicality ... such that 18–19 months of segregation under even the most isolated of conditions may not implicate a liberty interest.'. .In *Wilkinson*, the Supreme Court concluded that the defendant experienced 'atypical and significant hardship' because he was in an Ohio Supermax facility and prohibited from 'almost all human contact,' including communication with other inmates; the lights were on for twenty-four hours per day; he could exercise only one hour per day in a small room; review of placement occurred only annually; and placement in the facility disqualified an inmate from parole consideration. . . Here, in contrast, the magistrate judge found that Butler could take courses, had weekly access to a telephone, and could exercise outside. Moreover, Butler provided documentation showing that prison officials reviewed his SHU stay at least monthly and sometimes weekly. Butler does not challenge the determination that the conditions he faced in the SHU were not onerous enough to constitute an atypical prison situation. . . He has thus abandoned this argument. . . Moreover, Butler is unable to show that the conditions in the SHU were severe enough to implicate due process concerns. Butler instead argues that his circumstances implicated a liberty interest, relying upon internal regulations. However, '[o]ur case

law is clear ... that a prison official's failure to follow the prison's own policies, procedures or regulations does not constitute a violation of due process, if constitutional minima are nevertheless met.'. . Because Butler did not allege a protectable liberty interest, he has not shown that any omissions in process violated the Constitution, . . . regardless of whether the prison did or did not follow its own policies."); ***Porter v. Pennsylvania Dep't of Corrections***, 974 F.3d 431, 437-38, 449-51 (3d Cir. 2020) ("Because we are mindful that 'it is often appropriate and beneficial to define the scope of a constitutional right' to 'promote[ ] the development of constitutional precedent' before deciding whether the right was clearly established, we will begin by evaluating whether Defendants have violated Porter's constitutional rights. . . . Porter first argues that, according to our precedent in *Williams*, Defendants have violated his procedural due process rights by keeping him in solitary confinement for thirty-three years without any regular, individualized determination that he needs to be in solitary confinement, even though he has been granted a resentencing hearing. We agree. . . . *Williams* governs Porter's procedural due process claim. Because Porter's procedural due process rights have been clearly established since we decided *Williams* in 2017, Defendants are not entitled to qualified immunity on this claim. In *Williams*, we explicitly stated:

Our holding today that Plaintiffs had a protected liberty interest provides 'fair and clear warning' that, despite our ruling against Plaintiffs, qualified immunity will not bar such claims in the future. As we have explained, scientific research and the evolving jurisprudence has made the harms of solitary confinement clear: Mental well-being and one's sense of self are at risk. We can think of few values more worthy of constitutional protection than these core facets of human dignity.

848 F.3d at 574 (quoting *Lanier*, 520 U.S. at 271, 117 S.Ct. 1219).

We were not alone in reaching this conclusion. [collecting cases] . . . . There is therefore wide consensus that prolonged and indefinite solitary confinement gives rise to a due process liberty interest for inmates in Porter's circumstances. These cases gave Defendants 'fair warning' that keeping an inmate who has been in solitary confinement for thirty-three years on death row while appeals of his vacatur order proceed violates his procedural due process rights. Defendants therefore are not entitled to qualified immunity as of our decision in *Williams*. . . .On Porter's Eighth Amendment claim, however, we reach a different conclusion. Unlike his procedural due process rights, Porter's Eighth Amendment right has not been clearly established. Porter has correctly pointed out that our Circuit and our sister circuits have held that inmates can bring Eighth Amendment claims based (at least in part) on conditions in solitary confinement. But only one circuit has done so in connection with solitary confinement on death row. Cases that challenge interpretation of death row policy and conditions on death row are distinct from cases brought by inmates in general population subject to solitary confinement. In *Williams*, for example, we considered whether our decision in *Shoats*, 213 F.3d 140, was sufficiently similar to the facts and claims raised by the *Williams* plaintiffs. We decided that, although *Shoats* is analogous and should have 'raised concerns' about whether the treatment of the *Williams* plaintiffs was constitutional, it was not sufficiently similar because Shoats was not on death row and did not directly dispute the death row isolation policy at issue in *Williams*. . . We have not found Eighth Amendment cases with sufficiently similar fact patterns, and the cases that Porter cites in support of his argument are inapposite. . . .The Fourth Circuit has held that solitary confinement conditions on death row

violate the Eighth Amendment. *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019). But a single out-of-circuit case is insufficient to clearly establish a right. Defendants are therefore entitled to qualified immunity on Porter's Eighth Amendment claim. We emphasize, however, that from this point forward, it is well-established in our Circuit that such prolonged solitary confinement satisfies the objective prong of the Eighth Amendment test and may give rise to an Eighth Amendment claim, particularly where, as here, Defendants have failed to provide any meaningful penological justification."); ***Smith v. Collins***, 964 F.3d 266, 269, 275, 278-81 (4th Cir. 2020) ("In line with the Supreme Court's decision in *Wilkinson v. Austin*, 545 U.S. 209 (2005), our atypical-and-significant-hardship analysis turns on three factors: '(1) the magnitude of confinement restrictions; (2) whether the administrative segregation is for an indefinite period; and (3) whether assignment to administrative segregation had any collateral consequences on the inmate's sentence.' [citing *Incumaa v. Stirling*] Here, Smith has presented evidence demonstrating that his confinement conditions were severe in comparison to those that exist in general population (factor one) and that his segregation status may have had collateral consequences relating to the length of his sentence (factor three). Moreover, although the duration of Smith's segregated confinement—a fact we consider in assessing indefiniteness (factor two)—is not as long as the substantial periods of segregated confinement that this Court has found sufficient to support a protected liberty interest in the past, prisoners need not languish in solitary confinement for decades on end in order to possess a cognizable liberty interest under the Due Process Clause of the Fourteenth Amendment. The four-plus years that Smith spent in administrative segregation is significant enough to tip the scales in his favor, particularly in light of the other evidence of indefiniteness that he relies upon in this case. For these reasons, we hold that there is at least a genuine dispute of material fact as to whether Smith's conditions of confinement imposed a significant and atypical hardship in relation to the ordinary incidents of prison life. Therefore, we vacate the district court's summary judgment order and remand the case for further proceedings consistent with this opinion. Specifically, on remand, the district court should consider in the first instance, and after further discovery, whether the process that Smith received was constitutionally adequate and whether the Defendant-Appellees are nevertheless entitled to qualified immunity. . . . Because Smith is a convicted prisoner, he does not have an inherent, constitutionally protected liberty interest in release from solitary confinement. *See Prieto v. Clarke*, 780 F.3d 245, 248–52 (4th Cir. 2015). Thus, he must identify a state-created liberty interest in avoiding solitary confinement. . . To do so, he must be able to show two things: first, that there is 'a basis for an interest or expectation in state regulations' for avoiding such confinement, and second, that the conditions ' "impose[ ] atypical and significant hardship ... in relation to the ordinary incidents of prison life."'. . . The district court held that the first requirement of prong one was satisfied because VDOC policy provides for a security-level review for Level S prisoners in the Step-Down Program every ninety days, . . . and Defendants do not challenge that conclusion on appeal[.] . . . In this case, we must compare the conditions in administrative segregation at Wallens Ridge . . . to the 'ordinary incidents of prison life,' which, for Smith, means the conditions in general population. . . . Drawing on the Supreme Court's reasoning in *Wilkinson*, this Court has construed the atypical-and-significant-hardship analysis as turning on primarily three factors: '(1) the magnitude of confinement restrictions; (2) whether the administrative segregation is for an indefinite period; and (3) whether assignment to administrative

segregation had any collateral consequences on the inmate's sentence.'. . Applying those factors here, we conclude that Smith has at least demonstrated a genuine issue of material fact with regard to the atypicality and harshness of his confinement in administrative segregation at Wallens Ridge, and thus as to the existence of a liberty interest in avoiding such confinement. . . .The duration of Smith's confinement in administrative segregation at Wallens Ridge strengthens his evidentiary showing of indefiniteness. To be sure, Smith's period of segregated confinement is quite shy of the twenty-year period at issue in *Incumaa*. . . But four years and three months is far longer than the thirty-day period at issue in *Sandin*. . . and the six-month period at issue in this Court's decision in *Beverati*[.] . . It also exceeds the length of various periods that other courts have found insufficient to trigger a liberty interest, which 'range[ ] up to two and one-half years.'. . . In sum, we conclude that the three rationales cited throughout Smith's ICA hearing reviews, when taken together, at least establish a genuine issue of fact as to the existence of a viable pathway out of segregation for Smith, especially when coupled with the record evidence of duration. Because indefiniteness is one of the factors that we must consider in assessing the atypicality and harshness of a prisoner's confinement in administrative segregation, this fact is plainly material to Smith's procedural due process claim. . . . That leaves the third factor: 'whether assignment to administrative segregation had any collateral consequences on the inmate's sentence.'. . In *Wilkinson*, the 'collateral consequences' took the form of parole ineligibility. . . Here, Smith points to his inability to earn good-time credits as a collateral consequence of his stalled progress in the Step-Down Program. . . . There is at least a genuine issue of material fact as to whether Smith's conditions of confinement in administrative segregation at Wallens Ridge imposed an atypical and significant hardship, such that he had a protected liberty interest. Smith has presented strong evidence that the conditions he endured in administrative segregation were severe in comparison to the conditions that exist in general population, and he has pointed to collateral consequences that may well be attributable to his segregation status, even if they are perhaps less severe than those contemplated in *Wilkinson*. Finally, although the duration of Smith's confinement in administrative segregation is shorter than the period of confinement that this Court found significant in *Incumaa*, it is not insubstantial, and there are also other indicia of indefiniteness in the record that are sufficient to create a factual dispute as to the existence of any pathway out of segregation at Wallens Ridge. Thus, on the present record, the three *Wilkinson* factors weigh in Smith's favor, and Defendants cannot prevail as a matter of law on the atypical-and-significant-hardship analysis. . . .That there is a genuine dispute as to the existence of a protected liberty interest does not end our inquiry, however. To succeed on his procedural due process claim, Smith must establish not only a liberty interest but also that Defendants failed to afford him adequate process to protect that interest. . . Moreover, even if Smith successfully establishes a procedural due process violation, he cannot recover damages from Defendants if they are entitled to qualified immunity."); ***Smith v. McKinney***, 954 F.3d 1075, 1081-84 (8th Cir. 2020) ("Post-*Sandin*, 'the Court of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.'. . The Supreme Court has acknowledged 'the difficulty of locating the appropriate baseline' by which to measure what constitutes an atypical and significant hardship, but it has not resolved the issue. . . Instead, in *Wilkinson*, the Supreme Court held that inmates' assignment to a

state supermax prison 'impose[d] an atypical and significant hardship under any plausible baseline.'. . . Despite the lack of an established 'baseline from which to measure what is atypical and significant in any particular prison system,'. . . we have affirmatively held what does *not* constitute an atypical or significant deprivation. 'We have consistently held that a demotion to segregation, even without cause, is not itself an atypical and significant hardship.'. . Indeed, '*Sandin* teaches that [an inmate] has no due process claim based on [a] somewhat more restrictive confinement because he has no protected liberty interest in remaining in the general prison population; his only liberty interest is in not being subjected to "atypical" conditions of confinement.'. . As a result, 'to assert a liberty interest,' the inmate 'must show some difference between his new conditions in segregation and the conditions in the general population which amounts to an atypical and significant hardship.'. . .In the present case, Smith argues that the conditions of confinement he endured while in segregation and upon his transfer to the ISP imposed an atypical and significant hardship on him in relation to the ordinary incidents of prison life. First, he cites as an atypical and significant hardship his transfer from the FDCF, a medium security facility, back to the ISP, a maximum security facility, for an indefinite duration. . . . Because the transfer to a higher security facility alone is insufficient to establish an atypical and significant hardship, we must examine 'whether the conditions of [Smith's] confinement [in administrative segregation at the FDCF and] after his transfer [to the ISP] constituted a hardship that could reasonably be characterized as atypical and significant.'. . . But Smith has failed to set forth facts describing his conditions of confinement while in administrative segregation and disciplinary detention. Smith's reference to disciplinary detention as 'the hole' is not descriptive of what conditions he faced. . . Without a description of the conditions of confinement while in segregation, we are left with our precedent 'that demotion to segregation, even without cause, is not itself an atypical and significant hardship.'. .Smith also cites his loss of employment, wages, security classification, security points, and inmate tier status upon his transfer to the ISP. But none of these losses, individually or collectively, amounts to an atypical and significant hardship under our precedent. . . Because we hold that the conditions of confinement that Smith faced during administrative segregation at the FDCF and upon his transfer to the ISP do not amount to an atypical and significant deprivation when compared to the ordinary incidents of prison life, we affirm the district court's grant of summary judgment to the prison officials on Smith's due process claim."); ***Al-Turki v. Tomsic***, 926 F.3d 610, 614-16 & n.4 (10th Cir. 2019) ("A constitutionally protected liberty or property interest may be a creation of federal law (including the Constitution itself—at least for liberty interests) or of state law. . . .Plaintiff does not argue that he has a constitutionally protected liberty interest in changing his place of incarceration from Colorado to Saudi Arabia. And for good reason: Supreme Court precedent is squarely to the contrary. It is settled law that the federal Constitution in itself does not confer a right to incarceration in a particular institution. . . . The question thus becomes whether *state* law might create a liberty interest in the place of confinement that is protected by constitutional due process. At one time, the Supreme Court indicated that a State conferred a constitutionally protected liberty interest in favor of prisoners if, and only if, state law 'plac[ed] substantive limitations on official discretion.'. . . In *Sandin v. Conner*, 515 U.S. 472 (1995), and *Wilkinson*, 545 U.S. 209, however, the Supreme Court adopted a different analytic framework for determining whether a prisoner has a

constitutionally protected liberty interest. *Sandin* criticized 'the search [undertaken in previous cases] for a negative implication from mandatory language in prisoner regulations.'. . It explained that this test had 'encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges,'. . . even where that language conferred only trivial rights[.]. . As a result, the test created 'disincentives for States to codify prison management procedures,' and it 'led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.'. . The Court thus reverted to the principles it saw as underlying its decision in *Meachum*, and held that a State could create a constitutionally protected liberty interest for prisoners only insofar as it freed them from restraints that impose an 'atypical and significant hardship ... in relation to the ordinary incidents of prison life.'. . Applying this test, the Court held that no protected liberty interest was implicated in the plaintiff's 30-day confinement in his prison's Special Housing Unit, even though the applicable prison regulation spoke in mandatory terms. . . In contrast, *Wilkinson* held under the same test that prisoner incarceration at an Ohio Supermax facility implicated a liberty interest because of the harshness and duration of the conditions of confinement. . . Although the Court continued to analyze the issue in terms of a 'state-created' interest, it did not clarify how a State creates such an interest or what role (if any) the language of state law has in the *Sandin* inquiry. [fn 4 At least one opinion representing the views of three Justices suggests that a constitutionally protected liberty interest will still require an entitlement mandated by state law. . . . Indeed, requiring a prisoner to show both that state law has created an entitlement through discretion-cabining language and that he meets the *Sandin* test makes good sense. A plaintiff proceeding outside of the prison context must make the former showing; why should not the same be required of a prisoner, whose rights are necessarily limited by his incarceration? . . Nevertheless, we need not decide this question as Plaintiff clearly lacks a liberty interest in his place of confinement under the *Sandin* standard.] Here, unlike the cases to come before the Supreme Court, Plaintiff is not complaining about being transferred to conditions that he considers unconstitutionally harsh. He is the one seeking the transfer. But the same principles apply. To establish a protected liberty interest in a prison transfer, he must be able to show that keeping him in a Colorado prison subjected him to an 'atypical and significant hardship ... in relation to the ordinary incidents of prison life.'. . That, of course, he cannot do. While incarcerated in Colorado, he was, as far as the record shows, subjected to merely those 'ordinary incidents.'"); ***Perry v. Spencer***, 751 F.App'x 7 (2018), *rehearing en banc granted and opinion withdrawn,* 21 F.4th 207 (2022) ("Perry claims that defendants violated his right to procedural due process by confining him in the SMU without adequate justification, opportunity to be heard, meaningful periodic review, or avenue for appealing his placement. He contends that the stated reasons for his placement in the SMU were used as a pretext for indefinite confinement in restrictive segregation, and that the periodic reviews by defendants were perfunctory. To prevail on this claim, Perry must demonstrate (1) that defendants deprived him of a cognizable liberty interest, (2) without constitutionally sufficient process. . . Inmates do not have a protected liberty interest in avoiding restrictive conditions of confinement unless those conditions ' "impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."'. . . As the Court recognized in *Wilkinson,* however, 'the Courts of Appeals have not reached consistent conclusions

for identifying the baseline from which to measure what is atypical and significant in any particular prison system.'. . The *Wilkinson* Court found it unnecessary to define 'atypical and significant hardship' because it found that the conditions in that case met that standard 'under any plausible baseline.'. . .In 2012, the Massachusetts Supreme Judicial Court considered whether ten months in the SMU at SBCC on awaiting action status satisfied the 'atypical and significant hardship' standard. *LaChance v. Commissioner of Correction*, 463 Mass. 767, 776-77 (2012). Noting that the restrictive conditions in the SMU were substantially similar to those described in *Wilkinson,* and far more restrictive than the conditions in the general population unit, the SJC concluded that the ten-month period of confinement was sufficient to satisfy the standard and implicate a protected liberty interest subject to due process protections, and further held that the interest attaches after ninety days. . . However, the Court acknowledged that it was announcing a new rule, and that up to that point, no federal or state court decision had clearly articulated the point at which a liberty interest in avoiding segregated confinement arose. . .Noting that Perry was released from the SMU just after *LaChance* was decided, the district court here reached the same conclusion as the SJC, and found that defendants were entitled to qualified immunity because it would not have been obvious to prison officials in 2010 whether or at what point Perry's confinement in the SMU on awaiting action status became 'atypical and significant.' We agree. While the restrictive conditions in the SMU were substantially similar to those described in *Wilkinson*, other circumstances were arguably distinguishable and, while a number of courts had, prior to 2010, held that periods of solitary confinement shorter than Perry's were sufficient to give rise to a liberty interest, . . . other courts had found comparable periods insufficient. . . Given the varying approaches to measuring atypicality and the absence of any bright-line rule or consensus as to what combination of conditions and duration of confinement in administrative segregation was sufficient to implicate a liberty interest and trigger due process, or at what point that interest arose, the contours of the liberty interest were not sufficiently defined as to place the constitutional question 'beyond debate[.]'. . Further, even assuming that defendants should have known that due-process requirements attached to Perry's placement in the SMU at some point during his extended period of confinement, the level of process due in the circumstances was not clearly established. In *Wilkinson*, the Supreme Court endorsed 'informal, nonadversary procedures' consistent with those set forth in *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex,* 442 U.S. 1 (1979), and *Hewitt v. Helms*, 459 U.S. 460 (1983), where the liberty interest in avoiding indefinite placement in a supermax prison was at stake. . . . Perry asserts that the periodic reviews were perfunctory, noting that he received the same boilerplate notice at every review, and suggests that they were pretextual, as he was never interviewed in connection with any investigation into his STG status, was not advised of its progress or outcome, and was not told when or why his status shifted from awaiting action pending investigation to awaiting action pending out-of-state placement. In *LaChance*, the SJC concluded that these procedures were insufficient to provide meaningful review and safeguard the inmate's interest in avoiding arbitrary confinement in severe conditions, and held that segregated confinement on awaiting action status for longer than 90 days required notice of the basis for the placement, a hearing at which the inmate could contest the asserted rationale for the placement, and a post-hearing written notice explaining the reviewing authority's decision. . . But the SJC acknowledged that it was announcing these requirements for

the first time, and Perry was released into the general population shortly after that decision issued. Perry suggests that, even if defendants could not have been expected to anticipate the precise requirements outlined in *LaChance*, it was clearly established after *Wilkinson* that the 'informal, adversary procedures' required where an inmate's interest in avoiding atypical and significant hardship was at stake had to include some sort of meaningful periodic review. But *Wilkinson* did not set any standards for such review in this context. . . . In the absence of any authority more specifically defining the review requirements in these circumstances, Perry cannot show that no official could reasonably have believed the review was adequate. . . . In sum, at the time Perry was confined in the SMU on awaiting action status, it was not clearly established whether or at what point a protected liberty interest arose, and the procedural protections required in that circumstance had been defined only at a high level of generality. Defendants were therefore entitled to qualified immunity."); ***Grissom v. Roberts***, 902 F.3d 1162, 1175-80 (10th Cir. 2018) (Lucero, J., concurring in the judgment) ("I agree with my respected colleagues that our circuit precedents, particularly *Grissom v. Werholtz*, 524 F. App'x 467, 474 (10th Cir. 2013) (unpublished) ("*Grissom II*"), compel the outcome of this case. Nothing has changed in our jurisprudence since *Grissom II* that would mandate a different conclusion, and thus I join in the judgment reached by the majority. I write separately because it is important to establish that the prolonged term of solitary confinement before us—twenty consecutive years—based on what appears to be marginal justification, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. During much of the twenty years Grissom spent in solitary confinement, he received only rote repetition of the reason for his treatment. Prison officials merely indicated that the reason for his initial placement, suspected involvement in drug trafficking, remained valid. For half the time Grissom was subject to solitary confinement, from 2005 to 2015, he had a single disciplinary report: the control on a hot pot in his cell was set too high. I am disturbed by such flimsy rationale for the extension of the duration of such a term in solitary confinement. . . Assuredly, as the majority notes, Grissom is serving four consecutive life sentences for three separate murder convictions. He has no possibility of parole. Grissom was placed in solitary confinement on August 4, 1996. He did not return to the general prison population until December 5, 2016. Grissom spent more than seven thousand days alone in a cell about the size of a parking space. That cell was constantly illuminated with florescent light. The solid metal doors were intended to block out any sights or sounds, and they remained closed at all times. The walls of his cell were required to be kept plain. During those years, Grissom was permitted to leave his cell for one hour, five days per week, for solitary exercise in an eight-by-twenty foot cage. To participate in the exercise program, he was required to undergo a full strip search. In addition to the exercise program, he was granted three ten-minute showers each week. If a video booth happened to be available, he was allowed two one-hour video visitation sessions per week. . . . In 2016, Grissom was placed in the Behavior Modification Program, and was later returned to general population. He remains there today. Grissom seeks damages for having been kept in solitary confinement for twenty years on what he describes as 'stale' and disproportionate justifications. Noting the limited opportunities he had to leave his cell, the majority states that Grissom's argument paints an incomplete picture of his confinement. . . The majority concludes that Grissom was able to communicate with other inmates through vents in his cell, place phone calls, and had the biweekly video visitations noted above.

But what the majority fails to appreciate is that the fundamental parameters of his life remained the same. He lived in a cell designed to maximize sensory deprivation. He spent between 23 and 24 hours a day alone in that cell. . . Our society has long understood that extended periods of isolation take a significant toll on the human psyche. . . . In short, solitary confinement, even over relatively short periods, renders prisoners physically sick and mentally ill. It destroys any ability they may once have had to relate positively to others. These harms, which are persistent and may become permanent, become more severe the longer a person is exposed to solitary confinement. . . .Our court has identified a non-comprehensive set of factors to consider in determining whether conditions qualify as atypical and significant. These factors include: whether (1) segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) conditions of placement are extreme; (3) placement increases the duration of confinement; and (4) placement is indeterminate. . . As the majority opinion recounts, this court ruled in 2013 that the *DiMarco* factors weighed against finding that Grissom possessed a protected liberty interest in avoiding solitary confinement. . . As noted initially, I do not quarrel with the majority's conclusion that defendants are entitled to qualified immunity in light of that decision, albeit an unpublished order and judgment. Notwithstanding my agreement that *Grissom II* renders defendants immune in this case, I cannot agree with the *Grissom II* analysis. The *DiMarco* factors were never intended to provide a static, formal test, and we cannot treat them as such. . . In light of what we now know about the effects of prolonged solitary confinement, it is impossible not to conclude that two decades in solitary confinement 'imposes an atypical and significant hardship under any plausible baseline.'. .There should be no serious doubt that the duration of Grissom's confinement in solitary renders it extreme. . . .Grissom's conditions of confinement closely match those described in *Wilkinson* as atypical based in part on duration. . . And they are similar to those described by Justice Kennedy as 'exact[ing] a terrible price.' *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2210, 192 L.Ed.2d 323 (2015) (Kennedy, J., concurring). The third and fourth factors could be viewed as balanced. Grissom's placement will not increase the total duration of his sentence. . . But his placement in solitary confinement was indeterminate. . . I recognize that our court has discussed the availability of periodic reviews in considering whether a term of segregation is indeterminate. . . Regardless of the potential that a placement might end at some undefined time, the fact remains that Grissom's placement was for an indefinite and indeterminate period. . .At base, then, the question is whether the extreme nature of Grissom's confinement is justified by legitimate penological interests. . . At the very least, Grissom has created a material dispute of fact on that issue. . . . Given the severe consequences of long-term placement in solitary confinement, such conditions must be treated as a last resort, used in only the most extreme of cases. And even then, prison officials must meaningfully consider on a periodic basis whether solitary remains necessary. There appears to be no evidence of proportionality between the prison's interest in confining Grissom and the length of his solitary confinement. A factfinder could certainly determine that the reviews he received were inconsistent with the Fourteenth Amendment's demand for due process. . . For the foregoing reasons, I am compelled to conclude that the decision in Grissom II, in which Grissom was before us as an indigent without the benefit of counsel, incorrectly analyzed the *DiMarco* factors. The injustice that error has wrought—to wit, Grissom's twenty years of unjustified solitary confinement—is severe. But for our unpublished

order and judgment in *Grissom II*, I would conclude that the appellant has shown, under clearly established law and the facts presented in this appeal, that the twenty years he was forced to spend in solitary confinement violated his due process rights."); ***Thompson v. Commonwealth of Virginia***, 878 F.3d 89, 110 (4th Cir. 2017) ("We summarily affirm the district court's grant of summary judgment as to all defendants because administrative segregation from the general population does not implicate a protected liberty interest absent a showing of specific facts that conditions of confinement are significantly more onerous. *Incumaa v. Stirling*, 791 F.3d 517, 531 (4th Cir. 2015). Mr. Thompson's affidavits do not present specific facts demonstrating such hardship. To the extent that Mr. Thompson alleges that segregation was retaliatory punishment, that argument is better addressed under either the First or Eighth Amendment."); ***Williams v. Secretary Pennsylvania DOC***, 848 F.3d 549, 560-70 (3d Cir. 2017), *cert. denied sub nom. Walker v. Farnan,* 138 S. Ct 357 (2017), and *cert. denied sub nom. Williams v. Wetzel,* 138 S. Ct. 357 (2017) ("As *Wilkinson* recognized, '[i]n *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant.'. . Given *Wilkinson*'s guidance, in *Shoats v. Horn* we established the following two-factor inquiry: (1) the duration of the challenged conditions; and (2) whether the conditions overall imposed a significant hardship in relation to the ordinary incidents of prison life. . . Applying that inquiry in *Shoats*, we concluded that 'virtual isolation for almost eight years' in solitary confinement created a protected liberty interest. . . . Plaintiffs' isolation on death row lasted six and eight years. We see no meaningful distinction between those periods of extreme deprivation and the eight years of solitary confinement that we concluded in *Shoats* was 'not only atypical, but [ ] indeed "unique."'. . Although we do not suggest that it would be considered atypical under *Sandin*, we do note that researchers have found that even *a few days* in solitary confinement can cause cognitive disturbances. . .Here, as in *Wilkinson* and *Shoats*, Plaintiffs' placements on death row were indefinite. . . .Numerous studies on the impact of solitary confinement show that these conditions are extremely hazardous to well-being. Accordingly, it is precisely this type of isolation that led the courts in *Shoats* and *Wilkinson* to conclude that the deprivations of solitary confinement implicate a protected liberty interest. In *Shoats*, we gave great weight to the fact that the inmate was 'confined in his cell for 23 hours a day, five days a week, and 24 hours a day, two days a week .... [and] eats meals by himself.'. .Similarly, in *Wilkinson* the Supreme Court grounded a liberty interest on its finding that '[i]nmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day' and '[a]ll meals are taken alone in the inmate's cell instead of in a common eating area.'. . These conditions of extreme social isolation cannot be meaningfully distinguished from the deprivations suffered by Plaintiffs here. . . . Defendants assert that the appropriate standard in this case is not the general prison population as in *Wilkinson* and *Shoats*. Instead, they claim the metric we should use is the conditions imposed on 'inmates serving similar sentences' or what Plaintiffs' convictions have 'authorized the State to impose.'. .Defendants thus claim the baseline of comparison here is death row itself . . . because Plaintiffs remain eligible for the death penalty. . . Therefore, Defendants argue that Plaintiffs' continued confinement on death row can hardly be atypical. . . . The terms 'ordinary' and 'routine' direct us to use a general metric (the general population), not one specific to a particular inmate. Second, though some courts have used the metric Defendants propose, it is unworkable in this context. . . We cannot resolve Plaintiffs'

claims by reference to 'inmates serving similar sentences' because, during the period at issue, Plaintiffs were not serving any sentence whatsoever. Their sentences had been vacated and resentencing had been ordered. . . . These stories confirm what the scores of studies . . . that have examined this phenomenon tell us: Continued solitary confinement, the experience Plaintiffs complain of here, poses a grave threat to well-being. This data compels us to recognize the similarities between the plight of Plaintiffs, and those of Shoats and the inmates in *Wilkinson*. All were indefinitely subject to isolating conditions that researchers agree cause deep and long-term psychic harm. Such harm is the essence of the atypical and significant hardship inquiry required under *Sandin* and *Wilkinson*. . . . For the reasons we have discussed, we now hold that Plaintiffs had a due process liberty interest in avoiding the extreme sensory deprivation and isolation endemic in confinement on death row after their death sentences had been vacated. . . However, as we explain below, we must nevertheless affirm the district courts' grants of summary judgment in favor of Defendants because we conclude that they are entitled to qualified immunity."); ***Aref v. Lynch***, 833 F.3d 242, 253-57 (D.C. Cir. 2016) ("The Third, Sixth, and Tenth Circuits all generally look to administrative confinement as the baseline. [collecting cases] The Fifth Circuit, on the other hand, has held disciplinary segregation can never implicate a liberty interest unless it 'inevitably' lengthens a prisoner's sentence, *see Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997), and that administrative segregation—being an ordinary incident of prison life—is essentially incapable of creating a liberty interest, *see Orellana v. Kyle*, 65 F.3d 29, 31–32 (5th Cir. 1995). . . The Seventh Circuit also has adopted a high standard, holding the baseline is not just the conditions of confinement within that particular prison, but those at the harshest facility in the state's most restrictive prison. *See Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir. 1997). By contrast, the Fourth Circuit looks to the general population as the baseline. *See Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997). And the Second Circuit requires a fact-specific determination that compares the duration and conditions of segregation with conditions in both administrative confinement and the general population. *See, e.g.*, *Arce v. Walker*, 139 F.3d 329, 336 (2d Cir. 1998); *Brooks v. DiFasi*, 112 F.3d 46, 48–49 (2d Cir. 1997). As a result, the Second Circuit has found confinements as short as 180 and 305 days create a liberty interest under *Sandin*. *See Colon v. Howard*, 215 F.3d 227, 230–31 (2d Cir. 2000) (305 days); *Kalwasinski v. Morse*, 201 F.3d 103, 106 (2d Cir. 1999) (180 days). In sum, divergences in the baseline often lead to divergences in outcome. We are therefore cautious about relying too heavily on out-of-circuit precedent in evaluating appellants' claims, except to note that courts are generally hesitant to find a liberty interest in the confinement context. Our circuit laid out its approach to the comparative baseline in *Hatch*. The *Hatch* court examined *Sandin*'s language and motivations to conclude a liberty interest arises only when the deprivation 'imposes an "atypical and significant" hardship on an inmate in relation to the most restrictive confinement conditions that prison officials ... *routinely* impose on inmates serving similar sentences.'. . Because administrative segregation is most routinely imposed, the court held it constitutes the proper baseline. . . In doing so, though, the court took pains to emphasize this comparison 'does not end our analysis.'. . We must look 'not only to the nature of the deprivation ... but also to its length' in evaluating atypicality and significance. . . Since *Sandin* noted the thirty-day disciplinary segregation at issue 'was within the range of confinement to be normally expected *for one serving an indeterminate term of [thirty] years to*

life,'. . . *Hatch* held atypicality also depends 'in part on the length of the sentence the prisoner is serving.'. . Applying this standard, the *Hatch* court remanded to the district court for further fact-finding to determine whether the inmate's segregation for twenty-nine weeks amounted to a liberty interest. . . Specifically, the district court was to compare the conditions faced by the inmate (who was segregated due to a disciplinary infraction) to the usual conditions of administrative segregation. . . And even if the district court concluded those conditions were 'no more restrictive' than administrative segregation, it was still required to determine whether confinement for twenty-nine weeks was 'atypical' compared to the length of administrative segregation routinely imposed on similarly situated prisoners. . . We conclude, then, that the proper methodology for evaluating deprivation claims under *Sandin* is to consider (i) the conditions of confinement relative to administrative segregation, (ii) the duration of that confinement generally, and (iii) the duration relative to length of administrative segregation routinely imposed on prisoners serving similar sentences. We also emphasize that a liberty interest can potentially arise under less-severe conditions when the deprivation is prolonged or indefinite. . . .Although appellants' deprivations are more akin to transfer based on a non-punitive classification than disciplinary segregation, the *Sandin* framework still guides our analysis of whether these particular conditions can be considered 'atypical and significant.'. . Inmates in administrative segregation must remain in their cells for twenty-three hours a day; they are unable to hold jobs or access most educational opportunities. Their possessions are also limited, and they can exercise only one hour a day, five days a week. By contrast, CMU [Controlled Management Unit] inmates are allowed in common spaces with other CMU inmates for sixteen hours a day. They have access to educational and professional opportunities, can keep as many possessions as inmates in the general population, and have no added restrictions on exercise. Communication deprivations in administrative segregation are also harsher: those inmates can make only one fifteen-minute phone call per month and are limited to four hours of non-contact visits per month. CMU inmates can make two fifteen-minute calls per week and are allowed two four-hour non-contact visits per month. We therefore conclude CMU confinement involves significantly less deprivation than administrative segregation. On the other hand, CMU designation is indefinite—lasting years in appellants' case—and atypical because even though several thousand inmates could be designated to CMUs based on their commitment offenses, only a handful are placed under these restrictions. The main tension, then, is how atypicality, indefiniteness, and the harshness of the depravations should be weighed. We find three factors significant. Although CMU designation seems analogous to a classification, it is exercised selectively; the duration is indefinite and could be permanent; the deprivations—while not extreme—necessarily increase in severity over time. An inmate placed in administrative segregation may be wholly unable to communicate with his family or the outside world, but that restriction will generally only last for a few weeks. Inmates housed in CMUs, by contrast, may spend years denied contact with their loved ones and with diminished ability to communicate with them. . . .What we think pushes CMU designation over the *Sandin* threshold is its selectivity and duration, not its severity, and BOP's recognition that some process—however *de minimis*—is due. Thus, because we find the designation meets *Sandin*'s requirements, we must consider the sufficiency of BOP's response." [remanding for determination of this issue on the record, but suggesting that only minimal process would likely be due]); ***Ballinger v. Cedar Cty., Mo.***, 810

F.3d 557, 562-63 (8th Cir. 2016) ("[W]e assume Ballinger spent approximately one year in administrative segregation. But any error the district court made by failing to consider the greater length of time Ballinger alleges he was kept in solitary confinement does not change the result. ' "We have consistently held that a demotion to [administrative] segregation, even without cause, is not itself an atypical and significant hardship."'. .There is 'no liberty interest in avoiding administrative segregation unless the conditions of ... confinement "present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest."'. . The conditions Ballinger experienced in solitary confinement were not materially different from other cases in which we have declined to find a liberty interest. [collecting cases] As a prisoner, Ballinger has not sufficiently alleged he was deprived of a liberty interest under the Fourteenth Amendment Due Process clause."); ***Incumaa v. Stirling***, 791 F.3d 517, 527 (4th Cir. 2015) ("Although some of our sister circuits read our decision in *Beverati* to imply that the typical conditions in the general prison population provide the comparative baseline, *see, e.g., Wilkerson v. Goodwin,* 774 F.3d 845, 854 (5th Cir.2014), *Prieto* held that the general prison population is not always the basis for comparison—the 'baseline for atypicality' may shift depending on the 'prisoner's conviction and sentence.'. . Nonetheless, for the reasons explained below, we conclude that the general population is the baseline for atypicality for inmates who are sentenced to confinement in the general prison population and have been transferred to security detention while serving their sentence."); ***Kervin v. Barnes***, 787 F.3d 833, 835-37 (7th Cir. 2015) ("The Supreme Court has noted that 'in *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. This divergence indicates the difficulty of locating the appropriate baseline.'. . . *Wilkerson v. Goodwin,* 774 F.3d 845, 853 (5th Cir.2014), and *Brown v. Oregon Department of Corrections,* 751 F.3d 983, 988 (9th Cir.2014), sensibly suggest that the severity of treatment should be combined with its duration in assessing the gravity of the conditions complained of by the prisoner. . . But this need not imply that a rigid six-month period of inhuman confinement is a condition precedent to a deprivation of a prisoner's constitutionally protected liberty. *Marion v. Radtke,* 641 F.3d 874, 876 (7th Cir.2011), points out that that 'the right comparison is between the ordinary conditions of a high-security prison in the state, and the conditions under which a prisoner is actually held.' That doesn't say a great deal, however, because the critical question is how far the treatment of the complaining inmate deviates from those ordinary conditions. And what if the inmate is an elderly person convicted of a nonviolent crime such as bank fraud and serving his prison term in a minimum-security prison; wouldn't it be 'atypical' and 'significant' for him to be sent to a high-security prison for a trivial disciplinary infraction? . . . .The judge made two errors in finding that Kervin could not establish a violation of the *Sandin* standard, though they were not consequential. The first was to evaluate separately the gravity of each punishment meted out to him, thereby failing to assess the aggregate punishments inflicted. . . The judge's second error was to suggest, echoing the *Beverati* decision, that a prisoner must spend at least six months in segregation before he can complain about having been deprived of liberty without due process of law. A considerably shorter period of segregation may, depending on the conditions of confinement and on any additional punishments, establish a violation, as held in such cases as *Palmer v. Richards,* 364 F.3d 60, 65–67 (2d Cir.2004) (77 days); *Mitchell v. Horn,* 318 F.3d 523, 527, 532–33 (3d Cir.2003) (90

days); and *Gaines v. Stenseng,* 292 F.3d 1222, 1225–26 (10th Cir.2002) (75 days). Six months is not an apt presumptive minimum for establishing a violation. Judges who lean toward such a presumption may be unfamiliar with the nature of modern prison segregation and the psychological damage that it can inflict. Segregation isn't just separating a prisoner from one or several other prisoners. As noted by the Supreme Court in the *Wilkinson* case, 'almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room.'. . The serious psychological consequences of such quasi-solitary imprisonment have been documented. . . Kervin, however, was placed in segregation for at most 30 days and, more importantly, does not allege that he suffered any significant psychological or other injury from it. So the judge was right to dismiss his suit. But we take this opportunity to remind both prison officials and judges to be alert for the potentially serious adverse consequences of protracted segregation as punishment for misbehavior in prison, especially the kind of nonviolent misbehavior involved in the present case."); ***Fantone v. Latini***, 780 F.3d 184, 189-91 (3d Cir. 2015) ("Fantone's circumstances do not present hardship that is atypical and significant when compared to the ordinary incidents of prison life, so it cannot be said that defendants' actions infringed his liberty interests. . . The conditions in the RHU at SCI–Pittsburgh are quite different from those in the Supermax facility that the Supreme Court described in *Wilkinson.* As a baseline point of contrast, the RHU offers the inmates confined in it, whether on administrative or disciplinary confinement, markedly more human interaction and bodily movement than is allowed in Ohio's Supermax facility. *Wilkinson* describes how the Supermax facility's prisoners are kept in a single small cell for 23 hours each day and are permitted to leave only for one hour's exercise. . .Fantone faced far less restrictive constraints in the RHU. Moreover, placement in the Supermax facility is indefinite, and, after an initial 30–day review, the placement is reviewed just annually. Fantone, in contrast, was in the RHU, at least while on disciplinary confinement, for a set term of days, and his confinement in the RHU was subject to regular reviews. . . Finally, unlike the Supermax inmates, Fantone was not disqualified for parole consideration. This last consideration is significant: despite the language with which Fantone describes the rescission of his parole, he did not become ineligible for parole simply because of his placement in the RHU. To the contrary, when the Parole Board rescinded Fantone's parole, it repeated the procedural process that it had followed when it granted him parole as both times it reached its decision by exercising its discretion. Where state law provides parole authorities complete discretion to rescind a grant of parole prior to release, an inmate does not have a constitutionally protected liberty interest in being paroled. . . . Ultimately, we conclude that Fantone's due process argument is unvailing. The combination of his retention in the RHU and the rescission of his parole did not infringe his liberty interests. . . .Fantone did not have a liberty interest that defendants could have infringed because the misconduct determinations, his time in the RHU, and the rescission of his parole did not, either alone or in combination, create atypical and significant hardship in relation to the ordinary incidents of prison life. Accordingly, we will affirm the District Court's order dismissing Fantone's due process claim."); ***Wilkerson v. Goodwin***, 774 F.3d 845, 855-57 (5th Cir. 2014) ("Here, considering the duration of the solitary confinement [39 years], the severity of the restrictions, and their effectively indefinite nature, it is clear that Woodfox's continued detention in CCR

constitutes an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' according to any possible baseline we could consider. . . .[W]e consider the 23–hour–a–day in cell isolation, limited physical exercise, and limited human contact, together with the extraordinary length of time that Woodfox has been held in such conditions. Viewed collectively, there can be no doubt that these conditions are sufficiently severe to give rise to a liberty interest under *Sandin.* . . .Whether we compare Woodfox's nearly thirty-nine years in 23–hour–a–day isolation to other inmates in the general population, other inmates in segregated confinement within the Louisiana system as a whole, or other inmates serving life sentences, these conditions constitute an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'. . Whatever the 'ordinary incidents of prison life' may encompass, they can only be truly 'ordinary' when experienced by some measurable proportion of a baseline prison population. . . .Given the extraordinarily lengthy detention and the isolating, restrictive conditions that we consider here, there is no basis for concluding that prison officials may avoid the established constitutional rights of prisoners by transferring them to a new facility and wiping the slate clean, while continuing all of the conditions that the prisoner has challenged."); ***Brown v. Oregon Dept. of Corrections***, 751 F.3d 983, 988 (9th Cir. 2014) ("[U]nder any plausible baseline, Brown's twenty-seven month confinement in the IMU without meaningful review 'impose[d] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.'. . As an initial matter, we recognize that the baseline for determining 'atypical and significant hardship' is not entirely clear. We have noted that '[t]he *Sandin* Court seems to suggest that a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing,' *Keenan v. Hall,* 83 F.3d 1083, 1089 (9th Cir.1996), but have not clearly held that conditions in the general population, as opposed to those in other forms of administrative segregation or protective custody, form the appropriate baseline comparator. . . The Supreme Court acknowledged this uncertainty in *Wilkinson v. Austin,* noting that '[i]n *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.'. . It chose not to resolve the issue, however, concluding, '[W]e are satisfied that [the challenged conditions] impose[ ] an atypical and significant hardship under any plausible baseline.'. .Similarly, we need not locate the appropriate baseline here because Brown's twenty-seven month confinement in the IMU imposed an atypical and significant hardship under any plausible baseline. Confinement in the IMU subjected Brown to solitary confinement for over twenty-three hours each day with almost no interpersonal contact, and denied him most privileges afforded inmates in the general population. While these conditions alone might apply to most solitary-confinement facilities, here there is a crucial factor distinguishing confinement in the IMU: the duration of Brown's confinement. . . Brown was given a fixed and irreducible period of confinement in the IMU for twenty-seven months, in contrast to the limited period of confinement with periodic review afforded inmates in ODOC's other segregated-housing units. Retention in the ASU is limited to no more than thirty days without a hearing or status review. Retention in the DSU—where conditions of confinement generally are similar to conditions in the IMU—is limited by thirty-day assessment reviews, with the maximum period of confinement limited to six months. Brown's conditions of confinement in the IMU thus implicate a protected liberty interest under any

plausible baseline."); ***Hardaway v. Meyerhoff***, 734 F.3d 740, 744 (7th Cir. 2013) ("Since Hardaway's confinement was six months and one day in total, the duration of segregation alone is insufficient to rise to the level of a Fourteenth Amendment violation. Therefore, the court must address the conditions of Hardaway's confinement to determine if they were so extreme as to implicate due process considerations. Hardaway argues that the conditions contained in the record that amount to 'atypical and significant hardship' are his placement with a confrontational cell mate, the psychological issues he experienced in connection to his aversion to closed solid metal doors, and his weekly access to the shower and prison yard. . . . None of the circumstances of Hardaway's confinement come close to the harsh conditions described in *Wilkinson.* Hardaway was not deprived of all human contact and was permitted to use the shower and prison yard once every week. While these conditions are more severe than those found in the general prison population, they are hardly analogous to a confinement that deprives a prisoner of all human contact or sensory stimuli. Even reviewing all facts in a light most favorable to him, Hardaway failed to demonstrate a deprivation of rights that could be considered 'atypical and significant hardship.'"); ***Earl v. Racine County Jail***, 718 F.3d 689, 691, 692 (7th Cir. 2013) ("Regardless of why Earl was placed on suicide watch, the district court correctly determined that no liberty interest was implicated by his placement there. When an inmate is placed in conditions more restrictive than those in the general prison population, whether through protective segregation like suicide watch or discretionary administrative segregation, his liberty is affected only if the more restrictive conditions are particularly harsh compared to ordinary prison life or if he remains subject to those conditions for a significantly long time. . . The conditions Earl faced on suicide watch were more restrictive than ordinary prison life, but—as the district court found—they were not 'unusually harsh.'. . For example, the only changes to meals were the trays upon which food was served (Styrofoam rather than plastic) and the quick removal of the eating utensil after each meal; inmates were not denied bedding but were given a mattress (or two if available) and a 'suicide-proof' blanket; inmates were denied writing materials for only the first 48 hours as a precautionary measure; and rather than prohibiting human contact, deputies were assigned to closely and personally monitor the inmates to ensure their safety. Courts have deemed an inmate's liberty interest implicated only where the conditions are far more restrictive. . . In addition to the conditions of Earl's suicide watch being insignificantly harsh, they also were brief: he was placed on suicide watch for only five days, which generally is too short a time to trigger due-process protection. . .Insofar as Earl challenges his placement in administrative segregation, his argument falls short for the same reasons: his time in segregation was too short to affect his liberty, and he did not point to any conditions of administrative segregation that were any worse than general prison conditions."); ***Rezaq v. Nalley***, 677 F.3d 1001, 1010-17 (10th Cir. 2012) ("A protected liberty interest only arises from a transfer to harsher conditions of confinement when an inmate faces an '"atypical and significant hardship ... in relation to the ordinary incidents of prison life."'. . Courts have struggled to identify the appropriate baseline for assessing what constitutes an 'atypical and significant hardship' on inmates. . . . Our sister circuits are certainly not in agreement regarding the correct approach. While some circuits compare the conditions of confinement at issue to those in the general prison population, . . . others compare them to the conditions typically found in administrative segregation, . . . or 'the most restrictive conditions that prison officials,

exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences[.]'. . . *Wilkinson* recognized the divergent views on this issue among the circuit courts, but the Court declined to resolve the baseline question because the conditions at issue in that case 'impose[d] an atypical and significant hardship under any plausible baseline.'. . Most recently, in *DiMarco,* we similarly declined to make 'a rigid either/or assessment' of proper comparator evidence, opting instead to outline four potentially relevant, nondispositive factors. . . We noted that [r]elevant factors might include whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate (in *Wilkinson* the placement was reviewed only annually). . . While courts in this circuit have used these factors to guide the liberty interest analysis, . . . we have never suggested that the factors serve as a constitutional touchstone. . . Rather, we continue to believe that the proper approach is a fact-driven assessment that accounts for the totality of conditions presented by a given inmate's sentence and confinement . . . . [W]e read *Wilkinson* to say that extreme conditions in administrative segregation do not, on their own, constitute an 'atypical and significant hardship' when compared to 'the ordinary incidents of prison life.'. . . Plaintiffs argue that it is improper for the court to consider penological interests in determining whether a liberty interest exists. They contend that any inquiry into the necessity of restrictive confinement should be made at a due process hearing, not in determining at the outset whether a liberty interest exists. . . We disagree. Legitimate penological interests are a relevant consideration under settled Tenth Circuit precedent. . .. The government opened ADX to house inmates who, like plaintiffs, pose unusual security and safety concerns. These concerns stem from a uniquely federal penological interest in addressing national security risks by segregating inmates with ties to terrorist organizations. The BOP established that continued placement of these inmates in general population units could compromise prison safety or, given the unique criminal backgrounds of these plaintiffs, national security. We conclude that segregated confinement relates to and furthers the penological interests asserted in this case. . . . The conditions at ADX, like those at the Ohio supermax prison in *Wilkinson,* do not, in and of themselves, give rise to a liberty interest because they are substantially similar to conditions experienced in any solitary confinement setting. . . The conditions at ADX are comparable to those routinely imposed in the administrative segregation setting. We conclude that the conditions in the general population unit at ADX are not extreme as a matter of law. . . . While duration is certainly an important consideration, *Wilkinson* emphasized that duration is properly considered in tandem with indeterminacy. . . .Here, the periodic review process at ADX included opportunities for plaintiffs to participate. While plaintiffs were housed at ADX for many years, they were given regular reevaluations of their placement in the form of twice-yearly program reviews. . . . The availability of periodic reviews merely suggests that the confinement was not indefinite. . . This factor weighs against finding a liberty interest. . . .The totality of these factors indicate that the inmates did not have a liberty interest in avoiding confinement at ADX. Because no liberty interest is implicated, we do not reach the question of whether the inmates received adequate process to justify their transfers to ADX.")

See also ***Gillis v. Litscher***, 468 F.3d 488, 492-95 (7th Cir. 2006), where the Court of Appeals does a post-*Wilkinson* analysis as follows:

> After *Wagner* was decided, the Supreme Court determined in *Wilkinson* . . . that there can, in fact, be a liberty interest − short of an Eighth Amendment violation − triggering procedural requirements. . . . . *Wilkinson* turns, however, not on denial of basic life necessities so much as on the extension of incarceration. The determining factors were that placement at the prison is of indefinite duration and it disqualifies an otherwise eligible inmate from consideration for parole. *Wilkinson* does not answer the question as to when the denial of life's necessities alone could give rise to a liberty interest but still fall short of violating the Eighth Amendment. There is, as we said in *Wagner*, a 'small space' between the two. In our case, we must determine whether we are standing in that small space or on either side of it. . . . Gillis's case is one in which the plaintiff is entitled to have the trier of fact determine whether the conditions of his administrative confinement, principally with regard to the cell temperature and the provision of hygiene items, violated the minimal standards required by the Eighth Amendment. . . . Gillis may well be able to convince a jury that the program imposes an atypical and significant hardship even measured against the ordinary incidents of life at Supermax, thus establishing a liberty interest. Also, defendants have not shown that they are entitled to qualified immunity. They cannot show that in 2002, when these events occurred, it was not well-established that denial of shelter, heat, and hygiene items implicated an inmate's constitutional rights.

See also ***Incumaa v. Stirling***, 791 F.3d 517, 535 (4th Cir. 2015) ("Appellee . . . argues that its review process 'meets the flexible due process standard' approved in *Wilkinson* because, compared to inmates confined in Ohio's Supermax facility, 'Appellant's custody is reviewed much more frequently'—that is, every 30 days as opposed to once a year. . . However, in view of Appellant's uncontested evidence demonstrating the inadequacy of the Department's confinement review, this argument falls flat. . . .We do not decide whether prison review mechanisms must be as extensive as in *Wilkinson* in order to pass constitutional muster. On the facts presented in this case, however, we conclude that the record establishes a triable question of whether the Department's review process was adequate to protect Appellant's right to procedural due process."); ***Townsend v. Cooper***, 759 F.3d 678, 686-88 (7th Cir. 2014) (noting "similarity between the conditions imposed in *Gillis* under the BMP and Townsend's BAP," court concludes that "both the duration of the BAP and the conditions imposed implicate liberty interests that require procedural protections. At a minimum, those protections should have included notice and an opportunity to object in some fashion."); ***Marion v. Radtke***, 641 F.3d 874, 876, 877 (7th Cir. 2011) ("*Wilkinson* shows that a comparison to a 'supermax' prison (the comparison defendants propose) is not appropriate. Comparison with the sort of secure institution that a judge would have considered when sentencing a prisoner is more apt. Anticipated prison conditions affect the length of sentences: The more onerous a prison system's norm, the shorter a sentence can be and still achieve a desired amount

of deterrence and punishment. The due process clause requires hearings when a prisoner loses more liberty than what was taken away by the conviction and original sentence. That's why the right comparison is between the ordinary conditions of a high-security prison in the state, and the conditions under which a prisoner is actually held. . . . Once the custodian contends that the difference between one cell and another does not affect liberty, the prisoner must reply with evidence. When answering Marion's complaint, defendants denied that conditions in DS-1 confinement deprived him of liberty or property. Marion had to come up with evidence to demonstrate otherwise. His status as an inmate does not change that burden. He could have used discovery to gather information bearing on the 'liberty' question but did not try the procedures of Fed.R.Civ.P. 26. When a plaintiff fails to produce evidence, the defendant is entitled to judgment; a defendant moving for summary judgment need not produce evidence of its own. . . Marion failed to meet his burden of production. The answer to the question 'does 240 days of DS-1 confinement at Columbia Correctional Center deprive a prisoner of a liberty interest?' must await another day."); ***Pressley v. Blaine***, No. 08-1517, 2009 WL 3842753, at *4 (3d Cir. Nov. 18, 2009) (not published) ("In this case, the District Court held that Pressley failed to establish that his sentence of 1080 days in disciplinary custody constituted an 'atypical and significant hardship' sufficient to trigger a liberty interest under *Sandin.* In reaching this conclusion, the Court relied on our non-precedential opinion in which we held that a prisoner who was sentenced to 930 days in disciplinary confinement failed to state facts, or submit evidence, showing that he was subject to conditions that met the *Sandin* requirement. The District Court compared the length of Pressley's sentence to the 930-day sentence in that case, and reasoned that '[i]f 930 days does not [constitute] an atypical and significant hardship, a mere five months more does not either.'. . This analysis does not comport with the fact-specific inquiry required by *Sandin.* As set forth above, to determine whether Pressley endured an atypical and significant hardship, the District Court was required to examine the duration of his disciplinary confinement, and the actual conditions of that confinement, in relation to the hardships endured by other prisoners. . . Instead, the District Court compared the duration of Pressley's sentence to that of another prisoner and presumed that the conditions Pressley faced in disciplinary custody were identical to that inmate's. This analysis did not meet the *Sandin* standard and we will remand the matter to the District Court to conduct a further inquiry."); ***Marion v. Columbia Correction Inst***., 559 F.3d 693, 697-99 (7th Cir. 2009) ("Although the defendants contend that a prisoner's due process protections are triggered only by indefinite segregation and parole disqualification, we have declined to read *Wilkinson's* holding as being limited to its specific facts. . . The Supreme Court's decisions are helpful in setting out the durational parameters of a prison-segregation due process analysis. There nevertheless remains a significant area in which the presence of a cognizable liberty interest is not self-evident from a reading of these cases. In these situations, we must make the necessary determination by analyzing the combined import of the duration of the segregative confinement *and* the conditions endured by the prisoner during that period. . . . Mr. Marion's term of 240 days' segregation is significantly longer than terms of segregation imposed in cases where we have affirmed dismissal without requiring a factual inquiry into the conditions of confinement. . . . Following *Whitford* and later cases, it is clear that a term of segregation as lengthy as Mr. Marion's requires scrutiny of the actual conditions of segregation. . . . As *Wilkinson* and the decisions from our sister circuits also

emphasize, we must take into consideration all of the circumstances of a prisoner's confinement in order to ascertain whether a liberty interest is implicated. Without a factual record, we cannot determine whether the actual conditions of Mr. Marion's lengthy segregation are harsher than the conditions found in the most restrictive prison in Wisconsin. We therefore must reverse the dismissal of Mr. Marion's due process claim and remand this case to the district court for further proceedings."); ***Harden-Bey v. Rutter***, 524 F.3d 789, 792, 793 (6th Cir. 2008) ("The question here is whether Harden-Bey's allegedly indefinite confinement in administrative segregation, three years and running as of the time of the complaint, amounts to an 'atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.'. . Relying on Sixth Circuit precedent, the district court held that placement in administrative segregation is never 'atypical and significant' and that the 'length of the placement' does not affect the inquiry. . .In deciding whether changes to an inmate's conditions of confinement implicate a cognizable liberty interest, both *Sandin* and *Austin* considered the nature of the more-restrictive confinement *and* its duration in relation to prison norms and to the terms of the individual's sentence. . . . Consistent with these decisions, most (if not all) of our sister circuits have considered the nature of the more-restrictive confinement *and* its duration in determining whether it imposes an 'atypical and significant hardship.' . . . On remand, the court should consider whether the nature of this placement in administrative segregation together with its duration creates a cognizable liberty interest and, if so, whether the State has given Harden-Bey the protection to which he is due.").

Compare ***Al-Amin v. Donald***, 165 F. App'x 733, 2006 WL 197191, at*5,*6 (11th Cir. Jan. 27, 2006)(confinement in GSP's administrative segregation for a period of approximately three years, in single cell, with five hours of exercise per week rather than the seven hours available to general population inmates "does not constitute an 'atypical and significant hardship ... in relation to the ordinary incidents of prison life.'") *with* ***Fogle v. Pierson***, 435 F.3d 1252, 1259 (10th Cir.2006) ("The district court abused its discretion in concluding that there was no *arguable* basis that a three-year period of administrative segregation − during which time Fogle was confined to his cell for all but five hours each week and denied access to any outdoor recreation − is not 'atypical.'").

See also ***Isby v. Brown***, 856 F.3d 508, 525-29 (7th Cir. 2017) ("As the district court here rightly explained, we and other circuits have interpreted *Hewitt* as entitling inmates to an 'informal and nonadversary' periodic review (the frequency of which is committed to the discretion of the prison officials) that keeps administrative segregation from becoming a pretext for indefinite confinement. . . . Isby takes issue with the perfunctory nature of his thirty-day reviews, emphasizing that, despite the amount of time that has passed since the 1990 incident, . . . the duration of his confinement in the SCU, and his long stretches without disciplinary charges, he receives the same two-line decision at every review. To evaluate Wabash Valley's procedures in light of *Hewitt*, we consider the three *Mathews v. Eldridge* factors. . . . With respect to the first factor, Isby's private interest is considerably lessened because of his status as an inmate. . . However, whereas the inmate in *Hewitt* spent less than two months in segregation awaiting a hearing, Isby has spent over ten years there, and counting. The extended, indefinite length of his

placement in the SCU tips the scale in his favor on this prong of the analysis. . . .Next, we consider the government's interests, which are substantial. Maintaining institutional security and safety are crucial considerations in the management of a prison, and, to the extent that an inmate continues to pose a threat to himself or others, ongoing segregation may well be justified. . . .With no potential end date on Isby's segregation, we confront the third of the *Mathews* factors and note that the boilerplate output of each review seems all the more concerning. Defendants-appellees claim that '[t]here is no mystery as to why Isby remains in the SCU,' and the undisputed-facts portion of the district court's summary judgment order states that Isby has been kept in segregation because of his extensive conduct-report history, past behavior, violent tendencies, inability to cooperate with Wabash Valley staff, and other factors. However, the first two items in this list are limited to occurrences in the past, and it is unclear whether the other three items occurred in the distant or recent past as opposed to currently affecting Isby's readiness to return to the general prison population. Meanwhile, Lieutenant Nicholson highlighted the 1990 incident as the main reason for Isby's continued placement in segregation. If it is in fact the case, as defendants-appellees suggest, that Isby is still being held in administrative segregation because of his *ongoing* refusal to cooperate with staff and to participate in any of the self-help programs, then it seems easy enough to include that explanation in the output of his thirty-day reviews. . .Even one or two edits or additions along these lines could assuage our concerns and provide helpful notice to Isby as to the reasons for his placement and how he could get out. While defendants-appellees claim that Isby is 'well aware that he has an avenue for release' through the self-help programs, it is uncertain that participation in the IDOC programs would necessarily result in transfer or release from the SCU, and the parties dispute the extent to which such information was communicated to Isby. . . Defendants-appellees emphasize that the law does not require that an inmate receive a statement of reasons for their retention in administrative segregation. . . While such a statement of reasons may not be constitutionally required, however, under *Hewitt*, the periodic review must still be meaningful and non-pretextual. . . . On the record at summary judgment, there is a genuine dispute of fact as to whether the thirty-day reviews take into account any updated circumstances in evaluating the need for continued confinement, given the length of Isby's segregation, his long stretches of time without any disciplinary issues, and the rote repetition of the same two boilerplate sentences following each review. And while submission of new evidence or a full hearing may not be *necessary* to meet the requirements of due process under *Hewitt*, an actual review—*i.e.*, one open to the possibility of a different outcome—certainly is. . . . Several other circuits have also criticized review procedures like those we have here. [collecting cases] Given the long stretches of time during which Isby had no serious disciplinary problems, as well as the conflicting evidence as to the reasons for his ongoing segregation, Isby has raised triable issues of material fact regarding whether his reviews were meaningful or pretextual. . . Here, the repeated issuance of the same uninformative language (without any updates or explanation of why continued placement is necessary) coupled with the length of Isby's confinement, could cause a reasonable trier of fact to conclude that Isby has been deprived of his liberty interest without due process. Moreover, our concerns with the thirty-day review process bring us to the ninety-day reviews, and the parties and the district court agree there is a disputed issue of material fact in Isby's case with respect to these more formal reviews. Further testimony and evidence at trial could clarify the reasons for Isby's

ongoing segregation and convince a trier of fact that his reviews were not pretextual. However, his due process claim ought to have survived summary judgment."); ***Proctor v. LeClaire,*** 846 F.3d 597, 608-14 (2d Cir. 2017) ("Proctor raises a view of inmate procedural due process this Court has yet to address. While he acknowledges that Defendants have nominally afforded him sufficient process by conducting regular section 301.4(d) reviews, Proctor argues that those reviews have been in substance 'hollow,' 'perfunctory,' and meaningless. . . A meaningless section 301.4(d) review, Proctor asserts, is the functional equivalent of no review at all and therefore constitutionally insufficient. Proctor also argues that Defendants have violated the Due Process Clause by using Ad Seg as a means to punish him improperly and as a pretext to confine him in the SHU indefinitely. . . . Proctor's claim seeks to measure what *Hewitt* requires for meaningful periodic review of Ad Seg. Guiding that analysis are the three *Mathews* factors—the government's interest in limited fiscal and administrative burdens, the private interest in freedom from restraint, and 'the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.'. . The state's interest in flexible Ad Seg review procedures—maintaining institutional security—is substantial. Institutional safety and security are perhaps a prison facility's most important considerations. . . Courts must preserve prison officials' 'free[dom] to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape.'. . . However, the private interest implicated by an extended and indefinite stay in Ad Seg is also weighty. *Hewitt* instructs that an inmate in Ad Seg who 'was merely transferred from one extremely restricted environment to an even more confined situation' generally does not have a private interest 'of great consequence.'. . But Helms, the inmate in *Hewitt*, spent less than two months in Ad Seg awaiting his disciplinary hearing. . . Proctor, by contrast, has spent thirteen years in Ad Seg with no release date in sight. Proctor's interest in avoiding an indefinite Ad Seg term is surely substantial, more so than Helms's interest in avoiding a temporary Ad Seg term awaiting a hearing. . . . In light of those counterbalancing interests, we believe that meaningful periodic reviews of Ad Seg must at least satisfy the following criteria:

First, the reviewing prison officials must actually evaluate whether the inmate's continued Ad Seg confinement is justified. . . It is not sufficient for officials to go through the motions of nominally conducting a review meeting when they have developed a pre-review conclusion that the inmate will be confined in Ad Seg no matter what the evidence shows. Review with a pre-ordained outcome is tantamount to no review at all.

Second, the reviewing officials must evaluate whether the justification for Ad Seg exists at the time of the review or will exist in the future, and consider new relevant evidence as it becomes available. It is inherent in *Hewitt*'s use of the term 'periodic' that ongoing Ad Seg reviews may not be frozen in time, forever rehashing information addressed at the inmate's initial Ad Seg determination. . . Rather, reviews must take into account prison conditions and inmate behavior as they change over time; those changes may modify the calculus of whether the inmate presents a current threat to the safety of the facility. The periodic Ad Seg review test announced by the *Hewitt* Court is not whether the confined inmate *was* a threat to the facility when he was confined initially;

it is whether the inmate '*remains* a security risk' on the date of the periodic review. . . This is not to say that prison officials are barred from according significant weight to events that occurred in the past. Neither do we suggest that recent events categorically ought to be more salient in periodic reviews than those that occurred long ago. We conclude merely that prison officials must look to the inmate's present and future behavior and consider new events to some degree to ensure that prison officials do not use past events alone to justify indefinite confinement. . . Third and finally, the reviewing officials must maintain institutional safety and security (or another valid administrative justification) as their guiding principles throughout an inmate's Ad Seg term. SHU confinement that began for proper Ad Seg purposes may not morph into confinement that persists for improper purposes. The state is entitled to the procedural flexibility that *Hewitt* allows because of its manifest interest in maintaining safe detention facilities and other similar administrative concerns; 'the *Mathews* balancing test tips in favor of the inmate's liberty interest' when a state seeks to impose discipline. . . The state may not use Ad Seg as a charade in the name of prison security to mask indefinite punishment for past transgressions. Our resolution of this matter is in accord with the efforts of four of our sister circuits. [discussing cases] In sum, periodic reviews of Ad Seg satisfy procedural due process only when they are meaningful. Reviews are meaningful only when they involve real evaluations of the administrative justification for confinement, they consider all of the relevant evidence that bears on whether that administrative justification remains valid, and they ensure that Ad Seg is used as neither a form of punishment nor a pretext for indefinite confinement. Proctor has produced sufficient evidence to raise factual questions about whether his section 301.4(d) reviews have met that standard."); ***Reynoso v. Selsky***, 292 F. App'x 120, 123 (2d Cir. 2008) ("Aggregative sentences within this range − between 101 and 305 days − as here, require a district court to articulate specific findings of the conditions of the imposed confinement relative to ordinary prison conditions before determining whether such confinement is atypical. . . Accordingly, the district court was required to consider whether the sentences should have been aggregated for this due process inquiry, and if so, to articulate findings as to why the 150-day total sentence was not 'atypical and significant.' Such a determination is anything but simple, and cannot be resolved summarily."); ***Grinter v. Knight***, 532 F.3d 567, 574 (6th Cir. 2008) (no liberty interest in either freedom from four-point restraints for four hours or in applying the restraints only in the presence of a nurse because the restraints were not an "atypical and significant hardship" in prison life); ***DiMarco v. Wyoming Dep't of Corrections***, 473 F.3d 1334, 1340-42, 1344 (10th Cir. 2007) ("We have yet to apply *Wilkinson* to an inmate's placement in administrative segregation in a published opinion. . . . The question that must be answered in this appeal, then, is two-fold. First, what is the appropriate baseline comparison? Second, how significant must the conditions of confinement deviate from the baseline to create a liberty interest in additional procedural protections? Here the baseline comparison question lends itself to several possible solutions. One option is to compare administrative segregation with conditions in the general population. A second option is to compare it with other, typical protective custodies. And a third option is, to compare it with that experienced by other uniquely placed or difficult to place prisoners − i.e., ill inmates, elderly inmates, or inmates with disabilities or under supervision because of mental illness or dependency. In our view, the answer lies somewhere between these choices. It is simplistic to understand the *Sandin* formulation as suggesting a rigid either/or

assessment. Rather, it makes sense to look at a few key factors, none dispositive, as the Supreme Court did in *Wilkinson*. . . . Relevant factors might include whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate (in *Wilkinson* the placement was reviewed only annually). . . . Taken together, these factors do not weigh in favor of finding that DiMarco has an enforceable liberty interest. While we are sympathetic with her complaints about the petty deprivations resulting from her confinement, and are confident prison officials could have done better, we cannot conclude that the prison imposed such an atypical and significant hardship on her as to offend the Due Process Clause of the Constitution."); ***Trujillo v. Williams***, 465 F.3d 1210, 1225 (10th Cir. 2006) ("Thus, we have held that a district court errs in *sua sponte* dismissing a prisoner's due process claim under § 1915 if it does not have sufficient evidence before it to 'fully address both the duration and degree of the plaintiff's restrictions as compared with other inmates.'. . . Here, the district court determined that Mr. Trujillo failed to state a due process claim despite the lack of any evidence addressing whether Mr. Trujillo's confinement was atypical and significant when compared to conditions imposed on other prisoners. Mr. Trujillo's complaint specifically alleges that he spent over 750 days in segregation and that other inmates remain in segregation for the most serious offenses for only 180 days. Where, as here, the prisoner is subjected to a lengthy period of segregation, the duration of that confinement may itself be atypical and significant. . . . We therefore reverse the dismissal of Mr. Trujillo's due process claim against the New Mexico defendants and remand to allow the district court to conduct the required evidentiary analysis."); ***Jordan v. Federal Bureau of Prisons***, No. 04-1104, 2006 WL 2135513, at **9-11 (10th Cir. July 25, 2006)(on rehearing) (not published) ("When considering whether the conditions, duration or restrictions of confinement are atypical as compared with other inmates, this court has inconsistently used comparisons either with inmates in the same segregation or those in the general prison population. . . The Supreme Court has recognized, without deciding the issue, that the circuit courts are split on which baseline comparison to use. While instructive, *Wilkinson* is not dispositive here, as the conditions of Mr. Jordan's administrative detention were obviously not as onerous, given 1) he admittedly had frequent contact with staff; 2) the length of his sentence was not affected by the administrative detention; and 3) his confinement was not indefinite but instead limited to the duration of the pending murder investigation. . . . Based on the circumstances presented, we perceive no constitutional violation occurred with respect to the conditions or restrictions of Mr. Jordan's administrative confinement, and he has otherwise failed to meet his burden of establishing the officials violated a constitutional or statutory right for the purpose of overcoming their defense of qualified immunity. We next turn to the more egregious claim relating to the lengthy five-year or 1,825-day duration of Mr. Jordan's administrative detention to determine if it posed an atypical or significant hardship in relation to the ordinary incidents of prison life. Mr. Jordan claims the duration of his confinement alone created a liberty interest as a matter of law, while the prison officials argue it did not rise to an atypical hardship based on the pending murder investigation and continuing security risk he posed to other inmates and staff before and during that investigation. Clearly, we do not condone a murder investigation which takes almost five years, during which time an inmate is subjected to conditions which are atypical

or pose a significant hardship. However, in this case, we have already determined the conditions or restrictions Mr. Jordan encountered did not pose the requisite *Sandin* atypical or significant hardship. Even if we considered the five-year duration of the confinement alone, this court has held certain prison actions which might impinge on an inmate's constitutional rights may be valid if they are reasonably related to legitimate penological interests. . . . . In this case, Mr. Jordan's administrative detention was a result of a justified, ongoing criminal investigation of which prison officials were aware. . . . Thus, while his administrative detention was longer than other instances this court has considered and arguably atypical in duration, the fact it was commensurate with ongoing security concerns and a pending investigation, during which time Mr. Jordan did not experience atypical conditions or restrictions, provides sufficient extenuating circumstances to convince us no liberty interest was implicated."); ***Hill v. Fleming***, No. 05-2005, 2006 WL 856201, at *4 (10th Cir. Apr. 4, 2006) (not published) ("When considering whether the conditions, duration or restrictions are atypical as compared with other inmates, we have considered as a baseline whether the segregation at issue mirrors that imposed on other inmates in the same segregation, while at other times we have made comparisons with the general prison population. Other circuits grappling with the same baseline issue have had mixed results, either relying squarely on comparisons with other inmates in the same administrative segregation or those in the general population. In this case, despite the parties' opposing contentions on which baseline applies, the result is the same, no matter which baseline is used. We reach this conclusion because regardless of which baseline we previously applied in making comparisons − either segregated or general prison populations − this circuit has never held the conditions, duration or restrictions of the detentions presented on appeal created a liberty interest, even in circumstances where the detention exceeded the 399-day duration of Mr. Hill's detention or restricted some of the same privileges."); ***Skinner v. Cunningham***, 430 F.3d 483, 486, 487 (1st Cir. 2005) ("The hardship test has itself become the source of major disagreement. . . Some circuits compare the confinement conditions to those of the general prison population, while others look to the conditions of nondisciplinary administrative segregation. . . One circuit holds that disciplinary segregation never implicates a liberty interest unless it lengthens a sentence. *Carson v. Johnson,* 112 F.3d 818, 821 (5th Cir.1997). Whether *Sandin* should be read as a cookbook recipe for all cases is unclear. We think it is enough here that Skinner's segregation was rational, that its duration was not excessive, and that the central condition − isolation from other prisoners − was essential to its purpose. Skinner was a prisoner serving a sentence for murder who had just killed another inmate. . . . The prison was waiting on the Attorney General, and six weeks is hardly an excessive time to conduct a preliminary inquiry into a possible murder. . . As for Skinner's conditions of confinement, isolation from other prisoners was of the essence, and while it was perhaps needless to have denied Skinner amenities such as television or books, these deprivations are largely incidental to Skinner's main complaint, and were in any case short-term. Taking all the circumstances into account, including the prison's need to manage its own administration, . . .Skinner's temporary isolation without a formal hearing was not unconstitutional either in its essential character or in its duration."); ***Westefer v. Snyder***, 422 F.3d 570, 589, 590 (7th Cir. 2005) ("We believe that the allegations of the complaint, which we must accept as true at this stage of the litigation, preclude dismissal under the now-governing standards of *Wilkinson*. There are some differences between

the features of the Ohio supermax at issue in *Wilkinson* and those of the Illinois facility at issue here. It is not at all clear, however, that those differences are so qualitatively different as to require a different characterization of the facility for purposes of due process analysis under *Wilkinson*. Illinois' contention that the liberty interest identified in *Wilkinson* turned exclusively on the absence of parole constitutes, our view, far too crabbed a reading of the decision. . . . We also note that, if, after considering all the evidence submitted by the parties, the district court is not of the view that the Illinois situation is, like the Ohio facility, 'an atypical and significant hardship under any plausible baseline,' . . . the district court must confront the issue of what does constitute the appropriate baseline for the Illinois system. . . Assuming that a liberty interest is determined to exist, the district court will then have to confront whether the procedures that we have discussed at some length with respect to the exhaustion of administrative remedies provide sufficient process to protect the prisoners' liberty interest in this case."); ***Lekas v. Briley***, 405 F.3d 602, 608, 609 (7th Cir. 2005) ("[C]ourts today charged with assessing whether conditions of confinement pose an atypical and significant hardship are in essence counseled by *Sandin* to (1) compare the conditions of disciplinary segregation to those of discretionary segregation;. . . (2) compare the conditions of disciplinary segregation to those in the general prison population; and (3) determine whether the disciplinary action affects the length of the inmate's sentence. . . . [W]hat continues to be perplexing is the comparison group against which the conditions of disciplinary segregation are to be compared. While *Sandin* suggests the confinement be compared against both discretionary segregation as well as the general prison population, the realities of prison administration suggest that these two control groups are in fact one and the same. . . . This is because, in every state's prison system, any member of the general prison population is subject, without remedy, to assignment to administrative segregation or protective custody at the sole discretion of prison officials. . . . Thus, when a court compares disciplinary segregation to the general prison population, it is effectively comparing disciplinary segregation to discretionary segregation. . . . Indeed, taking *Sandin*'s prescribed comparisons to their logical extremes, it is possible that the conditions of discretionary segregation against which the plaintiff's confinement is to be judged are not necessarily those of the prison in which the plaintiff is incarcerated, but rather those of the most restrictive prison in the state penal system . . . and perhaps even those of the most restrictive prison in the entire country. . . . This is a harsh, and perhaps unintentional, result. But it is also inescapable, in light of the fact that a prisoner may be transferred from one state prison to another without implicating the inmate's liberty interest − even where the conditions of the destination prison are 'much more disagreeable' than those of the originating prison."); ***Ortiz v. McBride***, 380 F.3d 649, 655 (2d Cir. 2004) ("The district court in the case before us thus erred when it dismissed Ortiz's due process claim based solely on the fact that his SHU confinement was for fewer than 101 days. We need not delineate the precise contours of 'normal' SHU confinement. For present purposes, it is sufficient to note that, ordinarily, SHU prisoners are kept in solitary confinement for twenty-three hours a day, provided one hour of exercise in the prison yard per day, and permitted two showers per week. . . Ortiz alleges that for at least part of his confinement, he was kept in SHU for twenty-four hours a day, was not permitted an hour of daily exercise, and was prevented from showering 'for weeks at a time.' . . Based on these and Ortiz's other allegations relating to his treatment in SHU, we think that, if proved, they could establish conditions in SHU

'far inferior'. . . to those prevailing in the prison in general. We thus conclude that Ortiz has alleged that the ninety-day SHU sentence imposed on him was, under the circumstances, a hardship sufficiently 'atypical and significant' to withstand a Rule 12(b)(6) motion as to the first part of the due process test."); ***Palmer v. Richards***, 364 F.3d 60, 64-66 & n.4 (2d Cir. 2004) ("[O]ur cases establish the following guidelines for use by district courts in determining whether a prisoner's liberty interest was infringed. Where the plaintiff was confined for an intermediate duration − between 101 and 305 days − 'development of a detailed record' of the conditions of the confinement relative to ordinary prison conditions is required. . . . A confinement longer than an intermediate one, and under 'normal SHU conditions,' . . . is 'a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*.'. . . And although shorter confinements under normal SHU conditions may not implicate a prisoner's liberty interest, . . .we have explicitly noted that SHU confinements of fewer than 101 days could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions of *Sealey* or a more fully developed record showed that even relatively brief confinements under normal SHU conditions were, in fact, atypical. . . . In the absence of a detailed factual record, we have affirmed dismissal of due process claims only in cases where the period of time spent in SHU was exceedingly short − less than the 30 days that the Sandin plaintiff spent in SHU − and there was no indication that the plaintiff endured unusual SHU conditions. . . . .The actual duration of confinement is relevant to determining whether any liberty interest was infringed, . . .but should the analysis proceed to the second prong of the qualified immunity analysis − whether Richards's actions were objectively reasonable in light of the law at the time − the pronounced sentence is the relevant period, *see Hanrahan v. Doling*, 331 F.3d 93, 98 (2d Cir.2003) (per curiam)."); ***Mitchell v. Horn,*** 318 F.3d 523, 531, 532 (3d Cir. 2003) ("*Sandin* did not pronounce a per se rule, as the District Court's opinion implies. In *Sandin,* to determine whether the prisoner's treatment − thirty days disciplinary segregation for resisting a strip search − implicated a liberty interest, the Supreme Court carefully compared the circumstances of the prisoner's confinement with those of other inmates. . . . In deciding whether a protected liberty interest exists under *Sandin*, we consider the duration of the disciplinary confinement and the conditions of that confinement in relation to other prison conditions. . . Not surprisingly, our cases engaging in this inquiry have reached differing outcomes, reflecting the fact-specific nature of the *Sandin* test. [collecting cases]"); ***Sealy v. Giltner***, 197 F.3d 578, 584, 585-89 (2d Cir. 1999) ("The Seventh Circuit has interpreted *Sandin* to mean that 'the key comparison [to determine atypical and significant hardship] is between disciplinary segregation and nondisciplinary segregation,' *Wagner v. Hanks,* 128 F.3d 1173, 1175 (7th Cir.1997), thereby implying that confinement for administrative reasons can never implicate a liberty interest. We think *Sandin* does not go so far. The Court might have assumed that administrative confinement sometimes will not implicate a liberty interest because it might be imposed without the requirement that corrections officers find a substantive factual predicate. . . . But, as we have long recognized, New York has established substantive factual predicates for many instances of administrative confinement. . . . If an inmate is to be placed in atypical confinement (considering both the conditions and the duration) after being determined, for example, to be a threat to prison safety, he should have some procedural due process surrounding the determination that he poses such a threat. That is the teaching of *Hewitt*,

and if *Sandin* had meant to overrule *Hewitt* to the extent of precluding a protected liberty interest for all administrative confinements, we would expect to see more pointed language to that effect. . . . [surveying the approach taken by the Circuits on the question of] Ato what type of confinement is the challenged confinement to be compared' and noting that "[t]he relevant comparison in this Circuit has not been definitively settled, although our decision in *Brooks* suggests that, in a disciplinary confinement case, a comparison might be made to both conditions in administrative confinement and in the general prison population."); ***Hatch v. District of Columbia,*** 184 F.3d 846, 847 (D.C. Cir. 1999) ("Considering *Sandin's* language and objectives, we hold that due process is required when segregative confinement imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences. For appellant, these conditions include the usual conditions of administrative segregation at Lorton. They also include more restrictive conditions at other prisons if it is likely both that inmates serving sentences similar to appellant's will actually be transferred to such prisons and that once transferred they will actually face such conditions."); ***Tyree v. Weld***, Civ. Nos. 93cv12260-NG, 93cv12725-NG, 2010 WL 145882, at *12, *13 (D. Mass. Jan. 11, 2010) (How the 'ordinary incidents of prison life' should be defined is not entirely clear: as the Supreme Court has noted, the courts of appeals have been unable to agree on where to locate that baseline. . .The First Circuit has not yet decided the issue. However, as in *Wilkinson,* which dealt with Ohio's 'Supermax' facility, the conclusion is inescapable that the assignment of prisoners to Phase III and the East Wing clearly 'impose[d] an atypical and significant hardship under any plausible baseline.'. . Plaintiffs had perhaps a total of four hours each week in which they could interact with fellow prisoners. . . They ate alone and received far fewer canteen privileges than other prisoners. . . They had to remain in their cells for approximately 22.5 or 23 hours each day . . . and time spent showering and making phone calls was counted against their out-of-cell time. . . . Minimal jobs or educational programs were available, which meant that prisoners had greatly reduced opportunities to earn good-time credits. . .Finally, as discussed in more detail below, prisoners were assigned to Cedar Junction's restrictive confinement not for a short time, but rather for an indefinite duration. And they could not be reassigned to a less restrictive area for at least six months. . . Indeed, the average duration of assignment to the East Wing was a striking 270 days. Taken together, the deprivations suffered by plaintiffs and the indefinite duration of their stay in restrictive housing constitute an 'atypical and significant hardship' when compared to any reasonable baseline. *Cf. Wilkinson,* 545 U.S. at 223-24. The harsh conditions imposed on plaintiffs 'may well [have been] necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish [the] conclusion that the conditions give rise to a liberty interest in their avoidance.").

But see ***Davis v. Barrett***, 576 F.3d 129, 135 (2d Cir. 2009) ("Even though Davis's confinement was relatively short − lasting at most 55 days − this Court has required a 'detailed factual record,' unless 'the period of time spent in SHU was exceedingly short − less than [ ] 30 days ... − and there [is] no indication that the plaintiff endured unusual SHU conditions .'. . Here, the record lacks any evidence of the conditions for other inmates in administrative confinement,

or in the general prison population. To the extent that the magistrate judge conducted any comparison of conditions, he simply noted that, based upon the regulations, the conditions in administrative segregation were no more severe than disciplinary SHU conditions. However, this finding was insufficient under the requirements of *Welch.* A detailed factual record containing information as to the actual conditions in both administrative segregation and for the general population is necessary for the court to make the type of comparison required."); ***Colon v. Howard***, 215 F.3d 227, 231, 232 (2d Cir. 2000) ("Confinement in normal SHU conditions for 305 days is in our judgment a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*. There are no precise calipers to measure the severity of SHU hardship, but we believe that wherever the durational line is ultimately drawn, 305 days satisfies the standard. . . . Since we can anticipate continuing litigation in this area as the *Sandin* standard is given further content, we think it appropriate to advise the district courts of this Circuit that in cases challenging SHU confinements of durations within the range bracketed by 101 days and 305 days, development of a detailed record will assist appellate review. For instance, the parties might present evidence of the psychological effects of prolonged confinement in isolation and the precise frequency of SHU confinements of varying durations. Such a record will more likely result if counsel is appointed for the prisoner, both sides are given some latitude both in discovery and in presentation of pertinent evidence at trial, and, in cases where the absence of dispute as to relevant facts makes the *Sandin* issue appropriate for court determination, . . . the district judge makes the sort of particularized findings contemplated by our remands in *Welch*, 196 F.3d at 393-95, *Brooks*, 112 F.3d at 48-49, and *Miller*, 111 F.3d at 9-10."); ***Welch v. Bartlett***, 196 F.3d 389, 393, 394 (2d Cir. 1999) ("In our view, these facts do not justify the court's conclusion that the conditions of SHU confinement (considered without regard to duration or frequency of imposition) are not 'atypical' compared to the conditions of general population confinement. Although confinement to one's cell for half the day has some similarity to such confinement for 23 hours a day, the difference seems to us to be great. Furthermore, the fact that general population prisoners' access to programs is sometimes restricted or interrupted does not show either that such limitations occur with sufficient regularity to be considered typical, or that the severity of the conditions faced by a prisoner experiencing such limitations on his programs is comparable. Whether the conditions of Welch's confinement constitute an atypical and significant hardship requires that they be considered in comparison to the hardships endured by prisoners in general population, as well as prisoners in administrative and protective confinement, assuming such confinements are imposed in the ordinary course of prison administration. Further, the duration and the frequency of such deprivations are highly relevant to whether the conditions of a plaintiff's confinement should be considered atypical. The court did not consider the frequency or duration of non-punitive confinements such as administrative and punitive segregation, keeplock and cube confinements. . . Finally, we believe the court erred in concluding that the 90-day duration of Welch's confinement in the SHU did not render it atypical because approximately half the punitive SHU sentences were 90 days or more. In our view, the relevant comparison concerning duration is between the period of deprivation endured by the plaintiff and periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration, including general population prisoners and those in various forms of administrative and protective custody.

The theory of *Sandin* is that, notwithstanding a mandatory entitlement, a deprivation is not of sufficient gravity to support a claim of violation of the Due Process Clause if similar deprivations are typically endured by other prisoners, not as a penalty for misbehavior, but simply as the result of ordinary prison administration. . . The comparison required by *Sandin* therefore is not between the duration of plaintiff's SHU sentence and the SHU terms received by others who were convicted of misbehavior. That comparison does not tell whether Welch's deprivation was more serious than typically endured by prisoners as an ordinary incident of prison life.").

See also ***J.S. v. T'Kach***, 714 F.3d 99, 106 (2d Cir. 2013) ("We have held that a prisoner has a liberty interest that is implicated by SHU confinement if it 'imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'. . In this regard, we consider, among other things, the duration and conditions of confinement. . . In the absence of factual findings to the contrary, confinement of 188 days is a significant enough hardship to trigger *Sandin.* . . The government contends that JS's confinement was administrative and not punitive in nature. But the record is devoid of any explanation as to why JS was confined to SHU for that period. No one contends that § 3521(f) would permit the government to visit significant, unreviewable punishment on an inmate after his termination from the Program. Thus, without factual findings to the contrary, we have little difficulty concluding that JS's allegation of 188 days of administrative confinement is sufficient to implicate *Sandin*-type liberty interests."); ***Giano v. Selsky***, 238 F.3d 223, 226 (2d Cir. 2001) ("We view such an aggregation as particularly appropriate here, where it is clear that Giano's segregation at Clinton was simply a continuation of his segregation at Attica. A review of the record indicates that the two periods of confinement were based on the same administrative rationale and that the conditions of Giano's confinement were, for all practical purposes, identical at both facilities. Under these circumstances, Giano's two sentences of administrative segregation must be considered cumulatively for purposes of the *Sandin* analysis, although Giano will not be allowed a double recovery for the Attica sentence."); ***Kalwasinski v. Morse***, 201 F.3d 103, 107 (2d Cir. 1999) (" In the decision reviewed here, the district court surveyed other decisions holding that periods of SHU confinement similar in duration to Kalwasinski's did not implicate a liberty interest and therefore concluded that Kalwasinski's SHU penalty did not implicate a liberty interest either. As noted in *Welch*, however, the essential comparison is not to other terms of punitive SHU confinement. Rather, the district court must consider the 'periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration, including general population prisoners and those in various forms of administrative and protective custody.'"); ***Jones v. Baker***, 155 F.3d 810, 812 (6th Cir. 1998) ("Plaintiff contends that the extraordinarily long time during which he has been held in segregation [over two and one half years] establishes the 'atypical and significant' hardship necessary under *Sandin* to create a liberty interest. First, administrative segregations have repeatedly been held not to involve an "atypical and significant" hardship implicating a protected liberty interest without regard to duration. . . . [W]e agree with the district court that under *Sandin* a liberty interest determination is to be made based on whether it will affect the overall duration of the inmate's sentence and there is no evidence here that the segregation will impact plaintiff's sentence."); ***Jones v. Baker***, 155 F.3d 810, 815, 816 (6th Cir. 1998) (Gilman, J., concurring) ("The

majority in the present case asserts that administrative segregation in general is "typical" of what can normally be expected as an incident of prison life, so that such confinement does not normally give rise to a liberty interest. Other courts have agreed with this position. . . . Such a broad categorical approach to resolving procedural due process claims, however, is in my opinion out of step with *Sandin's* principal directive that courts should look to see if the particular inmate has been deprived of a state-created interest of 'real substance.'"); ***Gonzalez v. Coughlin***, No. 96-2494, 1998 WL 2410, *2 (2d Cir. Jan. 6, 1998) (unpublished) ("We do not need today to decide whether confinements of sufficient length may exist that, in themselves and without further examination of the specific circumstances of the punishment, can be deemed atypical. For our circuit's prior cases have made clear that 163 days is not enough, standing by itself, to fall into such a per se category under *Sandin*. Dealing with confinements of up to 180 days, 'we have indicated the desirability of fact-finding before determining whether a prisoner has a liberty interest in remaining free from segregated confinement.'"); ***Wright v. Coughlin***, 132 F.3d 133, 137 (2d Cir. 1998) ("Access to periodic confinement reviews − and thus, for those administratively assigned to SHU, the monthly prospect of being released from SHU − might differentiate disciplinary from administrative confinement. Therefore, despite the similarities of the conditions, the length of disciplinary confinement in the SHU could be meaningful in determining whether the confinement was an 'atypical and significant' hardship as contemplated by *Sandin*. A comparison between administrative and disciplinary confinement is therefore necessary. . . . Because the district court did not consider duration as a factor in its *Sandin* analysis as required by *Brooks* . . . and failed to consider how the lack of access to periodic confinement reviews might differentiate disciplinary from administrative confinement, we vacate and remand for further proceedings."); ***Brown v. Plaut***, 131 F.3d 163, 169-70 (D.C. Cir. 1997) ("Brown's placement in administrative segregation violated the Due Process Clause only if two conditions are met: Brown had a liberty interest in avoiding that term of segregation, and Brown did not receive the process he was due. The first of these questions raises difficult issues of constitutional law; the second, only narrow questions of fact. We therefore discuss the first question only to the extent necessary to explain why we do not decide it, and focus on the second. . . . Applying *Sandin* to this case presents a number of difficulties. First, although *Sandin* clearly dictates that we compare the hardship experienced by the inmate to 'the ordinary incidents of prison life,' it is not clear which prison or part of a prison is to provide the standard of comparison. . . . [Second,] [c]aselaw from the Second and Ninth Circuits suggests that whether a term in segregation amounts to an 'atypical and significant' deprivation turns on its length and on a comparison of conditions in segregation and in the prison's general population. . . Other courts have not adopted so structured an analysis. . . . And, finally, we would need to decide whether *Sandin's* 'atypical and significant' test merely supplements *Hewitt*'s test for the existence of a liberty interest, or supersedes it altogether. . . We do not think it necessary or even useful to resolve so many complex and fact-specific issues in the context of this case which it may be possible to decide on far narrower grounds."); ***Griffin v. Vaughn***, 112 F.3d 703, 707 (3d Cir. 1997) ("It is thus apparent that in the penal system to which Griffin was committed with due process of law, it is not extraordinary for inmates in a myriad of circumstances to find themselves exposed to the conditions to which Griffin was subjected. It is also apparent that it is not atypical for inmates to be exposed to those conditions, like Griffin, for

a substantial period of time. Given the considerations that lead to transfers to administrative custody of inmates at risk from others, inmates at risk from themselves, and inmates deemed to be security risks, etc., one can conclude with confidence that stays of many months are not uncommon. For these reasons, we believe that exposure to the conditions of administrative custody for periods as long as 15 months 'falls within the expected parameters of the sentence imposed [on him] by a court of law.' It necessarily follows, in our view, that Griffin's commitment to and confinement in administrative custody did not deprive him of a liberty interest and that he was not entitled to procedural due process protection."); ***Brooks v. DiFasi***, 112 F.3d 46, 49 (2d Cir. 1997) ("After *Sandin*, in order to determine whether a prisoner has a liberty interest in avoiding disciplinary confinement, a court must examine the specific circumstances of the punishment. . . . The mere fact that prison regulations allow for lengthy administrative confinement in some situations does not obviate this central factual inquiry. First, . . . we have never held that New York prisoners have no liberty interest in avoiding long-term administrative confinement. Second, the fact that administrative or protective custody is subject to periodic review, while disciplinary confinement is not, may be significant in determining whether lengthy disciplinary confinement constitutes an 'atypical and significant hardship.' Furthermore, the district court's approach depended on the observation that New York's prison regulations make little or no distinction between disciplinary and non-disciplinary segregated confinement. While it may be true that the regulations do not distinguish between the conditions of administrative and punitive confinement, it does not necessarily follow that the actual conditions are similar. Finally, the mere fact that New York's prison regulations permit extended administrative segregation does not tell how frequently or for what durations such segregation is imposed."); ***Miller v. Selsky***, 111 F.3d 7, 9 (2d Cir. 1997) ("*Sandin* did not create a per se blanket rule that disciplinary confinement may never implicate a liberty interest. Courts of appeals in other circuits have apparently come to the same conclusion, recognizing that district courts must examine the circumstances of a confinement to determine whether that confinement affected a liberty interest." (citing cases)).

See also ***Gaines v. Stenseng,*** 292 F.3d 1222, 1225, 1226 (10th Cir. 2002) (We conclude that the district court acted precipitately in the instant case and that a '1915(e) dismissal was improper. It is true that *Sandin* held, at the summary judgment stage, that the challenged 'discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.' . . . But to reach this conclusion the Court carefully examined the conditions of the prisoner's confinement, ultimately determining that his disciplinary segregation 'mirrored those conditions imposed upon inmates in administrative segregation and protective custody.'. . By contrast, in the present case the district court engaged in no such examination of the typical conditions of confinement in Gaines's prison, instead determining in a conclusory fashion that seventy-five days in disciplinary segregation was neither atypical nor significant. Although the court might properly conclude at the summary judgment stage that there is sufficient evidence to establish that such segregation mirrors conditions imposed upon inmates in administrative segregation and protective custody, and that therefore the complaint should be dismissed, it is inappropriate to invoke '1915(e) to dismiss the claim at this stage in the litigation without the benefit of any such evidence. . . . [W]e note that the holding in

this case is limited to the length of the seventy-five day disciplinary segregation. Disciplinary segregation for some lesser period could fail as a matter of law to satisfy the 'atypical and significant' requirement in a case in the future, thereby making it futile to allow the pro se plaintiff to amend his complaint."); ***Perkins v. Kansas Dep't of Corrections***, 165 F.3d 803, 809 (10th Cir. 1999) ("Here, the district court did not have evidence before it from which it could engage in the analysis required by *Sandin* and determine whether the conditions of plaintiff's confinement presented the type of atypical, significant deprivation that would implicate a liberty interest. Plaintiff's allegations, accepted as true, showed that he is confined in an eight-foot by fourteen-foot concrete cell for twenty-three and one-half hours a day. He is permitted to leave his cell for thirty minutes each day, to take a shower, but he must wear the face mask when he is out of his cell. Plaintiff has not been permitted exercise outside his cell for over a year. Plaintiff contends that no other inmates bear similar restrictions, and there is no evidence in the record at present to contradict this allegation. On appeal, appellees argue that the conditions of plaintiff's confinement do not represent an atypical and significant hardship because '[i]t is ordinary for prisoners to be locked down in segregation for various offenses and to be isolated from others due to extreme behavior.' Appellees' Br. at 5. This evidence was not before the district court at the time plaintiff's claim was dismissed, and, in any event, it does not fully address both the duration and degree of plaintiff's restrictions as compared with other inmates. . . Based upon our review, we conclude the district court erred in sua sponte dismissing plaintiff's due process claim."); ***Spaight v. Cinchon***, No. 98-2367, 1998 WL 852553, *2 (2d Cir. Dec. 8, 1998) (unpublished) ("In our view, the record as it currently stands is inadequate to permit effective review of Spaight's procedural due process claim. It is true that we have previously stated in dicta, in *Hynes v. Squillace*, 143 F.3d 653 (2d Cir.1997), that 'in cases involving shorter periods of confinement where the plaintiff has not alleged any unusual conditions, the district court need not provide such detailed explanation of its reasoning.' *Id.* at 658. However, we do not believe that Spaight's 39-day confinement was so short that his claim may be properly dismissed without further analysis. [footnote omitted] Significantly, our conclusion in *Hynes* rested in part on the fact that the defendants in that case had 'submitted detailed evidence on the typicality of Hynes' confinement' and that the magistrate judge's report 'contained a finding that the conditions of Hynes' keeplock confinement mirrored the conditions of other segregated inmates.' *Id*. By contrast, there is insufficient evidence in the record before us to allow an informed assessment of Spaight's confinement and of the relevant prison conditions. Accordingly, we must vacate the district court's judgment dismissing Spaight's procedural due process claim and remand for further fact-finding."); ***Scott v. Albury***, 156 F.3d 283, 287-88 (2d Cir. 1998) ("[W]e hold that in conducting the *Sandin* analysis to determine whether a disciplinary sentence 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,'. . . courts should consider the degree and duration of the sentence actually imposed in the hearing and not the maximum sentence that might have been imposed."); ***Hynes v. Squillace***, 143 F.3d 653, 658 (2d Cir. 1998) ("*Miller, Brooks* and *Wright* all involved relatively long periods of SHU confinement, and specific articulation of the factual findings underlying the district court's liberty interest analysis was necessary. However, in cases involving shorter periods of segregated confinement where the plaintiff has not alleged any unusual conditions, the district court need not provide such detailed explanation of its reasoning. . . . Given plaintiff's failure of

proof, including his failure to allege any unusual conditions, the short span of the confinement at issue, and previous decisions (including *Sandin*) holding that comparable periods and conditions of segregation do not amount to a deprivation of a liberty interest, we think the district court sufficiently articulated the factual predicates underlying its liberty interest analysis."); ***Williams v. Benjamin***, 77 F.3d 756, 769 (4th Cir. 1996) (noting plaintiff made "a forceful argument that confinement in four-point restraints poses an atypical and significant hardship."); ***Williams v. Fountain***, 77 F.3d 372, 374 n.3 (11th Cir. 1996) ("Because Williams's sanctions − especially the full year of solitary confinement − represent substantially more 'atypical and significant hardship[s] ... in relation to the ordinary incidents of prison life,' we assume that he suffered a liberty deprivation and was entitled to due process."); ***Williams v. Ramos***, 71 F.3d 1246, 1249 (7th Cir. 1995) (noting that the Court in *Sandin* relied on three factors in concluding that Conner had no constitutionally protected liberty interest: "1) disciplinary segregation was little different from discretionary forms of segregation; 2) comparison between Conner's confinement and conditions in the general population showed that Conner suffered no 'major disruption in his environment'; and 3) the length of Conner's sentence was not affected." citing *Sandin*, 115 S.Ct. at 2301); ***Rodriguez v. Phillips***, 66 F.3d 470, 480 (2d Cir. 1995) ("*Sandin* may be read as calling into question the continuing viability of our cases holding that New York regulations afford inmates a liberty interest in remaining free from administrative segregation. For purposes of the present appeal, however, we need not resolve whether Rodriguez had a protected liberty interest under the new *Sandin* standard. For we believe that even if he did, it was objectively reasonable for Lt. Alcock to believe Rodriguez had received all the process he was due."); ***Bulger v. United States Bureau of Prisons***, 65 F.3d 48, 50 (5th Cir.1995) (holding that prisoner has no liberty interest in job assignment); ***Orellana v. Kyle***, 65 F.3d 29, 31-32 (5th Cir.1995) ("[I]t is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional liberty status."), *cert. denied*, 116 S. Ct. 736 (1996); ***Whitford v. Boglino***, 63 F.3d 527, 533 (7th Cir. 1995) ("The holding in *Sandin* implies that states may grant prisoners liberty interests in being in the general population only if the conditions of confinement in segregation are significantly more restrictive than those in the general population.").

See ***Toney v. Owens***, 779 F.3d 330, 339-42 (5th Cir. 2015) ("We conclude that neither Toney's classification as a sex offender, nor the consequences flowing from that classification, implicated Toney's liberty interests under the due process clause. . . . .[S]ex offender classification triggers a liberty interest when combined with mandatory sex offender treatment. Toney correctly notes that in these cases, the inmates or parolees had not necessarily undergone sex offender treatment at the time they filed suit. . . But in each of these cases, sex offender treatment was clearly mandated. . . Here, based on the undisputed facts, Toney was never mandated to undergo sex offender treatment. First, it is clear that, unlike the parolees in *Coleman* and *Meza,* sex offender conditions of parole were never imposed on Toney. . . . Second, although Toney contends that he was transferred to the Ellis Unit in 2011 because 'they have Sex Offender Treatment Programs,' there is no evidence that Toney was ever mandated to undergo such treatment while at Ellis. Third, we conclude that Toney's participation in the Static 99 Assessment did not constitute sex offender

treatment. The district court correctly noted that this 'one-page worksheet' was merely a 'general risk assessment tool.' The evaluation-which was completed by a parole officer, not a psychiatrist or other mental health professional—consisted only of a handful of questions relating to Toney's history and past convictions. We hold that such a brief, perfunctory evaluation is not so 'stigmatizing and invasive' as to render Toney's conditions of incarceration 'qualitatively different' from those of other inmates. . . Finally, we conclude, based on the undisputed facts, that Toney was never mandated to complete the SOTP 18–month treatment program. . . . The other consequences Toney faced due to his sex offender classification also fail to give rise to a liberty interest. First, Toney contends that his sex offender status resulted in the repeated denials of his parole. However, even assuming the parole board relied on this factor in deciding to deny his parole, we have consistently held that 'Texas prisoners ... cannot mount a challenge against *any* state parole review procedure on procedural ... Due Process grounds.'. . Accordingly, even if the parole board 'consider[ed] unreliable or even false information' regarding Toney's sex offender status 'in making [its] parole determinations,' this 'simply do[es] not assert a federal constitutional violation.'. . Toney also points to his 2011 transfer to the Ellis unit, but, as discussed above, Toney has provided no evidence suggesting that he was required to undergo sex offender treatment upon his transfer to the Ellis unit. Moreover, an inmate generally 'has no liberty interest in residence in one prison or another. . . Finally, Toney's exclusion from substance abuse treatment and educational/vocational programs while in prison does not implicate a liberty interest, as such restrictions do not impose 'atypical and significant hardship [s] on [Toney] in relation to the ordinary incidents of prison life.'"); ***Gonzalez-Fuentes v. Molina***, 607 F.3d 864, 889, 890 (1st Cir. 2010) ("When we attempted to interpret *Sandin* in our *Dominique* opinion, we did not yet have the benefit of *Young,* which was handed down the following year. We now think that *Young* clarifies *Sandin's* holding. . . It implicitly suggests that the due process analysis depends on whether the baseline liberty being deprived is that of the general prison population or rather of a more parole-like arrangement. When the challenged action concerns what can be fairly described as the transfer of an individual from one imprisonment to another, *Sandin's* 'atypical hardship' standard remains our lodestar; when, on the other hand, it concerns the disqualification of an individual from a supervised release program that begins to more closely resemble parole, *Young* and *Morrissey* will form part of the guiding constellation. The upshot is that in cases in which an individual is not incarcerated in prison, the extent of his existing liberty within the relevant program − and not just the extent of his reduced liberty in a challenged placement − must be taken into account. This is not to question *Dominique's* ultimate holding, as the case before us is distinguishable on at least one critical fact. The transitional work-release program in *Dominique* required the plaintiff to reside in a correctional facility. . . Unlike him, ESP [electronic supervision program] participants reside, indefinitely, in their homes. Other circuits have emphasized the significance of the difference between confinement in an institutional setting and confinement within the home. . . . Taken together, these statements suggest that the Due Process Clause is particularly protective of individuals participating in non-institutional forms of confinement. A halfway house may indeed be a house, but it is not a home. . . . For these reasons, we believe that the appellees' arrangement was sufficiently similar to traditional parole − far more like parole than the work release program in *Dominique* − to merit protection under the Due Process Clause.");

Kitchen v. Upshaw, 286 F.3d 179, 186, 187 (4th Cir. 2002) ("We take judicial notice of the fact that there is nothing atypical about prisoners being denied permission to leave jail in order to work. Thus, we hold that under Virginia law prisoners have no constitutionally protected liberty interest in work release."); ***Asquith v. Department of Corrections,*** 186 F.3d 407, 411 (3d Cir. 1999) (removal from halfway house did not trigger protections of Due Process Clause); ***Callender v. Sioux City Residential Treatment Facility***, 88 F.3d 666, 668 (8th Cir. 1996) (no constitutionally protected interest in remaining in work-release program); ***Dominique v. Weld***, 73 F.3d 1156, 1159 (1st Cir. 1996) ("The question assigned to us is whether plaintiff had a liberty interest in remaining in work release status, such that under the Fourteenth Amendment he was entitled to due process of law before that privilege could be revoked. We are constrained to agree with defendants that the new threshold test articulated in *Sandin* precludes our finding a liberty interest and bars relief."); ***Grennier v. Nagle***, 73 F.3d 364, No. 94- 3838, 1995 WL 767897, at *1 (7th Cir. Dec. 28, 1995) (unpublished disposition) (prisoner's removal from work release program did not trigger a liberty or property interest under *Sandin*). *But see* ***Anderson v. Recore***, 446 F.3d 324, 328 (2d Cir. 2006) ("There is no question that Anderson had a liberty interest in continuing his participation in the temporary release program."); ***Paige v. Hudson,*** 341 F.3d 642, 643 (7th Cir. 2003) (removal from a home-detention program into jail is sufficient reduction in freedom to constitute deprivation of liberty under *Sandin*); ***Kim v. Hurston***, 182 F.3d 113, 118 (2d Cir. 1999) (Since *Sandin*, the district courts in New York have disagreed on whether an inmate has a liberty interest in continued participation in work release . . . . The work release program in which Kim participated, at least the final phase in which she lived at home and worked at a job, while regularly reporting to Parkside, is virtually indistinguishable from either traditional parole or the Oklahoma program considered in *Young*. While participating in this phase of the TRP, Kim enjoyed a liberty interest, the loss of which imposed a sufficiently 'serious hardship' to require compliance with at least minimal procedural due process.").

See also ***Domka v. Portage County, Wis.***, 523 F.3d 776, 781 (7th Cir. 2008) ("Our analysis . . . must begin with the 'initial question [of] whether being removed from a home-detention program into jail is a sufficiently large incremental reduction in freedom to be classified as a deprivation of liberty under the *Sandin* doctrine, since, if not, [Domka] has no right to due process of law.' *Paige v. Hudson*, 341 F.3d 642, 643 (7th Cir.2003) (citations omitted). The law in a case such as this, where the convict is not technically 'imprisoned,' is still evolving. What is established is that an inmate on parole has a liberty interest in retaining that status, *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and that this right has been extended to pre-parolees, *Young v. Harper*, 520 U.S. 143, 117 S.Ct. 1148, 137 L.Ed.2d 270 (1997). Our recent opinion in *Paige v. Hudson* broadened this principle slightly further, finding that removing a probationer from home detention status fell somewhere on the deprivation spectrum as greater than that at stake in *Sandin* and less than that at issue in *Young*, but qualified nonetheless as a 'sufficient reduction' in freedom to be deemed a 'deprivation of liberty' requiring due process. . .But we are not prepared to say that *Paige* is necessarily controlling here; the fact that Domka was not a probationer but instead a prisoner serving his time outside the jail renders *Paige* distinguishable. The County makes a valid point that revoking probation and returning someone who already served his sentence to

incarceration, as was the situation in *Paige*, is arguably a greater loss of freedom than having Domka serve out his remaining time of confinement in a 'different location.'. . Because we agree with the district court's ultimate determination that Domka waived any due process protections that may have been required,. . . we save for another day the narrow question of whether a prisoner − as opposed to a probationer, parolee or pre-parolee − has a liberty interest in a home detention program.").

The Supreme Court has held that a state may create a liberty interest on the part of inmates in the accumulation of good conduct time credits. ***Wolff v. McDonnell***, 418 U.S. 539, 563-71 (1974). Before being deprived of good-time credits an inmate must be afforded: (1) 24-hour advance written notice of the alleged violations; (2) the opportunity to be heard before an impartial decision maker; (3) the opportunity to call witnesses and present documentary evidence (when such presentation is consistent with institutional safety); and (4) a written decision by the fact-finder stating the evidence relied upon and the reasons for the disciplinary action. *Id*. *See also* ***Burns v. PA Dept. of Corrections***, 642 F.3d 163, 174, 175 (3d Cir. 2011) ("We therefore hold that an inmate's right to procedural due process is violated when a hearing examiner simply fails to view available evidence to determine its relevance and suitability for use at a disciplinary hearing. . . . Although the government may have a very real interest in barring an inmate's access to certain documentary evidence, that interest is not implicated when it is provided only to the hearing officer, who can then independently assess its probative value and weigh that against any institutional concerns that may counsel against allowing otherwise probative evidence to be used at the hearing.").

In *Sandin*, the Court did not disturb its holding in *Wolff*. Thus, if disciplinary action would inevitably affect the duration of the inmate's confinement, a liberty interest would still be recognized under *Wolff*. *See* ***Whitford v. Boglino***, 63 F.3d 527, 532 (7th Cir.1995). Note, however, that "the mere opportunity to earn good-time credits" has been held not to "constitute a constitutionally cognizable liberty interest sufficient to trigger the protection of the Due Process Clause." ***Luken v. Scott***, 71 F.3d 192, 193-94 (5th Cir. 1995) (per curiam).

See also ***Santiago v. Blair***, 707 F.3d 984, 993, 994 (8th Cir. 2013) ("Santiago alleges that Blair subjected him to two adverse actions: first, he placed Santiago in a cell without his personal property, bedding, running water, or a working toilet and, second, he threatened him with further retaliation. Blair contends that the conditions of Santiago's cell cannot support a cause of action under § 1983 because they did not create an atypical and significant hardship on Santiago as required under *Sandin*. . . . Blair misconstrues Santiago's claim. *Sandin* would be applicable if Santiago were alleging a conditions of confinement claim under the Due Process Clause. Santiago's claim, however, is clearly one for retaliation under the First Amendment, a claim that *Sandin* specifically left open. . . . We have held that deprivations and threats such as those allegedly made by Blair are sufficient to support a First Amendment retaliation claim. . . . Taken in the light most favorable to Santiago, a reasonable jury could conclude that these facts demonstrate that Blair took the above-described adverse actions because of Santiago's continued use of the prison

grievance procedure. Thus, Blair is not entitled to qualified immunity on Santiago's retaliation claim."); ***Allah v. Seiverling,*** 229 F.3d 220, 225 (3d Cir. 2000) ("Our holding that claims alleging retaliation for the exercise of First Amendment rights survive *Sandin* is consistent with those circuits that have considered the issue."); ***Cornell v. Woods***, 69 F.3d 1383, 1388 n.4 (8th Cir. 1995) (concluding *Sandin* does not affect retaliatory transfer or retaliatory discipline cases). *Accord* ***Hines v. Gomez***, 108 F.3d 265, 269 (9th Cir. 1997); ***Pratt v. Rowland***, 65 F.3d 802, 806-07 (9th Cir.1995).

In ***Mitchell v. Dupnik***, 75 F.3d 517 (9th Cir. 1996), the court of appeals held that the rationale of *Sandin* did not apply to a pretrial detainee "who had not been convicted or sentenced at the time he was disciplined." *Id*. at 524. The court concluded that *Sandin* left ***Bell v. Wolfish***, 441 U.S. 520 (1979), untouched and that where the purpose and effect of disciplinary segregation was punishment, a pretrial detainee could not be punished without a due process hearing. *Id*. *Accord,* ***Shorter v. Baca***, 895 F.3d 1176, 1190 (9th Cir. 2018) ("Pretrial detainees have a right to procedural due process before they are subjected to more severe conditions of confinement than other detainees.").

See also ***Williamson v. Stirling***, 912 F.3d 154, 169, 175-86 (4th Cir. 2018) ("This appeal implicates important questions concerning the treatment of pretrial detainees, particularly with respect to their placement and holding in solitary confinement. . . . The level of procedural due process to which a pretrial detainee is entitled in a particular situation . . . depends on context. More specifically, a pretrial detainee's procedural protections vary according to whether a restriction was imposed for disciplinary or administrative purposes. If the restriction imposed by jail officials is a disciplinary one — arising from a pretrial detainee's misconduct in custody — the detainee is entitled to notice of the alleged misconduct, a hearing, and a written explanation of the resulting decision. . . If, however, a restriction imposed by the jail officials is for administrative purposes — which include managerial and security needs — the level of process to which the pretrial detainee is entitled is diminished. In those situations, the courts of appeals have generally concluded that some level of process must be afforded to the pretrial detainee, even if the process is provided after the restriction has been imposed. . . As a general proposition, such individualized restrictions — whether disciplinary or administrative — implicate procedural due process concerns. In some circumstances, however, the treatment of a pretrial detainee can be so disproportionate, gratuitous, or arbitrary that it becomes a categorically prohibited punishment that will sustain a substantive due process claim. . . Thus, although jail officials are entitled to impose discipline and promote internal security by placing restrictions on pretrial detainees, such measures must yet be rationally related to a legitimate governmental purpose, regardless of the procedural protections provided. . . . The Supreme Court's decision in *Wolff v. McDonnell* in 1974 recognized that convicted prisoners subject to disciplinary deprivations of liberty or property interests are entitled to notice, a hearing (which may involve witnesses and documentary evidence), and an explanation of the resulting decision. . . Consequently, a jail official that seeks to discipline a pretrial detainee must provide the detainee with at least the procedural protections required by the *Wolff* decision. . . A similar — but less demanding — standard governs the imposition of

administrative restrictions on convicted prisoners. As the Supreme Court ruled in *Hewitt v. Helms* in 1983, if a sentenced prisoner has a viable liberty interest, he must be afforded some minimal procedural protections before being subjected to more restrictive conditions of confinement for administrative purposes. . . That rule extends to the placement of such a prisoner in 'administrative segregation,' a term that generally refers to solitary confinement. . . In such situations, the *Hewitt* decision requires that prison officials provide a convicted prisoner 'some notice of the charges against him and an opportunity to present his views' to the deciding official, although that opportunity may be provided after the fact. . . Prisoners are also entitled to periodic review of their confinement to ensure that administrative segregation is not 'used as a pretext for indefinite confinement.'. . Those principles — as enunciated by the Supreme Court — provide a floor for the rights of pretrial detainees such as Williamson. . . That is, a pretrial detainee with a liberty interest in avoiding administrative restrictions is entitled to at least the *Hewitt* level of procedural protections. . . Although the *Hewitt* principles provide a floor for the rights of pretrial detainees, the precise level of process that is due in a given situation also depends on a balancing of interests, consistent with the test identified by the Court in *Mathews v. Eldridge*[.]. . . Thus, a court evaluating a pretrial detainee's procedural due process claim concerning an administrative restriction must decide whether the procedures provided to the detainee comply with *Hewitt* and satisfy the *Mathews* test. . . . According meaningful consideration to the inquiries identified by the Supreme Court in *Bell*, and accepting the facts in the proper light, Williamson has shown that a genuine issue of material fact exists as to whether his treatment as a pretrial safekeeper actually amounted to punishment that was unconstitutional under *Bell*. More specifically, the evidence would support a jury finding that his extended period of solitary confinement was not attributable to a nonpunitive rationale, or that it was excessive in relation to that purpose. . . . Most strikingly, Williamson was placed in solitary confinement — restricted to his cell twenty-three hours a day, with minimal access to books, phones, or any human contact — for more than three years, because of a single incident of unrealized and unrepeated threats. A reasonable jury could readily find such a response to be excessive — and thus punitive — in relation to the State's interest in preventing Williamson from carrying out the threats. . . . In sum, viewing the evidence in the proper light and making reasonable inferences favorable to Williamson, he has demonstrated that the summary judgment awards to Stirling and Carroll were not warranted as to his substantive due process claim. More specifically, he has presented evidence on which a reasonable factfinder could conclude that his three-and-a-half years of solitary confinement were so excessive relative to his infractions — and the defendants so arbitrary in their actions — that Williamson suffered unconstitutional punishment in violation of his substantive due process rights. . . .Turning to Williamson's procedural due process claim, we must decide whether his detention in solitary confinement as a safekeeper 'implicated a liberty interest triggering procedural due process requirements; and, if so, whether the procedures' afforded him 'satisfied those requirements.'. . The answers to those inquiries depend on the nature and purpose of the solitary confinement, namely, whether it was 'disciplinary' or 'administrative.' In either circumstance, however, we are satisfied that Williamson's pretrial detention in solitary confinement implicated a liberty interest that entitled him to a level of procedural protections. . . . In short, although jail officials are entitled to place restrictions on pretrial detainees for misconduct committed during their detention, those regulatory

types of discipline nevertheless intrude on the detainee's liberty interest in remaining free from punishment. Accordingly, a pretrial detainee may not be disciplined in the absence of some level of due process. . . To determine whether a particular restriction is disciplinary — rather than administrative — the courts again consult the framework of *Bell*, which guides that inquiry for procedural as well as substantive due process claims. Such courts must ask whether the restriction is expressly punitive, or whether a punitive intent may be inferred because the restriction is not reasonably related to a legitimate, nonpunitive purpose. . . As explained heretofore, a triable issue is presented here concerning whether Williamson's prolonged placement in solitary confinement constituted punishment under *Bell*. That issue also bears on whether Williamson's extended period of solitary confinement was 'disciplinary'— rather than 'administrative' — and thus whether it intruded on his liberty interest in remaining free from punishment. . . Such disciplinary measures trigger the procedural protections recognized in the Court's 1974 *Wolff v. McDonnell* decision: that is, notice, a hearing, and a written explanation of the resulting decision. . . Accordingly, if Williamson's conditions of solitary confinement were imposed for a disciplinary purpose, the responsible officials intruded on his liberty interest in being free from punishment. In that event, Williamson was owed the level of process established by *Wolff*. . . .If, on the other hand, Williamson was in solitary confinement for more than three years for 'administrative' reasons, the question is whether, as a pretrial detainee, he nevertheless possessed a liberty interest in avoiding 'administrative segregation.' As explained below, Williamson possessed such a liberty interest. This issue is somewhat complex and our sister circuits seem to have approached it from different perspectives. Some circuits have ruled that pretrial detainees possess a liberty interest in being free from indefinite or prolonged administrative segregation. [citing cases from 7th and 3d Circuits] Another group of circuits has suggested that the liberty interest identified in *Bell* — remaining free from punishment — triggers some minimal procedural protections for administrative actions that further restrict a pretrial detainee's liberty. [citing cases from 2d, 9th and 8th Circuits] A third group of the courts of appeals — addressing short-term periods of confinement — have concluded that pretrial detainees do not have a liberty interest in avoiding limited administrative restrictions. [citing cases from 8th, 7th, and 6th Circuits] We are satisfied, however, to rely on the *Bell* decision and the Supreme Court's subsequent rulings explaining the level of process owed to convicted prisoners. As explained heretofore, the rights accorded convicted prisoners provide a floor for detainee rights. . . And Supreme Court precedent establishes that convicted prisoners possess some procedural due process rights with respect to administrative segregation. . . .The procedural protections afforded convicted prisoners inform the minimum standards for procedures that accompany the administrative segregation of pretrial detainees. . . Although the *Hewitt* decision conditioned those protections on the prisoner's ability to show a liberty interest, that principle does not pose an obstacle to pretrial detainees such as Williamson. . . . Our Court and every circuit to assess the question has rejected the application of *Sandin*'s 'atypical and significant hardship' test to pretrial detainees, whom *Sandin* itself distinguished from convicted prisoners. . . On the other hand, it is clear that a pretrial detainee must yield some of his rights in order for the authorities to effectively manage detention facilities. . . Prior to conviction, however, a pretrial detainee's liberty interests do not categorically yield to the managerial interest of the jail authorities. The *Bell* decision even acknowledged the 'operational concerns' that inhere in the effective

administration of jails, but Justice Rehnquist, in his majority opinion, did not suggest that those concerns should necessarily prevail over a detainee's liberty interests. . . We are therefore satisfied that a pretrial detainee — such as Williamson — has a liberty interest in avoiding the harsh conditions of solitary confinement, and that a detainee confined for administrative purposes is entitled to at least the procedural protections mandated by *Hewitt*. . . . On his procedural due process claim, Williamson similarly has a triable issue concerning the purpose of his solitary confinement. Specifically, a jury must determine whether that confinement was disciplinary or administrative. That determination will delineate whether Williamson was owed the *Wolff* level of process generally applicable to disciplinary measures, or — at minimum — the *Hewitt* level of process that provides the floor for procedures that accompany a pretrial detainee's administrative segregation. The *Bell* inquiry — whether the conditions imposed on a pretrial detainee are rationally and proportionally related to a nonpunitive purpose — should also guide this determination. . . We leave to the remand proceedings the determination of whether the level of process that Williamson was provided satisfies the *Mathews* principles and, as applicable, the minimum procedural protections established by *Wolff* or *Hewitt*."); ***Johnson v. Houston County, Georgia***, 758 F. App'x 911, ___ (11th Cir. 2018) ("Hays presents two arguments in support of her view that the district court erred in finding a constitutional violation. First, she contends that the court erred in finding that she was required to perform a periodic review of Johnson's administrative-segregation classification. She asserts that no periodic review is necessary when an inmate's administrative confinement is unconnected with the disciplinary process. Second, she maintains that the court erred in finding that Johnson had a liberty interest in freedom from administrative segregation, stating that Johnson cannot meet the standard established by the Supreme Court in *Sandin v. Conner*, 515 U.S. 472 (1995). These arguments, however, fail to address the stated ground for the district court's ruling. In finding a constitutional violation, the court did not cite Hays's failure to perform a 'periodic review,' which is a procedural protection sometimes afforded to those confined in administrative segregation. . . Nor did the court find that Johnson met *Sandin*'s standard, which does not, in any event, apply to pretrial detainees like Johnson. . . Instead, the district court concluded that Johnson had established a substantive-due-process violation under *Wolfish* by showing that the more restrictive conditions of administrative segregation were not reasonably related to a legitimate goal. . . .Accordingly, Hays's arguments relating to *Sandin* and periodic review do nothing to convince us that the stated ground for the district court's decision was incorrect."); ***Dilworth v. Adams***, 841 F.3d 246, 251-55 (4th Cir. 2016) ("*Sandin*, which concerned the punishment of convicted prisoners, . . . has no application to pretrial detainees like Dilworth. . . .Every federal court of appeals to consider the question has concluded that *Sandin's* 'atypical and significant hardship' standard does not govern the procedural due process claims of pretrial detainees. *See Jacoby v. Baldwin Cty*., [835 F.3d 1338] (11th Cir. Aug. 29, 2016); *Hanks v. Prachar*, 457 F.3d 774, 776 (8th Cir. 2006) (per curiam); *Surprenant*, 424 F.3d at 17; *Peoples v. CCA Det. Ctrs*., 422 F.3d 1090, 1106 n.12 (10th Cir. 2005); Benjamin v. Fraser, 264 F.3d 175, 188–89 (2d Cir. 2001); *Rapier v. Harris*, 172 F.3d 999, 1004–05 (7th Cir. 1999); *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996); *see also Fuentes v. Wagner*, 206 F.3d 335, 342 n.9 (3rd Cir. 2000) (holding *Sandin* inapplicable to detainee convicted but not yet sentenced), *cert denied*, 531 U.S. 821 (2000). We join our sister circuits and hold that Dilworth,

as a pretrial detainee, was entitled under *Bell* to procedural due process in connection with any 'punishment' imposed on him by the Detention Facility. . . .We, too, conclude that disciplinary segregation of a pretrial detainee, intended as a penalty for disciplinary infractions, implicates a protected liberty interest under the Fourteenth Amendment and may not be imposed without due process. . . .As the defendants concede, the process afforded Dilworth complies with neither the Detention Facility's policy nor the dictates of *Wolff.* There is no factual dispute as to what process Dilworth received: the opportunity to take a written appeal after his sanction was finalized. Nor can there be any question but that this process falls short of what *Wolff* requires. Under *Wolff*, the core component of due process in the prison discipline context is the right to a hearing. . . .That is not to say, of course, that prison or jail officials are barred from taking immediate action, without a prior hearing, in response to altercations like Dilworth's or other disciplinary offenses. On the contrary, it is clear—and Dilworth does not dispute—that for safety or security reasons, a jail may take immediate preventative action to segregate a detainee after a fight or disruption. . . And prisons and jails may and routinely do place inmates charged with disciplinary infractions in 'administrative segregation' pending their disciplinary hearings, allowing both prison officials and inmates time to investigate and prepare for those hearings. . . .But all of this presupposes that there is, in fact, a hearing in connection with the final imposition of disciplinary action, and that is the element that is missing here. On this record, it is plain that Dilworth was not provided a hearing before he was subjected to punishment in the form of disciplinary segregation, and the defendants do not contend otherwise. That is enough to resolve Dilworth's due process claim as a matter of law."); ***Jacoby v. Baldwin County***, 835 F.3d 1338, 1347-51 (11th Cir. 2016) ("*Sandin* recognized this distinction between convicted inmates, who can be punished without a due process hearing, and pretrial detainees, who cannot. . . .*Sandin* leaves intact *Bell*'s holding that 'a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.'. . It's true that Mr. Jacoby's procedural due process claim is different than the substantive due process claims brought in *Bell*. He challenges his being placed in segregation after what he views as an inadequate hearing. He does not challenge the general conditions of his incarceration with this claim. And the jail imposed disciplinary segregation not as punishment for the crime that led to Mr. Jacoby's detention, but rather as punishment for his violation of jail rules. Still, *Bell*'s teachings apply here with equal force. A pretrial detainee like Mr. Jacoby may not be punished for his misconduct while in prison unless he is given a due process hearing. . . A pretrial detainee need not meet the *Sandin* standard to establish his right to a due process hearing before being placed in disciplinary segregation. Specifically, a pretrial detainee is not required to prove that his conditions of confinement either 'exceed[ ] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force' or 'impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,'. . . to be entitled to the process governed by *Wolff*. Rather, a pretrial detainee is entitled to a due process hearing before being subjected to 'conditions [that] amount to punishment.' . . .Of course this does not mean that Mr. Jacoby and his fellow pretrial detainees are free to violate jail rules with impunity. Indeed, *Bell* recognizes the need for 'preserving internal order and discipline' among pretrial detainees and convicted inmates alike. . . What it does mean, however, is that before Mr. Jacoby, as a pretrial detainee, is punished for violating a jail rule, there must be a due process hearing to determine

what rule he violated. This approach is consistent with both *Bell* and *Sandin*. . . . Every other Circuit that has squarely considered this question has concluded that *Bell* creates a due process right for pretrial detainees who are subject to punishment. [collecting cases] We hold that, consistent with *Bell*, Mr. Jacoby was entitled to the due process protections enshrined in *Wolff* before being placed in disciplinary segregation. . . .Because Mr. Jacoby is a pretrial detainee, his substantive and procedural due process claims fall within *Bell*'s ambit. We reiterate *Bell*'s holding that 'a [pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.'. . For this reason, we hold that Mr. Jacoby was entitled to the due process hearing he received before being punished for his misconduct while in jail. However, because Mr. Jacoby has failed to overcome Sheriff Mack's qualified immunity defense on either of his claims, we affirm the District Court's grant of summary judgment."); ***Surprenant v. Rivas***, 424 F.3d 5, 17 (1st Cir. 2005) ("[T]he *Sandin* Court's rationale applies only to those convicted of crimes − not to pretrial detainees. The courts of appeals that have addressed this question are consentient on the point. [citing cases] We share that view. Pretrial detainees, unlike convicts, have a liberty interest in avoiding punishment − an interest that derives from the Constitution itself. . . Because the plaintiff in this case was a pretrial detainee at and prior to the time of the accusation and the hearing, *Sandin* is inapposite."); ***Rapier v. Harris***, 172 F.3d 999, 1004, 1005 (7th Cir. 1999); ***Whitford v. Boglino***, 63 F.3d 527, 531 n.4 (7th Cir.1995); ***T.S. v. Twentieth Century Fox Television***, No. 16 C 8303, 2017 WL 1425596, at *3–4 (N.D. Ill. Apr. 20, 2017) ("In Count I of the First Amended Complaint, Plaintiffs allege that as juvenile detainees, the Fourteenth Amendment due process clause provides them certain protections in relation to the conditions of their confinement and that all of the Defendants violated these protections. . . As the Seventh Circuit instructs, 'there is little practical difference, if any, between the standards applicable to pretrial detainees and convicted inmates when it comes to conditions of confinement claims, and that such claims brought under the Fourteenth Amendment are appropriately analyzed under the Eighth Amendment test.' *Smith v. Dart*, 803 F.3d 304, 310 (7th Cir. 2015). That being said, under the seminal Supreme Court decision relating to pretrial detainees' due process rights, namely, *Bell v. Wolfish*, the Supreme Court held that 'court [s] must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.'. . More specifically, '[i]n the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose."'. . Here, the challenged governmental action consists of the three lockdowns at the JTDC that occurred in June, July, and August 2015. Plaintiffs argue that these lockdowns, which resulted in the denial of their due process rights, were not rationally related to a legitimate nonpunitive purpose, but rather, the purpose of these lockdowns was to provide the Fox Defendants with a realistic prison facility to film two *Empire* episodes. In response, Defendants Dixon and Cook County argue that Plaintiffs have failed to allege a sufficient deprivation of their liberty interests in the context of substantive due process protections pursuant to *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 415 (1995), and its progeny—which is not Plaintiffs' theory of liability concerning the conditions of their confinement because Plaintiffs are not incarcerated adult prisoners challenging disciplinary segregation. . . Instead, Plaintiffs' theory of

the case is that all of the Defendants violated Plaintiffs' due process rights in relation to the conditions of their confinement as juvenile pretrial detainees in contradiction of *Bell v. Wolfish.*").

See generally ***Carlo v. City of Chino***, 105 F.3d 493, 498-99 (9th Cir. 1997) (noting that "[a] majority of the courts that have addressed this question have held that *Sandin* does not govern the assessment of state-created liberty interests for pretrial detainees[,]" citing cases and concluding that "holding an arrestee incommunicado is a restraint atypical of post-arrest detention."). *But see* ***Anderson v. Chapman***, 604 F. App'x 810, 813 (11th Cir. 2015) ("A convicted inmate's confinement to administrative segregation for non-punitive reasons does not violate due process because such segregation is 'ordinarily contemplated by a prison sentence.' *Sandin v. Conner,* 515 U.S. 472, 480, 115 S.Ct. 2293, 2298, 132 L.Ed.2d 418 (1995). We find no controlling precedent holding that the same is not true with respect to pretrial detainees as well. In short, confinement in administrative segregation under conditions substantially similar to those experienced by the general jail population does not implicate a liberty interest. . . The evidence in this case is that Anderson's placement was similar to the placement of anyone facing charges such as Anderson's. The placement was not for punishment; rather, it was done to ensure Anderson's safety and to minimize the risk of violence between inmates.").

See also ***Tilmon v. Prator,*** 368 F.3d 521, 523 (5th Cir.2004) (per curiam) ("Tilmon had argued that *Sandin* did not apply, citing *Fuentes v. Wagner,* 206 F.3d 335 (3d Cir.2000), in which that court held that a convicted inmate awaiting sentencing has the status of a pretrial detainee. The district court rejected Tilmon's argument that because he was convicted but not sentenced, *Sandin* did not apply. . . . We do not read *Bell v. Wolfish* as suggesting that a convicted but unsentenced prisoner should be treated as a pretrial detainee. . . . In our view, the adjudication of guilt, *i.e.,* the conviction, and not the pronouncement of sentence, is the dispositive fact with regard to punishment in accordance with due process. The Eighth, Ninth, and Tenth Circuits have recognized this principle. [discussing cases]").

See also ***Miller v. Dobier***, 634 F.3d 412, 415 (7th Cir. 2011) (disciplinary measures to which civil detainee was subjected were not so atypical and significant as to constitute deprivation of liberty interest, and thus procedural due process protections of *Sandin* were not triggered); ***Thielman v. Leean,*** 282 F.3d 478 (7th Cir. 2002) (applying *Sandin* in context of mental health facility where sexually violent person is committed for control, care, and treatment until no longer a sexually violent person).

The Court has held that, in certain circumstances, the Constitution itself may give rise to a liberty interest. *See, e.g.,* ***Washington v. Harper***, 494 U.S. 210, 221-222 (1990) (involuntary administration of antipsychotic drugs); ***Vitek v. Jones***, 445 U.S. 480 (1980) (involuntary commitment to a mental hospital). *See also* ***Desper v. Clarke***, 1 F.4th 236, 246-47 (4th Cir. 2021) ("With respect to Desper's invocation of a liberty interest protected by the Due Process Clause, Desper relies upon case law defining a parent's interest in 'the companionship, care, custody and management of his or her children.'. . But cases such as *Lassiter* considered the parent-child

relationship outside of the prison context, and Desper does not, as a duly incarcerated person, have the same liberty interest as one who is not incarcerated. . . By its very nature, prison restricts an incarcerated father's interactions with his children. And restrictions placed on registered sex offenders — especially those whose offenses involved minor victims — may be all the more austere. . . We therefore doubt that Desper has any protectable interest in visiting with a minor child. . . . Our review of Operating Procedure 851.1 leads us to conclude that its provisions do not confer a liberty interest on any inmate. First, it lacks the necessary substantive predicates that guide official discretion, as it treats visitation as 'a privilege' and establishes as a default policy for sex offenders that they 'will *not* be allowed to visit with any minor *until* granted a sex offender visitation *exemption*.'. . Moreover, the Operating Procedure does not specify 'substantive predicates' in granting an exemption from the default policy, nor does it mandate an exemption in defined circumstances. In short, the Operating Procedure does not give a reasonable inmate an objective expectation that he would *be entitled* to visitation 'absent the occurrence of one of the listed conditions.'. .Thus, we conclude that Desper has not plausibly alleged a procedural violation of the Due Process Clause as the process he received was adequate for any protectable liberty interest he may have had."); ***Hurd v. District of Columbia***, 864 F.3d 671, 682-83 (D.C. Cir. 2017) ("A prisoner who is released from prison early does in certain circumstances have a protected liberty interest entitling him to some form of process before re-incarceration, and the facts as plausibly pleaded here show such an interest. The Due Process Clause may itself confer a procedurally protected liberty interest on someone living openly in society for years after what, unbeknownst to him, was his premature release from prison. The Due Process Clause protects liberty, U.S. Const. amend. V, XIV, and 'freedom from bodily restraint' is at the very core of that protected interest. . . The freedom of a person to conduct his life physically unconfined by the government is among the most fundamental of constitutional liberty interests. The Supreme Court has repeatedly held that in at least some circumstances, a person who is in fact free of physical confinement—even if that freedom is lawfully revocable—has a liberty interest that entitles him to constitutional due process before he is re-incarcerated. . . . When a person lives in society at large for years, goes through a transition that, by all appearances, marks the formal end of the last stage of his sentence, and only then faces re-incarceration on the ground that he was prematurely released, the prospect of re-incarceration has implications both for him and the other individuals in his life as substantial as those of the parolee in *Morrissey*. Hurd alleges facts that support a liberty interest crystallized sufficiently by the close of the period of supervision to entitle him to some kind of process before re-incarceration."); ***Steele v. Cicchi***, 855 F.3d 494, 502-03 (3d Cir. 2017) ("There is no dispute between the parties that Steele had a constitutionally protected liberty interest in exercising his bail option, once bail had been set, sufficient to trigger substantive due process protection. We agree. Such a right emanates from the liberties 'at the heart' of the Due Process Clause: the freedom 'from government custody, detention, or other forms of physical restraint' prior to any determination of guilt. . . .Other Circuits acknowledge that substantive due process protection of this liberty interest attaches once arrestees are deemed eligible for release on bail. [collecting cases] Accordingly, we conclude that Steele had a protected liberty interest in exercising his bail option once his bail was set. Having established that his asserted liberty interest is protected by substantive due process, Steele must also show that 'the government's deprivation

of that protected interest shocks the conscience.'. . . We cannot say that Defendants' actions here amount to even deliberate indifference. . . . At bottom, we cannot agree with Steele's argument that in the specific circumstances of this case substantive due process required Defendants to provide Steele with unlimited, non-legal telephone privileges during his time in administrative segregation so that he could attempt to find a co-signer for his bail and exercise his bail option. . . Defendants' limitation of Steele's phone privileges did not 'shock the conscience,' and therefore, Steele's claim that Defendants violated his due process right to exercise his bail option fails."); ***Renchenski v. Williams***, 622 F.3d 315, 327 (3d Cir. 2010) (agreeing with the Eleventh and Fifth Circuits that "labeling a prisoner a sex offender and forcing him or her to submit to intensive therapy triggers a liberty interest"); ***Kirby v. James***, 195 F.3d 1285, 1292 (11th Cir. 1999) (holding that "the stigmatizing effect of being classified as a sex offender constitutes a deprivation of liberty under the Due Process Clause."); ***Coleman v. Dretke***, 395 F.3d 216, 222, 223 (5th Cir. 2004) (same). *But see* ***Powell v. Weiss***, 757 F.3d 338, 343, 346 (3d Cir. 2014) (inmate had no "independent due process nor a state-created liberty interest in his revoked prerelease status" and "anticipated transfer to a community correctional center."); ***Chappell v. Mandeville***, 706 F.3d 1052, 1063 (9th Cir. 2013) ("An investigative contraband watch is the type of condition of confinement that is ordinarily contemplated by the sentence imposed. Only the most extreme changes in the conditions of confinement have been found to directly invoke the protections of the Due Process Clause, such as involuntary commitment to a mental institution, *see Vitek v. Jones,* 445 U.S. 480, 493–94 (1980), or the forced administration of psychotropic drugs, *Washington v. Harper,* 494 U.S. 210, 221–22 (1990). Since a temporary contraband watch does not rise to this level, Chappell cannot directly claim a liberty interest under the Due Process Clause of the Fourteenth Amendment."); ***Overton v. Bazzetta***, 123 S. Ct. 2162, 2170 (2003) ("[W]ithdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline . . . is not a dramatic departure from accepted standards for conditions of confinement."); ***Bazzetta v. McGinnis***, 430 F.3d 795, 802, 803 (6th Cir. 2005) ("We extrapolate from *Overton* and *Sandin* that the substance abuse regulation is neither a 'dramatic departure,' nor an 'atypical and significant hardship' in relation to the ordinary incidents of prison life. Thus, although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation. . . . As detailed above, the *Overton* Court subsequently foreclosed a facial procedural due process challenge under the standard set forth in *Sandin*. The Court's decision in *Overton* does not preclude individual prisoners from challenging a *particular* application of the substance abuse regulation on First Amendment, Eighth Amendment or Fourteenth Amendment grounds but such '[a]n individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, ... [does] not support the ruling ... that the entire regulation is invalid.'. . . We know of no circuit court that has found an implicit due process right to prison visitation. In fact, the *Sandin* decision perpetuated the Court's general resistance to directly reading the Due Process Clause without support from a positive source of law, absent evidence of a 'grievous loss.' Although the substance abuse regulation at issue here is 'severe,' . . . we decline to hold that, on its face, it rises to the level of egregious conduct necessary to implicate the implicit guarantees of the Due Process Clause.").

See also ***Jones v. Cummings***, 998 F.3d 782, 788-89 (7th Cir. 2021) ("It is common ground by now that when defendants Koester and Kopp filed the untimely amendment, they violated Indiana law. Jones, however, is asserting that this state-law problem led to the deprivation of his Fourteenth Amendment right to due process of law. But a failure to follow state law does not automatically trigger a federal constitutional due-process violation. Indeed, the state-law consequences of the action are largely beside the point. What matters is the content of the plaintiff's argument. Often a state-law problem has no federal implications at all, though in some cases there can be overlapping violations. For example, criminal defendants are entitled to advance notice of the charges they face in order to prepare for trial. . . An untimely amendment made so close to the start of trial that it prejudices a defendant's ability to prepare for trial might simultaneously violate state law and the defendant's federal due-process rights. But Koester and Kopp made their untimely amendment on October 27, 2005, about eight months before Jones's trial began on June 12, 2006[.] . . Jones has never alleged the amendment prejudiced his ability to prepare for trial or in any other way affected the fundamental fairness of the procedures the state used. We need not delve into the question whether eight months was long enough to allow Jones to prepare, though the fact that the default rule under the Speedy Trial Act, 18 U.S.C. § 3161, calls for an indictment within 30 days of arrest and trial 70 days later strongly suggests that there is no generic problem with eight months. . . The only claim Jones makes is that the prosecutors violated state law and that our finding of a constitutional violation in *Jones III* proves the point. But Jones has received his remedy for the ineffectiveness of counsel, and he has not linked the underlying state-law violation to any other federal constitutional right. The district court thus could have dismissed on this ground as well, had it reached the merits."); ***James v. Pfister***, 708 F. App'x 876, ___ (7th Cir. 2017) ("Because we are remanding this case, we add two observations concerning James's claim that he was denied due process at his disciplinary hearing. First, as the district court observed, James cannot use § 1983 to enforce Department of Corrections regulations and policies. . . Neither can he assert a liberty interest arising from the procedures adopted by the parties in *Rasho* or from the Illinois statute and administrative directive which, James says, resulted from that case. . . Even if these sources might have created liberty interests for inmates suffering from serious mental illness, those state-created interests would not necessarily be protected by the Due Process Clause of the Fourteenth Amendment. . . Mentally ill inmates are not constitutionally guaranteed heightened procedural protections, so any state-created liberty interest for mentally ill inmates is subject to the Due Process Clause only if it passes the test in *Sandin*. James does not argue that the extra safeguards provided for mentally ill inmates are meant to protect them from atypical or significant hardships as compared to normal prison life. Rather, he argues essentially that § 5/3-2-2 and Directive 05.12.2013 constitute promises by the state to treat mentally ill inmates differently. But there is no constitutional dimension to these promises. . . Furthermore, although the parties in *Rasho* have reached agreement on many issues, the case is ongoing. Any concerns James has regarding decisions in *Rasho* should be directed to class counsel in that case. Second, we note that much of James's due process claim focuses on the allegation that he wasn't told about another inmate's confession to the conduct he allegedly committed. For disciplinary hearings resulting in lost good time, we have held that *Brady v. Maryland*, 373 U.S. 83 (1963), applies and, with some exceptions, requires that exculpatory evidence be disclosed to the inmate. . . Whether

Brady also would apply as part of the informal procedures sometimes required before subjecting an inmate to harsh segregation without also subjecting the inmate to a loss of good time is a question that, as far as we can tell, no court has considered. This question, if pursued by James on remand, can be addressed by the parties and the district court in the first instance."); ***Steele v. Cicchi***, 855 F.3d 494, 508-09 (3d Cir. 2017) ("The focus of Steele's procedural due process challenge circles back to Defendants' asserted reasons for transferring Steele to administrative segregation. He argues that he was transferred for disciplinary reasons, and, therefore, due process protections required MCACC officials to provide him with a written statement of the evidence and charges against him, which he did not receive. . . For the reasons already noted, however, we agree with the District Court that the summary judgment record in this case shows that Steele's transfer was for institutional security reasons rather than for discipline or punishment. Steele was administratively separated from the general MCACC population pending further investigation into his conduct and Speedy's activities within the MCACC. Therefore, he was due the level of process outlined in *Hewitt*. . .Steele also contends throughout his briefing that Defendants violated the Due Process Clause by failing to follow the procedures outlined in the Manual. Even if we were to find that the parties' actions implicated certain procedures set forth in the Manual, there is no standalone protected liberty interest in those procedures. . . . [A] valid due process claim will not automatically follow from Defendants' failure to abide by the Manual's procedural requirements. Further, where a plaintiff establishes a state-created liberty interest, a court must determine the level of process due by drawing from federal constitutional law, not from state laws, regulations, or policies. . . So here, the MCACC Manual does not dictate what level of process will pass constitutional muster. Accordingly, this argument fails."); ***Jenner v. Nikolas***, 828 F.3d 713, 716-17 (8th Cir. 2016) ("[D]espite the fact that Jenner has a statutory right to a parole hearing, that right is not a protected liberty interest. The existence of a state-mandated procedural requirement does not, in and of itself, create a constitutionally protected liberty interest. . . .Accordingly, Jenner does not have a protected liberty interest in her statutory right to a parole hearing. . . .The process of providing an unbiased and impartial tribunal does not exist in a vacuum, it exists to afford due process when due process is required to protect a liberty interest. Providing an unbiased and impartial tribunal *itself* is not a liberty interest protected by due process. . . .That the Board is statutorily required to provide a hearing does not change its procedural nature. Because Jenner's statutory right to a parole hearing is not a protected liberty interest, there is no interest for process to protect in this case."); ***Jordan v. Fisher***, 823 F.3d 805, 811-12 (5th Cir. 2016) (as revised) ("Plaintiffs argue that they have a liberty interest created by state law, specifically § 99–19–51, and that it prevents the state from executing them using any drugs other than 'an ultra short-acting barbiturate or other similar drug' as the first drug in a three-drug cocktail. However, even if the revised lethal injection protocol does not conform to § 99–19–51, 'a mere error of state law is not a denial of due process.'. . Plaintiffs contend that § 99–19–51 creates a liberty interest because it places 'substantive limitations on official discretion.' *Olim v. Wakinekona,* 461 U.S. 238, 249 (1989); *accord Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 462 (1989); *Hewitt v. Helms,* 459 U.S. 460, 471 (1983) (state created liberty interest in prison regulations characterized by 'repeated use of explicitly mandatory language'). The Supreme Court, however, later expressly rejected the 'substantive limitations' test used in *Olim, Hewitt,* and *Thompson,* reasoning that it 'create[d] disincentives for

States to codify prison management procedures' and 'led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.' *Sandin,* 515 U.S. at 482; *accord Wilkinson,* 545 U.S. at 222–23 (recognizing *Sandin's* rejection of the *Hewitt–Olim* standard). Instead, the Court now relies on *Sandin's* test to determine whether a state law or procedure gives rise to a liberty interest, asking whether the state's proposed deviation from policy 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'. . Therefore, in order to establish a liberty interest arising from § 99–19–51, Plaintiffs must show that execution with pentobarbital or midazolam would 'impose atypical and significant hardship' on them beyond the ordinary for those facing execution. . . The Court has recognized such hardship in a very small number of cases generally related to extensive solitary confinement or imprisonment beyond the term permitted by state law. *See, e.g., Wilkinson v. Austin,* 545 U.S. 209 (2005) (prisoners had a liberty interest in the state's decision to confine them in a supermax facility with highly restrictive solitary confinement conditions); *Hicks v. Oklahoma,* 447 U.S. 343 (1980) (prisoner had liberty interest in serving only ten years in prison rather than the forty years he was sentenced to under a habitual offender statute subsequently held to be unconstitutional); *Vitek v. Jones,* 445 U.S. 480, 491 (1980) (prisoner had liberty interest in remaining in prison rather than a mental hospital); *Washington v. Harper,* 494 U.S. 210, 221 (1990) (prisoner had liberty interest in avoiding involuntary administration of antipsychotic medication). Here, however, Mississippi's statutory requirements and the associated lethal injection protocol are not 'atypical ... in relation to the ordinary' in comparison with other states' execution protocols. The three-drug protocol and the particular drugs Mississippi proposes to use (midazolam, a paralytic, and potassium chloride) are typical for those states that use lethal injection and were recently upheld in the face of a constitutional challenge. *Glossip v. Gross,* 135 S.Ct. 2726, 2735 (2015) (describing Oklahoma's three-drug lethal injection protocol as midazolam, a paralytic, and potassium chloride). Because Plaintiffs have failed to demonstrate Mississippi's intent to 'impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,'. . . they have not established that the state's revised protocol invades a protected liberty interest. Even if § 99–19–51 were to create a liberty interest, the right it creates would be subject only to procedural protection. State law is not a source of liberty interests that are substantively protected by the Fourteenth Amendment; rather, it gives rise to interests that are promised procedural protections by the Fourteenth Amendment. . . . Our sister circuit has concluded that state post-conviction relief petitions satisfy a prisoner's right to seek proper enforcement of a state's method-of-execution law. *Pavatt v. Jones,* 627 F.3d 1336, 1341 (10th Cir.2010). We agree. Mississippi provides an adequate forum for the vindication of Plaintiffs' rights that arise from state law. Mississippi's post-conviction relief statute explicitly empowers prisoners to challenge their sentence as 'imposed in violation of the ... Constitution or laws of Mississippi.' Miss.Code Ann. § 99–39–5(1). If Plaintiffs wish to protest that Mississippi's revised lethal injection protocol is an unlawful deviation from Mississippi's laws, Mississippi's courts are the appropriate venue for their suit."); ***Bell v. McAdory***, 820 F.3d 880, 884 (7th Cir. 2016) ("[W[e see no reason for the district judge to give a second thought to Bell's argument that Rushville's (asserted) failure to give him the benefit of procedures established by state law creates a problem under § 1983. Although the Due Process Clause sometimes requires procedures, as a matter of

federal law, when state statutes and regulations define substantive entitlements, it does not treat state procedural requirements as property interests in their own right. See *Hewitt v. Helms,* 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); *Olim v. Wakinekona,* 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); *Sandin v. Conner,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).").

In ***Young v. Harper***, 117 S. Ct. 1148, 1150 (1997), a unanimous Court held that Oklahoma's Preparole Conditional Supervision Program, "a program employed by the State of Oklahoma to reduce the overcrowding of its prisons[,] was sufficiently like parole that a person in the program was entitled to the procedural protections set forth in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) before he could be removed from it." *See also* ***Victory v. Pataki***, 814 F.3d 47, 60-62 (2d Cir. 2016) ("Unlike a mere applicant for parole, a New York inmate who has been granted an open parole release date has a legitimate expectancy of release that is grounded in New York's regulatory scheme. We therefore conclude that a New York 'parole grantee has a protectable liberty interest that entitles him to due process in the [Board of Parole's] parole rescission hearings.'. .While Defendants do not dispute that Victory was a parole grantee, they assert that he did not have a protectable liberty interest because New York regulations confer more discretion on the Board of Parole to rescind a prior grant of parole status than did the federal regulations at issue in *Green.* This argument is without merit. . . .Because the Board *must* reinstate a parole grantee's prior release status unless there is substantial evidence of significant new information that forms a basis for rescission, a New York parole grantee possesses a liberty interest protected by the Due Process Clause."); ***Anderson v. Ricore,*** 317 F.3d 194, 200-02 (2d Cir. 2003) ("*Sandin*'s reliance on *Wolff,* which found an important liberty interest in the retention of good time credits, and its earlier citation with approval of *Morrissey,* a parole revocation case, negate any suggestion that *Sandin*'s particularized test should be applied outside the intra-prison disciplinary context. Because Anderson, like the petitioners in *Morrissey* and the plaintiffs in *Tracy,* lived outside the prison, a comparison to the ordinary conditions of prison life is inappropriate.. *Morrissey* itself established that once the State has given an inmate the freedom to live outside an institution, it cannot take that right away without according the inmate procedural due process. . . . [T]he lack of relevance *Sandin* has to work release and similar programs became even more apparent . . . when the Supreme Court decided *Young.* Relying almost exclusively on *Morrissey* and without employing a *Sandin* analysis, the *Young* court held that plaintiff had a liberty interest in Oklahoma's pre-parole program, which is quite similar to New York's work release program. . . Although *Young* had not been decided when New York revoked Anderson's work release status and thus does not enter into the qualified immunity analysis, it graphically demonstrates why defendants acted unreasonably in comparing the apples of revoking a work release program with the oranges of an intra-prison disciplinary transfer."); ***Blair-Bey v. Quick***, 151 F.3d 1036, 1047 n.9 (D.C. Cir. 1998) ("In *Sandin v. Conner* . . . the Supreme Court adjusted the *Hewitt* analysis in considering a prisoner's challenge of his placement in disciplinary segregation. In *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C.Cir.1996), we found that *Sandin* only alters the liberty-interest analysis applicable to claims relating to 'the day-to-day management of prisons,' and that it does not apply to parole-related claims."); ***Lynch v. Hubbard***, 47 F. Supp.2d

125, 128,129 (D. Mass. 1999) ("[T]he Court of Appeals for this circuit has employed the *Sandin* mode of analysis to hold that an inmate does not have a liberty interest in being given an expected, but not mandated, parole hearing, *see Hamm v. Latessa*, 72 F.3d 947, 956 (1st Cir.1995), nor in the loss of work-release privileges. *See Dominique v. Weld*, 73 F.3d 1156, 1161 (1st Cir.1996). It may always have been difficult, but post-*Sandin* it is impossible to conceive how making no change in a prisoner's incarcerated status could deprive him of liberty. His original sentence deprived him of liberty. . . The revocation of parole and reincarceration also would deprive him of liberty. *See Morrissey v. Brewer*, 408 U.S. 471 (1972). But the interest that a confined prisoner has in the possibility of being released earlier than the expiration of his sentence is of a quality substantially different from the interest a paroled prisoner at liberty has in not being reconfined. . . . A decision to deny parole, where the grant or denial of parole is subject to the broad discretion of the executive, is not a withdrawal of something that the inmate has, but merely of something he hopes to have.").

See also ***Persechini v. Callaway***, 651 F.3d 802, 808 (8th Cir. 2011) ("Persechini's failure to successfully complete the treatment program and, more importantly, the ensuing execution of his fifteen-year sentence were nonetheless consequences 'within the sentence [initially] imposed.' Thus, like a Bureau of Prisons decision to deny a sentence reduction after an inmate successfully completes its drug treatment program, we conclude that program termination did not confer a liberty interest because it 'mean[t] only that [Persechini] will serve the remainder of his original sentence under typical circumstances.' *Richardson v. Joslin,* 501 F.3d 415, 419-20 (5th Cir.2007). The adverse consequences of the Program Review Committee's decision to terminate Persechini from the treatment program, whether considered separately or in the aggregate, were insufficient to confer a liberty interest for due process purposes. Therefore, we need not consider whether the Program Review Committee's procedures were constitutionally adequate.").