42 U.S.C. §1983, THE BASICS

Dana K. Maine
Sara E. Brochstein
Freeman Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339
(770) 818-0000
dmaine@fmglaw.com
sbrochstein@fmglaw.com

R. Jeffrey Lowe
Kightlinger & Gray, LLP
One Commerce Square
4106 Charlestown Road
New Albany, Indiana 47150
(812) 949-2300
jlowe@k-glaw.com

Dana K. Maine is a partner with Freeman Mathis & Gary, LLP, in its Atlanta office. Her practice focuses on professional liability defense and governmental litigation. Dana heads the firm's LPL and MPL practice groups. She has been named a Super Lawyer for several years and was named Lawyer of the Year for Atlanta Municipal Law by Best Lawyers in America. Dana is a frequent speaker locally and on a national basis on all aspects of government liability including civil rights, zoning, and land use. She has represented clients at all stages of litigation from pre-suit mediation, to trial, and through the appeals process. In addition to other professional organizations, Dana served as program chair and committee chair for DRI's Government Liability Committee and remains active in the committee's leadership advisory board.

R. Jeffrey Lowe is a partner in Kightlinger & Gray LLP in New Albany, Indiana. He regularly defends municipalities throughout southeastern Indiana and Kentucky. His practice involves issues ranging from constitutional torts to zoning matters, employment issues, as well as state law claims made against his mu-nicipal clients. Mr. Lowe has successfully defended officers in a police chase shooting and has successfully defended a local zoning authority on a Telecommunications Act claim before the Seventh Circuit Court of Appeals. He recently served on the DRI Board of Directors.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

I. STANDING TO BRING A 42 U.S.C. 1983 ACTION

42 U.S.C. §1983 creates a private right of action for "any citizen of the United States or other person within the jurisdiction thereof." Clearly, United States citizens and persons within the jurisdiction of the United States have a right to bring an action to remedy a violation of their constitutional or federal rights. This statute may even apply to persons who are not citizens of the United States and are undocumented immigrants. *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982). However, the Supreme Court's holding in *Plyer* has been limited thereafter to require the undocumented immigrant to have some sort of connection to the United States and to have accepted some sort of societal obligation. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056 (1990).

Corporations may also have standing to bring a cause of action pursuant to § 1983. *Grosjean v. American Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 44, 46, 80 L. Ed. 660, 665 (1936); *Advocates for Arts v. Thomson*, 532 F.2d 792 (1st Cir. 1976) *cert. denied*, 429 U.S. 894, 97 S. Ct. 254, 50 L.Ed.2d 177. An association or organization, however, may lack standing pursuant to the principles enunciated by the Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L.Ed. 2d 383 (1977). For an association to have standing to bring suit on behalf of its members, the members must have standing to sue in their own right, the interest the association seeks to protect must be germane to the organization's purpose and neither the claim asserted nor the relief requested must require the participation of individual members in the lawsuit. *Id.* There has been much discussion over the third prong of the three prong *Hunt* test. In *United Food & Comm. Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544 (1996), the Supreme Court opined that Congress could abrogate the third element. Many circuits now hold that 42 U.S.C. § 10805(a)(1)(B) did in fact abrogate the third element. *See, e.g. Tellis v. LeBlanc*, No. 18-cv-0541, 2019 U.S. Dist. LEXIS 58026, at *12 (W.D. La. Apr. 3, 2019). Additionally, the nature of a §1983 action may make participation of the individual members necessary because of the possible differences in injuries and damages. *See Hatfield Bermudez v. Rey Hernandez*, 245 F.Supp.2d 383 (D. P.R. 2003) (finding it unlikely that an association will have standing to seek monetary relief under §1983

although it leaves open the possibility for injunctive or equitable relief for an association under §1983).

Another issue involved in the standing analysis is whether the Plaintiff is the person whose constitutional rights were actually violated. This can arise in several scenarios, the most likely being a wrongful death scenario. A deceased person is not a person as that term is defined for purposes of §1983, thus there is no cause of action for constitutional deprivations to a person after that person's death. *Guyton v. Phillips*, 606 F.2d 248 (6th Cir. 1979). However, that does not foreclose the right of an estate of a deceased to bring an action to remedy the deprivation of the deceased's constitutional rights before the decedent's death. *Hull v. Wooten*, 506 F.2d 564 (6th Cir. 1974). Pursuant to 42 U.S.C. §1988, a United States District Court, in the absence of a specific act of Congress, may refer to the law of the State in which it sits in order to determine whether an action under §1983 exists for injury to the person who survives the decedent's death. *Id.* Relying on §1988, *Hull* found Kentucky law permits a wrongful death action filed by the estate of the victim for the alleged constitutional deprivations. *Id*.

The general rule is that a party may not assert the constitutional claims of another. That is evidenced by the cases cited in the preceding paragraph that require the estate of the decedent to bring a claim for the violation of the decedent's constitutional rights instead of bringing the claim in the decedent's name. An exception to that rule is the idea of third party standing. The United States Supreme Court defined the elements of third party standing as: 1) injury to the Plaintiff; 2) a close relationship between the Plaintiff and the third party that would cause the Plaintiff to be an effective advocate for the third party's rights; and 3) some hindrance to the third party's ability to protect his or her own interests. *Campbell v. Louisiana*, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998); *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991).

Another issue that arises with the question of someone asserting the constitutional rights of another is the idea of a Plaintiff filing a loss of companionship or consortium claim based on the alleged violation of a family member's constitutional rights. Some courts have held that a loss of companionship claim is not cognizable under §1983. *See Broadnax v. Webb*, 892 F. Supp. 188, 189 (E.D. MI. 1995) (case outlining First, Eighth, Tenth Circuit precedent finding that no cause of action exists for loss of companionship due to constitutional deprivation suffered by another member of the family). The Seventh Circuit also recently joined this approach to an extent, albeit for different reasons. In 2005, it overruled *Bell v. City of Milwaukee*, 746 F.2d 1205 and held that parents had no constitutional right to recover for the loss of society and companionship of their adult son where (as in the case of a police shooting) the unconstitutional state action at issue was not specifically aimed at interfering with the familial relationship. The court noted that its reasoning in *Bell* stood alone among the circuits, and that other circuits had rejected the reasoning in *Bell* for compelling reasons. *Russ v. Watts*, 414 F.3d 783, 791 (7th Cir. 2005) ("We therefore overrule our decision in *Bell*

insofar as it recognized a constitutional right to recover for the loss of the companionship of an adult child when that relationship is terminated as an incidental result of state action.").

Other courts have found a loss of companionship claim to be cognizable under §1983. *See Broadnax*, 892 F. Supp at 189. A close review of your circuit's decisional law is necessary when presented with a case of this nature. The Circuits that have not recognized this cause of action seemingly base their decisions on the fact that the constitutional violation must be personal and must have been sustained by the Plaintiff. On the other hand, the Circuits that allow this cause of action find that due process recognizes a protectible liberty interest in the continued familial relationship.

II. WHO CAN BE A §1983 DEFENDANT?

A. Governmental Entities

The federal government cannot be sued under §1983 because it is not acting under color of *state* law. Additionally, lawsuits brought pursuant to §1983 against state governments are prohibited by the Eleventh Amendment. However, a state can be sued under §1983 if the state has waived its immunity or if Congress has overridden it. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989).

At least one court has concluded that a local health care district is not an "arm of the state" for Eleventh Amendment purposes. *Firstsource Sols. USA, LLC v. Tulare Reg'l Med. Ctr.*, No. 1:15-CV-01136-DAD-EPG, 2017 U.S. Dist. LEXIS 164795, [WL] at *2 n.1 ("[T]he analysis of whether a government body is an arm of the state for Eleventh Amendment purposes mirrors the same question for diversity jurisdiction purposes, save that a state agency may waive immunity but may not create diversity jurisdiction through waiver."). Likewise, political subdivisions of the state have no Eleventh Amendment protection from suit. *Moor v. County of Alameda*, 411 U.S. 693, 721 (1973).

Municipalities and other local governments are considered "persons" for purposes of § 1983. *Monell v. Dept of Social Services*, 436 U.S. 658 (1978). However, there are limits on the liability of local government entities. First, a municipality or other local governmental entity cannot be held liable under §1983 solely on the basis of *respondeat superior*. *Id.* at 691. Second, a municipality has the same immunity from suit as the state if it is considered part of the state for Eleventh Amendment purposes. *Id.* Finally, the defendant in a § 1983 lawsuit must be a separate jural entity which can sue or be sued in its own name. *Id.* (*e.g.* police department, fire department, and neighborhood services division are typically not jural entities.) Capacity to sue or be sued is determined by the law of the state in which the local government is located. Fed. R. Civ. P. 17(b). *See, e.g., Dean v. Barber*, 951 F.2d 1210, 1214 - 1215 (11th Cir. 1992); *Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 605 (9th Cir. 1986);

Post v. City of Fort Lauderdale, 750 F. Supp. 1131 (S.D. Fla. 1990); *Shelby v. City of Atlanta*, 578 F. Supp. 1368, 1370 (N.D. Ga. 1984); *Ragusa v. Streator Police Department*, 530 F. Supp. 814, 815 (N.D. Ill. 1981).

B. Individuals

Employees and officials of the federal government cannot be sued under §1983 because those officials are acting under color of federal law, and not state law. *See Lee v. Hughes*, 145 F.3d 1272 (11th Cir. 1998); *Daly-Murphy v. Winston*, 837 F.2d 348 (9th Cir. 1987); *Haley v. Walker*, 751 F.2d 284 (8th Cir. 1984); *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982); *Ellis v. Blum*, 643 F.2d 68 (2nd Cir. 1981); *Campbell v. Amax Coal Co.*, 610 F.2d 701 (10th Cir. 1979); *Smith v. U.S. Civil Service Commission*, 520 F.2d 731 (7th Cir. 1975). A claim for damages under §1983 can be brought against a state official, but only in his or her individual capacity. *Hafer v. Melo*, 502 U.S. 21, 27 (1991). However, a § 1983 claim for injunctive relief can be brought against a state official in his or her official capacity. *Id.* That is "because official-capacity actions for prospective relief are not treated as actions against the State." *Id.* (citations omitted). A §1983 claim can be brought against local government officials in both their official and individual capacities.

Private persons such as doctors, nurses, or teachers can be liable under §1983 in some circumstances. In order to be held liable, the private actor must be acting with knowledge of and pursuant to a state statute. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Examples of private actors acting under color of state law include: doctors providing health services to prisoners, *West v. Atkins*, 487 U.S. 42 (1988); the president of corporation who acted with county officials to illegally attach plaintiff's property to satisfy debt, *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); and the owner of a corporation who allegedly bribed a judge, *Dennis v. Sparks*, 449 U.S. 24 (1980). Private actors are not acting under color of state law if they have no connection with the government. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). For example, public defenders are not state actors for purposes of § 1983 because representing a criminal defendant is essentially a private function. *Polk County v. Dodson*, 454 U.S. 312 (1981).

The "color of law" requirement of §1983 is satisfied when a governmental official acts under authority of state law, regardless of whether such act is illegal under state law. *Monroe v. Pape*, 365 U.S. 167 (1961). "It is immaterial whether [the state official's] conduct is legal or illegal as a matter of state law." *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963).

When individual governmental actors are sued under §1983, they can be sued in either their individual or official capacity. An individual capacity suit is a claim against the person individually, seeking to impose personal liability upon a government official for actions he or she takes under color of state law. *Kentucky v. Graham*, 473 U.S. 159 (1985). An official capacity suit is essentially a claim

against the government entity itself. *Monell*, 436 U.S. 658. Individuals can be sued in both their individual and official capacities in the same suit. When the capacity of the individual is not designated in the Complaint, some courts have found the default capacity to be official. *See Nix v. Norman*, 879 F.2d 429 (8th Cir.1989); *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989). However, other courts have looked to the nature of the plaintiff's claim and whether there is a request for punitive damages. *See Yorktown Medical Laboratory, Inc. v. Perales*, 948 F.2d 84, 88-89 (2nd Cir. 1991) (If it is unclear from the Complaint whether a defendant is sued in his official or individual capacities the court looks to "the totality of the complaint as well as the course of proceedings to determine whether the defendants were provided with sufficient notice of potential exposure to personal liability").

III. DOES THE §1983 COMPLAINT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?

The first inquiry to make when considering whether a §1983 complaint states a claim upon which relief can be granted is whether the action alleged was taken under color of state law as opposed to for private reasons only. An action is taken under color of state law only when it is a "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299 (1941). A claim against a government employee might not be actionable under §1983 if the action taken by the employee was motivated by personal interests and not pursuant to official duties. *See, e.g., Almand v. DeKalb County*, 103 F.3d 1510 (11th Cir. 1997) (police officer who broke into plaintiff's home and sexually assaulted her was not acting under color of state law because he did not use his state power to gain entry into the apartment).

The next inquiry is whether the complaint alleges that the governmental action violated a specific federal right. By itself, §1983 does not create any substantive rights, but instead is a vehicle used to vindicate the violation of federal rights created elsewhere. *Albright v. Oliver*, 510 U.S. 266 (1994). Likewise, purely state law claims are insufficient to state a §1983 claim. *See Polk County v. Dodson*, 454 U.S. 312 (1981) (claim of negligence fails to state a claim under § 1983). Finally, where the language of a federal statute forming the basis of a claim does not clearly indicate that Congress intended to create individually enforceable rights, there is no basis for suit under §1983. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) (unless Congress "speak[s] with a clear voice," and manifests an "unambiguous" intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983).

Courts examining § 1983 complaints require plaintiffs to do more than assert conclusory allegations of unconstitutional conduct to state a claim; instead, specific factual allegations are required. *Lillard v. Shelby Cty. Bd. of Educ*., 76 F.3d 716, 726 (6th Cir. 1996). However, a plaintiff may allege facts tending to establish the deprivation of federal constitutional rights under color of state law and still fail

to state a claim if the defendant is immune from liability. *See Imbler v. Pachtman*, 424 U.S. 409 (1976). Additionally, a § 1983 complaint may be dismissed if the plaintiff fails to allege that the named defendant was personally involved with or responsible for the claimed deprivation of a constitutional right. *Trujillo v. Williams*, 465 F. 3d 1210, 1227 (10th Cir. 2006).

Finally, the inquiry ends with whether the complaint alleges a causal link between the alleged harm and the alleged deprivation. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). ("A municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.'"). For example, in a case against a governmental entity for municipal liability, "at the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). Proof of a single incident of unconstitutional activity does not prove causation. *Id.* at 824. Another definition of causation is a "plausible nexus" between the government conduct and the alleged deprivation of a constitutional right. *See Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990). In other words, the government conduct must have been the "moving force" behind the constitutional violation at issue. *Spiller v. City of Texas City, Police Dept.*, 130 F.3d 162 (5th Cir. 1997).

In order to bring and maintain a suit under §1983, a plaintiff is not required to follow the state's notice of claim procedure, nor is the plaintiff restricted by other state law limitations on claims against the government. *Felder v. Casey*, 487 U.S. 131 (1988). However, any pendent state law claims are still subject to the state's notice of claim requirements and abbreviated statute of limitations.

IV. STANDARDS FOR LIABILITY UNDER §1983

A. Standard for Liability for the Individual Capacity Defendant

The standard for liability for the individual capacity defendant will depend on the nature of the alleged constitutional or federal rights' violation. Each alleged constitutional violation may have a different standard for liability. First Amendment claims require different proof than Eighth Amendment Claims. Fourth Amendment claims require different proof than Fourteenth Amendment Claims. It is an impossible task to set out the applicable standard for each claim in these materials. A review of your Circuit's specific standard of liability for the claim against the individual capacity defendant will be required in evaluating the individual capacity claim.

One rule, however, that applies to all individual capacity claims is the individual capacity defendant must have directly participated or had personal involvement in the alleged wrong. *Provost v. City of Newburgh*, 262 F.3d at 146, 154 (2nd Cir. 2001); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3rd Cir. 1997); *Channer v. Murray*, 247 F. Supp. 2d 182, 188 (D. Conn. 2003). Normally,

the analysis of the individual capacity claim will present a clear indication of who the individual capacity defendants are. However, because of the restriction against *respondeat superior* liability in §1983 claims, some plaintiffs have attempted to argue that a supervisor or someone other than the person who performed the act is liable in an individual capacity.

In *Provost*, the court stated the personal involvement of a supervisory defendant could have been proven to a jury by showing the supervisory defendant personally participated in the alleged constitutional violation, was grossly negligent in supervising subordinates who committed the wrongful acts or exhibited deliberate indifference to the rights of the plaintiff by failing to act on information indicating that unconstitutional acts were occurring. *Provost* 262 F.3d at 154. The Third Circuit Court of Appeals in *Robinson* also found that in order to find an individual capacity defendant liable on a supervisory theory, the plaintiff must show direct participation by the supervisory defendant. *Robinson* 120 F.3d at 1293. (An employment discrimination case brought under §1983). It defined direct participation as personal participation by one who has knowledge of the facts that render the conduct illegal. *Id*. That knowledge, plus acquiescence in the subordinate's constitutional violation, can lead to individual liability for the supervisor. *Id. Robinson* also required that the supervisor must have some sort of actual control over the subordinate in order to be found individually liable under §1983. *Id*. at 1294.

The standards and language used to impose individual capacity liability for a supervisor will differ from circuit to circuit. Therefore, you will need to check your circuit's standard to apply the proper language. However, the basis of the claim is the supervisor's conduct, through deliberate indifference, ratification of the supervised's conduct, condoning the supervised's conduct, etc., is directly involved in the offending employee's conduct.

B. Standard for Liability under §1983 for an Official Capacity Defendant

The United States Supreme Court first held a municipality can be liable in a §1983 action in *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). The issue presented to the Supreme Court in *Monell* was the constitutionality of a City of New York Department of Social Services and the Board of Education official policy that compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. *Id*. at 661. The plaintiffs sued the officials of the Department in their official capacity as policymakers. *Id.* The plaintiffs were faced with the Supreme Court's prior holding in *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492 (1961), which had been interpreted to immunize municipalities from §1983 suits. *Id*. at 662. The Supreme Court granted certiorari to consider whether local government officials were persons within the meaning of §1983 when relief was sought against them in their official capacities. *Id*. The Supreme Court

overruled *Monroe v. Pape* and found that local governments were not wholly immune from suit under §1983. *Id*. at 663.

The Court found the legislative history underlying §1983 did not support a finding that municipalities were not to be considered persons under the Act. *Id*. at 693-685. Further, it found that by 1871, it was a well-established rule that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. *Id*. at 687. The court thus held "[l]ocal governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id*. at 690. Further, the Court held that a municipality may be sued for constitutional violations occasioned by governmental custom although it had not received formal approval through the body's official decisionmaking channels. *Id*. at 690-691.

The Court, however, found the same legislative history that permitted suits against municipalities required an articulated policy or custom in order to establish liability. *Id.* at 691. The legislative history and the plain language of the statute would not support a finding of §1983 liability based entirely on the fact that a municipality employed the individual capacity defendant. *Id*. at 691. It held a municipality cannot be held liable under §1983 on a *respondeat superior* theory because the plain language of §1983 requires causation. *Id*. at 691-92. The statute plainly requires the person to subject or cause to be subjected and *respondeat superior* liability did not comport with a plain reading of the terms of the statute. *Id*.

The Court held:

> We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those who edicts or acts may fairly be said to represent official policy, may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

Id. at 694.

Seven years later, in *Oklahoma City v. Tuttle*, 471 U.S. 808 105 S. Ct. 2427, 85 L.Ed.2d 791 (1985) (plurality opinion), the Supreme Court further refined when a municipality can be held liable under §1983. In *Tuttle*, an Oklahoma City police officer, Julian Rotramel, shot and killed Albert Tuttle outside a bar in Oklahoma City. *Id*. at 810. The administratrix of Albert Tuttle's estate, his widow, Rose Marie Tuttle, filed suit against the officer and the city alleging that their actions

deprived Tuttle of certain constitutional rights. *Id*. at 811. The jury returned the verdict in favor of the plaintiff against the city and awarded $1,500,000.00. *Id.* at 813. The city appealed, claiming it was error to instruct the jury that a municipality could be held liable for a policy of inadequate training based merely upon evidence of a single incident of unconstitutional activity. *Id*. at 813. The question presented to the Supreme Court was whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. §1983. *Id*. at 814.

The Court, reaffirming *Monell*, found a city may be held accountable only if the alleged constitutional deprivation was a result of a municipal custom or policy. *Id*. at 817. The Court found its decisions subsequent to *Monell* had done little to further contour a municipality's liability beyond reaffirming that the municipal policy or custom must be "the moving force of the constitutional violation." *Id*. at 820.

Against that background, the Court examined the city's liability. *Id.* The respondent did not claim that the city had a custom or policy of authorizing its police officers to use excessive force, but argued the city's policy of training and supervising police officers was inadequate and caused the alleged constitutional violation. *Id.* Despite the trial court's charge to the jury that it had to find the city guilty of more than just mere negligence, that it must find the city guilty of gross negligence or deliberate indifference, the Supreme Court found the trial court's instructions allowed the jury to infer from a single unusually excessive use of force that it was attributable to inadequate training or supervision, amounting to deliberate indifference or gross negligence on the part of the officials in charge. *Id*. at 821. The Court found the inference impermissible because it allowed a §1983 plaintiff to establish municipality liability without submitting proof of a single action taken by a municipal policymaker. *Id*. at 821.

The estate relied on *Monell* for the proposition that a single policy decision could result in liability to the municipality even though it only resulted in a single harm to a single person. *Id*. at 822. The Court distinguished *Monell* by finding that the policy in this case, on its face, was not unconstitutional as the policy in *Monell* and there was no evidence that the policymakers deliberately chose a training program that would prove inadequate. *Id*. at 823. The Court found §1983 liability requires a closer causal connection than the connection supported by the estate. It held "[a]t the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." *Id*. at 823 ("[t]here must at least be an affirmative link between the training inadequacies alleged and their particular constitutional violation at issue. *Id*. at 824 n. 8.). Further,

> [p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof

> that it was caused by an existing, unconstitutional municipality policy, which policy can be attributed to a municipality policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.

Id. at 823-24.

One year later, the Court sought to further refine municipality liability under *Monell* in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d. 452 (1986) (plurality opinion). The question presented in *Pembaur* was under what circumstances a decision by municipal policymakers on a single occasion may satisfy *Monell*. *Id.* at 471. Pembaur was the subject of the grand jury investigation in Hamilton County, Ohio, regarding welfare fraud. *Id.* at 471. Two of his employees were issued subpoenas for appearance in front of the grand jury, but failed to appear. *Id.* at 472. The Hamilton County Prosecutor obtained capiases for their arrest and detention. *Id.* Pembaur would not allow the sheriff's deputies who attempted to serve the capiases into the private area of his office. *Id.* The deputies contacted the prosecutor who, after consulting with his superior, told the sheriffs to go into the office and get the witnesses. *Id.* at 473. The deputies, with the assistance of city police officers, obtained an ax and chopped down the door to the interoffice, but did not find the two witnesses sought to be detained. *Id.*

Pembaur eventually filed his §1983 action alleging the City of Cincinnati, the County of Hamilton, the Cincinnati Police Chief, the Hamilton County Sheriff, the members of the Hamilton Board of County Commissioners in their official capacities only, the prosecutor and nine city and county police officers violated his rights under the Fourth and Fourteenth Amendments. *Id.* at 473-74. After dismissal of the suit, Pembaur challenged the dismissal of his claims against the prosecutor, Hamilton County, and the City of Cincinnati. *Id.* at 476. The Sixth Circuit Court of Appeals found that despite the fact that the sheriff and prosecutor were both county officials authorized to establish the official policy of Hamilton County with respect to law enforcement, Pembaur failed to prove the existence of the county policy in the case. *Id.* at 476-77.

The Supreme Court addressed *Monell's* requirement of an official policy finding the requirement of a policy was intended to distinguish the acts of the municipality from the acts of its employees with the intention that a municipality is only liable for actions for which the municipality is actually responsible. *Id.* at 479. The municipality must officially sanction or order the acts in order for those acts to

be acts of the municipality. *Id.* at 480. Based on that understanding, the Court held it was patently clear that municipal liability may be imposed for a single decision by a municipal policymaker under appropriate circumstances. *Id.* The power to establish municipal policy is not solely vested in the municipal governing body, but may be expressed by other officials whose acts "may fairly be said to represent official policy." *Id.* at 480. Not only does that include acts that are to be applied uniformly over time, but also courses of action narrowly tailored to a particular situation and not intended to control decisions in later situations. *Id.* at 480-81. As long as a particular course of action is decided on by the municipality's final decisionmaker, it represents an act of official government policy. *Id.* at 481. Thus, the key becomes whether the decisionmaker possesses final authority to establish municipal policy with respect to the particular action at hand. *Id.* The authority to make municipal policy may be granted directly by legislative enactment or delegated by an official who possesses such authority. *Id.* at 483. Whether an official has final policy making authority is a question of state law. *Id.* The Court held "municipal liability under §1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* The Court found the County Prosecutor was acting as a final decisionmaker for the county in ordering the Deputy Sheriffs to enter Pembaur's office and thus, the county could be held liable under §1983. *Id.* at 485.

Two years later in *City of St. Louis v. Praprotnik*, the Supreme Court held that outside an official written policy, a municipality may become liable in two other ways. *City of St. Louis v. Praprotnik*, 45 U.S. 112, 108 S. Ct. 915, 99 L.Ed.2d 107 (1988). It held a §1983 plaintiff may establish a custom or usage sufficient to find a municipality liable when the plaintiff can prove the existence of a widespread practice that is permanent and well settled. *Id.* at 127. Further, when an authorized policymaker reviews and approves a subordinate's decision and the basis for it, the ratification by the policymaker is chargeable to the municipality because the decision is final. *Id.* Thus, outside the realm of an official policy, there are alternative means to establish municipal liability under §1983.

The issue of *Monell* liability arose again one year later in *City of Canton, Ohio v. Harris*, 49 U.S. 378, 109 S. Ct. 1197 103 L.Ed.2d 412 (1989). The main issue in *City of Canton* was whether a municipality can ever be liable under §1983 resulting from the failure to train its employees. Harris claimed she was denied medical attention while in police custody in violation of her due process rights of the Fourteenth Amendment. *Id.* at 381. The Court began its analysis by stating the first inquiry in any case alleging municipal liability under §1983 is to question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. *Id.* at 385. Because of the apparent difficulty in deciding that issue since *Monell*, the Court focused on that issue. *Id.* 385-86. The city urged the Court to adopt a rule that a municipality could only be found liable under §1983 where the policy in question was itself unconstitutional. *Id.* at 386.

In this case, the Court found the city's policy on its face was constitutional and that to impose liability against the municipality when the policy was applied unconstitutionally would be to impose *respondeat superior* liability against the municipality. *Id.* at 386-87. The Court, however, characterized the claim as a failure to train claim and found there are limited circumstances where a municipality can be liable for the failure to train. *Id.* at 387. It held "[t]he inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. Only when the failure to train constitutes deliberate indifference, can such failure to train be thought of as a policy or custom and liability will attach to a municipality. *Id.* at 389.

The Court found there are two critical inquiries in an inadequate training case. The first being whether the training program is adequate and second, if not, the question becomes whether such inadequate training can justifiably be said to represent city policy. *Id.* at 390. For example, the Court found that in light of a specific officer's duties, the need for more or different training is so obvious and the inadequacy is so likely to result in a violation of constitutional rights that the municipality policymakers can be said to have been deliberately indifferent to the need for further training. *Id.* In determining whether a municipality's training program is adequate, the Court must focus its analysis on the task the particular officer must perform because causation must relate the inadequacy of the training program to the specific injury. *Id.* at 391. Thus, if some other reason is accepted by the jury for the alleged constitutional violation, no municipal liability will attach. The Court, although recognizing the high standard of liability for a failure to train case, held to go forward on a lesser standard would result in *de facto respondeat superior* liability for municipalities, a theory rejected in *Monell*. *Id.* at 392.

Another area where §1983 plaintiffs have attempted to find a municipality liable is in the hiring decisions of the municipality. In *Board of County Commissioners of Bryant County Oklahoma v. Brown*, 520 U.S. 397, 111 S. Ct. 1382, 137 L.Ed.2d 626 (1997), the Supreme Court addressed the parameters of a failure to screen claim as a grounds for municipal liability under §1983. The Court held a plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. *Id.* at 411. "Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'" *Id.* Further, the Court held the mere probability that an inadequately screened officer would inflict constitutional injury is insufficient. *Id.* The plaintiff must show that the specific hire would result in the particular injury suffered by the §1983 plaintiff. *Id.* at 412. The connection between the background of the hire and the specific constitutional violation must be strong. *Id.*

The key phrase from *Brown* is that the alleged constitutional violation will be a "plainly obvious consequence" of the hiring decision. *Id.* The Court specifically warned that §1983 cases alleging constitutional injury as a result of an ill-considered hiring decision posed the greatest risk that a municipality will be held liable for an injury it did not cause and create *respondeat superior* liability under §1983. *Id.* at 415. Accordingly, it found the high burden of proof on plaintiffs in these types of cases was justified. *Id.*

V. DEFENSES TO INDIVIDUAL CAPACITY CLAIMS

A. Qualified Immunity

Although it is discussed here under the headline of "defenses," qualified immunity is not really a defense, but rather is the privilege of governmental officials not to be sued in their individual capacity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Qualified immunity immunizes individual defendants from suit in their individual capacity as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have knowledge. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The contours of the right must be sufficiently clear to compel a conclusion as to the specific facts of case. *Id.*

The standard for reviewing whether an individual capacity defendant is entitled to qualified immunity is an objective one. The inquiry is not governed by what the individual defendant actually knew or believed. In fact, the individual can have a reasonable but mistaken belief that his or her conduct is lawful and qualified immunity will still apply. *Id.*; *Saucier*, 533 U.S. at 202. In assessing whether an individual is entitled to qualified immunity, the court will look to statutes, Supreme Court decisions, or specific Court of Appeals decisions for binding precedent to see if the right is "clearly established." *Anderson v. Creighton*, 483 U.S. 635 (1987). Even in novel factual circumstances, it can be determined that a defendant violated the plaintiff's clearly established constitutional rights if "the state of the law . . . [gives defendants] **fair warning** that their alleged [conduct] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added).

Like an affirmative defense, qualified immunity must be asserted or it will be waived. *Harlow*, 457 U.S. 800. However, because it is not a defense, but rather an immunity from suit, case law supports the issue of qualified immunity being resolved at the earliest possible stage in litigation. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Applicability of qualified immunity is a question of law for the Court and is usually raised in a motion for summary judgment. *Id.* Denial of a motion for summary judgment on the basis of qualified immunity is an immediately appealable order. *Id.* If qualified immunity turns on a factual dispute about the official's conduct making it impossible to determine which legal

rules apply, then the finder of fact may decide whether the official is entitled to qualified immunity. *Johnson v. Jones*, 515 U.S. 304 (1995).

There are some procedural tools that counsel defending an individual government defendant can use to prepare the case for potential resolution of qualified immunity on a motion for summary judgment. Upon request by counsel for the individual defendants, courts will usually preclude discovery altogether or at least limit it until the issue of qualified immunity is resolved. *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc). Also, upon a defendant's request, courts may also order a plaintiff to serve a reply to an Answer under Fed. R. Civ. P. 7(a). *Id.*; *Lee v. County of Los Angeles*, 250 F.3d 668, 680 n.6 (9th Cir. 2001) (holding that a heightened pleading standard applies in certain § 1983 cases). Finally, a court may also grant a defense motion for the plaintiff to submit a more definite statement pursuant to Fed. R. Civ. P. 12(e).

B. Absolute Immunity

Absolute immunity provides immunity from suit to certain government officials performing certain government functions regardless of whether the action violates a plaintiff's constitutional rights. The purpose of absolute immunity is to protect the individual's ability to perform his or her function without being subject to liability. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Rather than giving blanket immunity to certain government officials based solely on their position, courts use a functional approach to determine whether qualified immunity or absolute immunity is appropriate. *Forrester v. White*, 484 U.S. 219 (1988). For example, judges are entitled to absolute immunity as long as the act is within their jurisdiction and is judicial in nature. *Burns v. Reed*, 500 U.S. 478 (1991).

Prosecutors are also absolutely immune as long as their conduct at issue is part of the prosecutorial process. *See Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Prosecutors are not absolutely immune from investigative or police functions, *Burns*, 500 U.S. 478, nor are statements to the media protected by absolute immunity, *Buckley*, 509 U.S. at 277. Legislators and their staff are immune for conduct that constitutes a legislative act. *Gravel v. United States*, 408 U.S. 606 (1972).

Finally, government officials are entitled to absolute immunity from a §1983 suit for testimony they give at trial. *Briscoe v. LaHue*, 460 U.S. 325 (1983) (holding that police officers who allegedly committed perjury were entitled to absolute immunity for the testimony they gave at the plaintiff's criminal trial).

VI. OTHER DOCTRINES PROVIDING DEFENSE TO CIVIL RIGHTS CLAIMS

A. *Pullman* Abstention

Pullman abstention applies when a state or local legislative enactment is challenged on constitutional grounds and the challenged law is susceptible to state court determination that may modify or render moot the constitutional question. *Railroad Commissioner v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941). In those circumstances, the federal court will generally abstain from resolving the state law issue until a determination by the highest court of the state is rendered. *Pullman* abstention can be addressed by motion of a party or by the court *sua sponte*.

B. *Younger* Abstention Doctrine

Younger abstention, from *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971), forbids federal declaratory or injunctive relief challenging the validity of a state statute involved in pending state criminal proceedings. The theories underlying *Younger* abstention are twofold. One is the theory that courts of equity should not restrain criminal prosecution when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. *Id.* at 43 - 44. Further, the notion of comity, or a respect for state functions, recognizes that state courts are best left unhindered by intervention from the federal government when the state is in the best position to resolve the issue. *Id.* at 44. The Court held that despite the possibility that extraordinary circumstances may exist in which a Plaintiff could show the necessary irreparable injury for purposes of the present case, Harris failed to make a showing of bad faith, harassment, or other unusual circumstance that would call for the equitable relief requested. *Id.* at 54.

In *George v. Parratt*, 602 F.2d 818 (8th Cir. 1979), the Eighth Circuit Court of Appeals listed several factors that should be considered in a civil rights case to determine whether a court should abstain, including: (1) what effect abstention will have on the rights to be protected, specifically focusing on the nature of the petitioner's right and the nature of the remedy necessary to protect or vindicate the exercise of the right; (2) whether there are available state remedies; (3) whether the challenged law is unclear; (4) whether the challenge to state law is fairly susceptible of an interpretation that would avoid any federal constitutional question; and (5) whether abstention would avoid unnecessary federal interference in state operations (considering whether there is an active suit that would be disrupted and whether federal intervention would interfere with state procedures and policies in areas of special state interests). *Id.* at 822.

C. *Rooker-Feldman* Doctrine

In certain circumstances, when a federal suit follows a state suit, the *Rooker-Feldman* doctrine may prohibit the federal district court from exercising jurisdiction. The doctrine derives from two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d

206 (1983). Under this rule, lower federal courts lack subject matter jurisdiction over challenges to determinations made by state courts. Instead, review of state court decisions lies exclusively in the United States Supreme Court. The doctrine, which is grounded in principles of federalism and comity, has statutory rather than constitutional origins. *Butcher v. Wendt*, 975 F.3d 236, 243 (2d Cir. 2020).

Four requirements must be met for the *Rooker-Feldman* doctrine to apply: (1) the federal plaintiff must have lost in state court; (2) the plaintiff "complains of injuries caused by the state court judgments"; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments. *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010). This doctrine is closely related to the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits federal courts from issuing injunctions to stay state court proceedings.

D. *Burford* Abstention Doctrine

There are two primary situations in which the abstention rule announced in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943) may be appropriate. First, federal courts should abstain from deciding “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.” *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989). Second, federal courts will abstain from exercising federal review that “would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” *Id*. The *Burford* doctrine is primarily concerned with protecting complex state administrative processes from undue federal interference. *Id*. at 362. Notably, *Burford* abstention will not apply if state administrative proceedings have been skipped altogether, and it will also rarely (if ever) be appropriate when "the state law to be applied appears to be settled." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815, 96 S. Ct. 1236, 1245 (1976).

E. *Colorado River* Abstention Doctrine

Under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236 (1976), federal courts will abstain from deciding a federal action where there is a pending federal or state proceeding and when other abstention doctrines are not applicable. Determining whether *Colorado River* abstention should apply requires a district court to make a two-part inquiry. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 498 (7th Cir. 2011). "First, the court must determine whether the concurrent state and federal actions are actually parallel." *Tyrer v. City of South Beloit*, 456 F.3d 744, 751 (7th Cir. 2006). If so, the court must consider second whether "exceptional circumstances" justify abstention. *Id*. Two suits are “parallel” for *Colorado River* purposes when "substantially the same parties are contemporaneously litigating substantially the same issues." *Id*. at 752.

If *Colorado River* abstention is appropriate, the federal court will generally stay its proceeding until completion of the state proceedings.

VII. DEFENSES TO BOTH INDIVIDUAL AND OFFICIAL CAPACITY CLAIMS

A. Statute of Limitations

The statute of limitations is an initial consideration that must be considered. Given that Section 1983 did not contain a statute of limitations courts were left to interpret what should be the applicable limitation of action for Section 1983 suits. The United States Supreme Court resolved that issue when it held the applicable statute of limitation for Section 1983 actions is the applicable personal injury limitation in the state where the cause of action accrued. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (holding § 1983 actions should be characterized as personal injury actions for the purpose of determining the applicable statute of limitations). Obviously, counsel will need to consider where the events that form the basis of the action occurred in order to determine the appropriate statute of limitations.

The Supreme Court revisited the issue in *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L.E.2d 594 (1989). In *Owens*, the Court was presented with the issue of whether to apply a personal injury statute of limitation for intentional torts or to apply the general residual statute of limitations for personal injuries in the state in which the §1983 claim arose. *Id.* To reduce confusion that could be caused by the numerous statutes in various states that provide different statute of limitations for different intentional torts, the Supreme Court found that each state has one general or residual statute of limitations governing personal injury actions. *Id.* at 245. Accordingly, it held where state law provides multiple statutes of limitation for personal injury actions, courts considering §1983 claims should borrow from the general or residual statute for personal injury actions. *Id.* at 250.

While state law establishes the statute of limitations for Section 1983 causes of action, federal law governs the accrual of that cause of action. *Wallace v. Kato*, 127 S.Ct. 1091, 1095 (2007). The standard rule is the cause of action accrues when the Plaintiff has a "complete and present cause of action," "when the plaintiff can file suit and obtain relief," or the date "on which the Plaintiff discovers that he has been injured." *Id.* Typically, the accrual date is obvious, but in certain Section 1983 claims it is less than clear. For example, a wrongful arrest claim accrues when the plaintiff appears before the examining magistrate and is bound over for trial. *Id.* at 1096. Additionally, a Section 1983 claim based upon an alleged unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated. *Heck v. Humphrey*, 512 U.S. 477, 489-90 (1994).

B. Plaintiff's Section 1983 Claim Will Be Barred by Plaintiff's Conviction

In *Heck v. Humphrey*, 512 U. S. 477, 114 S. Ct. 2364, 129 L.E.2d 383 (1994), the Supreme Court held that in order to successfully recover on a §1983

claim for an allegedly unconstitutional conviction or imprisonment or for other harm that would render a conviction or sentence invalid, a §1983 Plaintiff "must prove that the conviction or sentence has been reversed on direct appeal, expunged by Executive Order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S. §2254." *Id.* at 486-87. When the Plaintiff's conviction or sentence has not been overturned in that manner, the Plaintiff's claim is not cognizable under §1983. *Id.* at 487. If a Judgment for damages in the §1983 suit would necessarily imply the invalidity of a conviction or sentence, the complaint must be dismissed without a prior showing of an invalid conviction or sentence. *Id.* However, if the court determines that the §1983 action would not demonstrate that the conviction or sentence is improper, then the §1983 action should be allowed to proceed absent some other defense. *Id.*

C. The Prison Litigation Reform Act

Three major defenses from the PLRA are the

(i) Failure to exhaust administrative remedies – 1997e(a)

(ii) Cannot claim mental or emotional damage without attendant physical damage or sexual abuse – 1997e(e)

(iii) Three Strikes Rule 1915a(g)

(i) Failure to Exhaust Administrative Remedies

a. Exhaustion is an affirmative defense that must be pled or it is waived.

The Supreme Court has determined exhaustion must be properly pleaded in response to a complaint or it is waived. The plaintiff has no burden to establish he/she exhausted his/her administrative remedies. *Jones v. Bock,* 549 U.S. 199 (2007).

b. Exhaustion is a Determination to be made prior to reaching the merits of an action.

When applicable, the failure to exhaust administrative remedies requires dismissal of a claim without reaching its merits. *Zook, citing Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 535 (7th Cir. 1999) ("The statute [requiring administrative exhaustion] can function properly only if the judge resolves disputes about its application before turning to any other issue in the suit.").

c. Exhaustion only Applies to Prisoners at the Time the Suit is Filed.

By definition, a prisoner is someone who is incarcerated at the time the suit is filed. Accordingly, people who are not incarcerated when suit is filed

are not required to show exhaustion of their administrative remedies.

d. Exhaustion Requirement's Applicability

By statute, the requirement applies to all conditions of confinement. The exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Zook v. Ruiz*, WL 4147860 (S.D. Ind. 2007) *citing Porter v. Nussle*, 534 U.S. 516, 524-525 (2002).

It is undisputed that the PLRA's exhaustion requirement is very broad. *Smith v. Zachary*, 244 F.3d 446, 452 (7th Cir. 2001). In examining the definition of "prison conditions" within 42 U.S.C. §1997 e(a), the *Smith* court noted:

> "Here, although § 1997e does not define the term 'prison conditions,' another section of the PLRA does. Amended on the same day, Title 18 U.S.C. § 3626 is part of the same legislation as § 1997e and addresses the same subject – the appropriate remedies for and limitations on prisoner litigation.
>
> …
>
> In § 3626, Congress defines the term 'a civil action with respect to prison conditions' to mean either 'an action with respect to the conditions of confinement' or a suit arising from the 'effects of actions by government officials on the lives of persons confined in prison.' 18 U.S.C. § 3626(g)(2)."

Smith at 448-449.

The *Smith* court concluded an inmate's alleged beating by prison guards was within the statutory definition of "prison conditions" despite Smith's primary argument that an isolated event could not be subject to the exhaustion requirement because the term "conditions" means ongoing and systemic violations. *Smith* at 448-449.

e. Exhaustion Requires Strict Compliance with Administrative Guidelines

Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings. *Zook v. Ruiz*, WL 4147860 (S.D. Ind. 2007) *citing Woodford*

v. Ngo, 126 S.Ct. 2378, 2385 (2006), *Dale v. Lappin*, 376 F.3d 652, 655 (7th Cir. 2004) ("In order to properly exhaust, a prisoner must submit inmate complaints and appeals 'in the place, and at the time, the prison's administrative rules require.'") (*quoting Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Circ. 2002)).

"If the prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim…Courts merely need to ask whether the institution has an internal administrative grievance procedure by which prisoners can lodge complaints about prison conditions." *Zook* at 3. If such an administrative process is in place, then §1997e(a) requires inmates to exhaust those procedures before bringing a prison conditions claim. *Id.*

In *Booth v. Churner*, 532 U.S. 731 (2001), the Supreme Court discussed the mandatory nature of the exhaustion of administrative remedies before a prisoner may seek redress of his federal claims. In *Booth*, the inmate filed an initial grievance but failed to seek any administrative review after this grievance was decided against him. *Id*. at 734-35. In a detailed analysis, the Supreme Court held that recent amendments to the PLRA made administrative exhaustion an absolute condition precedent to proceeding in federal court. *Id*. at 740-41. This is true regardless of the relief offered or available at the administrative level. *Id.*

f. Dismissal is typically Without Prejudice unless Exhaustion cannot be completed

It is well established under the PLRA that dismissal is the proper relief when a prisoner fails to exhaust his administrative remedies. *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002). Normally, this is a dismissal without prejudice to allow the prisoner to exhaust administrative remedies. *Id*. However, an exception exists allowing for dismissal with prejudice when it is too late for the prisoner to exhaust. *Id*.

> Without the prospect of a dismissal with prejudice, a prisoner could evade the exhaustion requirement by filing no administrative grievance or by intentionally filing an untimely one, thereby foreclosing administrative remedies and gaining access to a federal form without exhausting administrative remedies.

Marsh v. Jones, 53 F.3d 707, 710 (5th Cir. 1995) (cited with approval in *Walker, supra.*)

g. Evidentiary Hearings on Exhaustion

In *Pavey v. Conley*, 544 F.3d 739, 741 (7th Cir. 2008) the court held the issue is one to be decided by the court, not the jury. In that instance where disputed issues of fact arise on the exhaustion issue, the court should conduct an evidentiary hearing to make the determination whether the plaintiff properly exhausted administrative remedies. It held:

> The sequence to be followed in a case in which exhaustion is contested is therefore as follows: (1) the district judge conducts a hearing on exhaustion and permits whatever discovery relating to exhaustion he deems appropriate. (2) If the judge determines that the prisoner did not exhaust his administrative remedies, the judge will then determine whether (a) the plaintiff has failed to exhaust his administrative remedies, and so he must go back and exhaust; (b) or, although he has no unexhausted administrative remedies, the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), and so he must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround); or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. (3) If and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.
>
> We emphasize that in the ordinary case discovery with respect to the merits should be deferred until the issue of exhaustion is resolved. If merits discovery is allowed to begin before that resolution, the statutory goal of sparing federal courts the burden of prisoner litigation until and unless the prisoner has exhausted his administrative remedies will not be achieved. But we do not want to place the district courts of this circuit in a straitjacket. There may be exceptional cases in which expeditious resolution of the litigation requires that some discovery be permitted before the issue of exhaustion is resolved. The present case is one in which the exhaustion issue and the merits issue share common facts (the facts relating to the gravity of the injury to the plaintiff's arm), so that discovery targeted on exhaustion may well produce evidence or leads relating to the merits.

h. <u>Class Actions and the Exhaustion Requirement</u>

In *Jones v. Swanson Servs. Corp.* 2009 U.S. Dist. LEXIS 60313 * (Mid. D.

Tenn. July 13, 2009) a federal district court in Tennessee was required to address how to handle the defendants' claim that a proposed class action should be dismissed because some class members had not exhausted their administrative remedies. It held:

> To be sure, Plaintiff, as a former prisoner, is not bound by the exhaustion requirements of the PLRA, *Cox v. Mayer, 332 F.3d 422, 424-25 (6th Cir. 2003)*, but as least one member of the class must demonstrate that the requirement has been met. *Jones, 172 F.Supp.2d at 1133* ("the exhaustion requirement would be satisfied by a showing that one or more class members had exhausted his administrative remedies with respect to each claim raised by the *class*"). For this reason, the Sixth Circuit has held that non-prisoners actions should not be joined with current *prisoners*. *Ziegler v. McGinnis, 32 Fed. Appx. 697, 2002 WL 169614 (6th Cir. 2002)* (dismissing all but one prisoner's civil rights action for failure of the other prisoners to exhaust their individual administrative remedies); *Sanchez v. Becher, 2003 U.S. Dist. LEXIS 4515, 2003 WL 1563941 at *4 (S.D. Ind. Jan. 31, 2003)* (rejecting vicarious exhaustion under *Section 1997e(a)*). Allowing prisoners, even as a class, to proceed without a least one member of the class having exhausted his or her administrative remedies would frustrate these objectives. *Id.* Contrary to Plaintiff's assertion, "[t]here is no futility exception to the exhaustion requirement." *Booth v. Churner, 532 U.S. 731, 731, n.6, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)*. Moreover, "exhaustion is required where administrative remedies are available even if the available administrative remedies do not provide the precise or full, relief sought." *Walker v. Maschner, 270 F.3d 573, 577 (8th Cir. 2001)*.

Therefore, you should check your Circuit to determine how it handles this issue.

i. Plaintiff's Counter-Arguments

The administrative remedy must be "available" to the plaintiff. The Plaintiff will attempt to argue it was not "available" for many different reasons. For example, where corrections officers refuse to provide forms to file a grievance the process is not available to the plaintiff. Where officers refuse to respond to a grievance as required by policy, the grievance may not be available. *Turner v. Huston*, 137 Fed. App'x 880, 882 (7th Cir. 2005). Where the facility fails to inform the inmate of the grievance procedure, the grievance may not be available. *Id.* When the administrative remedies are unavailable to inmates, the process is deemed exhausted. *Id.*

It is also not the failure to exhaust administrative remedies if the inmate

files a grievance, receives a positive response to the grievance resolving his issue and then fails to appeal that grievance. *Thornton v. Snyder*, 428 F.3d 690, 695-696 (7th Cir. 2005). At that point, the inmate's only option is to file suit for money damages for the initial action that led to the grievance because the administrative process does not provide for money damages. In essence, the Plaintiff has exhausted his administrative remedies and the only option is to file suit.

(ii) Mental and Emotional Damages without Attendant Physical Injury

The term "physical injury," for Section 1997e(e)'s purposes, is defined by the eighth amendment's analysis of physical injury. *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). In *Siglar*, the court held that a bruised ear was an insufficient physical injury to satisfy Section 1997e(e)'s "physical injury" requirement. *Id.* The *Siglar* court cited the United States Supreme Court from *Hudson v. McMillan*, 503 U.S. 1, 7, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992) in order to define the parameters of physical injury. *Id.* at 193. It held although the lack of a serious injury is persuasive that the Plaintiff suffered no physical injury, it is not conclusive. *Id.* The physical injury, however, must be more than de minimus before the statutory mandate will be satisfied. *Id.* It held the bruised ear, for which the plaintiff did not seek or receive treatment and which lasted approximately three days, was a de minimus injury that did not support his claims of emotional or mental suffering. *Id.* at 194.

In *Zehner v. Trigg*, 952 F. Supp. 1318, 1322-23 (S.D. Ind. 1997), the plaintiffs alleged continuous exposure to asbestos in the prison commissary caused them physical injury and emotional damages. The defendants moved to dismiss the claims on the grounds the plaintiffs failed to allege a sufficient physical injury to satisfy the mandates of Section 1997e(e). *Id.* at 1322. The court rejected the plaintiffs' argument that impact with the airborne asbestos particles was sufficient injury because the court found the exposure that does not manifest itself in an injury is not sufficient physical injury. *Id.* at 1323. The court held the mere exposure to asbestos, as well as other harmful or hazardous substances, is not, in and of itself, sufficient physical injury to recover damages under traditional tort concepts. *Id.* at 1323. Thus, it held "the term 'physical injury' in §1997e(e) is not broad enough to encompass mere inhalation or ingestion of asbestos particles without proof of resulting disease or other adverse physical effects." *Id.*

In *Mansoori v. Shaw*, 2002 U.S. Dist. Lexis 11670 (N.D. Ill. June 27, 2002), the United States District Court for the Northern District of Illinois resolved an assertion by Defendant that a prisoner who sought solely emotional distress damages based only on "subjective and unverifiable claims of tenderness and soreness" could not satisfy the physical injury requirement, but instead must produce "objective verifiable evidence of

physical injury." The court rejected the defendant's assertion that the plaintiff's injury was de minims finding the claimed physical injury was significant enough for the corrections officers to take the plaintiff to the hospital for treatment. Additionally, the court rejected the defendant's assertion the PLRA requires objective evidence of physical injury. It held:

> the Supreme Court has stated that in order to survive summary judgement, the plaintiff must show some injury, and that no "serious injury is required." *Hudson v. McMillian, 503 U.S. 1, 6-8, (1992).* The reasonable inference from a complaint of pain is that some physical injury caused it. *Gordon v. Sheahan, 1997 U.S. Dist. LEXIS 3508, 1997 WL 136699*, *4 (N.D. Ill.). The jury as the fact finder determines if the alleged action by the defendant caused and correlates to the injury of the plaintiff. Id. (Stating that the plaintiff adequately alleged an injury under § 1997e(e) because a jury could find as a matter of common knowledge that sleeping on a hard cold floor can cause back pain). This court has determined that a single gratuitous punch to the stomach is of sufficient gravity to place the issue before a jury.

In *Oliver v. Keller*, 289 F.3d 623, 629-630, 2002 U.S. App. LEXIS 8345, *16-18, (9th Cir. Nev. May 2, 2002), the 9th Circuit addressed the damages that would be potentially recoverable when the Plaintiff does not allege or cannot prove physical injury. It held:

> In considering the scope of § 1997e(e), some circuits have merely recognized that § 1997e(e) *may not* bar claims for nominal and punitive damages. *See Davis v. District of Columbia*, 332 U.S. App. D.C. 436, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (suggesting possibility of nominal but not punitive damages); *Harris*, 190 F.3d at 1288 n. 9 (declining to reach issue of nominal damages because plaintiffs had not requested nominal damages). However, at least two circuits expressly resolve the issue. In *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000), the Third Circuit determined that § 1997e(e) did not bar a claim for nominal and punitive damages for alleged constitutional violations. *Id.* at 251-52. *See also Searles v. Van Bebber*, 251 F.3d 869, 879-81 (10th Cir. 2001) (even absent physical injury, prisoner was entitled to seek nominal and punitive damages under § 1997(e)).
>
> Applying § 1997e(e) to the facts of this case, we reach a conclusion similar to *Al-Hafeez* and *Searles*. Appellant's complaint seeks punitive damages and is consistent with a claim for nominal damages even though they are not expressly requested. *See Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (pro se complaints may be construed liberally); *Al-Hafeez* 226 F.3d at 251 (construing pro se complaint to include claim for nominal damages where complaint sought only compensatory and punitive

> damages). Appellant's complaint also seeks compensatory damages. To the extent that appellant has actionable claims for compensatory, nominal or punitive damages - premised on violations of his Fourteenth Amendment rights, and not on any alleged mental or emotional injuries - we conclude the claims are not barred by § 1997e(e).

In *Cassidy v. Indiana Dep't of Corrections*, 199 F.3d 374, 376-377 (7th Cir. 2000), the Seventh Circuit addressed the plaintiff's arguments that the physical injury requirement did not apply to his ADA and Rehabilitation Act claims. It held:

> Cassidy first argues that his suit does not fall within sec. 1997e(e)'s ambit, because he is not bringing an action "for mental or emotional injury . . . without a prior showing of physical injury"; instead, he is bringing an action for violations of his rights under the ADA and the Rehabilitation Act to be free from disability-based discrimination. Cassidy's argument fails under two Seventh Circuit cases. *See Rowe v. Shake,* 196 F.3d 778, 1999 U.S. App. LEXIS 29349, 1999 WL 1011930 at *2 (7th Cir. 1999) (suggesting that a prior showing of physical injury is not required to bring a First Amendment claim, so long as the prisoner does not seek recovery for mental or emotional injuries); *Robinson v. Page,* 170 F.3d 747, 749 (7th Cir. 1999) (holding that prisoner's claims for mental or emotional injury were not barred by sec. 1997e(e) where it was not yet established if prisoner could establish a physical injury).
>
> Cassidy also contends that Congress intended that sec. 1997e(e) apply only to non-constitutional tort claims in order to impose a uniform standard on federal, state and local prisoners seeking relief against official tortfeasors. In support, he points to the similarity of language between sec. 1997e(e) and a PLRA addition to the Federal Tort Claims Act which reads: "No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 28 U.S.C. sec. 1346(b)(2). This argument ignores this court's case law applying sec. 1997e(e) to constitutional torts. *See Rowe*, 196 F.3d 778, 1999 U.S. App. LEXIS 29349, 1999 WL 1011930 (First Amendment); *Robinson*, 170 F.3d 747 (Eighth Amendment). Even if the court accepts Cassidy's argument as applied to both constitutional and non-constitutional torts, however, the plain language of sec. 1997e(e) nonetheless unambiguously states that "No Federal civil action" shall be brought for mental or emotional damages without a prior showing of physical injury. In light of this plain language, we will not carve out exceptions for

> which Congress did not provide. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992); *LAC Courte Oreilles Band of Lake Superior Chippewa Indians v. IRS*, 845 F.2d 139, 144 (7th Cir. 1988).
>
> Cassidy also argues that sec. 1997e(e) should not apply to ADA claims, because the ADA has its own remedial scheme designed to redress discrimination, including a separate attorney's fees provision, 42 U.S.C. sec. 12205. Cassidy points out that sec. 1997e(d) limits the recovery of attorney's fees available to prisoners under 42 U.S.C. sec. 1988, and that any mention of the ADA is conspicuously absent from sec. 1988. As IDOC reminds, though, sec. 1988 applies to other civil rights statutes, including the Civil Rights Act of 1964, indicating that Congress did not intend to exempt such actions from sec. 1997e(e)'s ambit. And again, the plain language of sec. 1997e(e) provides for no exceptions. *See also, Davis v. District of Columbia*, 332 U.S. App. D.C. 436, 158 F.3d 1342, 1348-49 (D.C. Cir. 1998)(holding that sec. 1997e(e) precludes prisoner's claim for emotional injury under the ADA if there is no prior showing of physical injury).
>
> A plain reading of sec. 1997e(e) tells us that Cassidy's claims for damages for mental and emotional injuries, contained in paragraph one of his "Report of Specific Forms of Relief Sought," must be barred, though Cassidy may nonetheless pursue all of his other claims for damages. Indeed, the *Robinson* case espouses this viewpoint. See 170 F.3d at 748-49.

Finally, in *Meade v. Plummer*, 344 F. Supp. 2d 569, 572-574 (E.D. Mich. Nov. 2, 2004) the United States District Court for the Eastern District of Michigan addressed the defendants' assertion that plaintiff's lack of a physical injury as a result of a First Amendment violation barred plaintiff's claim. It held:

> The defendant states that the plaintiff has not alleged any physical injury, and therefore the only conceivable injury that could otherwise flow from a First Amendment violation is an injury for mental or emotional distress. Since Section 1997e(e) plainly bars recovery for such damages absent a physical injury, the defendant reasons, the case must be dismissed. The defendant cites *Davis v. District of Columbia*, 332 U.S. App. D.C. 436, 158 F.3d 1342, 1348-49 (D.C. Cir 1998), in support of her argument. In that case, the District of Columbia Circuit dismissed a case involving the Americans with Disabilities Act and the Rehabilitation Act where no physical injury was alleged based on the view that Section "1997e(e) precludes claims for emotional injury without any prior physical injury, regardless of the statutory or constitutional basis of legal wrong." *See also Harris v. Garner*, 216 F.3d 970, 984 (11th Cir. 2000) (en banc) (addressing constitutional violations that

occurred during a shakedown and holding that the language "no action shall be brought" operates as a bar to a prisoner's entire suit alleging emotional damages absent physical injury).

Other courts have sustained claims by prisoners brought to enforce First Amendment rights, reasoning that "[a] deprivation of First Amendment rights standing alone is a cognizable injury." *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999); *see also Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (holding that "the deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred"). Still other courts have held that claims for First Amendment violations absent physical injury need not be dismissed outright, but Section 1997e(e) limits recovery to nominal and punitive damages since compensatory damages must amount to recovery for mental or emotional injury. *See Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002) (addressing claim based on depravation of medication); *Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000) (addressing First Amendment free exercise of religion claims); *Royal v. Kautzky*, 375 F.3d 720, 722-23 (addressing claims of retaliation for exercising First Amendment Rights); *Searles v. Van Bebber*, 251 F.3d 869, 875-76 (10th Cir. 2001) (addressing First Amendment free exercise of religion claims).

The Sixth Circuit has not addressed the issue in a published opinion. However, in an unpublished decision, the court reversed the district court and allowed a prisoner to argue for nominal, compensatory, and punitive damages flowing from a violation of his First Amendment rights. *See Williams v. Ollis*, 2000 U.S. App. LEXIS 23671, Nos. 99-2168, 99-2234, 2000 WL 1434459 at *2 (6th Cir. Sept. 18, 2000) (unpublished) (citing *Canell*, 143 F.3d at 1213).

The Court cannot agree with the reasoning of courts that construe Section 1997e(e) as barring suit based on constitutional violations when no physical injury is alleged. The *Davis* and *Harris* courts read the Section too broadly by construing it as a prohibition against a claim rather than the limitation on damage recovery that it plainly is. Likewise, this Court does not believe that First Amendment claims are excluded from Section 1915e(e)'s scope, as the Ninth and Seventh Circuits have suggested. *See Canell*, 143 F.3d at 1213; *Rowe*, 196 F.3d at 781. Those cases premise the exclusion on the character of First Amendment claims as having compensable value even in the absence of physical *or* emotional injury. However, the Supreme Court rejected that rationale in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308, 91 L. Ed. 2d 249, 106 S. Ct. 2537 (1986), stating that "the abstract value of a constitutional right may not form the basis for § 1983 damages." Rather, Section

1983 created a "species of tort liability" that allowed compensation "according to principles derived from the common law of torts." *Id.* at 306. Compensable damages include economic loss, physical injury, pain and suffering, "impairment of reputation . . ., personal humiliation, and mental anguish and suffering." *Id.* at 307 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)).

Section 1915e(e), enacted in 1996 as part of the Prison Litigation Reform Act, serves to limit the damages prisoners can recover by restricting compensation for mental or emotional injuries to those instances in which the prisoner can show physical injury. The plain language of the statute does not require dismissal of constitutional claims in which no physical injury is present, since nominal and punitive damages may be recovered in cases, such as this, where First Amendment violations are alleged. *See Stachura*, 477 U.S. at 308 n.11 (citing *Carey v. Piphus*, 435 U.S. 247, 266, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978)).

It plainly appears that the plaintiff seeks damages for mental and emotional injury, and the undisputed facts establish that no physical injury occurred. Those damages are barred by Section 1997e(e). However, the plaintiff also prays for damages for other injuries, and, as noted above, nominal damages are available if the plaintiff can prove First Amendment violations. He also seeks punitive damages in varying amounts against the several defendants. The Court concludes that the plaintiff has made a showing sufficient to warrant presenting his claims for relief to the jury, and that he may seek to recover nominal, compensatory, and punitive damages, if appropriate, for all injuries except mental and emotional injuries.

The takeaway from these cases cited above is

1. 1997e(e) will serve to preclude recovery of compensatory damages for mental or emotional pain and suffering from a constitutional or non-constitutional tort, including ADA and Rehabilitation Act claims.
2. However, to the extent compensatory damages are based on something else, the lack of an alleged physical injury will not preclude recovery of those compensatory damages.
3. Additionally, even without an alleged physical injury nominal and punitive damages may be recoverable.
4. The physical injury requirement can be avoided merely by waiting until the inmate gets out of jail.
5. The physical injury requirement does not seemingly apply to claims for declaratory or injunctive relief.

(iii) Three Strikes Rule

While prisoner litigants can be excused from paying the full filing fee for federal court litigation at the time the complaint is filed, if a prisoner litigant has had three cases dismissed because the litigation was frivolous, malicious or failed to state a claim upon which relief can be granted the prisoner litigant may be precluded from receiving *in forma pauperis* treatment.

A frivolous lawsuit is one that fails to raise even an arguable question of law, or in which it is apparent from the complaint itself that it is barred by a defense or based on an indisputably meritless legal theory. A complaint can also be frivolous by arguing a completely unreasonable set of facts.

A lawsuit is malicious because it is brought for an improper purpose, as harassment or as an abuse of the legal process.

A lawsuit fails to state a claim upon which relief can be granted when the allegations of the Plaintiff's complaint taken as true do not support a legal claim.

If a lawsuit is dismissed for any of those reasons it counts as a strike. The lawsuit does not have to be filed *in forma pauperis* to be counted as a strike. The dismissal of the case still counts as a strike, even if one of the strikes is being appealed. *Coleman v. Tollefson*, 135 S.Ct. 1759 (2015).
A decision on the merits, a decision based on immunity grounds or a decision based on the inmate's failure to exhaust his administrative remedies typically do not constitute a strike.

The Court can consider this sua sponte or the defendant may raise the issue in response to the plaintiff's petition to proceed *in forma pauperis*. It is the defendant's burden to prove the strikes if it raises the defense.

There is an exception for situations where the inmate alleges they are faced with imminent danger of death or serious bodily harm. The danger must be a present, imminent threat, not a past one.

VIII. DAMAGES AND REMEDIES AVAILABLE UNDER §1983

A. Compensatory Damages

In order to recover compensatory damages under §1983, a plaintiff must show actual or special damages. General damages flowing from the alleged violation of a constitutional right will not be presumed. *Carey v. Piphus*, 435 U.S. 247 (1978). Because a constitutional right has no intrinsic value, a plaintiff cannot recover damages merely because his or her constitutional rights were violated. *Memphis Cmty. Sch. v. Stachura*, 477 U.S. 299 (1986). In the absence of specific

proof of actual or special damages, only nominal damages are awardable:

> The awarding of nominal damages for the "absolute" right to procedural due process "recognizes the importance to organized society that [this] righ[t] be scrupulously observed" while "remain[ing] true to the principle that substantial damages should be awarded only to compensate actual injury."

Farrar v. Hobby, 506 U.S. 103, 112 (1992) (quoting *Carey*).

B. Injunctive and Declaratory Relief

In order to obtain injunctive relief under §1983, a plaintiff must show real or immediate harm from the challenged conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983). The harm must be irreparable. *Id.* Speculation about future harm based on past conduct is not enough for a plaintiff to obtain injunctive relief, particularly when the plaintiff is able to seek money damages. *Id.*

C. Punitive Damages

Punitive damages are not available from a governmental entity or an official capacity defendant. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). However, punitive damages are available against individual capacity defendants

> when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others . . . even when the underlying standard of liability for compensatory damages is one of recklessness.

Smith v. Wade, 461 U.S. 30, 56 (1983). In at least one Circuit, punitive damages may be available against individual capacity defendants, even if compensatory damages are not awarded. *See Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991).

D. Attorneys' Fees

Under 42 U.S.C. §1988, the court **may** allow the prevailing party in a §1983 lawsuit to collect its reasonable attorneys' fees. Although the statute does not distinguish between prevailing plaintiffs and defendants, the Supreme Court has construed it in such a way to make collection of fees almost automatic for plaintiffs and rare for defendants. A party is deemed to have prevailed if he or she succeeds on any significant issue that achieves some benefit the party sought. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Even when a plaintiff does not collect money damages, he or she can be the prevailing party. A plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992). Likewise, an award of nominal damages is enough for the plaintiff to be the prevailing party and be entitled to an award of attorney's fees. *Id.* at 112. However, in such a case, the Supreme Court has held that "reasonable" attorney's fees for an award of nominal damages should usually be none at all. *Id.* at 144. Only when "special circumstances would render such an award unjust" have courts found that a prevailing plaintiff should not collect his or her attorneys' fees. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 404 (1968).

Attorneys' fees can be awarded to a prevailing defendant only if the action is "frivolous, unreasonable, or groundless, or the plaintiff continues to litigate after it clearly becomes so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). To get around the double-standard created by the courts with respect to §1988 attorneys' fees, the defendant may use an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure to prevent the plaintiff from collecting attorneys' fees. If the award of damages to the plaintiff plus attorneys' fees is lower than the offer of judgment made by the defendant, the plaintiff is not the prevailing party. This is so because in § 1983 cases, "costs" under Rule 68 include attorneys' fees. *See Marek v. Chesney*, 473 U.S. 1 (1985).

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