

19

42 U.S.C. § 1983

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19-1 SCOPE

19-1.01 The Statute

This chapter considers the liability of local governments and officials under 42 U.S.C. § 1983. Section 1983, which was originally enacted as Section 1 of the Civil Rights Act of 1871, provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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

The coverage of this chapter will examine the impact of § 1983 upon the operation of local government.

19-2 THE MODERN EMERGENCE OF SECTION 1983 LITIGATION

19-2.01 *Monroe v. Pape*

Prior to 1960, very few cases were filed against local governments under § 1983. In *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), the Supreme Court held that a municipal corporation was not a “person” within the meaning of the statute and, therefore, local governments could not be sued under this section. Litigation under § 1983 continued, however, with courts holding that individuals could be sued both in their official and individual capacities for equitable relief and damages. Thus, rather than suing the governmental entity directly, suits were filed during this period against members of a board of supervisors, for example, in their official and individual capacities. The Court in *Monroe* also ruled that § 1983 provides a remedy for constitutional violations even if a state law claim is available.

19-2.02 *Monell v. New York City Department of Social Services*

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978), the Court reread the legislative history of § 1983 and reversed *Monroe v. Pape*, holding that Congress intended municipalities and other local government units to be included among those “persons” to whom § 1983 applies. Since the decision in *Monell*,

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local governments have been subject to § 1983 suits directly, and it is no longer necessary to bring “official capacity” suits. Section 1983 suits may be brought either against individuals or against the government entity itself. *Monell* addressed only the tip of the iceberg, however, because even though it made clear that localities could be sued, it left open the precise circumstances under which they would be liable for the actions of their officers and employees.

Section 1983 suits can be brought to enforce any alleged violation of a constitutional right or a violation of a federal statute. *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502 (1980); see section 19-5.04(d). *Monell*’s “policy or custom” requirement applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective, such as an injunction or declaratory judgment. *Los Angeles Cnty. v. Humphries*, 562 U.S. 29, 131 S. Ct. 447 (2010). A § 1983 claimant seeking only prospective, non-monetary relief against a municipal entity must show that the alleged constitutional injury was the result of municipal custom, policy, or practice. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 129 S. Ct. 788 (2009); *Monell, supra*. Jurisdiction over § 1983 suits is not found in § 1983 itself but must be based on either 28 U.S.C. § 1331 or § 1343(3).

19-2.03 Corporations as “Persons”

The Fourth Circuit has held that a corporation can establish a racial identity and sue under Title VI, which protects any “person” from discrimination based on “race, color, or national origin” when participating in a program receiving federal financial assistance. *Carnell Constr. Corp. v. Danville Redev. & Hous. Auth.*, 745 F.3d 703 (4th Cir. 2014). In *Carnell*, the state had certified the business as minority-owned. The Fourth Circuit dismissed dictum in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977), in which the Supreme Court stated that a corporation “has no racial identity and cannot be the direct target” of race discrimination. Whether a corporation can be a “person” under § 1983 will depend on developing case law.

19-3 LIABILITY OF THE INDIVIDUAL

19-3.01 Absolute Immunity

Whenever a defendant is sued individually in a § 1983 suit, the court must first determine whether the person has absolute immunity. Appellate courts have jurisdiction under the collateral order doctrine to review denials of Rule 12(b)(6) motions based on absolute immunity. To succeed on a 12(b)(6) motion, the defense of absolute immunity must clearly appear on the face of the complaint. *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222 (4th Cir. 1997).

19-3.01(a) Members of City Councils, Boards of Supervisors, and School Boards

Whenever a member of a legislative body is sued for adopting legislation, absolute immunity based on the legislative nature of the action should be raised. The case law is clear that any legislative immunity enjoyed by individual members of a board is rooted in the common law. *Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 906 (W.D. Va. 2012). In *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998), the United States Supreme Court confirmed what had been assumed: local legislators are absolutely immune from suit under § 1983 for their legislative activities. The Court also held that a legislator’s subjective intent in passing the ordinance was irrelevant. The Court distinguished the termination of a position from the hiring or firing of a particular employee. The Court also held that the mayor was entitled to absolute immunity even as an executive official because signing the act into law was an integral step in the legislative process. See also *Brickey v. Hall*, No. 1:13cv00073 (W.D. Va. Jan. 23, 2014) (amending grievance procedure is a legislative action for which town council members are entitled to absolute immunity), *rev’d on other grounds*, 828 F.3d 298 (4th Cir. 2016); *Doe v. Pittsylvania*, 842 F. Supp. 2d 906 (W.D. Va. 2012) (legislative immunity does not shield non-legislative acts such as an opening prayer); *Mainstream Loudoun v. Bd. of Trustees*, 2 F. Supp. 2d 783

(E.D. Va. 1998) (policy to block certain sites on library computers discretionary exercise of rulemaking authority thus properly treated as legislative in nature; library board and its members have absolute immunity). Note, however, that legislative immunity can be waived by an explicit and unequivocal renunciation of the protection. *Bd. of Sup'rs of Fluvanna Cnty. v. Davenport & Co.*, 285 Va. 580, 742 S.E.2d 59 (2013). The court in *Davenport* held that the board waived legislative immunity (an individual right) by: (1) declining to assert legislative immunity, (2) voluntarily filing a complaint that, due to the board's burden of proof, involved issues protected by legislative immunity, and (3) making an unequivocal waiver of protection from inquiry into legislative motivation in the text of its complaint.

The administrative decisions of a council or board, however, are not subject to absolute immunity. In *Roberson v. Mullins*, 29 F.3d 132 (4th Cir. 1994), the Fourth Circuit held that the termination of a government employee was not within the traditional legislative province, and thus the board members who voted to fire him were not entitled to absolute immunity. *Cf. Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998) (termination of position); *Pettis v. Nottoway Cnty. Sch. Bd.*, No. 3:12cv864 (E.D. Va. May 31 and June 17, 2013) (school board members not liable for termination where damages sought were monetary and members were not involved in the decision to terminate), *aff'd on other grounds*, No. 14-1192 (4th Cir. Nov. 12, 2014). The distinction between traditional legislative powers and administrative ones is often not clear. For instance, budget decisions are generally legislative, while employment and personnel decisions are generally administrative. Certain employment decisions, however, may be voted on in the context of budgetary discussions. *See Chadwell v. Lee Cnty. Sch. Bd.*, 457 F. Supp. 2d 690 (W.D. Va. 2006) (elimination of position, as opposed to demotion, meant action was legislative, not administrative). In *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997), board members were entitled to absolute immunity for discipline of a fellow board member. The Fourth Circuit has stated that courts should focus on the impact of the legislation—the more general, the more likely the action is legislative; the more specific, the more likely it is administrative. *Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995).

It should be noted that absolute immunity for the legislative decisions of council or board members does not insulate the locality from liability. *Berkley v. Common Council*, 63 F.3d 295 (4th Cir. 1995) (en banc). In *Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996), the court held that, although there is no derivative immunity, there is a testimonial privilege, and legislators may not be compelled to testify regarding their motives in passing legislation. Such privilege may be waived by the legislator. In *Kensington Volunteer Fire Department, Inc. v. Montgomery County*, 684 F.3d 462 (4th Cir. 2012), the court stated that *Berkley* and *Burtnick* hold that, while a municipality is not immune from liability under § 1983 for the enactments and actions of the local legislative body, a court may not rely on alleged improper legislative motives to strike down an otherwise valid statute. *See generally Virginia Uranium, Inc. v. Warren*, 587 U.S. ___, 139 S. Ct. 1894 (2019), for a discussion of problems with inquiring into the legislative purposes for enacting a statute.

19-3.01(b) City Managers or County Executives

Absolute immunity may also be available to an administrator who is acting in a legislative capacity. *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171 (1979). In *Kensington Volunteer Fire Department, Inc. v. Montgomery County*, 684 F.3d 462 (4th Cir. 2012), the court held that a county executive and fire chief were legislatively immune from claims arising from their activity in proposing, submitting, and advocating a budget.

19-3.01(c) Members of Appointed Boards or Commissions

If a legislative function is involved, the cases cited above may be used. If the function is a judicial one, such as a personnel board or grievance panel, absolute immunity may be

available depending on the procedures used by the panel. *Cleavinger v. Saxner*, 474 U.S. 193, 106 S. Ct. 496 (1985).

19-3.01(d) Employees

The United States Supreme Court affirmed a ruling by the Sixth Circuit that social workers are absolutely immune from suit under § 1983. *Hoffman v. Harris*, 511 U.S. 1060, 114 S. Ct. 1631 (1994). In *Gedrich v. Fairfax County Department of Family Services*, 282 F. Supp. 2d 439 (E.D. Va. 2003), the court distinguished between the duties of social workers that are directly related to the judicial process (e.g., emergency removal petition), for which they are entitled to absolute immunity, and those related to an investigation, for which qualified immunity may apply. See also *Nelson v. Green*, No. 3:06cv70 (W.D. Va. Aug. 15, 2013) (social workers entitled to absolute immunity for filing of a petition, but only qualified immunity for investigative and administrative acts). In *Willis v. Blevins*, 957 F. Supp. 2d 690 (E.D. Va. 2013), the federal district court extensively discussed the distinction between absolute immunity for a prosecutor's advocative acts and qualified immunity for his investigative and administrative acts. "Absolute immunity only protects those 'acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State.'" *Id.* at 694 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993)); see also *Faison v. Clarke*, No. 7:15cv530 (W.D. Va. Sept. 26, 2016) (absolute immunity awarded; authorizing gathering of evidence does not constitute legal advice to police).

Government employees are absolutely immune from liability for testimony given before a grand jury or in a criminal trial. *Rehberg v. Paulk*, 566 U.S. 356, 132 S. Ct. 1497 (2012).

19-3.02 Qualified Immunity

A defendant sued individually in a § 1983 suit may be entitled to qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), the Supreme Court expressed concern that civil damage awards against public officials or employees for every judicially determined violation of constitutional rights would prove too expensive to the public, discourage public service, and cause officials or employees to hesitate before making decisions if they were unsure of their potential liability. See also *Turner v. Dammon*, 848 F.2d 440 (4th Cir. 1988). The intent of the doctrine is to shield certain mistakes in judgment from litigation by protecting all but the plainly incompetent or those who knowingly violate the law. *Stanton v. Sims*, 571 U.S. 3, 134 S. Ct. 3 (2013) (per curiam) (citing *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986)). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011); *Ziglar v. Abbasi*, 582 U.S. 120, 137 S. Ct. 1843 (2017) (*Bivens* action).²

² The reader may note that in 2020, three bills were introduced in the U.S. Congress that would have ended or sharply curtailed the applicability of qualified immunity. Similar bills have been considered in dozens of states, including Virginia, where such a bill passed the House of Delegates but failed to move out of the Committee on the Judiciary in the Senate. The bill, [HB 5013](#), would have ended sovereign immunity and qualified immunity for law enforcement officers who, under color of law, violate a person's rights under any law or under the state or federal Constitution. Liability could arise from an officer's affirmative actions or for failing to intervene. Similar legislation was introduced in the General Assembly in 2021 (H.B. 2025 and S.B. 1440), but never made it out

Qualified immunity applies regardless of whether the government official's alleged error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009); *Pleasants v. Town of Louisa*, 847 F. Supp. 2d 864 (W.D. Va. 2012) (illegal entry), *aff'd on this ground*, No. 12-1496 (4th Cir. May 7, 2013), No. 3:11cv00032 (W.D. Va. Mar. 18, 2014) (false arrest).

The Court in *Harlow, Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987), and *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534 (1991), emphasized that motions to dismiss on the basis of qualified immunity (or motions for summary judgment if affidavits to establish the facts are necessary) are questions of law that should be decided as soon as possible in the case so that officers and employees do not have to go through discovery and trial with potential individual damages hanging over their heads. See *Willingham v. Crooke*, 412 F.3d 553 (4th Cir. 2005) (jury determines disputed facts, but court determines if conduct violated clearly established law and whether officer could have reasonably believed otherwise); *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (noting that it may never be appropriate for a jury to determine if qualified immunity applies). For similar reasons, the Court has allowed, under certain circumstances, interlocutory appeals of denials of qualified immunity. See section 19-3.02(c).

Qualified immunity must be pled as an affirmative defense. *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920 (1980). In *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000), the court held a defendant waived his right to assert qualified immunity on remand when he pled, but did not pursue, the defense prior to remand.

To establish qualified immunity, a defendant must show that there was no clearly established law against his conduct at the time it occurred or that a reasonable official under the circumstances would not have known the conduct was illegal. When evaluating a qualified immunity claim, the court must determine whether, construing the facts in the light most favorable to the nonmoving party, a right would have been violated on the facts alleged and whether the right was clearly established. *Harris v. Pittman*, 927 F.3d 266 (4th Cir. 2019) (stressing that every inference must be in favor of the non-moving party); *LeSueur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261 (4th Cir. 2012) (citing *Smith v. Smith*, 589 F.3d 736 (4th Cir. 2009)); *Wernert v. Green*, No. 10-1360 (4th Cir. Mar. 22, 2011) (unpubl.). It is up to the court to determine which prong should be addressed first considering the circumstances of the particular case. *Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163 (4th Cir. 2010) (citing *Hunsberger v. Wood*, 570 F.3d 546 (4th Cir. 2009)). Government officials who prevail on grounds of qualified immunity may still, in some cases, appeal a decision that their conduct violated the Constitution. *Camreta v. Greene*, 563 U.S. 692, 131 S. Ct. 2020 (2011).

19-3.02(a) Clearly Established Law

The Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), held that individuals sued under § 1983 could claim qualified immunity when their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Whether the right was clearly established is a question of law; it is not the plaintiff's burden to prove. *Elder v. Holloway*, 510 U.S. 510, 114 S. Ct. 1019 (1994); *Mays v. Sprinkle*, 992 F.3d 295 (4th Cir. 2021) ("Plaintiffs bear the burden of proof to show that a constitutional violation occurred. But, at least in our Circuit, defendants bear the burden of showing that the violation was not clearly established, and they are

of committee. At the same time, the U.S. Supreme Court has shown a reluctance to revisit the doctrine, having denied certiorari to eight qualified immunity cases in 2020 alone. *But see* [dissent](#) by Justice Thomas, *Baxter v. Bracey*, 590 U.S. ___, 140 S. Ct. 1862 (2020), who would have granted certiorari in at least one of the cases given the importance of the issue and his "strong doubts" about the doctrine.

therefore entitled to qualified immunity.”). This principle, properly applied, promotes the application of qualified immunity in all but egregious cases. *See, e.g., Taylor v. Riojas*, 592 U.S. ___, 141 S. Ct. 52 (2020) (qualified immunity not appropriate where prisoner was placed naked in cold cell covered with feces and sewage for several days because “no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house [the inmate] in such deplorably unsanitary conditions for such an extended period of time”). Of course, whether a clearly established right was violated may turn on factual issues. *See, e.g., Stanton v. Elliot*, 25 F.4th 227 (4th Cir. 2022) (district court’s grant of summary judgment reversed because there was a genuine issue of material fact regarding whether the decedent was shot by police officer while unarmed and running away—which, if demonstrated, “would violate his clearly established rights”); *Knibbs v. Momphard*, 30 F.4th 200 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 303 (2022) (similar).³

If “the contours of the law are clearly established,” qualified immunity normally will not apply, unless extraordinary circumstances existed to show that the defendant officials “did not know nor should have known of the relevant legal standard.” *McKenna v. Police Chief, Bristol Va. City Police Dep’t*, No. 1:22-CV-00002 (W.D. Va. Apr. 18, 2023) (citing *Harlow*), *appeal filed*, No. 23-1573 (4th Cir. May 26, 2023). Reliance upon the advice of counsel regarding the legality of the conduct does not constitute an extraordinary circumstance. *Id.* Although it may be considered as a factor in the overall analysis, the fact that a public officer sought legal advice is not unusual, much less extraordinary or dispositive. *Id.*, citing *Buonocore v. Harris*, 134 F.3d 245 (4th Cir. 1998).

19-3.02(a)(1) Level of Generality

The test for “clearly established law” should not be conducted on a high level of generality. *District of Columbia v. Wesby*, 583 U.S. 48, 138 S. Ct. 577 (2018); *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548 (2017) (per curiam); *City of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765 (2015); *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305 (2015) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596 (2004) (per curiam); *Gooden v. Howard Cnty.*, 954 F.2d 960 (4th Cir. 1992) (en banc). While a controlling case does not have to be directly on point, existing precedent must place the lawfulness of the conduct “beyond debate.” *Wesby*, *supra*; *White*, *supra*; *Mullenix*, *supra*; *Lane v. Franks*, 573 U.S. 228, 134 S. Ct. 2369 (2014). That is to say, based on relevant precedent, every reasonable officer would understand that his conduct was unlawful. *Wesby*, *supra*; *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011); *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088 (2012). In this analysis, a “high degree of specificity is required.” *Wesby*, *supra*; *Braun v. Maynard*, 652 F.3d 557 (4th Cir. 2011) (defendants entitled to qualified immunity because not clearly established that a strip or visual body cavity search after a drug scanner alarm was a Fourth Amendment violation); *Fijalkowski v. Wheeler*, 801 Fed. Appx. 906 (4th Cir. 2020) (unpubl.) (qualified immunity appropriate because not clearly established that “delaying by up to two-and-a-half minutes the rescue of a drowning person who may have posed a danger to others violated that person’s substantive due process rights”); *Wiley v. Doory*, 14 F.3d 993 (4th Cir. 1994) (official entitled to qualified immunity if there is “any legitimate question” as to whether the conduct constituted a constitutional violation). An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any

³ Cases such as *Stanton* and *Knibbs* seem indicative of a trend emerging in the Fourth Circuit, where district courts are denying motions to dismiss or for summary judgment on the grounds of qualified immunity, and the Court of Appeals is vacating dismissals based on qualified immunity when there is a disputed factual issue or the plaintiff can allege any outlandish or egregious action by the defendant. This may represent a significant change in the general receptiveness of the courts to the application of qualified immunity to protect police officers and other public officials, at least at the motion to dismiss or summary judgment stage. Practitioners should be aware of this potential shift in qualified immunity practice.

reasonable official in the defendant's shoes would have understood that he was violating it. *Kisela v. Hughes*, 584 U.S. 100, 138 S. Ct. 1148 (2018) (per curiam); *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012 (2014). This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *District of Columbia v. Wesby*, 583 U.S. 48, 138 S. Ct. 577 (2018); *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986). Note that the Court has stated that the "specificity of the rule" is especially important in the Fourth Amendment context. *Wesby*, *supra*, and *Kisela*, *supra*.

19-3.02(a)(2) Controlling Authority

For a law to be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. It must be settled law, which means it is dictated by "controlling authority" or "a robust consensus of cases of persuasive authority." *Wesby*, 583 U.S. 48, 138 S. Ct. 577 (2018); *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692 (1999); *cf. Keenan v. Ahern*, 524 F. Supp. 3d 472 (E.D. Va. 2021) (denying motion to dismiss excessive force claim against police officer who allegedly released K-9 police dog on nonresponsive individual where analogous cases cited were not on "all fours," but the principles clearly espoused by the Fourth Circuit in such cases gave more than "fair warning" that the officer's actions were unlawful). Based on the "robust consensus" language, it is not clear that a single Fourth Circuit decision of sufficient specificity would constitute sufficient controlling precedent, though the Supreme Court has posited that a single federal appellate-level decision may be sufficient to clearly establish the law. See *Carroll v. Carman*, 574 U.S. 13, 135 S. Ct. 348 (2014) (per curiam) ("Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law") At times, the conduct may be "so obviously unlawful" that it is not necessary to cite a case with analogous facts or engage in a "detailed explanation." *Dean v. McKinney*, 976 F.3d 407 (4th Cir. 2020) (finding that officer should have known he was violating Fourteenth Amendment under the deliberate indifference standard when he engaged in high-speed driving while not responding to an emergency or chasing a suspect); *Taylor v. Riojas*, 592 U.S. ___, 141 S. Ct. 52 (2020) (reversing Fifth Circuit's holding that treatment of prisoner violated Eighth Amendment but officers were entitled to qualified immunity because they did not have fair warning their acts were unconstitutional; stating "no reasonable correctional officer" could have believed their actions were permissible).

However, the Court has also intimated that more may be required. See, e.g., *Kisela v. Hughes*, 584 U.S. 100, 138 S. Ct. 1148 (2018) (per curiam) ("Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue.") (quoting *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305 (2015)); *Taylor v. Barkes*, 575 U.S. 822, 135 S. Ct. 2042 (2015) (per curiam); *City of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765 (2015) (only assuming a "robust consensus of cases of persuasive authority" could establish federal law in absence of a Supreme Court holding). In *Booker v. South Carolina Department of Corrections*, 855 F.3d 533 (4th Cir. 2017), the Fourth Circuit held that the right of an inmate to pursue a grievance without retaliation was a First Amendment right to petition the government that was clearly established based on a consensus of cases of persuasive authority from other jurisdictions. The court also reaffirmed the rule that unpublished opinions "cannot be considered in deciding whether particular conduct violate[s] clearly established law." *Id.* (quoting *Hogan v. Carter*, 85 F.3d 1113 (4th Cir. 1996)); see also *Brooks v. Johnson*, 924 F.3d 104 (4th Cir. 2019) (noting that subjective element of Eighth Amendment violations means qualified immunity unlikely because an officer acting with a culpable state of mind knows his conduct was in violation of established law); *Martin v. Duffy*, 858 F.3d 239 (4th Cir. 2017); *Thompson v. Commonwealth*, 878 F.3d 89 (4th Cir. 2017) ("overwhelming" consensus on right of prisoner to be free from malicious assault; exact means of assault need not be precedential).

The Fourth Circuit has stated that, as the law must be clearly established at the time of the challenged conduct, decisions issued after the allegedly unconstitutional conduct are inapplicable unless they address whether the law was clearly established at the time of the challenged official action. *West v. Murphy*, 771 F.3d 209 (4th Cir. 2014); see also *Kisela v. Hughes*, 584 U.S. 100, 138 S. Ct. 1148 (2018) (per curiam) (reliance on case decided after conduct occurred did not give “fair notice” to the official). Even recent controlling authority might not apply. See *Marcavage v. City of Winchester*, No. 5:10cv00114 (W.D. Va. July 12, 2011) (although Virginia Supreme Court recently had declared similar noise ordinance unconstitutional, officers entitled to rely on presumptive validity of the ordinance).

19-3.02(a)(3) Order of Consideration

In *Siebert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789 (1991), the Supreme Court stated that concomitant to the issue of whether a constitutional right was clearly established was whether a violation of a constitutional right had been asserted at all. That statement created confusion in the lower courts, causing courts to debate whether to determine the merits of the constitutional claim prior to determining if the law was clearly established at the time of the conduct. See *DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995). In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001), the Court pronounced that the constitutional question should be answered first. However, in *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009), the Court held that the *Saucier* procedure should not be regarded as an inflexible requirement, and it is within the sound discretion of the lower courts to determine which prong should be considered first. See also *Melgar v. Greene*, 593 F.3d 348 (4th Cir. 2010). The *Pearson* Court stated that, while *Saucier* was correct in noting that the two-step procedure promotes the development of constitutional precedent, it is most valuable for questions that do not frequently arise or in cases in which a qualified immunity defense is unavailable. Appellate courts are free to address both prongs even if a decision regarding both is not necessary for reversal. *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012 (2014); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011).

19-3.02(a)(4) Other Issues

In *Smith v. Gilchrist*, 749 F.3d 302 (4th Cir. 2014), the Fourth Circuit held that a public employer was not entitled to qualified immunity for terminating an employee for speech of public concern because the employer made no showing that the employee’s free speech rights were outweighed by workplace efficiency concerns, stating that there was “nothing on the employer’s side of the ledger to weigh.” However, the Supreme Court granted qualified immunity in a similar situation even though the employer’s side of the *Pickering* scale (see section 19-6.04(b)) was “entirely empty.” *Lane v. Franks*, 573 U.S. 228, 134 S. Ct. 2369 (2014). While the rest of the Fourth Circuit’s *Gilchrist* analysis supports a finding of no qualified immunity (unlike in *Franks*, the employer in *Gilchrist* conceded that the speech was of public concern), the mere failure of having any evidence of one of the prongs of a constitutional violation test is not sufficient to bar qualified immunity. See also *Brickey v. Hall*, 828 F.3d 298 (4th Cir. 2016) (qualified immunity granted when employer had reasonable apprehension of workplace disruption because of employee’s speech).

In a slightly different twist, the Fourth Circuit held in *In re Allen*, 106 F.3d 582 (4th Cir. 1997), that there can be no qualified immunity for a public official who performs an act clearly established to be beyond the scope of his discretionary authority. It is the official’s burden to prove that his conduct is within the scope of his duties. Whether conduct is within an official’s scope of authority is to be determined based on an analysis of applicable statutes and regulations. However, a government employee does not lose the protection of qualified immunity just because the employee may also be “serving two masters” and simultaneously working for a non-governmental entity. *Rabenstine v. Nat’l Ass’n of State Boating Law Adm’rs Inc.*, No. 4:14cv78 (E.D. Va. July 2, 2015) (considering

immunity where government employee assigned to work with non-governmental entity to train government employees).

19-3.02(b) Reasonable Official

In *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987) and *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986), the Court held that the question is objective (albeit fact-specific): whether a reasonable official could believe the conduct was lawful in light of the clearly established law and the information the official possessed at the time the action occurred. Facts are to be evaluated from the perspective of a reasonable officer on the scene, and the use of hindsight must be avoided. *Smith v. Kendall*, No. 09-6452 (4th Cir. Mar. 8, 2010) (citing *Gray-Hopkins v. Prince George's Cnty.*, 309 F.3d 224 (4th Cir. 2002)); see also *Putman v. Harris*, 66 F.4th 181 (4th Cir. 2023) ("To determine whether the force used was excessive, we apply a standard of objective reasonableness. This is a question of law, which we judge from the perspective of a reasonable officer on the scene.") (internal quotation marks and citations omitted)). *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011) ("At the summary judgment stage, once we have viewed the evidence in the light most favorable to the nonmovant, the question of whether the officer's actions were reasonable is a question of pure law.")

Note that it is not necessary to determine that the right is clearly established *before* determining that the officer's actions were objectively reasonable. See *Messerschmidt v. Millender*, 565 U.S. 535, 132 S. Ct. 1235 (2012). Immunity applies if a reasonable officer would not have known for certain that the particular conduct was unlawful. *Ziglar v. Abbasi*, 582 U.S. 120, 137 S. Ct. 1843 (2017) (*Bivens* action); *Wingate v. Fulford*, 987 F.3d 299 (4th Cir. 2021) (officers entitled to qualified immunity because although arrest was unlawful, it was not 'plainly incompetent' for officers to think their conduct under local ordinance was lawful) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011)).

Thus, officers who reasonably, though mistakenly, conclude that probable cause is present and make a warrantless arrest are protected by qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534 (1991). It was unreasonable, however, for an officer to rely on a facially deficient warrant, and thus the officer was not entitled to qualified immunity. *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284 (2004) (application, but not warrant, had to specify items to be seized); compare *Messerschmidt v. Millender*, 565 U.S. 535, 132 S. Ct. 1235 (2012) (warrant not "obviously defective"), with *Graham v. Gagnon*, 831 F.3d 176 (4th Cir. 2016) (even though warrant obtained, no immunity when objectively unreasonable to conclude there was probable cause for arrest), and *Merchant v. Bauer*, 677 F.3d 656 (4th Cir. 2012) (no indicia of probable cause even though warrant obtained). Even if an arrest warrant is obtained, officers must also have reasonable cause to believe that the suspect resides in the home and is present inside. *United States v. Brinkley*, 980 F.3d 377 (4th Cir. 2020) (finding requirement established by *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980) that officers have "reason to believe" suspect is within the home equivalent to "probable cause" standard).

When the historical facts are undisputed, whether a reasonable officer should have known of the illegality of his conduct is a question of law for the court. And while a jury must resolve disputed facts, the ultimate question of whether, based on those facts, the official had an objectively reasonable belief his actions were lawful is a question for the court. *Willingham v. Croke*, 412 F.3d 553 (4th Cir. 2005) (opinion notes that circuits are split on whether the latter issue can be decided by a jury).

Although it found the practice unconstitutional, the Supreme Court held a reasonable officer could have believed that execution of a search warrant with media present was lawful, and thus granted qualified immunity. *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692 (1999).

Reasonableness is addressed in specific situations in the following lower court decisions: *E.W. v. Dolgos*, 884 F.3d 172 (4th Cir. 2018) (objectively unreasonable for a police officer to handcuff a ten-year-old student for a fight on a bus three days after the fight took place; qualified immunity granted); *Meyers v. Baltimore Cnty.*, 713 F.3d 723 (4th Cir. 2013) (no qualified immunity because officer's use of the taser ten times was not objectively reasonable after subject ceased actively resisting); *Buonocore v. Harris*, 134 F.3d 245 (4th Cir. 1998) (no qualified immunity because law clearly established that third party may not conduct independent search during execution of a search warrant and reasonable person could not have thought otherwise); *Day v. Young*, No. 1:15cv1477 (E.D. Va. Oct. 6, 2016) (while officer entitled to qualified immunity for initial use of taser, officer will not be entitled to qualified immunity if jury finds that the plaintiff did not pose a safety threat or actively resist arrest during continuation of taser use); *Fain v. Rappahannock Reg'l Jail*, No. 3:12cv293 (E.D. Va. June 19, 2013) (qualified immunity barred claim against law enforcement officers because reasonable officer would not have known that restraining defendant on the way to the hospital, during labor and delivery, and during postpartum period violated her Eighth Amendment rights); *Bell v. Johnson*, No. 7:09cv214 (W.D. Va. Mar. 30, 2011) (officers not liable for making bad guess in gray areas; liable only for transgressing bright lines); *Bellamy v. Wells*, 626 F. Supp. 2d 595 (W.D. Va. 2009) (reliance on mistaken advice of legal counsel does not automatically cloak an officer with qualified immunity), *aff'd*, No. 09-1702 (4th Cir. July 12, 2011); *Lytle v. Brewer*, 77 F. Supp. 2d 730 (E.D. Va. 1999) (although constitutional right to protest on pedestrian overpass clearly established, reasonable officer could rely on statute and superior's instructions).

In *Doe v. South Carolina Department of Social Services*, 597 F.3d 163 (4th Cir. 2010), the Court of Appeals found that placing a child involuntarily removed from her home by state social workers in a known dangerous foster care environment was a substantive due process violation. However, the court found that officials could have reasonably believed otherwise and were thus entitled to qualified immunity. *See also Doe v. Mullins*, No. 2:10cv00017 (W.D. Va. July 22, 2010).

In *Cole v. Buchanan County School Board*, 328 F. App'x 204 (4th Cir. 2009), the court of appeals held that a reasonable Virginia school board member could have believed that banning a critical reporter from school grounds would not violate the reporter's First Amendment rights. In *Johnson v. Caudill*, 475 F.3d 645 (4th Cir. 2007), the court of appeals held that, because a reasonable official would not have considered the termination of a female employee to violate her clearly established constitutional rights, the official was entitled to qualified immunity.

In *Bethea v. Howser*, 447 F. Supp. 3d 497 (E.D. Va. 2020), the court found an officer was entitled to qualified immunity for firing shots after the suspect's vehicle crashed into a pole. In its reasonableness analysis, the court stated:

[The officer] saw a firearm and perceived that [Plaintiff] was raising it directly at him [The officer] is then faced with a difficult and fast-moving choice about whether to discharge his firearm. [The officer] is forced to choose between hesitation or discharging his weapon to prevent a perceived threat to his own life. The Fourth Circuit has made clear that no court can expect any human being to remain passive in the face of an active threat on his or her life.

Id. (internal citations and quotation marks omitted).

19-3.02(c) Interlocutory Appeals

In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985), the Court held that qualified immunity determinations should be immediately appealable. In *Behrens v. Pelletier*, 516

U.S. 299, 116 S. Ct. 834 (1996), it held that a defendant may appeal the denial of qualified immunity on an interlocutory basis at both the motion to dismiss and summary judgment stages.

A party may not appeal an order denying summary judgment after a full trial on the merits. Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion. A qualified immunity defense remains available to defending officials at trial, but at that stage, the defense must be evaluated considering the character and quality of the evidence received in court, not on the summary judgment pleadings. Procedurally, post-trial, the case must be presented to the court of appeals as an appeal of a denial of judgment as a matter of law and not as an appeal of the denial of summary judgment. *Ortiz v. Jordan*, 562 U.S. 180, 131 S. Ct. 884 (2011).

There is no federal right to an interlocutory appeal of a qualified immunity denial in a state court § 1983 action, though states are free to create a statutory mechanism for interlocutory appeal. *Johnson v. Fankell*, 520 U.S. 911, 117 S. Ct. 1800 (1997). Virginia has done so, extending the petition-for-review process of Va. Code § 8.01-626, applicable to preliminary injunctions, to orders granting or denying immunity. Va. Code § 8.01-670.2(A).

19-3.02(c)(1) Factual Aspects of Qualified Immunity

In *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151 (1995), the Court held that the fact-related determination of whether there is a genuine issue of material fact is not immediately appealable. Interlocutory appeals must be limited to cases presenting abstract issues of law, i.e., whether conduct violated preexisting, clearly established law. Although *Johnson* seemed to limit significantly the availability of interlocutory appeals, a subsequent Supreme Court decision curtailed its effect. In *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834 (1996), the Court stated that, although every denial of a summary judgment motion ultimately rests upon a determination that there are controverted issues of material facts, *Johnson* was not meant to limit appeals of all cases where the facts were controverted. *Johnson*'s non-appealability rule applies to determinations of whether the evidence could support a finding that particular conduct occurred. See also *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012 (2014). The Court acknowledged in *Behrens* that, if the district court does not identify the particular charged conduct it deemed adequately supported, then the court of appeals may have to undertake that cumbersome review. However, the court lacks jurisdiction to re-weigh the evidence in the record to determine whether a material factual dispute precludes summary judgment. *Iko v. Shreve*, 535 F.3d 225 (4th Cir. 2008). The appellate court may, however, consider the facts as the district court viewed them, as well as any additional undisputed facts. *Danser v. Stansberry*, 772 F.3d 340 (4th Cir. 2014) (relying on *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997) (en banc)); see also *Yates v. Terry*, 817 F.3d 877 (4th Cir. 2016) (although district court evaluated tasing as three separate incidents for which qualified immunity was separately evaluated, the better approach was to view the reasonableness of the force "in full context, with an eye toward the proportionality of the force" in light of the totality of the circumstances; accordingly, insufficiency of evidence as to the excessiveness of the third use of the taser did not preclude jurisdiction); *Williams v. Strickland*, 917 F.3d 763 (4th Cir. 2019) (appellate court can determine if qualified immunity should be granted if it accepts the facts as determined by the district court and views those facts in the light most favorable to the plaintiff); *Ussery v. Mansfield*, 786 F.3d 332 (4th Cir. 2015) (court has jurisdiction to decide whether, on the facts assumed by the district court for summary judgment purposes, the defendant was entitled to qualified immunity). The Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), further limited the implications of *Johnson* by holding that a qualified immunity appeal based solely on the complaint's failure to state a claim was a proper subject of interlocutory jurisdiction.

In *Jackson v. Long*, 102 F.3d 722 (4th Cir. 1996), the Fourth Circuit also addressed the implications of *Behrens* on *Johnson*'s holding that the *Johnson* principle is limited to circumstances where the issue on appeal is whether a factual dispute was created. If, however, resolution of the factual dispute is immaterial to whether immunity should be afforded, the underlying legal question about whether immunity is to be afforded remains appealable. See also *Culosi v. Bullock*, 596 F.3d 195 (4th Cir. 2010) (no appeal because district court implicitly found material disputed fact when it denied summary judgment); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998) (factual dispute over suspect's possession of knife immaterial when officer's actions were objectively reasonable; qualified immunity granted); *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996) (issue not what conduct occurred, but whether uncontroverted conduct constituted excessive force); *Amaechi v. West*, 87 F. Supp. 2d 556 (E.D. Va. 2000) (factual dispute as to nature of search precludes summary judgment; facts as pled allege clearly established constitutional violation), *aff'd*, 237 F.3d 356 (4th Cir. 2001) (*Johnson* concerns avoided because court accepted plaintiff's version as true for purposes of the interlocutory appeal).

In qualified immunity cases, it is important to correctly distinguish between factual issues and legal issues. See *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) (categories of "fact-based" and "abstract" legal questions are not well-defined). The trend appears to be toward the classification of most qualified immunity issues as legal. See *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834 (1996); *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657 (1996) (issue of whether facts, viewed from standpoint of objectively reasonable police officer, amount to reasonable suspicion or probable cause is for judge even though it raises mixed questions of law and fact); *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534 (1991) (whether officer reasonably believed he had probable cause to arrest was law, not fact, question).

19-3.02(c)(2) Collateral Orders

In *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S. Ct. 1203 (1995), the Supreme Court held the collateral order rule does not allow a municipality to piggyback its defenses to a § 1983 claim onto the interlocutory appeal of an individual's entitlement to qualified immunity. The Court held that, unlike individual immunity defenses, which are protected from suit, municipal defenses, such as the conduct was not official policy or custom, are defenses to liability that may be effectively reviewed upon final judgment. Although it did not mention *Swint*, the Fourth Circuit in *Gray-Hopkins v. Prince George's County*, 309 F.3d 224 (4th Cir. 2002), held that it had pendent appellate jurisdiction over state law issues concerning the validity of governmental and public official immunity because both state doctrines were intended to provide immunity from suits, not just immunity from liability. The Fourth Circuit reaffirmed that authority in *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012) ("[W]e have appellate jurisdiction under the collateral order doctrine to review a district court's denial of those claims to which the defendants assert immunities 'from suit.'").

19-3.02(c)(3) Pendent Appellate Jurisdiction

In *Swint*, the Court also held there was no "pendent party appellate jurisdiction." Thus, an appellate court has no jurisdiction over a locality pendent to its jurisdiction over the issue of an official's qualified immunity.

In dicta in *Swint* and in *Johnson*, the Supreme Court indicated that, while appellate courts may have "pendent appellate jurisdiction" over an *issue* that would otherwise not be immediately appealable, the exercise of such jurisdiction should be limited to "exceptional circumstances" or where there are "compelling reasons." At a minimum, the party seeking the interlocutory appeal must show that the district court's determination of other motions was inextricably intertwined with the individual defendant's qualified immunity motion or that review of the former decisions was necessary to ensure meaningful review of the latter. The court in *Jackson v. Long*, 102 F.3d 722 (4th Cir.

1996), in a “rare exercise” of pendent appellate jurisdiction, dismissed a complaint against a sheriff in his official capacity after determining he was entitled to qualified immunity in his individual capacity. *But see Gray-Hopkins v. Prince George’s County*, 309 F.3d 224 (4th Cir. 2002).

The Fourth Circuit has stated that pendent appellate jurisdiction is an exception of limited and narrow application driven by considerations of need rather than of efficiency. *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006). Exercise of pendent appellate jurisdiction is proper only when (1) an issue is inextricably intertwined with the decision of the lower court to deny qualified immunity or (2) consideration of the additional issue is necessary to ensure meaningful review of the qualified immunity question. *Bellotte v. Edwards*, 629 F.3d 415 (4th Cir. 2011). In *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012), the appellate court, after noting that the state constitutional claims shared “certain wholesale commonalities” of fact and law with the immunity issues, nonetheless dismissed the appeal for lack of jurisdiction because the state constitutional claims still required the resolution of distinct factual and legal issues.

19-3.02(d) Qualified Immunity for “Private Actors”

A private actor may be entitled to qualified immunity depending on the nature of the relationship of the actor to the government and the nature of the function performed by the actor. The Supreme Court has stated that the analysis should be in harmony with general principles of tort immunities and defenses. *Filarsky v. Delia*, 566 U.S. 377, 132 S. Ct. 2764 (2012). In *Filarsky*, the Court held that, as common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities, an attorney hired by a city to assist in an internal affairs investigation could not categorically be denied qualified immunity. The Court distinguished its prior decision in *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827 (1992), which held that private actors who used a state replevin action to seize disputed property could not avail themselves of qualified immunity. A prior Supreme Court opinion had held that such actors were acting under color of state law and were subject to § 1983 claims if the statute was unconstitutional. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744 (1982). The *Filarsky* Court distinguished *Wyatt* as a case that involved no government agents, no government interests, and no government need for immunity. The *Filarsky* decision also distinguished *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100 (1997), which held that employees of a privatized prison were not entitled to immunity. Although recognizing that the private employees in *Richardson* were clearly performing a governmental function, the *Filarsky* Court stated that *Richardson* was a narrow decision with particular circumstances that mitigated the concerns underlying recognition of governmental immunity. Construing the *Filarsky* decision, the Fourth Circuit held that bail bondsmen were not entitled to qualified immunity, finding that they did not perform a public function and acted for private profit rather than in the public interest. *Gregg v. Ham*, 678 F.3d 333 (4th Cir. 2012).

19-3.02(e) Qualified Immunity Cases

19-3.02(e)(1) Search & Seizure

Ray v. Roane, 948 F.3d 222 (4th Cir. 2020) (county deputy sheriff not entitled to immunity for shooting and killing dog because pet did not pose immediate danger and use of force was avoidable; killing constituted unreasonable seizure); *Clark v. Coleman*, 448 F. Supp. 3d 559 (W.D. Va. 2020) (sheriff’s deputy not entitled to qualified immunity for Fourth Amendment violation because passenger’s gesture of middle finger to deputy did not, alone, constitute reasonable suspicion for investigatory stop); *Sims v. Labowitz*, 885 F.3d 254 (4th Cir. 2018) (no qualified immunity when search was sexually intrusive and conducted in intimidating manner; execution of warrant required minor to perform a sex act in presence of officers); *Humbert v. Mayor of Baltimore City*, 866 F.3d 546 (4th Cir. 2017) (no qualified immunity because it is clearly established that officer cannot intentionally or recklessly include false material information and exclude material

information in arrest warrant affidavit); *Miller v. Prince George's Cnty.*, 475 F.3d 621 (4th Cir. 2007) (same); *Smith v. Munday*, 848 F.3d 248 (4th Cir. 2017) (no qualified immunity for arresting wrong person without adequate information); *City of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765 (2015) (not clearly established that entering room of violent and mentally unstable person by police should be delayed so that disability could be accommodated, even if entry in contravention to training); *United States v. Ortiz*, 669 F.3d 439 (4th Cir. 2012) (probable cause standard (reasonable grounds for belief) is lower than a preponderance of the evidence standard (more likely than not)); *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012) (false statements must be "material"); *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011) (pre-textual use of warrant does not invalidate otherwise justifiable issuance); *Bellotte v. Edwards*, 629 F.3d 415 (4th Cir. 2011) (qualified immunity not granted where only scanty rationale was offered for a no-knock invasion); *Rutledge v. Town of Chatham*, No. 4:10cv00035 (W.D. Va. Nov. 5, 2010) (qualified immunity granted where encounter with police officer did not rise to the level of a seizure), *aff'd*, No. 10-2310 (4th Cir. Mar. 4, 2011); *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009); *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 129 S. Ct. 2633 (2009) (student strip search parameters not clearly established); *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001) (no qualified immunity where officer strip searched arrestee pursuant to an arrest warrant for a noise violation).

19-3.02(e)(2) Excessive Force

In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001), the Supreme Court distinguished between the qualified immunity inquiry into whether a reasonable officer would have understood his conduct to violate clearly established law (see section 19-3.02(a)) and the inquiry on the constitutional merits of whether the use of force was objectively reasonable (see section 19-6.02(b)). See also *Cybernet, LLC v. David*, 954 F.3d 162 (4th Cir. 2020) (damage to property during execution of search warrant was not so significant to constitute excessive force in violation of Fourth Amendment); *Betton v. Belue*, 942 F.3d 184 (4th Cir. 2019) (finding no qualified immunity for excessive force when victim possessed a weapon but did not threaten the use of it); *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013) (same); *Brockington v. Boykins*, 637 F.3d 503 (4th Cir. 2011) (no qualified immunity because shots fired after suspect collapsed from first shots were excessive force); *Orem v. Rephann*, 523 F.3d 442 (4th Cir. 2008) (no qualified immunity because clearly established that using taser was excessive, wanton, and unnecessary under circumstances); *Jones v. Buchanan*, 325 F.3d 520 (4th Cir. 2003) (no qualified immunity because *Graham* factors (see section 19-6.02(b)) clearly favor plaintiff); *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002) (no qualified immunity because clearly established constitutional violation to shoot a man who should have been reasonably perceived as unarmed and not dangerous); *Brown v. Gilmore*, 278 F.3d 362 (4th Cir. 2002) (qualified immunity granted because reasonable officer would have believed arrest was being resisted); *Russell v. Wright*, 916 F. Supp. 2d 629 (W.D. Va. 2013) (qualified immunity because constitutionality of use of taser on potentially violent noncompliant arrestee unclear).

Significant policing reforms became effective in 2021, including new standards regarding the use of force. Virginia Code § 19.2-83.5(A) provides that a law enforcement officer may not use deadly force against a person unless several conditions are met:

1. the officer reasonably believes that deadly force is immediately necessary to protect himself or another person (other than the subject of the use of deadly force);
2. the officer provided a warning before using such deadly force;
3. the officer's actions were reasonable given the totality of the circumstances; and

4. all other options had been exhausted or did not reasonably lend themselves to the circumstances.

The reasonableness of the officer's belief and actions are judged from the perspective of a reasonable officer on the scene at the time of the incident. Va. Code § 19.2-83.5(B). The totality of the circumstances, including several enumerated factors, must be considered. *Id.* In addition, neck restraints may not be used unless immediately necessary to protect the law enforcement officer or another person from death or serious bodily injury, and kinetic impact munitions may not be used unless necessary to protect the officer or another person from bodily injury. Va. Code § 19.2-83.4. Officers may not willfully discharge a firearm into or at a moving vehicle. *Id.* Moreover, each state and local law enforcement agency must collect the number of complaints received by the agency alleging use of excessive force. Va. Code § 52-30.2. Chief law enforcement officers must provide access to the Commonwealth Attorney of all records relating to use of force complaints against an officer under their command if the officer is a potential witness in a pending criminal matter or criminal investigation regarding the officer's job performance. Va. Code § 19.2-201.

19-3.02(e)(3) First Amendment

See *Wood v. Moss*, 572 U.S. 744, 134 S. Ct. 2056 (2014) (qualified immunity granted to secret service officers who removed protestors but not supporters from area where President was dining); *Reichle v. Howards*, 566 U.S. 658, 132 S. Ct. 2088 (2012) (qualified immunity granted because not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation); *Brickey v. Hall*, 828 F.3d 298 (4th Cir. 2016) (qualified immunity for sheriff who terminated deputy running for town council after deputy's alleged misuse of funds); *Lefemine v. Wideman*, 672 F.3d 292 (4th Cir. 2012) (qualified immunity because no clearly established constitutional right for abortion protesters to display graphic posters near highway), *vacated and remanded on other grounds*, 568 U.S. 1, 133 S. Ct. 9 (2012); *Cole v. Buchanan Cnty. Sch. Bd.*, No. 08-1105 (4th Cir. May 14, 2009) (qualified immunity granted to school board members who denied a reporter access to meetings, where statutory and judicial precedent compelled the conclusion that the board had wide latitude in making determinations about access to school grounds); *Campbell v. Galloway*, 483 F.3d 258 (4th Cir. 2007) (qualified immunity granted because sexual harassment complaint could reasonably be viewed as personal grievance, not matter of public concern); *Davison v. Rose*, No. 1:16cv540 (E.D. Va. July 28, 2017) (qualified immunity for school officials because not clearly established that Facebook pages of officials were a public forum). *But see Lozman v. Riviera Beach*, 585 U.S. 87, 138 S. Ct. 1945 (2018) (First Amendment retaliatory arrest claim can be made even if arrest supported by probable cause); *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016) (no qualified immunity for disciplinary actions taken pursuant to a constitutionally overbroad restriction on negative comments in social media); *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013) (no qualified immunity for sheriff who fired a deputy for his dissemination to the media of his grievance documents that alleged misconduct in the sheriff's office).

19-3.02(e)(4) Jail/Prison

For qualified immunity cases in the jail/prison context, see *Taylor v. Riojas*, 592 U.S. ___, 141 S. Ct. 52 (2020) (Eighth Amendment violated and qualified immunity not appropriate where prisoner was placed naked in cold cell covered with feces and sewage for several days); *Dean v. Jones*, 984 F.3d 295 (4th Cir. 2021) (pepper spraying and beating of subdued and prone inmate, if proven, would be violation of Eighth Amendment); *Earle v. Shreves*, 990 F.3d 774 (4th Cir. 2021) (court declined to extend *Bivens* to First Amendment claim by federal prisoner against federal prison officials); *Taylor v. Barkes*, 575 U.S. 822, 135 S. Ct. 2042 (2015) (whether Eighth Amendment requires adequate suicide screening not clearly established); *Rish v. Johnson*, 131 F.3d 1092 (4th Cir. 1997) (not clearly established that "universal precautions" necessary to protect inmates acting

as orderlies from risk of exposure to bodily fluids); *Hogan v. Carter*, 85 F.3d 1113 (4th Cir. 1996) (en banc) (qualified immunity for emergency administration of psychotropic drug); *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990) (officers entitled to qualified immunity in jail suicide); *see also MacDonald v. Angelone*, 69 F. Supp. 2d 787 (E.D. Va. 1999) (prison privacy rights not clearly established). The Jail Authority Superintendent was entitled to qualified immunity for First Amendment claims related to the jail's confiscation of various books and magazines, but not for violations of the publisher's due process rights because the "undisputed evidence" demonstrated that he "knew the policy was not being consistently followed or applied in a way that complied with" constitutional requirements. *Human Rights Def. Ctr. v. Sw. Va. Reg'l Jail Auth.*, 396 F. Supp. 3d 607 (W.D. Va. 2019).

19-3.03 Supervisory Liability

The Fourth Circuit has indicated that holding a supervisor liable for a subordinate's conduct in a § 1983 case is a difficult task. *Hughes v. Halifax Cnty. Sch. Bd.*, 855 F.2d 183 (4th Cir. 1988); *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984) (holding supervisor liable). Supervisors and municipalities cannot be liable under § 1983 without some predicate constitutional injury at the hands of the individual officer, at least in suits for damages. *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012); *Waybright v. Frederick Cnty.*, 528 F.3d 199 (4th Cir. 2008). In *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994), the court held that to establish supervisory liability the plaintiff must prove (1) that the supervisor had actual or constructive knowledge of the subordinate's conduct that posed an unreasonable risk of constitutional violation, (2) that the supervisor's response amounted to deliberate indifference, and (3) that there was an affirmative causal link between the supervisor's inaction and the injury suffered. *See also Randall v. Prince George's Cnty.*, 302 F.3d 188 (4th Cir. 2002); *Doe v. Russell Cnty. Sch. Bd.*, 292 F. Supp. 3d 690 (W.D. Va. 2018) (finding sufficient evidence to support supervisory liability but granting qualified immunity); *Greer v. Petersburg Bureau of Police*, No. 3:16cv850 (E.D. Va. Apr. 20, 2017); *Woodson v. City of Richmond*, 88 F. Supp. 3d 551 (E.D. Va. 2015). In *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), the Fourth Circuit held that to prove tacit condoning by a supervisor of a subordinate's conduct, a plaintiff must prove the supervisor knew or reasonably should have known of conduct that was sufficiently widespread to pose a pervasive and unreasonable risk of constitutional injury and, in the face of such knowledge, remained deliberately indifferent. In *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999), the court emphasized that a close fit was required between the supervisor's inaction and injury suffered by the plaintiff. *See also Campbell v. Florian*, 972 F.3d 385 (4th Cir. 2020) (general counsel not liable for alleged misconduct of deputy general counsel because supervisor "could rely on the good judgment of his subordinates until he had reason to believe otherwise"); *Oakes v. Patterson*, No. 7:13cv552 (W.D. Va. Apr. 17, 2014); *Oliver v. Powell*, 250 F. Supp. 2d 593 (E.D. Va. 2002); *Delph v. Trent*, 86 F. Supp. 2d 572 (E.D. Va. 2000); *Williams v. Garrett*, 722 F. Supp. 254 (W.D. Va. 1989) (supervisory liability cannot be imposed on the basis of a single incident; plaintiff must prove continued inaction in the face of widespread abuses).

In *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001), the Fourth Circuit upheld a jury's finding that a school principal had been deliberately indifferent to the risk presented by a teacher who was allowed to continue teaching despite prior known instances of sexual abuse of a student.

19-3.04 Bystander Liability

Even a non-supervisory law enforcement official, who has not affirmatively engaged in unconstitutional conduct, may be liable under § 1983 based on the concept of "bystander liability," which is premised on an officer's duty to uphold the law and protect the public from illegal acts, regardless of who commits them. *Randall v. Prince George's Cnty.*, 302 F.3d 188 (4th Cir. 2002). Therefore, an officer may be liable under § 1983 on a theory of bystander liability if he: (1) knows that a fellow officer is violating an individual's

constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act. A complaint puts defendants on fair notice of a bystander liability claim if the “natural consequence” of the allegations in the complaint demonstrates the elements of bystander liability. *Stevenson v. City of Seat Pleasant*, 743 F.3d 411 (4th Cir. 2014) (court also noted that a *Twombly-Iqbal* analysis was not appropriate because the sufficiency of the complaint was challenged at the summary judgment rather than dismissal stage); see also *Monk v. Gulick*, No. 3:20cv518 (E.D. Va. Apr. 6, 2021) (complaint stated claim of bystander liability against two police officers who did not intervene to stop third officer’s use of excessive force on arrestee); *Wiggins v. Quesenberry*, 222 F. Supp. 3d 490 (E.D. Va. 2016) (no bystander liability because facts not sufficiently pled that officer was aware of excessive force being used or had time to intervene); *Douglas v. Johnson*, No. 7:11cv468 (W.D. Va. Mar. 18, 2013) (bystander liability claim against prison guards who allowed opposite sex observation of strip searches survives Rule 12(b)(6) motion). Bystander liability claims cannot be stated as violations of substantive due process; they must be brought as claims under the Fourth Amendment. *Booker v. City of Lynchburg*, No. 6:20cv000-11 (W.D. Va. July 22, 2020).

19-3.05 Lack of State Action

In suits against individuals, it may also be argued that the individual is a private actor and, therefore, did not act under color of law as required under § 1983. “Under color of state law” is treated as equivalent to the state action required under the Fourteenth Amendment. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S. Ct. 2764 (1982). In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744 (1982), the Supreme Court established a two-part test to determine whether a party acted under color of state law. First, the deprivation of civil rights must have been caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state or a person for whom the state is responsible. Second, the party charged with the deprivation must be either a state actor, i.e., a state official; an individual acting together with, or obtaining significant aid from state officials; an individual performing a public function; or an individual compelled or significantly encouraged to act by the state. See also *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977 (1999) (worker’s compensation insurers not state actors).

The Fourth Circuit has articulated four circumstances for finding state action exists: (1) the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) the state has delegated a traditional and exclusively public function to a private actor; or (4) the state has committed an unconstitutional act in the course of enforcing a right of a private citizen. *DeBauche v. Trani*, 191 F.3d 499 (4th Cir. 1999). *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337 (4th Cir. 2000), states a slightly different formulation of the four circumstances. The court in *Chestnut Ridge* emphasized the totality of the circumstances in finding the volunteer fire department was a state actor because it undertook a traditional and exclusive Maryland public function. See also *Charlottesville Div. v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673 (W.D. Va. 2015) (when a private entity exercises eminent domain authority it becomes a state actor); *Charles v. Front Royal Volunteer Fire & Rescue Dep’t*, No. 5:13cv20 (W.D. Va. Sept. 18, 2014) (refusing to find as a matter of law that a volunteer fire department was not a state actor until evidence heard at trial regarding historical and current degree of governmental control over the department, the department’s funding, and the hierarchy within the department).

Neatly classifying the state action doctrine may be an impossible task, however, as the Supreme Court has stated that a “host of facts” can justify state action attribution. *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 551 U.S. 291, 127 S. Ct. 2489 (2007) (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)) (assuming, without deciding, that the high school coach was speaking as a citizen about matters of public concern, the

athletic league can impose conditions only on speech about matters of public concern that are necessary to manage an efficient and effective state-sponsored high school athletic league); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 121 S. Ct. 924 (2001) (finding private athletic association a state actor because of pervasive entwinement of public institutions and public officials in its composition and workings); see also *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001) (military cadets at state school not state actors); *White Coat Waste Project v. Greater Richmond Transit Co.*, 463 F. Supp. 3d 661 (E.D. Va. 2020) (transit company constituted state actor for purposes of § 1983 by virtue of its statutory origin, public function, and government ownership), *aff'd in relevant part*, *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179 (4th Cir. 2022).

In *United Auto Workers, Local No. 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902 (4th Cir. 1995), the Fourth Circuit listed the “very narrow category” of governmental functions that have been classified by the Supreme Court as traditionally the exclusive prerogative of the state: administration of elections, operation of a company town, eminent domain, peremptory challenges in jury selection, and in limited circumstances the operation of a municipal park. The following have been held not to be the traditional prerogative of the state: provision of utilities, operation of nursing homes, coordination and governance of college and amateur athletics, provision of education, and care of foster children. (See citations of cases so holding in *Gaston Festivals*, *supra*.) In *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729 (1978), the Supreme Court expressly left open whether fire, police protection, and tax collection are traditionally exclusive public functions. In *Haavistola v. Community Fire Co.*, 6 F.3d 211 (4th Cir. 1993), the court held that such determination for a private fire company depends on a factual and historical analysis of state law. *Gaston Festivals*, however, suggests that such determinations can usually be made as a matter of law. The Fourth Circuit has held that the provision of medical services to an inmate, even by a physician not under contract to a state, is a traditionally exclusive prerogative of the state and, therefore, state action. *Conner v. Donnelly*, 42 F.3d 220 (4th Cir. 1994).

Another way of examining state action is by what the Supreme Court has said is not state action. The mere receipt of substantial federal funding does not convert a private entity into a state actor. *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777 (1982). Action taken by private entities with the mere approval or acquiescence of the state is not state action. *Id.* Operating public access channels on a cable system is not a traditional, exclusive public function, so a private entity who operates the channels is not a state actor. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. ___, 139 S. Ct. 1921 (2019). The mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, is not sufficient encouragement of the private activity so as to make the state responsible for it. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340 (1988). The fact that the state requires completion of a form does not make it responsible for the private party's decision. *Blum*, *supra*. The fact that a private entity performs a function that serves the public does not make its acts governmental action. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S. Ct. 2764 (1982). Privately owned enterprises providing services that the state would not necessarily provide, even though they are extensively regulated, are not state actors. *Blum*, *supra*; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 95 S. Ct. 449 (1974); see generally *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977 (1999).

Another state action issue arises when a state official may not be acting under color of state law. In *K.I.D. v. Jones*, No. 3:14cv177 (E.D. Va. July 18, 2014), *aff'd sub nom. K.I.D. v. Wilkins*, No. 14-1846 (4th Cir. Apr. 10, 2015), the court held that a deputy sheriff who was a school resource officer but also a volunteer guidance counselor was not acting under color of state law when he abused a student. In *Vincent v. City of Lexington*, No. 91-00048-L (W.D. Va. Aug. 8, 1992), the district court held that an on-duty policeman

who killed his wife was not acting under color of state law. *See also Wallace v. Chrysler Credit Corp.*, 743 F. Supp. 1228 (W.D. Va. 1990) (off-duty deputy sheriff not acting under color of state law when he repossessed vehicle in state where he had no jurisdiction).

An official's conduct can still constitute state action even though he is off duty. In *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003), off-duty sheriff's deputies executed a plan on Election Day to buy up a significant number of copies of a local paper critical of the sheriff and a candidate for state's attorney. The court focused on the close link between the motivation for their actions and their official duties. *See also Rivera v. La Porte*, 896 F.2d 691 (2d Cir. 1990) (off-duty police officer making arrest was acting under color of state law); *Keller v. District of Columbia*, 809 F. Supp. 432 (E.D. Va. 1993) (officers arresting motorist outside of jurisdiction still acting under color of state law); *cf. Robinson v. Davis*, No. 4:15cv40 (W.D. Va. Dec. 30, 2015) (no state action because public official's actions "were no more than what any private citizen could do" and thus insufficient nexus to convert a private tort into a federal wrong).

In *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), the Fourth Circuit held that the chairman of the board of supervisors was acting under color of state law in creating a social media page (on Facebook) that was used for contact with her constituents. Relying on *Rossignol*, the court found that the page was intended to further her duties as a municipal official and the "totality of circumstances" showed that it was maintained under color of state law.

19-3.06 Official-Capacity Suits Distinguished

Although it is no longer necessary after *Monell*, many plaintiffs' attorneys still bring § 1983 actions against officials in their "official capacity." It is important to recognize that this is not a suit against the person in his individual capacity. The Supreme Court in *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991), explained the distinctions between official capacity and personal (individual) capacity suits. The Court also clarified that "capacity" refers to the capacity in which the officer is sued, not the capacity in which he committed the acts. The Fourth Circuit does not assume that failure to expressly plead individual capacity indicates an intent to sue the defendant only in his official capacity. Instead, courts should look to the substance of the complaint to determine the capacity intended. *Biggs v. Meadows*, 66 F.3d 56 (4th Cir. 1995). When a plaintiff does plead official capacity, however, a court cannot look to the substance of the complaint to determine if individual capacity was meant or pled. *Amos v. Md. Dep't of Pub. Safety*, 126 F.3d 589 (4th Cir. 1997), *opinion vacated and dismissed because of settlement*, 205 F.3d 687 (4th Cir. 2000).

A § 1983 suit brought against a person in his official capacity is equivalent to a suit against the entity he represents and must be defended as such. *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099 (1985). Privity exists between the governmental entity and defendants in their official capacity but not in their individual capacity. *Brooks v. Arthur*, 626 F.3d 194 (4th Cir. 2010). A locality is not liable for actions taken by a constitutional officer. *Ryu v. Whitten*, No. 1:15cv202 (E.D. Va. Apr. 4, 2016) (treasurer was true party of interest), *aff'd in part and vacated in part on other grounds*, No. 16-1421 (4th Cir. Apr. 6, 2017). The locality is liable for damages even if it is not a named party. *Brandon v. Holt*, 469 U.S. 464, 105 S. Ct. 873 (1985). The plaintiff must provide *Monell*-type proof of an official policy or custom as the cause of the constitutional violation. *See Flanagan v. Scarce*, No. 7:19cv00413 (W.D. Va. Aug. 23, 2021) (dismissing claims against DSS Board member in his official capacity because no evidence of policy or custom of the Board that played a part in the alleged constitutional violations and because he was no longer a member of the Board). Qualified or absolute immunity defenses are not available to a person sued in his official capacity. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980); *Int'l Ground Transp., Inc. v. Mayor of Ocean City*, 475 F.3d 214 (4th Cir. 2007) (individual defendants protected by qualified immunity, municipalities are not;

municipality liable when jury returns general verdict for individual defendants but against municipality after jury is instructed on qualified immunity as to individuals); *Ridpath v. Bd. of Governors of Marshall Univ.*, 447 F.3d 292 (4th Cir. 2006). If the municipality has also been sued, suits against officials in their official capacity should be dismissed as redundant. *Richardson v. City of Hampton*, No. 4:95cv160 (E.D. Va. May 30, 1996).

19-4 LIABILITY OF THE LOCAL GOVERNMENT ENTITY

19-4.01 Origins of Municipal Liability

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978), the Supreme Court attempted to limit a local government's § 1983 liability to situations where an official policy or custom resulted in a constitutional or statutory violation, as opposed to the actions of an individual employee, for which the Court felt the government (and the taxpayers) should not be responsible. The Court stated:

[A] municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

*Id.*⁴

The Fourth Circuit has summarized the ways in which municipal liability can be imposed because of official policy or custom:

(1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that “manifest[s] deliberate indifference to the rights of citizens”; or (4) through a practice that is so “persistent and widespread” as to constitute a “custom or usage with the force of law.”

Lytle v. Doyle, 326 F.3d 463 (4th Cir. 2003) (quoting *Carter v. Morris*, 164 F.3d 215 (1999)); see also *Heywood v. Va. Peninsula Reg. Jail Auth.*, 217 F. Supp. 3d 896 (E.D. Va. 2016) (mere negligence of policy makers not sufficient); *Moody v. City of Newport News*, 93 F. Supp. 3d 516 (E.D. Va. 2015) (analyzing all four factors to determine whether claims sufficiently stated that the city had an official policy or custom that led to unconstitutional use of excessive force by its police officers).

19-4.02 Express Policy

The easiest cases are those in which the unconstitutional policy statement, ordinance, regulation, or decision is formally adopted by a governing body or agency. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981) (vote of city

⁴ Respondeat superior liability is to be distinguished from supervisory liability, which can be established in some cases. See section 19-3.03 of this chapter. See also *Jamison v. Kincaid*, No. 3:19cv19 (E.D. Va. Sept. 9, 2020), in which the court denied a motion to dismiss as to supervisor-level employees of the Fairfax County Adult Detention Center when the defendants merely argued that they could not be held liable “because there is no *respondeat superior* liability under § 1983.” Likely, the defendants intended to argue there could be no supervisory liability under the circumstances, but the court declined to “conduct a search for other issues which may lurk in the pleadings.” *Id.* (internal quotations omitted).

council to cancel rock concert was official policy); *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980) (city council personnel decision was official policy).

19-4.03 Policymaking Officials

The Supreme Court has held that localities may be held liable under § 1983 only for acts that the locality itself has officially sanctioned or ordered, so that only those public officials who have final policymaking authority may by their actions subject the government to § 1983 liability. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915 (1988) (plurality); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986) (plurality) (city can be liable for single decision of policymaker); *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529 (4th Cir. 2022) (because school boards have final policymaking authority over short-term suspensions, school board actions regarding suspensions can serve as “policies” for purposes of § 1983 liability). Whether a particular official has final policymaking authority is a question of state law. *Id.* Therefore, Virginia law determines who, for example, in an employment case, has the “final authority” to make policy. See *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004) (although school superintendent demoted principal as retaliation for protected speech, the upholding of that decision by the school board was not a constitutional violation because of insufficient evidence that the “Board was aware of the constitutional violation and either participated in, or otherwise condoned, it”); *Penley v. McDowell Cnty. Bd. of Educ.*, 876 F.3d 646 (4th Cir. 2017); *Lytle v. Doyle*, 326 F.3d 463 (4th Cir. 2003) (police directive not final policy when not approved by city manager); *Riddick v. Sch. Bd. of City of Portsmouth*, 238 F.3d 518 (4th Cir. 2000) (school board not subject to municipal liability based on decisions of superintendent and principal because under state law school board retains “exclusive final authority”); *Altizer v. Town of Cedar Bluff*, 104 F. Supp. 3d 760 (W.D. Va. 2015) (town manager not final policymaker regarding termination when town employee had right of appeal to town council); *Ashby v. Isle of Wight Cnty. Sch. Bd.*, 354 F. Supp. 2d 616 (E.D. Va. 2004) (following *Riddick*); *Brown v. Mitchell*, 327 F. Supp. 2d 615 (E.D. Va. 2004) (city council, not city manager, final policy maker for city regarding jail conditions; council’s inaction in light of knowledge of jail conditions could constitute policy or custom); *Rasnick v. Dickenson Cnty. Sch. Bd.*, 333 F. Supp. 2d 560 (W.D. Va. 2004) (in Virginia, a school superintendent does not have final policymaking authority over personnel decisions); see also *Wolf v. Fauquier Cnty.*, 555 F.3d 311 (4th Cir. 2009) (county board of supervisors was not proper party in § 1983 action alleging county department of social services failed to adequately investigate claim of child abuse, where board did not supervise department employees nor did it make policy for department); *Doe v. Mullins*, No. 2:10cv00017 (W.D. Va. July 22, 2010) (local departments of social services are properly characterized as arms of the state because of the high degree of control exercised by the Commonwealth and the corresponding lack of autonomy of the local departments).

Cutting against this line of cases is the Fourth Circuit’s decision in *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016). There, the court held that the fact that the police chief was by ordinance under the direction and control of the city manager did not require a finding that he was not the final policymaker with regard to the police department’s unconstitutional social media policy. The court held that an “entity has ‘final’ authority to set this sort of policy when no further action is needed for the policy to take effect.”

In every case, it needs to be asked whether there arguably was a “policy or custom” and whether, if so, it was established by the “final authority” under Virginia law. See *Pachaly v. City of Lynchburg*, 897 F.2d 723 (4th Cir. 1990) (single act may give rise to civil liability only if it is shown that officials responsible for establishing challenged policy made calculated choice to follow course of conduct deemed unconstitutional; since there was no evidence city had policy of issuing illegal search warrants, summary judgment for city); *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529 (4th Cir. 2022),

aff'g in part and rev'g in part, No. 4:18cv63 (E.D. Va. Nov. 20, 2020) (because Virginia school boards have final policymaking authority over short-term suspensions, school board actions regarding suspensions can serve as “policies” for purposes of § 1983 liability). In *Hunter v. Town of Mocksville*, 897 F.3d 538 (4th Cir. 2018), the Fourth Circuit held that, under North Carolina law, a town manager is the final policy-making authority for personnel decisions, and liability to the town can be imputed from a decision to fire three police officers in violation of their free speech rights. The court further held that because the town manager was the final policymaker, the police chief could not be even though he had discretion to hire and fire.

The plurality opinion in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915 (1988), underscored the issue of “finality,” holding that when an official’s discretionary decisions are constrained by policies not of that official’s making, those policies, rather than the subordinate’s departure from them, are the acts of the municipality. For example, although a department head may have final authority to hire, fire, or promote someone and to determine the procedures used, if that authority is constrained by broader municipal policy, then the department head is not a final policymaker. See also *Greensboro Prof. Fire Fighters Ass’n, Local 3157 v. City of Greensboro*, 64 F.3d 962 (4th Cir. 1995); *Crowley v. Prince George’s Cnty.*, 890 F.2d 683 (4th Cir. 1989). In *Bockes v. Fields*, 999 F.2d 788 (4th Cir. 1993), the court of appeals stated that policymaking authority implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government. The court held the local board of social services not liable for the firing of a local department of social services employee because the county board’s employment decisions were limited by state-prescribed criteria and thus were not made as the result of the county board’s own policymaking authority. See also *Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998) (authority to make personnel decisions not same as authority to craft municipal policy); *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990); *Hughes v. Halifax Cnty. Sch. Bd.*, 855 F.2d 183 (4th Cir. 1988); *Morrash v. Strobel*, 842 F.2d 64 (4th Cir. 1987); *Hassell v. City of Chesapeake*, 64 F. Supp. 2d 573 (E.D. Va. 1999) (authority to order drug test of employee not policy determination), *aff’d*, No. 99-2304 (4th Cir. Sept. 18, 2000). But see *Searce v. Halifax Cnty.*, No. 94-0020-D (W.D. Va. May 26, 1995) (county administrator final policymaker in unconstitutional discharge of county employee despite state statute that administrator authorized only to make recommendations when county board of supervisors in fact did not exercise review of decisions).

In a 5-4 decision, the Supreme Court further clouded the waters regarding municipal liability for the single act of a policymaker in *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 117 S. Ct. 1382 (1997). It is clear that a single act by a policymaker, that is itself unconstitutional, can result in municipal liability. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981) (vote of city council to cancel rock concert was official policy); *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980). When the act itself is not unconstitutional but leads to a constitutional violation, however, municipal liability can be imposed only when there is a strong link between the act and the ultimate injury. In failure-to-train cases, the constitutional violation must be a “highly predictable” consequence of the failure to train. In hiring situations, the Court went further and held that the plaintiff must show that the particular constitutional injury was the “plainly obvious” consequence of the particular hiring decision. See also *Riddick v. Sch. Bd. of City of Portsmouth*, 238 F.3d 518 (4th Cir. 2000) (no causal connection or deliberate indifference proven); *Lee v. City of Richmond*, No. 3:12cv471 (E.D. Va. Mar. 19, 2013) (complaint must contain factual allegations that plausibly show an entitlement to relief).

In *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S. Ct. 2702 (1989), the Court emphasized that whose decisions represent official policy of government is a

state law question for the judge, not the jury. The jury determines whether the decision of the final policymaker actually caused the alleged harm.

19-4.04 Inaction

19-4.04(a) Inadequate Training

A failure to train can constitute a “policy or custom” when such failure evidences a deliberate indifference to civil rights. *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989). A municipality’s culpability for a deprivation of rights is at its most tenuous when a claim turns on a failure to train. *Connick v. Thompson*, 563 U.S. 51, 131 S. Ct. 1350 (2011). The plaintiff ordinarily must prove a pattern of similar constitutional violations by untrained employees sufficient to demonstrate deliberate indifference. *Id.*; *Willis v. Blevins*, 966 F. Supp. 2d 646 (E.D. Va. 2013); *cf. Estate of Lynch v. City of Virginia Beach*, No. 2:21-cv-341 (E.D. Va. Mar. 7, 2022) (plaintiff successfully pleads deliberate indifference under two separate failure-to-train theories of inadequate training and pattern of similar constitutional violations by untrained officers); *Booker v. City of Lynchburg*, No. 6:20cv11 (W.D. Va. Feb. 11, 2021) (motion to dismiss); *Brown v. Cobb*, No. 3:17cv627 (E.D. Va. Dec. 3, 2018) (motion to dismiss); *Doe v. Russell Cnty. Sch. Bd.*, No. 1:16cv45 (W.D. Va. Apr. 13, 2017) (motion to dismiss) (complete failure to train teachers and employees on how to spot, investigate, and address sexual assault amounted to deliberate indifference and no pattern of unconstitutional behavior was required); *Doe v. Russell Cnty. Sch. Bd.*, No. 1:16cv00045 (W.D. Va. Feb. 13, 2018) (summary judgment) (sufficient evidence that school board was deliberately indifferent to need to train and failure closely related to ultimate injuries suffered; qualified immunity for individual defendants granted). To sufficiently plead that a municipality is liable for failure to train, a plaintiff must make more than conclusory statements without factual support. *Jackson v. Brickey*, 771 F. Supp. 2d 593 (W.D. Va. 2011); *see also Danvers v. Loudoun Cnty. Sch. Bd.*, No. 1:21-cv-1028 (E.D. Va. Sept. 29, 2022) (alleging failure to train without specifically connecting such failure to the alleged harassment insufficient to survive motion to dismiss); *Lee v. City of Richmond*, No. 3:12cv471 (E.D. Va. Mar. 19, 2013) (plaintiff must allege facts that reveal an obvious need for improved personnel training). Deliberate indifference is objectively shown when the need for more or different training is so obvious that the inadequacy is likely to result in violations of constitutional rights. *See Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998); *Woodson v. City of Richmond*, 88 F. Supp. 3d 551 (E.D. Va. 2015) (employees must be so inadequately trained that a violation of a federal right is a highly predictable consequence); *Sch. Bd. of Portsmouth v. Colander*, 258 Va. 417, 519 S.E.2d 374 (1999) (although aware of previous inappropriate videotaping incident, school board not liable for retaining teacher who subsequently secretly videotaped females undressing in locker room because second incident was not plainly obvious consequence of retention after first incident). Mere negligence is insufficient to impose liability. *Semple v. City of Moundsville*, 195 F.3d 708 (4th Cir. 1999) (negligence in training regarding domestic violence not unconstitutional).

There must be a direct causal link between specific deficiencies in training and the constitutional injury. It is insufficient proof that the injury occurred and that whatever training existed did not prevent it. *McWilliams v. Fairfax Cnty. Bd. of Sup’rs*, 72 F.3d 1191 (4th Cir. 1996); *see also Buffington v. Baltimore Cnty.*, 913 F.2d 113 (4th Cir. 1990) (evidence insufficient to permit jury to find that policy of failure to train officers in suicide prevention actually caused harm). Municipal indifference or condoning of conduct cannot be shown by evidence of constitutional violations different from the specific injury suffered by the plaintiff. A close fit is required between the injury and the municipal policy. *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999) (evidence of instances of excessive force by officers does not support claim of indifference to unlawful searches and arrests).

Proof of a single incident of unconstitutional activity is generally insufficient to prove policy of deficient training or causal connection. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985). However, evidence of a single violation of federal rights,

accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 117 S. Ct. 1382 (1997). This exception is narrow, however, and requires a stringent standard of fault. *Connick v. Thompson*, 563 U.S. 51, 131 S. Ct. 1350 (2011) (no failure to train claim stated as a result of single incidence of prosecutor's failure to reveal exculpatory evidence pursuant to *Brady*); *Estate of Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020) (city not liable for unconstitutional use of deadly force on incapacitated man because it had policy in place requiring use of physical force to be necessary, objectively reasonable, and proportionate). In *Brown v. Mitchell*, 308 F. Supp. 2d 682 (E.D. Va. 2004), the court held that a failure to train claim had been sufficiently alleged in light of a single deprivation of an obvious constitutional right. See also *Lytle v. Doyle*, 326 F.3d 463 (4th Cir. 2003); *Semple v. City of Moundsville*, 195 F.3d 708 (4th Cir. 1999); *Jordon v. Jackson*, 15 F.3d 333 (4th Cir. 1994). Note, however, that a plaintiff need not detail underlying facts or plead multiple incidents in order to withstand a motion to dismiss. *Jordon, supra*, relying on *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160 (1993), discussed in section 19-5.01.

If there is no underlying constitutional violation, inadequate training becomes immaterial. See *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061 (1992) (immaterial that deliberately indifferent city policy may have caused injury, when injury not constitutional in scope); see also *Grayson v. Peed*, 195 F.3d 692 (4th Cir. 1999); *S.P. v. City of Takoma Park*, 134 F.3d 260 (4th Cir. 1998) (although the omission of instruction on standards for mental health seizures was clearly inadequate training, immaterial issue when no constitutional injury); *Temkin v. Frederick Cnty. Comm'rs*, 945 F.2d 716 (4th Cir. 1991); *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990); *Lee v. Williams*, 138 F. Supp. 2d 748 (E.D. Va. 2001); *B.M.H. v. Sch. Bd. of City of Chesapeake*, 833 F. Supp. 560 (E.D. Va. 1993); *Williamson v. City of Virginia Beach*, 786 F. Supp. 1238 (E.D. Va. 1992), *aff'd*, 991 F.2d 793 (4th Cir. 1993).

19-4.04(b) Other Inaction

In *Brown v. Mitchell*, 327 F. Supp. 2d 615 (E.D. Va. 2004) (summary judgment motion) and 308 F. Supp. 2d 682 (E.D. Va. 2004) (Rule 12(b)(6) motion), the court held that municipal inaction can constitute a policy or custom when (1) the municipality fails to act despite a known pattern of constitutional deprivations; or (2) the municipality fails to remedy a situation that, unaddressed, is patently likely to cause constitutional deprivations to an identifiable group of persons who stand in a special relationship to the municipality. The court found that it was a triable issue of fact whether continued inaction by the city in the face of known overcrowding and unsanitary conditions at the jail caused the death of an inmate from meningitis. Another district court followed this reasoning in *Sleeper v. City of Richmond*, No. 3:12cv441 (E.D. Va. Aug. 16, 2012), denying a Rule 12(b)(6) motion by the city that it could not be sued for its inaction with regard to excessive heat in a jail that resulted in a pretrial detainee's death. In *Woodson v. City of Richmond*, 88 F. Supp. 3d 551 (E.D. Va. 2015), the city's motion for summary judgment was denied because the court held that a reasonable jury could find that the city jail had engaged in a known pattern and practice of permitting the health risks of heat exposure to exist without taking reasonable steps to ameliorate the known risks. The city subsequently settled for \$2.99 million.

19-4.05 Custom or Usage

Monell also allows imposition of liability for "custom or usage," the existence of which may be found in persistent and widespread practices of municipal officials that, although not authorized by written law, are so permanent and well-settled as to have the force of law. *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (evidence of a pattern of incidents of police brutality sufficient to establish municipal liability). If the custom grew from the ranks of the employees, a plaintiff must show that the municipality knew of the custom

and condoned it. *Greensboro Prof. Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962 (4th Cir. 1995). The direct causal link between such non-formal policy or custom and the constitutional deprivation may be established through proof of inadequate training or condonation of the conduct. *Spell, supra*. In *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999), the court held that to constitute municipal custom, the particular practice must be so persistent and widespread and so permanent and well-settled as to have the force of law. Sporadic or isolated violations of rights are not sufficient to prevail on this type of claim, only widespread or flagrant violations will suffice. *Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379 (4th Cir. 2014); *see also Lytle v. Doyle*, 326 F.3d 463 (4th Cir. 2003) (isolated incidents of unconstitutional conduct by subordinate employees do not establish a custom); *Woodson v. City of Richmond*, 88 F. Supp. 3d 551 (E.D. Va. 2015) (two instances of a failure to investigate do not constitute a persistent and widespread practice). A plaintiff can withstand a 12(b)(6) motion to dismiss without pleading "the multiple incidents of constitutional violations that may be necessary at later stages to establish the existence of an official policy or custom and causation." *Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994).

19-5 ADDITIONAL DEFENSES TO § 1983 ACTIONS

19-5.01 Lack of Specificity in Pleadings

Section 1983 claims are not subject to a "heightened pleading standard." *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160 (1993). It is thus not necessary for plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim. *Johnson v. City of Shelby*, 574 U.S. 10, 135 S. Ct. 346 (2014) (per curiam). While plaintiffs need not necessarily plead the multiple instances of constitutional violations that may be necessary to prevail on their claims, *Jordan v. Jackson*, 15 F.3d 333 (4th Cir. 1994), they still must meet the pleading instructions established by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). These cases established that a plaintiff must plead facts sufficient to show that a claim has substantive plausibility. *See also Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013); *Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009); *Lavender v. City of Roanoke Sheriff's Office*, 826 F. Supp. 2d 928 (W.D. Va. 2011) (all holding that plaintiff must state a claim that is plausible on its face).

Some courts, however, have held that the *Twombly/Iqbal* analysis only applies to the sufficiency of a complaint at the dismissal stage. *See Grant v. Bank of Am.*, No. 2:13cv342 (E.D. Va. Feb. 25, 2014) (does not apply to affirmative defenses; also noting split in federal district court cases); *Stevenson v. City of Seat Pleasant*, 743 F.3d 411 (4th Cir. 2014) (*Twombly-Iqbal* analysis was not appropriate because the sufficiency of the complaint was challenged at the summary judgment rather than dismissal stage). Noting a split in authority, a district court held that the *Twombly/Iqbal* analysis does not apply to an affirmative defense. *Flame S.A. v. Indus. Carriers Inc.*, No. 2:13cv658 (E.D. Va. June 24), *aff'd on other grounds*, 762 F.3d 352 (4th Cir. 2014).

19-5.02 Failure to Pursue Administrative Remedies

Generally, exhaustion of administrative remedies is not required prior to filing a suit under § 1983. *Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584 (1997); *Patsy v. Bd. of Regents*, 457 U.S. 496, 102 S. Ct. 2557 (1982). Exhaustion of remedies may be required, however, before bringing a § 1983 action to enforce a federal statute that mandates exhaustion. *Talbot v. Lucy Corr Nursing Home*, 118 F.3d 215 (4th Cir. 1997) (exhaustion required only if explicitly mandated in statute or implicitly required based on congressional intent; mere provision of state remedies not sufficient implication of such intent). State prisoner suits must be stayed for 180 days to require exhaustion of Virginia's certified grievance mechanism under the Prison Litigation Reform Act, 42 U.S.C. § 1997e (28 C.F.R. §§ 40.1-40.22). *See Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378 (2006) (state

administrative review is not exhausted even if an administrative remedy is not available because prisoner procedurally defaulted; “proper exhaustion” of administrative review, including compliance with applicable procedural rules, is a precondition to filing federal suit); *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983 (2002) (administrative exhaustion required for excessive force claim); *Booth v. Churner*, 532 U.S. 731, 121 S. Ct. 1819 (2001) (exhaustion required even when monetary relief sought not available); *Hall v. McCoy*, 89 F. Supp. 2d 742 (W.D. Va. 2000) (same as *Porter* and *Booth*); see also *Billups v. Carter*, 268 Va. 701, 604 S.E.2d 414 (2004) (reasonable, not perfect, compliance with administrative procedures sufficient to meet exhaustion requirement); cf. *Taylor v. Barnett*, 105 F. Supp. 2d 483 (E.D. Va. 2000) (exhaustion met if prison does not act on claim in reasonable time).

A court may not excuse a failure to exhaust, even to consider a legitimate belief that exhaustion was not required. However, if the administrative procedure is consistently not provided (despite what regulations or guidance materials may promise), is so opaque as to be essentially impossible to use, or its use is consistently thwarted by prison administrators through machination, misrepresentation, or intimidation, then the state procedure is not available, and exhaustion is not required. *Ross v. Blake*, 578 U.S. 632, 136 S. Ct. 1850 (2016).

Exhaustion is not a pleading requirement, however, but an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910 (2007). A sua sponte dismissal of a complaint for failure to exhaust is only permissible when the complaint shows on its face that a required exhaustion was not made. *Custis v. Davis*, 851 F.3d 358 (4th Cir. 2017) (holding *Jones* irreconcilable with prior Fourth Circuit law that allowed sua sponte dismissals of complaints where exhaustion was unclear if the plaintiff was given an opportunity to address the issue).

See also the discussion of abstention in section [19-5.09](#).

19-5.03 Statute of Limitations

In *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985), the Supreme Court held as a matter of federal law that the limitations period in a § 1983 suit is the state statute of limitations applicable to tort suits for the recovery of damages for personal injury. This limitations period applies to all § 1983 claims, even if the statutory right on which the § 1983 claim is based contains its own statute of limitations. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S. Ct. 1453 (2005); *Morris v. Ratliff*, No. 7:08cv00221 (W.D. Va. Mar. 18, 2008). In dicta, however, the Supreme Court in *Rancho Palos Verdes* stated that for civil actions based on an Act of Congress enacted after December 1, 1990, the statute of limitations for § 1983 actions based on such statutes may be the four-year federal catchall limitations period of 28 U.S.C. § 1658. Based on that dicta, the Eleventh Circuit held in *Baker v. Birmingham Board of Education*, 531 F.3d 1336 (11th Cir. 2008), that a § 1983 claim premised upon a § 1981 post-contract formation violation is governed by the four-year limitations period of 28 U.S.C. § 1658 rather than the period applicable to § 1983 actions. *Accord Mveng-Whitted v. Va. State Univ.*, 927 F. Supp. 2d 275 (E.D. Va. 2013).

The Fourth Circuit has recognized that Va. Code § 8.01-243, which provides a two-year statute of limitations for personal injury claims, is the proper limitation period for § 1983 suits. *A Society Without a Name v. Virginia*, 655 F.3d 342 (4th Cir. 2011); *Lewis v. Richmond City Police Dep’t*, 947 F.2d 733 (4th Cir. 1991); see also *Shelton v. Angelone*, 148 F. Supp. 2d 670 (W.D. Va. 2001) (Va. Code § 8.01-243 applies to prisoner claims, rather than one-year limitation of Va. Code § 8.01-243.2); *Demuren v. Old Dominion Univ.*, 33 F. Supp. 2d 469 (E.D. Va. 1999), *aff’d*, No. 99-1205 (4th Cir. Aug. 25, 1999); *Clay v. LaPorta*, 815 F. Supp. 911 (E.D. Va. 1993), *aff’d*, 36 F.3d 1091 (4th Cir. 1994);

Blackmon v. Perez, 791 F. Supp. 1086 (E.D. Va. 1992); *Billups v. Carter*, 268 Va. 701, 604 S.E.2d 414 (2004).

The time of accrual of a cause of action is a matter of federal law that is not resolved by reference to state law. *McDonough v. Smith*, 588 U.S. ___, 139 S. Ct. 2149 (2019) (claim of fabricated evidence—akin to malicious prosecution—accrues when criminal proceedings end in favor of plaintiff); *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091 (2007) (claim of false imprisonment accrues at the time the claimant becomes detained pursuant to legal process, not when released from custody); *Brooks v. City of Winston-Salem*, 85 F.3d 178 (4th Cir. 1996); *Graham v. City of Manassas Sch. Bd.*, 390 F. Supp. 3d 702 (E.D. Va. 2019) (in § 1983 suit regarding sexual abuse by school employee, federal rule that accrual occurs when plaintiff knows or has reason to know of injury applies, rather than Va. Code § 8.01-249(6) regarding accrual of claim of sexual abuse occurring during infancy).

The common law cause of action most closely analogous to the constitutional right at stake is an appropriate place to start to determine when a claimant possesses sufficient facts for accrual purposes. See *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). Generally, under federal law, a cause of action accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry would reveal his cause of action. *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995); *Clay v. LaPorta*, 815 F. Supp. 911 (E.D. Va. 1993), *aff'd*, 36 F.3d 1091 (4th Cir. 1994) (accrual is when plaintiff knows or has reason to know of the injury that is the basis of the action). But if the common law provides a “distinctive rule” for determining the start date of the limitations period for the analogous tort, a court should consider this rule in determining when the limitations period for the plaintiff’s claim begins to run. *Owens v. Baltimore City State’s Attorney’s Office*, 767 F.3d 379 (4th Cir. 2014) (malicious prosecution most analogous to *Brady*-like claims and accrual begins with *nolle prosequi*, not grant of new trial); see also *Waters v. Geo Grp. Inc.*, No. 2:15cv282 (E.D. Va. Aug. 10, 2016) (claim of deliberate indifference to medical need of jail inmate is most closely analogous to medical malpractice and accrues when inmate learns of condition and its cause).

Federal courts apply state rules for tolling the statute of limitations. See *Hardin v. Straub*, 490 U.S. 536, 109 S. Ct. 1998 (1989); *Bd. of Regents v. Tomanio*, 446 U.S. 478, 100 S. Ct. 1790 (1980); *Graham v. City of Manassas Sch. Bd.*, 390 F. Supp. 3d 702 (E.D. Va. 2019) (applying Virginia’s tolling statute for time during which plaintiffs were minors). But see *Battle v. Ledford*, 912 F.3d 708 (4th Cir. 2019) (if state statutory and equitable tolling doctrines do not apply, courts must determine whether failing to toll would be inconsistent with the goals and policy of § 1983); *Lewis v. Richmond City Police*, 947 F.2d 733 (4th Cir. 1991) (federal, not state, tolling rules apply). It may be argued that a “continuing violation” tolls the statute of limitations. In *Depaola v. Clarke*, 884 F.3d 481 (4th Cir. 2018), the Fourth Circuit held that a prisoner may allege a continuing violation under § 1983 by identifying a series of acts or omissions that demonstrate deliberate indifference to a serious, ongoing medical need. The statute of limitations does not begin to run on such a claim for a continuing violation of a prisoner’s Eighth Amendment rights until the date, if any, on which adequate treatment was provided. See also *Ocean Acres Ltd. P’ship v. Dare Cnty. Bd. of Health*, 707 F.2d 103 (4th Cir. 1983); *Grethen v. Clarke*, No. 2:13cv416 (E.D. Va. Mar. 13, 2015) (prisoner § 1983 claims not tolled during period of administrative exhaustion; Virginia tolling principles applied), *aff’d on other grounds*, No. 16-6206 (4th Cir. Jan. 5, 2017); *Presley v. City of Charlottesville*, No. 3:05cv00010 (W.D. Va. Oct. 7, 2005), *aff’d in part, rev’d in part on other grounds*, 464 F.3d 480 (4th Cir. 2006). In an extensive construction of Va. Code § 8.01-229(K), a federal district court held that the § 1983 action was tolled during the plaintiff’s state and federal prosecutions. *Pinder v. Knorowski*, 660 F. Supp. 2d 726 (E.D. Va. 2009).

The continuing violation principle did not apply to a claim by NAACP that the naming of various schools (Stonewall Jackson and Lee-Davis) and team mascots (the Rebels) violates the Equal Protection Clause; at the latest, the naming and desegregation of the schools occurred in 1969, well beyond the two-year statute of limitations for § 1983 suits. *Hanover Cnty. Unit of the NAACP v. Hanover Cnty.*, 461 F. Supp. 3d 280 (E.D. Va. 2020). However, the continuing violation theory may have been successful if counsel and the pleadings had instead objected to the *maintenance* of the school and mascot names. *Id.* (discussing “[c]ounsel’s insistence that the NAACP challenged the naming of the schools, not the maintenance of their names”).

In *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302 (1988), the Supreme Court held that a six-month notice of a claim, adopted by the state as a prerequisite to a suit against a local government, did not apply to § 1983 suits, whether they were filed in federal or state court.

19-5.04 Certain Jurisdictional Restrictions

19-5.04(a) Eleventh & Tenth Amendments

The Supreme Court has been aggressive regarding the Eleventh Amendment’s protection of states and state employees from suit. The Court has limited Congress’s authority to abrogate a state’s immunity, *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996), holding that the Commerce Clause does not provide such authority. Moreover, while § 5 of the Fourteenth Amendment provides Congress with such authority, for a statute to be a valid means of enforcing the Fourteenth Amendment there must be congruence and proportionality between the injury to be prevented and the means adopted by Congress. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). For an extensive analysis of these cases, see *Zemedagegehu v. Arlington County Sheriff*, No. 1:15cv5 (E.D. Va. Apr. 28, 2015), in which the district court held that Congress had authority under § 5 of the Fourteenth Amendment to abrogate the Eleventh Amendment immunity of a sheriff in an action alleging a violation of Title II of the American with Disabilities Act. The Court limited the circumstances under which state waiver of immunity is found. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999).

Eleventh Amendment immunity is an affirmative defense. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536 (4th Cir. 2014). A state does not waive its Eleventh Amendment immunity when it removes a case from state court to federal court unless the state has waived its immunity through a statute, regulation, or other clear statement. *Biggs v. N.C. Dep’t of Pub. Safety*, 953 F.3d 236 (4th Cir. 2020); see also *Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2005) (state does not waive its sovereign immunity by voluntarily removing an action to federal court when it would have been immune from the same action in state court). But see *Lapides v. Bd. of Regents*, 535 U.S. 613, 122 S. Ct. 1640 (2002) (the case was limited by its facts to the removal of only state law claims for which sovereign immunity had been waived in state courts). Additionally, the Eleventh Amendment ordinarily raises no bar to an official-capacity action brought against a state official by a plaintiff seeking prospective relief to end an ongoing violation of federal law. *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 117 S. Ct. 2028 (1997) (citing *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908)); *Biggs, supra*; *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013) (Eleventh Amendment does not bar suit against sheriff to the extent that the relief sought is reinstatement, which is prospective relief). Conversely, prospective relief is not available when the suit is brought against defendants only in their individual capacities. *Chadwell v. Brewer*, 59 F. Supp. 3d 756 (W.D. Va. 2014).

Outside of the § 1983 context, when a suit names employees of a government entity but the real party in interest is actually a state employer with Eleventh Amendment sovereign immunity, the claim should be dismissed. See *Martin v. Wood*, 772 F.3d 192

(4th Cir. 2014) (dismissing employment lawsuit against state hospital employees where real party in interest was the Commonwealth). In *Adams v. Ferguson*, 884 F.3d 219 (4th Cir. 2018), the Fourth Circuit held that the *Martin* factors for determining the real party in interest are inapplicable to § 1983 claims against state officials.

Sovereign immunity also acts to bar suits against states in their own courts, *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999) and *Clark v. Va. State Police*, 292 Va. 725, 793 S.E.2d 1 (2016), and federal administrative adjudications in which a private party seeks relief from a non-consenting state, *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 122 S. Ct. 1864 (2002) (5-4 decision). Furthermore, even if a state waives sovereign immunity in its own state courts, it does not also impliedly waive immunity in federal court. *Trantham v. Henry Cnty. Sheriff's Office*, No. 4:10cv00058 (W.D. Va. Mar. 10, 2011) (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999)), *aff'd*, No. 11-1337 (4th Cir. June 20, 2011).

In *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 122 S. Ct. 1864 (2002), the Supreme Court stated that the central purpose of the state immunity doctrine was to accord the states the respect owed them as joint sovereigns, while the protection of the state treasury was an "important function" of the doctrine. The Supreme Court observed that the Fourth Circuit had reversed these priorities in holding that the primary consideration was the impact on the state treasury, but the Court affirmed because the result would not have been any different. It held that, even if the state treasury was unaffected, the entity might still enjoy sovereign immunity if the judgment would adversely affect the dignity of the state as a sovereign. Three additional factors would then be considered in accordance with *Cash v. Granville County Board of Education*, 242 F.3d 219 (4th Cir. 2001): (1) the degree of control the state exercises over the entity or the degree of autonomy from the state that the entity enjoys; (2) the scope of the entity's concerns, whether local or statewide; and (3) the manner in which state law treats the entity. Using this analysis, the Fourth Circuit in *Cash* held that North Carolina school boards were not arms of the state. *See also Kitchen v. Upshaw*, 286 F.3d 179 (4th Cir. 2002) (Virginia regional jail authorities not arms of state); *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996); *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995) (relying on *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394 (1994)) (whether a person is a state official for purposes of Eleventh Amendment immunity is a federal law question and not the same analysis as whether a person is a final policymaker for § 1983 liability; *cf.* section 19-4.03); *Kincaid v. Anderson*, No. 1:14cv27 (W.D. Va. June 8, 2015) (because of degree of state oversight, local departments of social services are arms of the state entitled to sovereign immunity); *Newbrough v. Piedmont Reg'l Jail Auth.*, 822 F. Supp. 2d 558 (E.D. Va. 2011) (follows *Kitchen*).

The Supreme Court stated expressly in *Board of Trustees v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001), that the Eleventh Amendment does not extend its immunity to units of local government. Thus, the only way a local government entity or official can achieve Eleventh Amendment protection is by the assertion that it is, in effect, a state entity or official. In footnotes in *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S. Ct. 900 (1997), the Court reiterated that whether an entity is an arm of the state is a question of federal law, but left unresolved whether an entity can be an arm of the state for some purposes but not others. In *McMillian v. Monroe County*, 520 U.S. 781, 117 S. Ct. 1734 (1997), the Court held in a 5-4 decision that a sheriff can be a local or state official for purposes of § 1983 liability depending on whether the official acted in a state or local capacity regarding the particular challenged conduct. *See Gemaehlich v. Johnson*, No. 7:12cv00263 (W.D. Va. Feb. 14, 2013), *aff'd*, No. 14-1198 (4th Cir. Dec. 2, 2014), in which the district court collected the cases addressing the applicability of the Eleventh Amendment to sheriffs and holding that it precludes official capacity suits against sheriffs and their deputies. There is no "residual" sovereign immunity applicable to

counties that permits a broader interpretation of acting as an “arm of the state” than under Eleventh Amendment jurisprudence. *N. Ins. Co. v. Chatham Cnty.*, 547 U.S. 189, 126 S. Ct. 1689 (2006).

See also Lewis v. Clarke, 581 U.S. 155, 137 S. Ct. 1285 (2017) (an indemnification clause cannot extend a sovereign immunity defense to a suit against an employee in his individual capacity); *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000) (Eleventh Amendment immunity not available to defendants in individual capacity despite state indemnification); *NVR Homes, Inc. v. Clerks of the Circuit Courts*, 189 F.3d 442 (4th Cir. 1999) (local taxing authorities in Maryland not entitled to Eleventh Amendment protection from bankruptcy proceedings); *Drewrey v. Portsmouth City Sch. Bd.*, 264 F. Supp. 3d 724 (E.D. Va. 2017) (finding school boards are not arms of the state protected by Eleventh Amendment immunity after extensive analysis of relevant factors); *Nelson v. Green*, 965 F. Supp. 2d 732 (W.D. Va. 2013) (claims against social services employees not barred by Eleventh Amendment where plaintiffs alleged an affirmative link between official misconduct and the adoption of a plan or policy by government officials that expressly or otherwise shows their authorization or approval of such misconduct); *Carpenter v. Rappahannock Rapidan Cmty. Servs. Bd.*, No. 3:11cv17 (W.D. Va. Aug. 5, 2011) (no Eleventh Amendment immunity for community services board because of insufficient risk to state treasury); *Brickey v. Cnty. of Smyth*, 944 F. Supp. 1310 (W.D. Va. 1996) (county’s participation in state’s risk management program does not operate to extend Eleventh Amendment immunity to county); *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994) (same); *Roberson v. Mullins*, 876 F. Supp. 100 (W.D. Va. 1995) (Eleventh Amendment immunity not available to officials in individual capacities or to political subdivisions such as counties); *cf. Bockes v. Fields*, 999 F.2d 788 (4th Cir. 1993) (county department and board of social services were state agencies and entitled to Eleventh Amendment immunity in a suit alleging deprivation of due process for discharge without notice or hearing, because damages would be paid from state treasury); *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017) (commonwealth’s attorneys are arms of the state and entitled to Eleventh Amendment immunity); *Hussein v. Miller*, 232 F. Supp. 2d 653 (E.D. Va. 2002) (commissioners of the revenue are protected by Eleventh Amendment immunity); *Daley v. Hanover Cnty.*, No. 3:95cv304 (E.D. Va. June 26, 1995) (county, department and board of social services, and social workers in official capacities are arms of the state and entitled to Eleventh Amendment immunity); *Schaefer v. Clark*, No. 3:94cv296 (E.D. Va. 1994) (claims for damages against county, department of social services, and defendants in their official capacities dismissed as violative of Eleventh Amendment).

There is always the possibility of Tenth Amendment jurisprudence providing a defense, although it has rarely been used. *See Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997); *Petersburg Cellular P’ship v. Bd. of Sup’rs of Nottoway Cnty.*, 205 F.3d 688 (4th Cir. 2000); *West v. Anne Arundel Cnty.*, 137 F.3d 752 (4th Cir. 1998). If a federal statute violates the Tenth Amendment, there would be no right enforceable under § 1983, see section 19-5.05(b).

19-5.04(b) Rooker-Feldman Doctrine

For a brief time, the *Rooker-Feldman* doctrine was a popular defense to § 1983 suits because, if it applied, there was no federal court subject matter jurisdiction. The doctrine now applies only to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517 (2005). In essence, the federal action is an appeal of the state court judgment. *Id.*; *see also Skinner v. Switzer*, 562 U.S. 521, 131 S. Ct. 1289 (2011) (doctrine does not bar § 1983 jurisdiction over claim that denial of access to post-conviction DNA testing unconstitutional).

Rooker-Feldman has no application to judicial review of executive action, including determinations made by a state administrative agency. *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 122 S. Ct. 1753 (2002). Thus, for *Rooker-Feldman* to be implicated, the complaint must allege injuries caused by the state court judgment, not the administrative actions that are challenged in a state court action. *Thana v. Bd. of License Comm'rs for Charles Cnty., Md.*, 827 F.3d 314 (4th Cir. 2016); see also *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc) (doctrine does not bar suit challenging constitutionality of state statute that prohibits the sale of alcohol to those have been judicially determined to be habitual drunkards because challenge is to application of the statute in the future).

Rooker-Feldman does not override or supplant preclusion doctrine or augment comity or abstention doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions. Properly invoked concurrent jurisdiction does not vanish if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court. The preclusion principles of privity also do not apply for *Rooker-Feldman* purposes. *Lance v. Dennis*, 546 U.S. 459, 126 S. Ct. 1198 (2006) (per curiam). Thus, the Fourth Circuit's decision in *Shooting Point, L.L.C. v. Cumming*, 368 F.3d 379 (4th Cir. 2004), was probably an invalid invocation of the *Rooker-Feldman* doctrine. In *Shooting Point*, the court held that a favorable federal court decision on a permit applicant's due process claims would have required a determination that the state court wrongly decided that the applicant was not entitled to the permit pursuant to state regulations. See also *Burrell v. Commonwealth*, 395 F.3d 508 (4th Cir. 2005) (*Rooker-Feldman* does not bar § 1983 suit because plaintiff ultimately did not lose in state court); *Holliday Amusement Co. v. South Carolina*, 401 F.3d 534 (4th Cir. 2005) (*Rooker-Feldman* doctrine does not apply when plaintiff was not a party to the state proceedings); see also *O.W. v. Sch. Bd. of the City of Va. Beach*, 656 F. Supp. 3d 596 (E.D. Va. 2023) (holding that *Rooker-Feldman* did not apply where state court had considered and dismissed similar legal challenges during suppression motions; state court's action was of no moment to the issue of subject matter jurisdiction because federal lawsuit presented independent federal law claims, which were not intertwined with the state court judgment), *appeal dismissed on other grounds*, No. 23-1191 (4th Cir. Jan. 3, 2024); *petition for rehearing and rehearing en banc denied*, (4th Cir. Jan.30, 2024).

19-5.04(c) Tax Injunction Act

In *Indian Creek Monument Sales v. Adkins*, 301 F. Supp. 2d 555 (W.D. Va. 2004), the court held that it lacked subject matter jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, to hear a suit demanding a refund of a county's unconstitutionally imposed solid waste disposal fee. The Act provides that federal courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the state courts. The Act applies to both state and local taxes. *Collins Holding Corp. v. Jasper Cnty.*, 123 F.3d 797 (4th Cir. 1997). Although the state court, in declaring the waste disposal fee unconstitutional, analyzed its imposition as a fee, not a tax,⁵ the federal court in *Indian Creek* determined that the fee was properly classified as a tax for purposes of the Tax Injunction Act. See generally *Nat. Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012) (penalty imposed for failure to maintain minimum health insurance coverage is a tax for purposes of Congress's constitutional authority to impose it, but as Congress classified it as a penalty, it is not subject to the Tax Injunction Act); *DirecTV, Inc. v. Tolson*, 513 F.3d 119 (4th Cir. 2008) (interpreting "tax" broadly, local cable franchise charges were taxes).

See also *Schwab v. Hansen*, No. 2:17cv394 (E.D. Va. Nov. 16, 2017), in which the federal district court did not reach the Tax Injunction Act challenge but held that a

⁵ See *Estes Funeral Home v. Adkins*, 266 Va. 297, 586 S.E.2d 162 (2003).

challenge to the constitutionality (based on due process grounds) of a special service district violated the principles of comity.

19-5.04(d) Insubstantiality of Federal Claim

Dismissal based on lack of subject-matter jurisdiction because the federal claim is inadequate is proper only when the claim is so insubstantial, implausible, foreclosed by prior Court decisions, or otherwise completely devoid of merit as not to involve a federal controversy. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003 (1998). The Fourth Circuit, in *Lovern v. Edwards*, 190 F.3d 648 (4th Cir. 1999), dismissed a wholly frivolous federal claim instituted to bring a state claim in federal court. The court in *Davis v. Pak*, 856 F.2d 648 (4th Cir. 1988), dismissed a claim filed by a state employee that the state director of personnel exceeded his authority in approving a punishment that was in excess of that mandated by the Virginia Standards of Conduct, thus depriving her of a property interest without due process. The court, relying on *Hagans v. Lavine*, 415 U.S. 528, 94 S. Ct. 1372 (1974), held that to establish federal jurisdiction, it is not sufficient to merely assert a constitutional violation, but that it is necessary to assert a "substantial federal question." Thus, in any action where it is felt that the constitutional claim is frivolous, absolutely devoid of merit, or clearly resolved by previous decisions, a motion to dismiss on the basis of lack of jurisdiction may be filed. The court stated in *Davis* that, if the case is dismissed as being insubstantial, the court has no power to resolve pendent state claims, and they must be filed in state court.

19-5.05 No Constitutional or Enforceable Federal Statutory Right Exists

19-5.05(a) No Constitutional Right Was Violated

At the risk of stating the obvious, the plaintiff must allege conduct that actually violates the Constitution. In *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061 (1992), the Supreme Court emphasized that a § 1983 claim is not stated merely because the plaintiff pled deliberately indifferent training and supervision by the city; the plaintiff must also allege a deprivation of federally protected rights. The Court held that a claim had not been stated because the Due Process Clause does not entitle public employees to working conditions free of unreasonable risks of harm. In *Slaughter v. Mayor of Baltimore*, 682 F.3d 317 (4th Cir. 2012), the court of appeals held that in the voluntary employment context, the government must have intended to harm the employee to establish a substantive due process violation. See also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796 (2005) (mandatory enforcement of arrest statutes does not create individual entitlement to a specific enforcement or arrest so as to be protected by the Due Process Clause); *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789 (1991) (allegations of stigmatizing statements by public employer made after resignation of employee do not state a constitutional claim); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 109 S. Ct. 998 (1989) (no constitutional duty to protect citizens from harm absent "special relationship"); *Turner v. Thomas*, 930 F.3d 640 (4th Cir. 2019) (not clearly established that police stand-down order during Charlottesville protests affirmatively created danger to third parties); *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277 (W.D. Va. 2020) (no clearly established legal norm requiring city to protect plaintiff from violations of plaintiff's First Amendment free speech rights by third parties); *Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015) (no state-created danger when state actor did not increase the risk of private danger through direct affirmative acts); *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (en banc) (in dicta, no constitutional affirmative duty to protect individuals outside of the custodial context from harm by third party despite awareness of danger and promise that danger will be eliminated); *Rutherford v. City of Newport News*, 919 F. Supp. 885 (E.D. Va. 1996) (following *Pinder*); *Estate of Morgan v. Mayor of Hampton*, 936 F. Supp. 343 (E.D. Va. 1996) (no constitutional duty to provide adequate fire services). But see *Cybernet, LLC v. David*, 954 F.3d 162 (4th Cir. 2020) (execution of search warrant did not violate Fourth Amendment where damage to property was "not negligible" but also not "excessive," even if search could have been conducted in more careful manner); *Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163 (4th Cir. 2010) (a child

who has been involuntarily removed from her home by state social workers and knowingly placed in a dangerous foster care environment may state a claim for damages under § 1983).

If the official's conduct is found not to violate a constitutional right, then the locality cannot be liable for any failure to train. See *Hinkle v. City of Clarksburg*, 81 F.3d 416 (4th Cir. 1996) (no excessive force); *Sturges v. Matthews*, 53 F.3d 659 (4th Cir. 1995) (no excessive force); *Moody v. Mainwaring*, No. 3:96cv932 (E.D. Va. June 25, 1997) (no negligent hiring when no excessive force); *Holder v. Kaiser*, No. 2:95cv880 (E.D. Va. Mar. 28, 1996) (mistaken arrest). The Fourth Circuit held that prosecution under an ordinance that is subsequently deemed to be unconstitutional does not automatically give rise to a cause of action under § 1983. *Reyes v. City of Lynchburg* 300 F. 3d 449 (4th Cir. 2002). The unconstitutionality of the law itself does not supply the necessary constitutional element underlying a valid § 1983 claim.

19-5.05(b) Federal Statute Does Not Create a Right Enforceable Under § 1983

In *Pennhurst State School v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531 (1981) and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981), the Court put two limitations on the right to sue under § 1983. First, no § 1983 jurisdiction exists where the federal statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983. Second, Congress can foreclose this enforcement of the statute either implicitly or explicitly in the statute's remedial scheme.

In *Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002), the Court clarified how a federal statute is analyzed to determine if it confers a right enforceable under § 1983. A personal right must be unambiguously conferred by the statute. The three-part test established in *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353 (1997), which focused on the benefits created by the statute, is no longer relevant. In fact, the analysis is the same as determining if an implied right of action exists under the statute itself. The difference is that an implied right of action analysis must also determine if the statute manifests an intent to provide a remedy. Under § 1983, however, once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable.

A state may rebut this presumption by showing that Congress specifically foreclosed a remedy under § 1983. *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457 (1984). The state's burden is to demonstrate that Congress shut the door to private enforcement either expressly, through "specific evidence from the statute itself," *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 107 S. Ct. 766 (1987), or "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353 (1997); see also *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615 (1981). If there is no individualized right created in the first place by the statute, then the presumption of enforceability is not an issue.

The Court indicated in *Gonzaga* that this analysis would result in suits under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments being enforceable under § 1983. Subsequently, the Court held that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools or a substitute for § 1983 suits as a means of enforcing constitutional rights. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 129 S. Ct. 788 (2009).

The Supreme Court held that the Telecommunications Act of 1996 was not enforceable under § 1983 because the Act's more restrictive remedial scheme is incompatible with individual enforcement under § 1983. *City of Rancho Palos Verdes v.*

Abrams, 544 U.S. 113, 125 S. Ct. 1453 (2005). Furthermore, the Religious Land Use and Institutionalized Persons Act does not authorize a claim for money damages against an official in his official capacity. *Sossamon v. Texas*, 563 U.S. 277, 131 S. Ct. 1651 (2011). There is no private right of action under the Uniform Relocation Act. *Clear Sky Car Wash LLC v. City of Chesapeake*, 743 F.3d 438 (4th Cir. 2014). The Medicaid Act provision requiring state medical assistance to be provided with “reasonable promptness” is enforceable under § 1983. *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007). Opinions regarding other statutes should be reevaluated using the Court’s current criteria. *Compare Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994), *Dwyer v. Smith*, 867 F.2d 184 (4th Cir. 1989), *Keller v. Prince George’s Cnty. Dep’t of Social Servs.*, 827 F.2d 952 (4th Cir. 1987), and *Allen v. Coll. of William & Mary*, 245 F. Supp. 2d 777 (E.D. Va. 2003) (Title VII does not foreclose a § 1983 public employment discrimination claim), with *Burnette v. Blue Ridge Reg. Jail Auth.*, No. 6:02cv00080 (E.D. Va. Oct. 30, 2003) and *Shelton v. Richmond Pub. Schs.*, 186 F. Supp. 2d 646 (E.D. Va.) (no § 1983 cause of action for Fourteenth Amendment violation because originally could have instituted a Title VII cause of action), *aff’d*, No. 02-1300 (4th Cir. Sept. 4, 2002).

See also *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000) (federal statute regulating the disclosure of drug treatment records, 42 U.S.C. § 290dd-2, does not create an enforceable right); *Kendall v. City of Chesapeake*, 174 F.3d 437 (4th Cir. 1999) (Fair Labor Standards Act remedial scheme forecloses § 1983 action); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524 (4th Cir. 1998) (Individuals with Disabilities Education Act comprehensive remedial claim precludes § 1983 claim); *Zombro v. Baltimore City Police Dep’t*, 868 F.2d 1364 (4th Cir. 1989) (enforcement scheme under Age Discrimination in Employment Act forecloses actions for age discrimination under § 1983); *Koroma v. Richmond Redev. & Hous. Auth.*, No. 3:09cv736 (E.D. Va. Apr. 27, 2010) (no § 1983 claim to enforce Section 8 housing rights); *Jolliffe v. Mitchell*, 971 F. Supp. 1039 (W.D. Va. 1997) (Family and Medical Leave Act comprehensive scheme precludes a § 1983 action); *Nat’l Coalition for Students with Disabilities v. Allen*, 961 F. Supp. 129 (E.D. Va. 1997) (National Voter Registration Act is not enforceable under § 1983), *rev’d on other grounds*, 152 F.3d 283 (4th Cir. 1998).⁶

19-5.06 Issue or Claim Preclusion Due to Prior Court Action

As a preliminary matter, it should be noted that courts are increasingly using the term “issue preclusion” instead of “collateral estoppel,” and “claim preclusion” instead of “res judicata.” While the change in nomenclature has not necessarily resulted in a precise use of the terms by the courts, generally, issue preclusion refers to issues that were actually litigated and decided against a civil rights plaintiff, while claim preclusion refers to issues that could have been presented to a state court but were not.

In *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S. Ct. 892 (1984), the Supreme Court held that state rules of issue and claim preclusion apply to § 1983 claims. A discharged employee filed a contract claim in state court. After losing in state court, she filed a § 1983 case based on denial of due process. The Court held that, because she could have raised her § 1983 claim in the state court action, she was precluded from raising it in the federal court. Thus, it is necessary to determine whether, under Virginia law, a plaintiff must bring all related claims in one suit or lose their opportunity to do so. (Note: In *Swanson v. Faulkner*, 55 F.3d 956 (4th Cir. 1995), the

⁶ Note that admiralty law is an exception to the general rule that a federal statute must have explicitly created an enforceable right for purposes of § 1983 jurisdiction. Federal maritime common law provides substantive rights and remedies for maritime torts, including negligence, and these rights are enforceable through § 1983, even without allegation of a constitutional or statutory violation. *Glover v. Hryniewicz*, 438 F. Supp. 3d 625 (E.D. Va. 2020) (city could be held vicariously liable for negligence of city police officer in high-speed testing of vessel).

Fourth Circuit held that a state court's determination that it was not precluded from determining an issue ostensibly decided by a federal district court was entitled to full faith and credit even if its determination of preclusive effect was erroneous.

Defendants in their official and individual capacities are not in privity with one another for the purposes of res judicata. *Brooks v. Arthur*, 626 F.3d 194 (4th Cir. 2010) (privity does exist between governmental entity and defendants in their official capacity); see also *Andrews v. Daw*, 201 F.3d 521 (4th Cir. 2000) (res judicata does not require dismissal of individual capacity suit because of dismissal of official capacity suit).

See *O.W. v. Sch. Bd. of the City of Va. Beach*, 656 F. Supp. 3d 596 (E.D. Va. 2023) (holding that collateral estoppel did not apply where City failed to establish necessary elements; more specifically, the ultimate dismissal of the criminal action against juvenile defendant in the Juvenile and Domestic Relations Court could have occurred absent juvenile's unsuccessful constitutional objections during his suppression motion), *appeal dismissed on other grounds*, No. 23-1191 (4th Cir. Jan. 3, 2024); *petition for rehearing and rehearing en banc denied*, (4th Cir. Jan.30, 2024); *Sunrise Corp. v. City of Myrtle Beach*, 420 F.3d 322 (4th Cir. 2005) (state court finding that zoning decision was arbitrary does not have res judicata effect on federal court claim alleging violation of due process and equal protection); *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (no collateral estoppel based on judicial finding of unconstitutionality of school board's diversity admissions policy when that policy not identical to diversity policy currently at issue and legal determination not necessary to decision); *O'Reilly v. Cnty. Bd. of Appeals*, 900 F.2d 789 (4th Cir. 1990) (case remanded for a determination of whether the issue decided in plaintiff's prior adjudication regarding employment discrimination was identical to issue raised in § 1983 claim); *Allen v. Greenville Cnty.*, 712 F.2d 934 (4th Cir. 1983) (state court determination on reason for termination has preclusive effect in later federal action involving same issue); *Hendrick v. Caldwell*, 232 F. Supp. 3d 868 (W.D. Va. 2017) (plaintiffs not barred from challenging constitutionality of interdiction statute when did not have full and fair opportunity in state court to litigate constitutional claims), *rev'd on other grounds sub nom. Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc); *Davison v. Rose*, No. 1:16cv540 (E.D. Va. July 28, 2017) (dismissal with prejudice of state court action challenging ban of parent from school property barred § 1983 action alleging violations of First and Fourteenth Amendments); *Nolan v. Terry*, No. 7:04cv00731 (W.D. Va. Sept. 13, 2006) (state grievance proceedings did not collaterally estop § 1983 action because adverse decision still on appeal); see also *Whitley v. Commonwealth*, 260 Va. 482, 538 S.E.2d 296 (2000) (federal court finding pursuant to § 1983 suit that there was no deliberate indifference to medical needs collaterally estops gross negligence claim).

See *HMK Corp. v. Walsey*, 637 F. Supp. 710 (E.D. Va. 1986), *aff'd*, 828 F.2d 1071 (4th Cir. 1987), for a good discussion of the effect of state court decisions in zoning matters on plaintiff's ability to bring a RICO action. See also *Wool v. Md.-Nat'l Capitol Park*, 664 F. Supp. 225 (D. Md. 1987); *Donlan v. Smith*, 662 F. Supp. 352 (D. Md. 1986), *aff'd*, 820 F.2d 1219 (4th Cir. 1987); *Fate v. Dixon*, 649 F. Supp. 551 (E.D.N.C. 1986).

19-5.06(a) Criminal Proceedings

In *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994), the Supreme Court held that, if a successful § 1983 action would necessarily imply that a plaintiff's conviction was unlawful, then a § 1983 action will not lie. For example, a successful suit for malicious prosecution, false imprisonment, or unreasonable seizure (if convicted of resisting arrest) would necessarily imply those convictions were unlawful. Thus, when a state prisoner seeks damages in a § 1983 suit, a court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. See *Gilliam v. Sealey*, 932 F.3d 216 (4th Cir. 2019) (plaintiff pardoned because of actual innocence). However, a suit alleging an

unreasonable search may be brought because it does not necessarily imply the invalidity of the conviction (because of doctrines such as independent source, inevitable discovery, and harmless error). *See also Griffin v. Baltimore Police Dep't*, 804 F.3d 692 (4th Cir. 2015) (no § 1983 claim can be based on a *Brady* violation).

Prior to *Heck*, the Court had held in *Haring v. Prosise*, 462 U.S. 306, 103 S. Ct. 2368 (1983), that a § 1983 plaintiff who pleads guilty to a state court criminal charge is not precluded from subsequently litigating the validity of the search, because under Virginia law the guilty plea would not have preclusive effect. In *Masterson v. Grant*, No. 1:10cv445 (E.D. Va. Jan. 25, 2011), *aff'd*, No. 11-1437 (4th Cir. Feb. 23, 2012), the federal district court distinguished *Prosise* and held that the § 1983 claim was barred when the guilty plea was for assault of a police officer and judgment in favor of the § 1983 claim of excessive force would necessarily imply the invalidity of the underlying crime.

The Fourth Circuit has held that, in addition to *Heck*'s requirement that the claim necessarily implies the invalidity of the conviction, the claim must be brought by a claimant who is either (i) currently in custody or (ii) no longer in custody because the sentence has been served, but nevertheless could have practicably sought habeas relief while in custody. *Covey v. Assessor of Ohio Cnty.*, 777 F.3d 186 (4th Cir. 2015). The Fourth Circuit also held that a civil rights claim does not necessarily imply the invalidity of a conviction or sentence if (i) the conviction derives from a guilty plea rather than a verdict obtained with unlawfully obtained evidence and (ii) the plaintiff does not plead facts inconsistent with guilt. *Id.* In *Griffin v. Baltimore Police Department*, 804 F.3d 692 (4th Cir. 2015), the court summed up the "narrow" exception to *Heck*: "[a] would-be plaintiff who is no longer in custody may bring a § 1983 claim undermining the validity of a prior conviction only if he lacked access to federal habeas corpus while in custody."

In *Gray v. Farley*, 13 F.3d 142 (4th Cir. 1993), the Fourth Circuit held that a West Virginia state court ruling in a criminal proceeding that the defendant's confession had not been coerced by beatings inflicted by police, collaterally estopped the defendant's subsequent § 1983 claim of excessive force. In *Chambers v. City of Roanoke*, No. 7:02cv00464 (W.D. Va. Jan. 13, 2003), the plaintiff had pled guilty and then filed a § 1983 claim alleging arrest without probable cause and excessive force. The court held a § 1983 claim could not be brought because it would disturb a valid, legal conviction. *But see Snyder v. City of Alexandria*, 870 F. Supp. 672 (E.D. Va. 1994) (unclear under Virginia law whether issues that were litigated in criminal proceeding would be collaterally estopped in § 1983 civil action). The "illegal act" defense is inapplicable in § 1983 claims and thus conviction of the crime for which arrested does not preclude an excessive use of force claim. *Heflin v. Town of Warrenton*, 944 F. Supp. 472 (E.D. Va. 1996); *accord Lee v. City of Roanoke*, No. 95-0453-R (W.D. Va. Oct. 8, 1996).

19-5.06(b) Judicial Estoppel

In *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996), the Fourth Circuit precluded the plaintiff in a § 1983 suit from asserting positions different from statements made in his guilty plea by applying judicial, rather than collateral, estoppel. Unlike collateral estoppel, the court held that judicial estoppel is a matter of federal law and does not require that an issue be actually litigated or that detrimental reliance be proved. Its elements are 1) the taking of an inconsistent factual position in subsequent litigation, 2) the acceptance of the prior inconsistent position by the court, and 3) the intentional misleading of the court to gain unfair advantage. *See also King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192 (4th Cir. 1998) (non-§ 1983 case; judicial estoppel applies to prior inconsistent factual positions made in administrative proceedings). *But see Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 119 S. Ct. 1597 (1999) (a person who applies for and receives Social Security disability benefits is not judicially estopped from claiming in an Americans with Disabilities Act suit that he is able to perform essential functions of job).

19-5.07 Issue or Claim Preclusion Due to Prior Administrative Action

In *University of Tennessee v. Elliott*, 478 U.S. 788, 106 S. Ct. 3220 (1986), the Supreme Court held that, if a state agency acts in a quasi-judicial manner and provides an opportunity for appeal, its fact-findings have preclusive effect. Unlike the preclusive effect of state court proceedings, the preclusive effect of prior administrative action is determined by federal common law.

In *Dionne v. Mayor of Baltimore*, 40 F.3d 677 (4th Cir. 1994), the Fourth Circuit held that an unreviewed state administrative proceeding does not have *claim* preclusive effect on a subsequent § 1983 action arising out of the same transaction or series of transactions, when there is no opportunity to present all possible claims in a § 1983 action in the state proceeding. Possible claims include remedies. Thus, if a § 1983 action offers remedies that are not available in a state proceeding, there can be no claim preclusion. In *Layne v. Campbell County Department of Social Services*, 939 F.2d 217 (4th Cir. 1991), the court held that a grievance panel under the Virginia grievance procedure acted “in a judicial capacity” and, therefore, plaintiff’s claims in federal court were precluded. In *Hall v. Marion School District*, 31 F.3d 183 (4th Cir. 1994), however, the Fourth Circuit held that there was no *issue* preclusion because of a finding that the state agency had actual bias, even though the state agency proceedings were judicial in nature.

19-5.08 Availability of Adequate State Remedy

The existence of a post-deprivation state remedy may preclude a § 1983 action for negligent (*Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981)) or intentional (*Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194 (1984)) deprivation of property without due process. The act must be random and unauthorized; if established state procedure causes the deprivation, a § 1983 suit is actionable despite state remedies. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148 (1982); *see also Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990) (availability of tort action against state employees who took child from custody of father would not cure an otherwise defective due process violation). *But see Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446 (2001) (post-deprivation remedies adequate due process for state statutory scheme allowing withholding of payment under a public works contract). *Parratt’s* reasoning also applies to liberty deprivations but does not apply to allegations of substantive due process violations. *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990).

Zinermon also held that *Parratt* does not apply when the erroneous deprivation was foreseeable and pre-deprivation procedures are practicable. *See Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990) (suit by college professor alleging discharge without due process not barred). *But see Bogart v. Chapell*, 396 F.3d 548 (4th Cir. 2005) (suit alleging deprivation of property, the seizure and euthanization of animals, without procedural due process, barred; action was unauthorized and unforeseeable).

In *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986), a prisoner in the Richmond City Jail alleged that a guard negligently left a pillow on a step, causing him to slip and be injured, thereby depriving him of his “liberty” under the Due Process Clause. The Court held that a claim of mere negligence cannot violate procedural due process even if a state remedy is not available.⁷ While the Court left open the possibility that negligent deprivation of a substantive constitutional right might be treated differently, the Fourth Circuit found that the reasoning of *Daniels* extends beyond the Due Process Clause and held that the negligent denial of access to courts is not actionable under § 1983 as a

⁷ To the extent that *Parratt* held otherwise (i.e., to the extent that *Parratt* held that a negligently caused deprivation of property was actionable under § 1983 as a violation of the Fourteenth Amendment), it was overruled by *Daniels*. “We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.” *Id.* (emphasis in original).

violation of the First Amendment. *Pink v. Lester*, 52 F.3d 73 (4th Cir. 1995); see also *Cherry v. Mayor of Baltimore*, 762 F.3d 366 (4th Cir. 2014) (no Contracts Clause violation when plaintiffs have state law claim for breach of contract).

19-5.09 Abstention

19-5.09(a) *Burford* Abstention

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943), the Supreme Court authorized federal court abstention when federal adjudication would frustrate the purpose of a comprehensive state regulatory scheme. See *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 491 U.S. 350, 109 S. Ct. 2506 (1989); *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269 (4th Cir. 2008) (*Burford* abstention appropriate in vested rights case); *I-77 Props., LLC v. Fairfield Cnty.*, 288 F. App'x 108 (4th Cir. 2008) (federal courts may dismiss claims for equitable relief on *Burford* abstention grounds while staying action on claims for damages); *Pomponio v. Fauquier Cnty.*, 21 F.3d 1319 (4th Cir. 1994) (en banc) (*Burford* abstention is particularly appropriate in § 1983 zoning and land use suits); cf. *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170 (4th Cir. 1983). See *Viridis Development Corp. v. Board of Supervisors of Chesterfield County*, 92 F. Supp. 3d 418 (E.D. Va. 2015), for an extensive discussion of *Burford* abstention in a zoning matter. See also *Martin v. Stewart*, 499 F.3d 360 (4th Cir. 2007) (discussion of *Burford* in non-§ 1983 case); *Johnson v. Collins Entm't Co.*, 199 F.3d 710 (4th Cir. 1999) (expansive discussion of *Burford* in non-§ 1983 case); *Paging, Inc. v. Bd. of Zoning Appeals for Cnty. of Montgomery*, 957 F. Supp. 805 (W.D. Va. 1997) (abstention denied because of interplay of Telecommunications Act and zoning authority).

19-5.09(b) *Pullman* Abstention

In *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941), the Supreme Court recognized a second type of abstention where resolution of a federal constitutional claim might be obviated if the state courts are given the opportunity to interpret ambiguous state law. See also *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070 (1959).

19-5.09(c) *Younger v. Harris*

In *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971), the Supreme Court recognized a third type of abstention in suits raising constitutional challenges to ongoing state criminal investigations. See also *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989); *Simopoulos v. Va. State Bd. of Med.*, 644 F.2d 321 (4th Cir. 1981). The Supreme Court extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions, see *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200 (1975), or that implicate a state's interest in enforcing the orders and judgments of its courts, see *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 107 S. Ct. 1519 (1987). These "exceptional" circumstances define the scope of *Younger* abstention. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 134 S. Ct. 584 (2013). Abstention is not in order simply because a pending state-court proceeding involves the same subject matter. *Id.*; *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 109 S. Ct. 2506 (1989).

Although the Court in *Ohio Civil Rights Commission v. Dayton School*, 477 U.S. 619, 106 S. Ct. 2718 (1986), had stated that *Younger* abstention may apply when administrative action is pending if the administrative proceeding is coercive rather than remedial, the Court in *Sprint Communications* found that dichotomy unnecessary and unhelpful, "given the susceptibility of the designations to manipulation." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 134 S. Ct. 584 (2013).

The key question is whether the state allowed the plaintiff to raise his objections, not whether the state agreed with those objections, *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371 (1979), or whether plaintiff is happy with the results, *Nivens v. Gilchrist*, 444 F.3d. 237 (4th Cir. 2006).

19-5.09(d) Stay v. Dismissal

In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 116 S. Ct. 1712 (1996), the Supreme Court held that federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. Federal courts applying abstention principles in damages actions may only enter a stay.

19-5.10 Governmental Agency Not Under Control of Locality**19-5.10(a) Sheriffs**

In many cases, most often involving sheriff's departments, the county or city is also made a party to the § 1983 suit. Since the locality has no control over the sheriff's policies, the locality should not be liable under § 1983. *But see Good v. Fairfax Cnty.*, No. 1:24cv1350 (E.D. Va. Dec. 19, 2014) (Title VII employment case; county was co-employer of deputy sheriff when county police exercised sufficient control over employee's work conditions). The Supreme Court has said that whether a local official is acting in a state or local capacity is determined through evaluation of state law. *McMillian v. Monroe Cnty.*, 520 U.S. 781, 117 S. Ct. 1734 (1997) (5-4 decision). The Court indicated that a key factor might be the county's liability under state law for the sheriff's tortious actions. The strong evidence that the sheriff in *McMillian* was a state official for law enforcement purposes was not negated by evidence that the sheriff was elected and operated only in the county and that the county paid his salary and provided equipment.

Most Fourth Circuit and district court opinions have found that sheriffs are not acting in a local capacity. *See Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000) (North Carolina law—employment decision); *Grayson v. Peed*, 195 F.3d 692 (4th Cir. 1999); *Strickler v. Waters*, 989 F.2d 1375 (4th Cir. 1993) (Virginia law—jail operation); *Widener v. City of Bristol*, No. 1:13cv53 (W.D. Va. Nov. 12, 2013); *Blankenship v. Warren Cnty.*, 918 F. Supp. 970, *on reconsideration*, 931 F. Supp. 447 (W.D. Va. 1996) (sheriff is state official for employment purposes); *Jennings v. United States*, No. 2:96cv324 (E.D. Va. Oct. 3, 1996) (city sheriff not local government official); *Olivo v. Mapp*, 838 F. Supp. 259 (E.D. Va. 1993) (Virginia law—employment decision), *rev'd on other grounds*, No. 94-2279 (4th Cir. 1995). However, the Fourth Circuit analyzed Maryland law and held that the sheriff was a final policymaking official of the county for purposes of operating the county jail. *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991). A Virginia district court also so held. *May v. Newhart*, 822 F. Supp. 1233 (E.D. Va. 1993) (sheriff's operation of the jail was local, not state function; therefore, locality may be held liable in suit alleging Eighth Amendment violations) (court subsequently granted defendants summary judgment on the merits, No. 3:92cv38, Jan. 21, 1994). The Fourth Circuit stated that it was still unclear under Maryland law whether a sheriff was a state or local actor. *Zepp v. Rehmann*, 79 F.3d 381 (4th Cir. 1996); *see also Briggs v. Waters*, 455 F. Supp. 2d 508 (E.D. Va. 2006) (holding that a sheriff's office or sheriff in his official capacity is a state employee within the meaning of Title VII); *Efird v. Riley*, 342 F. Supp. 2d 413 (M.D.N.C. 2004) (same); *Blankenship v. Warren Cnty.*, 931 F. Supp. 447 (W.D. Va. 1996) (same); *Doud v. Commonwealth*, 282 Va. 317, 717 S.E.2d 124 (2011) (sheriff and employees not state employees for purposes of the Virginia Tort Claims Act).

In *Brown v. Mitchell*, 327 F. Supp. 2d 615 (E.D. Va. 2004), the court found that the city itself had responsibilities regarding jail conditions and thus it was a triable issue of fact whether continued inaction by the city in the face of known overcrowding and unsanitary conditions at the jail caused the death of an inmate from meningitis. In *Sleeper v. City of Richmond*, No. 3:12cv441 (E.D. Va. Aug. 16, 2012), the court followed *Brown* and held the city could be responsible for the physical condition at the jail but could not be liable for decisions by the sheriff as a policymaker for the city.

See also Jenkins v. Weatherholtz, 909 F.2d 105 (4th Cir. 1990); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Carter v. Shires*, No. 92-942-R (W.D. Va. Apr. 11, 1994)

(county not liable for sheriff's alleged unnecessary use of force); *Keathley v. Vitale*, 866 F. Supp. 272 (E.D. Va. 1994) (when a successful action has been brought against a sheriff in his official capacity for sexually discriminatory hiring practices, the state, and not the county, is responsible for paying the damages); *United States v. Gregory*, No. 83-0094-D (W.D. Va. Dec. 2, 1992) (same); *Whited v. Fields*, 581 F. Supp. 1444 (W.D. Va. 1984).

19-5.10(b) Other Constitutional Officers

Constitutional officers are responsible to the voters who elected them but do not depend upon either the Commonwealth or the governing bodies of their counties or cities for their authority. *Doud v. Commonwealth*, 282 Va. 317, 717 S.E.2d 124 (2011); *see also McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987) (registrars are state employees); *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017) (commonwealth's attorneys are arms of the state); *Hussein v. Miller*, 232 F. Supp. 2d 653 (E.D. Va. 2002) (commissioners of the revenue are state, not local, officers and, therefore, immune from suit in their official capacity); *Williams v. McDonald*, 69 F. Supp. 2d 795 (E.D. Va. 1999) (city not liable for employment decisions of commissioner of the revenue); *Carraway v. Hill*, 265 Va. 20, 574 S.E.2d 274 (2003) (treasurer is neither local nor state agency for purposes of the Government Data Collection and Dissemination Practices Act).

19-5.10(c) Proper Party

A related point is that a § 1983 suit should be brought against the city or county itself; it is not proper to sue the police department or the personnel department. *See Draego v. City of Charlottesville*, No. 3:16cv57 (E.D. Va. Nov. 18, 2016) (unconstitutional actions of council attributable to city); *Williams v. Baxter*, 536 F. Supp. 13 (E.D. Tenn. 1981); *Canty v. City of Richmond Police Dep't*, 383 F. Supp. 1396 (E.D. Va. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975).

19-5.11 Defense to a Contribution Claim

A federal district court ruled that, for cases originating in Virginia, § 1983 does not provide a right of contribution. In *Woodson v. City of Richmond*, 2 F. Supp. 3d 804 (E.D. Va. 2014), a sheriff sought contribution from a county in an inmate mistreatment case. The court noted that under Virginia law, "a contribution plaintiff cannot recover from a contribution defendant unless the injured party could have recovered against the contribution defendant." *Id.* (citing *Pierce v. Martin for Benefit of Comm. Union Ins.*, 230 Va. 94, 334 S.E.2d 576 (1985)). The court found that as the statutory scheme of § 1983 was to benefit victims of constitutional torts, it would be inconsistent with that scheme to infer additional rights on behalf of those who caused the rights violation.

19-5.12 Pendent State Claims in § 1983 Cases

28 U.S.C. § 1367 codified, using the term "supplemental jurisdiction," the doctrine of pendent jurisdiction over state law claims. The statute provides that, as long as a federal district court has original jurisdiction over a claim, it will have supplemental jurisdiction over all other claims that are so related that they form part of the same case or controversy. 28 U.S.C. § 1367(a). Supplemental jurisdiction exists if the state and federal claims derive from a common nucleus of operative fact. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966). This standard is not satisfied by superficial factual overlap of the federal and state claims or by the fact that the federal and state claims have some facts in common. *Shavitz v. Guilford Cnty. Bd. of Ed.*, No. 03-1960 (4th Cir. June 7, 2004); *Novak v. Harper*, No. 3:14cv376 (E.D. Va. Sept. 17, 2014).

28 U.S.C. § 1367(c) provides for discretionary rejection of supplemental jurisdiction. The first two grounds—that the state law claim raises novel or complex state law issues or substantially predominates over the federal question—overlap with the *Pullman* and *Burford* abstention doctrines, discussed in section 19-5.09. The third ground, § 1367(c)(3), allows for discretionary dismissal of state law claims when the court has dismissed all claims over which it had original jurisdiction. The Fourth Circuit has indicated

that such dismissals should hinge on the moment when the federal questions are dismissed: the earlier in the case, the more appropriate the dismissal of the state law claims. *Taylor v. Waters*, 81 F.3d 429 (4th Cir. 1996); *Torchinsky v. Siwinski*, 942 F.2d 257 (4th Cir. 1991) (state false arrest and imprisonment claims not entertained in federal court under § 1983 through pendent jurisdiction).

Supplemental jurisdiction includes the power to conduct an on-the-record review of local administrative decisions. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 118 S. Ct. 523 (1997) (denial of demolition permit). The Court noted, however, that, while the deferential nature of a review of state administrative claims did not bar supplemental jurisdiction, the principles of abstention may result in the state claims not being heard.

28 U.S.C. § 1367(d) provides that “[t]he period of limitations for any [state] claim [joined with a claim within federal-court competence] shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.” The tolling provision is facially constitutional. *Jinks v. Richland Cnty.*, 538 U.S. 456, 123 S. Ct. 1667 (2003). The application of the tolling provision to political subdivisions of a state does not implicate state sovereignty concerns. *Id.* The statute does not abrogate a state’s Eleventh Amendment immunity. However, see section 19-5.04(a), and note that the statute of limitations for pendent claims dismissed on Eleventh Amendment grounds is not tolled pursuant to 28 U.S.C. § 1367(d). *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 122 S. Ct. 999 (2002).

In *Artis v. District of Columbia*, 583 U.S. 71, 138 S. Ct. 594 (2018), the Supreme Court resolved a conflict among state supreme courts regarding whether the tolling provision “stops the clock” or a affords grace period, holding that the former was the correct construction; tolling means that the limitations period is suspended (i.e., stops running) while the claim is *sub judice* elsewhere, and then starts running again when the tolling period ends, picking up where it left off. The Court found that “including the 30 days within § 1367(d)’s tolling period accounts for cases in which a federal action is commenced close to the expiration date of the relevant state statute of limitations. In such a case, the added days give the plaintiff breathing space to refile in state court.” *Id.*

In addition, it is an abuse of discretion for a district court to exercise supplemental jurisdiction over a state law claim if that claim was not properly pled and evidence related to it only incidentally arises at trial. *Pinkley, Inc. v. City of Frederick*, 191 F.3d 394 (4th Cir. 1999) (applying Fed. R. Civ. P. 15(b) and 54(c)).

19-6 COMMON § 1983 LITIGATION SUBJECTS

19-6.01 Land Use

Property rights are protected under § 1983. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 92 S. Ct. 1113 (1972). Section 1983 actions brought for constitutional violations in the creation and application of land use regulations often include substantive and procedural due process and equal protection claims. *First Assembly of God v. City of Alexandria*, 739 F.2d 942 (4th Cir. 1984). These claims often arise in the context of alleged “takings” without just compensation and the unlawful denial of use permits. *Front Royal & Warren Cnty. Indus. Park v. Town of Front Royal*, 945 F.2d 760 (4th Cir. 1991); *N. Va. Law Sch., Inc. v. City of Alexandria*, 680 F. Supp. 222 (E.D. Va. 1988).

19-6.01(a) Substantive Due Process

To prove a violation of substantive due process, the plaintiff must prove he had property or a property interest of which the government deprived him, and which deprivation was so beyond the outer limits of legitimate governmental action that no process could cure the deficiency. In *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389 (2003), the Supreme Court stated that government conduct must be egregious or arbitrary to violate substantive due process. Thus, a city council that followed

its neutral referendum procedures regarding a low-income housing complex did not violate the Constitution despite evidence that opposition to the complex was motivated by racial animus. *See also Quinn v. Bd. of Cnty. Comm'rs for Queen Anne's Cnty.*, 862 F.3d 433 (4th Cir. 2017) (no entitlement to receive sewer service and ordinance was a patently legitimate plan to address legitimate planning goals); *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810 (4th Cir. 1995) (action must be so arbitrary and unjustified as to be incapable of avoidance by pre-deprivation protections or post-deprivation remedies). In *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998), the court held the belated installation of sewer lines was a sufficient post-deprivation remedy. Whether a state law regulating land use was violated is not determinative of whether substantive due process rights were violated. *Tri-Cnty. Paving v. Ashe Cnty.*, 281 F.3d 430 (4th Cir. 2002).

19-6.01(b) Procedural Due Process

To prove denial of procedural due process, the plaintiff must prove he had property or a property interest of which the government deprived him without due process of law. To have a property interest in a governmental benefit, the benefit must be an entitlement. *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993); *see also Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810 (4th Cir. 1995) (no property interest in special zoning designation because approval was discretionary with the county board); *Gardner v. City of Baltimore Mayor*, 969 F.2d 63 (4th Cir. 1992) (developer did not have property interest in public works agreement); *cf. Scott v. Greenville Cnty.*, 716 F.2d 1409 (4th Cir. 1983) (nondiscretionary entitlement to building permit created protected property interest). Even if a property interest exists, there is no constitutional violation if constitutionally adequate pre- and post-deprivation processes exist. *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006). In *Lee v. City of Norfolk*, 281 Va. 423, 706 S.E.2d 330 (2011), the Virginia Supreme Court stated that “[i]t is possible for a state agency to fail to adhere strictly to its regulations without violating the constitutional right to due process.” Citing *Mullane v. Central Hanover Bank Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950), the court held that notice is constitutionally adequate if it appraises interested parties of the pendency of the action and affords them an opportunity to present their objections. The notice must reasonably convey the required information and provide a reasonable time for those interested to make their appearance. *See also Bergano, D.D.S., P.C. v. City of Va. Beach*, 241 F. Supp. 3d 690 (E.D. Va. 2017) (city violated procedural due process when it deprived the plaintiff of relocation assistance pursuant to Va. Code § 25.1-400 et seq.).

19-6.01(c) Equal Protection

In *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389 (2003), the Supreme Court found that a city council that followed its existing neutral referendum procedures regarding a low-income housing complex did not violate the Equal Protection Clause despite evidence that opposition to the complex was motivated by racial animus. The Court noted that a locality's discretionary enactment of a new measure, however, would be subject to scrutiny of its intent. In *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995), a developer alleged unconstitutional discrimination under the Equal Protection Clause in a zoning matter based on ethnic and non-county residency classifications. The Fourth Circuit held that the Equal Protection Clause analysis of the ethnic discrimination claim required strict scrutiny, but the allegation of residency discrimination could be justified by a rational basis. Moreover, proof of disparate treatment, even if illegal or arbitrary under state law, does not establish a *prima facie* Equal Protection Clause claim absent evidence of discriminatory intent. *See also Tri-Cnty. Paving v. Ashe Cnty.*, 281 F.3d 430 (4th Cir. 2002) (no equal protection violation); *Front Royal Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998). In *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000), the Supreme Court held that the Equal Protection Clause can protect a “class of one” where the plaintiff did not allege membership in a class or group. In this zoning case concerning an easement to connect to the locality's water supply, the Court held a plaintiff can state a case by alleging

substantially different treatment from others similarly situated, for which difference there was no rational basis. See also *Van Der Linde Hous., Inc. v. Rivanna Solid Waste Auth.*, 507 F.3d 290 (4th Cir. 2007) (no equal protection claim when classification nearly perfectly tailored to effectuate legitimate public purpose for which the authority exists); *McWaters v. Cosby*, No. 02-1430 (4th Cir. Dec. 22, 2002) (unpubl.) (no equal protection claim when conceivable rational bases for action; subjective motivation irrelevant). A former public employee's claim of retaliation in response to her complaints is not cognizable under the Equal Protection Clause, even if the complaints regarded unconstitutional sex discrimination and harassment. *Wilcox v. Lyons*, 970 F.3d 452 (4th Cir. 2020).

19-6.01(d) Regulatory Takings

The general theory is that a governmental regulation must deny a landowner the economically viable use of his land to be considered a taking. See *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522 (1992). However, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), the Court held that compensation is not required, even if a regulation deprives a landowner of all use of his property, if the regulation prohibits a use which was not "part of [the] title to begin with." The Court then remanded the case to the South Carolina Supreme Court to determine if the common law of nuisance and property prohibited the owner's intended uses. In *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998), the appellate court held that, while a partial regulatory taking may be compensable, the failure to extend sewer lines was not such a taking.

In *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), the Court required an individualized determination of whether there was a "rough proportionality" in extent and nature between local government exactions and the impact of the proposed development. It found no such proportionality for a condition requiring dedication of an easement for a public pathway in exchange for a permit for commercial expansion. See also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 133 S. Ct. 2586 (2013); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987).

A landowner seeking damages under § 1983 for a taking without just compensation is entitled to a jury trial on the issue of whether the owner was deprived of all economically viable use of the land and whether the government's denial of the development bore a reasonable relation to the (conceded) legitimate public interests. *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999).

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), the Supreme Court ruled that a takings claim under § 1983 is not ripe until the claimant has sought compensation through state procedures and obtained a final decision regarding the application of local ordinances and regulations to his property. In *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491 (2005), the Court subsequently held that collateral estoppel and res judicata prevent relitigating state takings cases in federal court under Fifth Amendment. The Court found that these two cases placed the takings plaintiff in a Catch 22: he could not go to federal court without going to state court first, but if he went to state court and lost, his claim would be barred in federal court. Accordingly, the Court overruled *Williamson* and held that a property owner has an actionable Fifth Amendment takings claim when the government takes his property without just compensation. *Knick v. Twp. of Scott*, 588 U.S. ___, 139 S. Ct. 2162 (2019). The Court noted that as a practical matter this should not mean that government action or regulation may not proceed in the absence of contemporaneous compensation. Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate. *Id.*

See section 1-17 of Chapter 1, Planning and Zoning, for a fuller discussion of regulatory takings.

19-6.01(e) Abstention

In 1976, the Supreme Court stated that abstention is the exception rather than the rule. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236 (1976). Federal courts in Virginia, however, have consistently utilized the *Pullman* and *Burford* doctrines in § 1983 land use actions. In *Pomponio v. Fauquier County*, 21 F.3d 1319 (4th Cir. 1994) (en banc), the Fourth Circuit held that *Burford* abstention is particularly appropriate in § 1983 zoning and land use suits. See also *Front Royal & Warren Cnty. Indus. Park v. Town of Front Royal*, 945 F.2d 760 (4th Cir. 1991) (where the abstention argument was raised not by the defendants but by local governments amicus curiae); *Donohoe Constr. Co. v. Montgomery Cnty. Council*, 567 F.2d 603 (4th Cir. 1977) (no abstention when state law questions are settled); section 19-5.09; cf. *Neufeld v. City of Baltimore*, 964 F.2d 347 (4th Cir. 1992) (*Burford* abstention not appropriate when challenge to zoning ordinance raises federal preemption question).

19-6.02 Police**19-6.02(a) Search and Seizure**

Where police officers act unconstitutionally in making searches or seizures, a Fourth Amendment § 1983 claim may be made. *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411 (1980).

At minimum, the Fourth Amendment protects against physical intrusions onto private property. Thus, the placement by police of a GPS tracking device on a car was a Fourth Amendment search because it was a physical intrusion on private property for the purpose of gathering information. *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945 (2012). Two concurring opinions comprising five justices, however, suggested that even if a physical invasion had not occurred, such a digital gathering of information would have been a Fourth Amendment search. The Court subsequently held, in *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206 (2018), that such digital information is protected by the Fourth Amendment, finding that the warrantless collection from a phone provider of cell phone/cell tower linkage information over an extended period of time was a search that invaded a reasonable expectation in the privacy of physical movements. The Court rejected the argument that the privacy expectation was negated because the information was voluntarily turned over to a third party. *Carpenter* negates the Fourth Circuit's holding in *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (en banc). See also *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330 (2021) (en banc) (applying *Carpenter* and holding aerial surveillance program and its collection of location data violated reasonable expectation of privacy and constituted unconstitutional search).

The government also conducts a search when it attaches a device to a person's body without consent for the purpose of tracking that individual's movements. *Grady v. North Carolina*, 575 U.S. 306, 135 S. Ct. 1368 (2015) (per curiam) (left unaddressed was whether the state's program of monitoring sex offenders was a reasonable search). Similarly, the presence of a drug-sniffing dog on a residential front porch is a physical intrusion and, thus, a search. *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013).

An objectively reasonable mistake of law that conduct was illegal does not render a subsequent search unconstitutional. *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530 (2014).

Probable cause is required for a mental health detention. *Gooden v. Howard Cnty.*, 954 F.2d 960 (4th Cir. 1992) (en banc) (general right to be free from seizure unless probable cause exists is clearly established in the mental health seizure context); cf. *Parker v. Austin*, 105 F. Supp. 3d 592 (W.D. Va. 2015) (complaint alleging Fourth and Fourteenth Amendment violations for emergency removal and detention of children dismissed; absent probable cause, officials can still make a seizure if there is a "reasonable suspicion" that a child's life or limb is in immediate jeopardy). While there is an admitted

lack of clarity as to what constitutes probable cause in social service situations, a reasonable fear that an individual might be a danger to himself or others based on reports and observations appears to be sufficient. See *Raub v. Campbell*, 785 F.3d 876 (4th Cir. 2015); *Barrett v. Pae Gov't Servs., Inc.*, 975 F.3d 416 (4th Cir. 2020). Thus, qualified immunity is usually a successful defense. See *Estate of Armstrong v. Vill. of Pinehurst*, 810 F.3d 892 (4th Cir.) (excessive force (taser) used in mental health seizure, but qualified immunity granted). But see *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159 (4th Cir. 2016) (no qualified immunity at motion to dismiss stage when complaint alleges a mental health detainee was unconstitutionally detained when he exhibited no signs of mental illness and made no threats to harm himself or others); *Burruss v. Riley*, 192 F. Supp. 3d 655 (W.D. Va. 2016) (arrestee's allegation that officers detained him for mental health evaluation without probable cause was sufficient to plead that his constitutional rights were violated, as required to overcome assertion of qualified immunity).

19-6.02(a)(1) Premises

See *Collins v. Virginia*, 584 U.S. 586, 138 S. Ct. 1663 (2018) (warrantless automobile exception does not apply to vehicles located in a home's curtilage). Regarding consent to police searches of premises, compare *Fernandez v. California*, 571 U.S. 292, 134 S. Ct. 1126 (2014) (if police have objectively reasonable grounds for removing objecting tenant, his consent is not needed for a search) with *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006) (one occupant may not give effective consent to search shared premises when a co-tenant is present and refuses the search). Anticipatory warrants—not executable until a condition precedent is achieved—are not categorically unconstitutional. *United States v. Grubbs*, 547 U.S. 90, 126 S. Ct. 1494 (2006). However, “all persons” warrants are constitutional only if there is probable cause that all persons on the premises would be involved in criminal activity. *Owens v. Lott*, 372 F.3d 267 (4th Cir. 2004).

Regarding warrantless entries, see *Caniglia v. Strom*, 593 U.S. ___, 141 S. Ct. 1596 (2021) (no “community caretaking” exception to enter homes without warrant; warrantless entry and seizure of firearms unlawful where husband consented to go to psychiatric hospital and no evidence of crime or exigent circumstances present); *United States v. Hewitt*, No. 7:21-cr-00003 (W.D. Va. June 14, 2021) (“community caretaking” exception not applicable to warrantless search of hotel room when there was no indication that property or persons in room were in need of protection); *Ryburn v. Huff*, 565 U.S. 469, 132 S. Ct. 987 (2012) (per curiam) (even lawful actions and actions that are mundane in isolation can lead a reasonable officer to believe that there is a threat of imminent harm justifying a warrantless entry); *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849 (2011) (disapproving of *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008)) (unless police create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable); *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943 (2006) (warrantless entry into home justified if objectively reasonable basis for believing occupant is seriously injured or imminently threatened; subjective motivation of officer for entering is irrelevant); *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038 (2001) (thermal imaging of residence is a search and presumptively unreasonable without warrant); *Mora v. City of Gaithersburg*, 519 F.3d 216 (4th Cir. 2008) (warrantless, preventive home search during emergency was constitutional because law enforcement entitled to take any action necessary to defuse grave threat and true emergency).

Regarding the execution of warrants, see *Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 127 S. Ct. 1989 (2007) (per curiam) (permissible for deputies executing warrant in home to order residents, who were a different race than suspects, out of bed and to stand for a few minutes before allowing them to dress); *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465 (2005) (handcuffing occupant during warrant search of premises does not violate Fourth Amendment); *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521 (2003) (officers' fifteen- to twenty-second wait before forcible entry pursuant to warrant satisfied Fourth

Amendment); *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692 (1999) (media accompaniment of officers in execution of warrant unconstitutional); *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914 (1995) (knock and announce required in most cases).

Significantly, laws passed in 2020 and 2021 outlawed “no-knock” search warrants in Virginia. Va. Code § 19.2-56(B). In the execution of a search warrant of a place of abode, law enforcement officers must be identifiable as uniformed law enforcement officers and provide “audible notice” of their authority and purpose prior to the execution of the warrant. *Id.* Moreover, search warrants may be executed only during the daytime (between 8:00 a.m. and 5:00 p.m.) unless a judge or magistrate, for good cause or by particularized facts in an affidavit, authorizes the execution of the warrant at another time. *Id.*

Regarding the detention of a homeowner or resident while a search warrant is being obtained, compare *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946 (2001) (homeowner could be temporarily restrained from entering home until warrant was obtained) with *United States v. Watson*, 703 F.3d 684 (4th Cir. 2013) (three-hour detention of person not suspected of criminal activity while search warrant sought not reasonable seizure); see also *Trull v. Smolka*, No. 3:08cv460-HEH (E.D. Va. Jan. 14, 2009) (officers entered home with wife’s consent and lawfully entered the bathroom occupied by husband as part of their investigation; court held that any restriction of husband’s movement after exiting bathroom was reasonable and justified pending outcome of investigation), *aff’d*, No. 09-1172 (4th Cir. Feb. 18, 2011).

See also *Ingram v. Commonwealth*, 74 Va. App. 59, 866 S.E.2d 55 (2021) (no Fourth Amendment violation when sheriff’s deputy looked in windows after approaching house via path that visitors would be expected to take to seek out residents); *United States v. Bosyk*, 933 F.3d 319 (4th Cir. 2019) (single click on a URL could justify a search warrant of home when link was on a website that plainly indicated it would show child pornography); *Altman v. City of High Point*, 330 F.3d 194 (4th Cir. 2003) (dogs are property subject to Fourth Amendment protections); *Rogers v. Pendleton*, 249 F.3d 279 (4th Cir. 2001) (probable cause, not reasonable suspicion, is standard for searches of curtilage); *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (search warrant may not be used to facilitate a private individual’s search for items not listed in a warrant).

19-6.02(a)(2) Traffic

Substantive United States Supreme Court cases include: *Kansas v. Glover*, 589 U.S. ___, 140 S. Ct. 1183 (2020) (traffic stop is constitutional when police officer learns registered owner’s license is revoked, even if driver turns out to be person other than owner); *Byrd v. United States*, 584 U.S. 395, 138 S. Ct. 1518 (2018) (unauthorized drivers of rental cars may have a reasonable expectation of privacy in the car); *Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609 (2015) (police stop that exceeds time needed to handle matter for which is stop made is an unreasonable seizure absent further reasonable suspicion); *Prado Navarette v. California*, 572 U.S. 393, 134 S. Ct. 1683 (2014) (traffic stop valid based on anonymous tip); *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400 (2007) (passenger in a car during traffic stop is seized for Fourth Amendment purposes and may challenge the stop’s constitutionality); *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834 (2005) (suspicionless dog sniff at a concededly lawful traffic stop does not violate Fourth Amendment); *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 124 S. Ct. 2451 (2004) (statute providing for arrest of person subject to a *Terry* investigatory stop who refuses to identify himself is constitutional); *Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795 (2003) (probable cause existed for arrest of passenger in car containing illegal drugs); *United States v. Drayton*, 536 U.S. 194, 122 S. Ct. 2105 (2002) (Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches); *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536 (2001) (Fourth Amendment does not forbid warrantless arrest for minor criminal offense

punishable only by a fine); *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297 (1999) (officers with probable cause to conduct a warrantless search of vehicle may search all containers in vehicle capable of concealing object of search regardless of ownership); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998) (Fourteenth, not Fourth, Amendment analysis applied because high-speed chase not a search or seizure).

See *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447 (2000) (highway checkpoints for purpose of drug interdiction unconstitutional); cf. *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885 (2004) (highway checkpoint for the purpose of gathering information about a recent accident constitutional, distinguishing *Edmond*); *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872 (2001) (distinguishing *Edmond* and holding roadblock for purpose of investigating a specific murder not unconstitutional).

See also *United States v. Feliciano*, 974 F.3d 519 (4th Cir. 2020) (no reasonable suspicion to stop defendant merely for driving commercial vehicle on parkway that requires commercial vehicles to possess permit; nor was the stop a valid “administrative inspection”); *United States v. Buzzard*, 1 F.4th 198 (4th Cir. 2021) (legitimate traffic stop of car for defective brake light was not transformed into investigation when officer asked driver and passenger whether there was anything illegal in vehicle because question related to officer safety); *United States v. Hill*, 852 F.3d 377 (4th Cir. 2017) (length of traffic stop; follows *Rodriguez*, 575 U.S. 348, 135 S. Ct. 1609 (2015)); *Santos v. Frederick Cnty. Bd. of Comm’rs*, 725 F.3d 451 (4th Cir. 2013) (local and state law enforcement officers may not detain person based on a civil immigration warrant); *Figg v. Schroeder*, 312 F.3d 625 (4th Cir. 2002) (follows *Atwater*; no Fourth Amendment violation for detention without arrest when probable cause existed to arrest for minor offenses); *Norwood v. Bain*, 166 F.3d 243 (4th Cir. 1999) (en banc) (per curiam) (checkpoint stop and videotaping of participants at a rally does not violate the Fourth Amendment; however, the search of saddlebags and unworn clothing does); *Sturges v. Matthews*, 53 F.3d 659 (4th Cir. 1995) (accidental collision with police car’s extended bumper in high speed chase not a “seizure”).

19-6.02(a)(3) Search Incident to Arrest

See *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473 (2014) (cellphones may not be searched incident to an arrest); *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009) (warrantless search of passenger compartment of vehicle only justified as incident to arrest if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest); *Thornton v. United States*, 541 U.S. 615, 124 S. Ct. 2127 (2004) (vehicle may be searched incident to arrest even if arrestee is out of the vehicle before law enforcement official makes contact); *United States v. Casper*, 34 F. Supp. 3d 617 (E.D. Va. 2014) (*Gant* applies to non-vehicular situations such that police cannot search coat in room incident to arrest when handcuffed suspect is outside room; split in circuits noted); *United States v. Ferebee*, 957 F.3d 406 (4th Cir. 2020) (search of backpack unlawful where arrestee was unsecured and “could walk around somewhat freely”); *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021) (search of backpack unlawful where search happened after suspect was handcuffed and could not reach it; search of vehicle unlawful, even though suspect fled and large amount of cash was found in his pockets, because this may have provided *articulable suspicion* that evidence of a crime might be found in the car but not the required *probable cause*).

19-6.02(b) Excessive Force During Arrest

In *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989), the Supreme Court held that § 1983 claims arising from a police officer’s stop or seizure, including the alleged use of excessive force in making an arrest, implicate the Fourth Amendment. A court should not inquire into an officer’s motives, intentions, or tendencies. Rather, to pass constitutional muster, the force used must be objectively reasonable in light of the facts and

circumstances confronting the officer at the time. Neither the good- nor bad-faith intentions of the officer are relevant. Instead, the court should evaluate the use of force “from the perspective of a reasonable officer on the scene.” *Id.* Three factors to be considered are (1) the severity of the crime, (2) the threat to safety, and (3) any resistance to arrest. *See also Kisela v. Hughes*, 584 U.S. 100, 138 S. Ct. 1148 (2018) (per curiam) (Court need not decide whether Fourth Amendment violation occurred when officer used deadly force because officer was “at least” entitled to qualified immunity); *Estate of Armstrong v. Vill. of Pinehurst*, 810 F.3d 892 (4th Cir. 2016) (excessive force [taser] used in mental health seizure, but qualified immunity granted); *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002); *Simpson v. Va.*, No. 1:16cv162 (E.D. Va. Sept. 27, 2016) (known mental illness must be considered in use of force, and, depending on the circumstances, it may render the force used either more or less reasonable); *Cromartie v. Billings*, 298 Va. 284, 837 S.E.2d 247 (2020) (officer’s use of force at traffic stop objectively unreasonable); *Southworth v. Jones*, 529 F. Supp. 3d 454 (E.D. Va. 2021) (severity of crime (“lunchbox snatching”) and other factors weighed against finding that force was reasonable).

The Supreme Court held in *Torres v. Madrid*, 592 U.S. ___, 141 S. Ct. 989 (2021), that the “application of physical force to the body of a person with intent to restrain is a seizure” within the meaning of the Fourth Amendment, “even if the force does not succeed in subduing the person.” *See also Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 137 S. Ct. 1539 (2017) (if force used was not excessive under the circumstances, fact that officer violated the Fourth Amendment in some other way in the course of events leading up to the seizure, e.g., unconstitutional warrantless entry, is immaterial); *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305 (2015) (per curiam); *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012 (2014); *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769 (2007) (deadly force may be used to stop fleeing motorist to end endangerment to innocent bystanders or fellow police officers); *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985) (deadly force analyzed). In *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994), the Fourth Circuit held that the force is to be evaluated in light of the totality of the circumstances. Thus, the escalating force used in the detention of a suspect over a lost five dollar bill, which resulted in a permanent disability, was to be evaluated in the context of all the circumstances and not with regard to the provocation for each distinct act of force. *Cf. Yates v. Terry*, 817 F.3d 877 (4th Cir. 2016) (not objectively reasonable in light of the totality of the circumstances to tase an individual for not having a driver’s license and playing music loudly); *Smith v. Ray*, 781 F.3d 95 (4th Cir. 2015) (objective reasonableness of force to be viewed in full context, not segmented into sequence of events); *Brockington v. Boykins*, 637 F.3d 503 (4th Cir. 2011) (while a totality of circumstances analysis still remains good law, if events occur in a series they may be analyzed as such); *Harris v. Pittman*, 927 F.3d 266 (4th Cir. 2019) and *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005) (both holding that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated). In considering the totality of the circumstances, courts are not to include the risk posed to third parties by the official use of force in determining whether that use of force was excessive as against a particular § 1983 plaintiff. *Howerton v. Fletcher*, 213 F.3d 171 (4th Cir. 2000).

In *Franklin v. City of Charlotte*, 64 F.4th 519 (4th Cir. 2023), the Fourth Circuit considered another excessive force situation. In *Franklin*, after demanding to see the victim’s hands, police officers then ordered him to drop his gun, whereupon the victim pulled a firearm out of his jacket, held it from the top of the barrel, pointing it at no one, and was then shot and killed. The Fourth Circuit held that the officers were not entitled to qualified immunity because, when the victim was shot and killed in 2019, it was well established in the Fourth Circuit that carrying a weapon, without more, did not justify an officer’s decision to shoot. *See also Putman v. Harris*, 66 F.4th 181 (4th Cir. 2023) (qualified immunity granted where dog bite on a criminal suspect who officers reasonably believed may have been armed, was noncompliant with the officers’ commands to turn

around, was argumentative, and was waving his hands around did not constitute excessive force under the Fourth Amendment); *Wilson v. Prince George's Cnty.*, 893 F.3d 213 (4th Cir. 2018) (use of deadly force when plaintiff was only threatening to harm himself with a knife was not objectively reasonable despite officer's knowledge that plaintiff had assaulted a third party earlier); *Holloman v. Markowski*, No. 15-1878 (4th Cir. Oct. 7, 2016) (no established law regarding whether use of lethal force was objectively unreasonable and therefore excessive when used against an unarmed but actively resisting suspect who had destroyed property and attacked an officer); *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011) (en banc) (objectively unreasonable to mistake a firearm for a taser, and use of firearm was clearly excessive force, therefore, no qualified immunity); *Abney v. Coe*, 493 F.3d 412 (4th Cir. 2007) (decision to terminate high-speed chase and force used reasonable because other motorists at substantial risk of serious harm; consistent with U.S. Supreme Court decision in *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769 (2007)); *Newsome v. Watson*, No. 2:14cv94 (E.D. Va. Aug. 22, 2014) (excessive force claim stated when deadly force used to stop a fleeing, unarmed, and non-threatening arrestee); *Swann v. City of Richmond*, 498 F. Supp. 2d 847 (E.D. Va. 2007) (detective's use of deadly force was objectively reasonable and did not give rise to § 1983 excessive force claim), *aff'd*, No. 07-1981 (4th Cir. Jan. 27, 2009); *Estate of Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020), *as amended* (June 10, 2020) ("By shooting an incapacitated, injured person who was not moving . . . the police officers crossed a 'bright line' and can be held liable.")

19-6.02(c) Excessive Force After Arrest

Pretrial detainees are protected both by the Fifth Amendment's protection against self-incrimination and by the Fourteenth Amendment's substantive due process protection against "excessive force that amounts to punishment" before trial. *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989); *Orem v. Rephann*, 523 F.3d 442 (4th Cir. 2008) (summary judgment denied in allegation of excessive force with taser). Negating a line of Fourth Circuit case law, the Supreme Court held that in proving that an officer's intended actions were excessive, the plaintiff need only show that the use of force was objectively unreasonable based on the perspective and the knowledge of the defendant officer. The defendant's state of mind, whether he intended or was recklessly indifferent to the excessiveness of the force, is not a required element. *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466 (2015). The Court expressly did not answer whether force *recklessly* applied could impose liability as the officers admitted their actions were purposeful; the issue was whether there was any subjective intent that the force be excessive. Non-exclusive considerations that may bear on the reasonableness of the force used include the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. The Court also noted but declined to address that its *Kingsley* decision "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners."

Proof of de minimis injury does not in and of itself prove that de minimis force has been applied. *Wilkins v. Gaddy*, 559 U.S. 34, 130 S. Ct. 1175 (2010); see section 19-6.03(d). The Supreme Court has not decided whether a pretrial detainee can bring a Fourth Amendment excessive force claim, *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989), but the Fourth Circuit has held that such claims are only addressable under the Fourteenth Amendment, *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (en banc).

Coerced statements do not violate the Fifth Amendment's constitutional protection against self-incrimination unless the statements are used in a criminal case. However, this "do[es]" not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means

that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry." *Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994 (2003). Whether the coercion violated due process and gives rise to § 1983 liability is evaluated under the "shock the conscience" standard. *Id.*

In *Lombardo v. City of St. Louis*, 594 U.S. ___, 141 S. Ct. 2239 (2021), the Supreme Court noted:

In assessing a claim of excessive force, courts ask whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them. A court (judge or jury) cannot apply this standard mechanically. Rather, the inquiry requires careful attention to the facts and circumstances of each particular case. Those circumstances include the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Id. (internal quotations and citations omitted).

19-6.02(d) False Arrest & Malicious Prosecution

There is a clearly established right not to be arrested without probable cause. *Pritchett v. Alford*, 973 F.2d 307 (4th Cir. 1992). The determination of probable cause depends on

[w]hether, at the moment the arrest was made, . . . the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person arrested] had committed or was committing an offense.

Beck v. Ohio, 379 U.S. 89, 85 S. Ct. 223 (1964). The stated basis for the arrest, however, need not be the criminal offense as to which the known facts provide probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 125 S. Ct. 588 (2004) (irrelevant to arrest's validity that stated cause for arrest (violating state's Privacy Act) was not closely related to the offense for which probable cause for an arrest existed (impersonating an officer)). In *Cromartie v. Billings*, 298 Va. 284, 837 S.E.2d 504 (2020), the Virginia Supreme Court held that there was no probable cause for an arrest for obstruction of justice when the arrestee's conduct merely made the officer's task "more difficult" rather than "impeding or preventing" his getting information at a traffic stop. See also *McKenna v. Police Chief, Bristol Va. City Police Dep't*, No. 1:22-CV-00002 (W.D. Va. Apr. 18, 2023) (granting summary judgment to plaintiff; no probable cause to arrest for obstructing justice for failing to provide officers with identifying information or for failing to cooperate fully), *appeal filed*, No. 23-1573 (4th Cir. May 26, 2023); *Hupp v. Cook*, 931 F.3d 307 (4th Cir. 2019) (no qualified immunity at summary judgment stage for false arrest or malicious prosecution); *Bonnell v. Beach*, 408 F. Supp. 3d 733 (E.D. Va. 2019) (no qualified immunity at summary judgment stage where jury could reasonably find the officer procured arrest by intentionally making misrepresentations and/or omissions of material facts in criminal complaint).

The fact that a neutral magistrate issued a warrant is the clearest indication that officers acted in a reasonable manner. *Messerschmidt v. Millender*, 565 U.S. 535, 132 S. Ct. 1235 (2012); see also *Porterfield v. Lott*, 156 F.3d 563 (4th Cir. 1998) (no Fourth Amendment violation if arrest made pursuant to facially valid warrant); *Wilkes v. Young*, 28 F.3d 1362 (4th Cir. 1994) (no Fourth Amendment violation because alleged false information in affidavit to secure arrest not necessary to finding of probable cause).

However, a warrant will not shield an officer if it was objectively unreasonable for the officer to conclude there was probable cause for the arrest. *Graham v. Gagnon*, 831 F.3d 176 (4th Cir. 2016). In *Humbert v. Mayor of Baltimore City*, 866 F.3d 546 (4th Cir. 2017), the Fourth Circuit held that probable cause did not exist for an arrest warrant even though the victim had identified the plaintiff from a photo array, when the officer omitted from the warrant application the fact that he had previously shown the victim a photograph of the plaintiff indicating he was the assailant, and the victim stated she could not positively identify the plaintiff without seeing or hearing him. See also *Thompson v. Prince William Cnty.*, 753 F.2d 363 (4th Cir. 1985) (arresting officer may be liable where the wrong person is arrested on a valid warrant and the officer should have known that the suspect arrested was not the person named in the warrant).

Even if the determination of probable cause was wrong as a matter of law, officers may have probable cause to arrest based on "reasonable mistakes of law." *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015) (quoting *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530 (2014)).

If probable cause exists, the Fourth Amendment does not require any further judicial oversight or investigation. *Safar v. Tingle*, 859 F.3d 241 (4th Cir. 2017) (qualified immunity because not clearly established that officer had duty to revoke arrest warrant that was issued based on information that officer subsequently learned was erroneous); *Brooks v. City of Winston-Salem*, 85 F.3d 178 (4th Cir. 1996) (no Fourth Amendment protection for failure to dismiss charges); *Taylor v. Waters*, 81 F.3d 429 (4th Cir. 1996) (no Fourth Amendment protection for police failing to promptly turn over exculpatory material to prosecutor).

While the Fourth Amendment is not implicated if probable cause for an arrest exists, there may still be a First Amendment violation if the arrest, albeit supported by probable cause, was made in retaliation for protected speech. *Lozman v. City of Riviera Beach*, 585 U.S. 87, 138 S. Ct. 1945 (2018). In *Lozman*, the plaintiff disrupted a city council meeting and was forcibly removed and arrested. While conceding probable cause existed for his arrest, the plaintiff claimed that the arrest was in retaliation for his prior protected speech regarding a lawsuit against the city and criticism of public officials. The Court held that for the claim to be viable, the plaintiff must prove the existence and enforcement of an official policy motivated by retaliation. The Court distinguished the facts of *Lozman* from when allegedly protected speech is made in connection with, or contemporaneously to, criminal activity. Subsequently, the Court held that if probable cause for arrest exists, there is no First Amendment claim except under the narrow circumstances when a plaintiff can provide objective evidence that he was arrested when otherwise similarly situated individuals engaged in the same sort of protected speech had not been. See also *Snoeyenbos v. Curtis*, 439 F. Supp. 3d 719 (E.D. Va. 2020) (even though probable cause existed to issue traffic citation for reckless driving, triable issue of material fact existed regarding whether deputy sheriff's conduct in attempting to induce fellow deputy to issue the citation in retaliation for plaintiff's negative social media postings about deputy sheriff, caused more than de minimus inconvenience to plaintiff's exercise of First Amendment rights).

In *Manuel v. Joliet*, 580 U.S. 357, 137 S. Ct. 911 (2017) (judicial probable cause determination based on criminal complaint that was based on fabricated facts asserted by police department), the Supreme Court held there is a right under the Fourth Amendment to be free from pretrial detention absent probable cause for arrest. The Court stated, "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 remanded the case to the Seventh Circuit to determine the elements of such an action. The Fourth Circuit had already determined that such a Fourth Amendment claim existed and adopted the elements of a state law malicious prosecution claim. The plaintiff

must demonstrate both an unreasonable seizure and a favorable termination of the criminal proceeding flowing from the seizure. *Durham v. Horner*, 690 F.3d 183 (4th Cir. 2012); *Humbert v. Mayor of Baltimore City*, 866 F.3d 546 (4th Cir. 2017) (malicious prosecution claims are properly construed as Fourth Amendment claims for unreasonable seizure that incorporate certain elements of the common law malicious prosecution tort). Addressing a circuit split, the Supreme Court held that the “favorable termination” element is satisfied so long as the plaintiff’s prosecution ended without a conviction. *Thompson v. Clark*, 596 U.S. ___, 142 S. Ct. 1332 (2022). It is not necessary to demonstrate some affirmative indication of innocence. *Id.*

Constitutional torts, like their common law brethren, require a demonstration of both but-for and proximate causation. *Massey v. Ojaniit*, 759 F.3d 343 (4th Cir. 2014) (accepting allegation of fabrication of evidence as true, no causal connection between fabrication and conviction). An officer-prosecutor conspiracy does not alter the rule that a prosecutor’s independent decision to seek an indictment breaks the causal chain, rendering an officer immune from a malicious prosecution claim unless the officer has misled or unduly pressured the prosecutor. *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012); see also *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074 (2011) (pretextual use of warrant does not invalidate otherwise justifiable issuance); cf. *Gilliam v. Sealey*, 932 F.3d 216 (4th Cir. 2019) (no qualified immunity at summary judgment stage because clearly established that an individual has a constitutional right not to be deprived of liberty as a result of the intentional, bad-faith withholding of evidence by an investigating officer); *Willis v. Blevins*, 966 F. Supp. 2d 646 (E.D. Va. 2013) (no qualified immunity at Rule 12(b)(6) stage because plaintiff sufficiently alleged that officer conspired with prosecutor to fabricate evidence); *Hash v. Close*, 968 F. Supp. 2d 825 (W.D. Va. 2013) (constitutional violation of due process rights sufficiently stated when plaintiff has alleged bad faith on the part of the police investigators and the existence of a *Brady* violation).

In *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807 (1994), the Supreme Court held that there is no Fourteenth Amendment substantive due process liberty interest to be free from criminal prosecution except upon probable cause. See also *Safar v. Tingle*, 859 F.3d 241 (4th Cir. 2017) (holding that the Fourth Amendment, not the Fourteenth, is the only actionable ground for government officials’ pretrial “missteps”).

19-6.03 Operation of Jails

Where the sheriff is responsible for the operation of the jail, the defense should be made, as noted earlier, that the county or city is not responsible for jail operations, even if salary supplements are provided. See cases cited in section [19-5.10\(a\)](#).

An Eighth Amendment cruel and unusual punishment analysis requires an inquiry into (1) whether the prison official acted with a sufficiently culpable state of mind (subjective component), and (2) whether the deprivation suffered was sufficiently serious (objective component). *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995 (1992). In *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994), the Court emphasized that the official’s state of mind was a *subjective* component. The Court rejected an objective test based on whether the official knew or should have known of the risk of harm. What must be established with regard to each component varies according to the nature of the alleged constitutional violation.

19-6.03(a) Strip Searches

Strip-searching non-indictable offenders without reasonable suspicion does not violate the Fourth Amendment, at least as long as they are placed in the general jail population after processing. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 132 S. Ct. 1510 (2012); see also *Cantley v. W. Va. Reg’l Jail Auth.*, 771 F.3d 201 (4th Cir. 2014) (granting qualified immunity but noting blanket policy of strip searching pre-arraignment detainees is of questionable constitutionality); *Calloway v. Lokey*, 948 F.3d

194 (4th Cir. 2020) (“[T]he standard under the Fourth Amendment for conducting a strip search of a prison visitor—an exceedingly personal invasion of privacy—is whether prison officials have a reasonable suspicion, based on particularized and individualized information, that such a search will uncover contraband on the visitor’s person on that occasion.”).

19-6.03(b) Medical Care of Inmates

In *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976), the Supreme Court held the Eighth Amendment test was deliberate indifference to a serious medical need. A prison official shows deliberate indifference if he knows of and disregards an excessive risk to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994); *Odom v. S.C. Dep’t of Corr.*, 349 F.3d 765 (4th Cir. 2003); *Barnes v. Johnson*, No. 3:12cv00053 (W.D. Va. July 3, 2014). The medical condition must be serious; if the medical condition is not diagnosed by a physician, it must be “so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” *Scinto v. Stansberry*, 841 F.3d 219 (4th Cir. 2016); *Mays v. Sprinkle*, 992 F.3d 295 (4th Cir. 2021) (at motion to dismiss stage, plaintiff sufficiently alleged deliberate indifference where officers did not call for medical help for intoxicated pretrial detainee when there was evidence he had consumed alcohol and drugs, he had trouble talking, walking, or sitting upright, and he was unconscious or semiconscious throughout the evening); *Gray v. Spillman*, 925 F.2d 90 (4th Cir. 1991) (reiterating that the medical need must be serious); *Lee v. City of Roanoke*, No. 95-0453-R (W.D. Va. Oct. 8, 1996) (applying deliberate indifference standard to medical care of arrestee).

The subjective component requires proof of more than mere negligence but less than malice. *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995 (1992). Subjective awareness may be inferred from obviousness of injury or risk of injury. *Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101 (4th Cir. 1995); see also *Gordon v. Schilling*, 937 F.3d 348 (4th Cir. 2019) (no summary judgment regarding policy to not treat hepatitis C under certain circumstances); *Jackson v. Lightsey*, 775 F.3d 170 (4th Cir. 2014) (failure to provide care that defendant doctor himself deemed necessary to treat an inmate’s serious medical condition may constitute deliberate indifference); *Johnson v. Quinones*, 145 F.3d 164 (4th Cir. 1998) (no deliberate indifference to serious medical need even though doctors were aware of obvious symptoms because no evidence of subjective awareness of actual medical condition); *Shakka v. Smith*, 71 F.3d 162 (4th Cir. 1995) (stressing subjective knowledge); *Estate of Harvey v. Roanoke City Sheriff’s Office*, 585 F. Supp. 2d 844 (W.D. Va. 2008) (to be liable, an official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference).

Because pretrial detainees are not convicted prisoners and cannot be subject to any form of “punishment,” the Fourteenth Amendment, rather than the Eighth Amendment, governs a detainee’s claim of failure to provide adequate medical care. *Martin v. Gentile*, 849 F.2d 863 (4th Cir. 1988). However, the analysis under either rubric is effectively the same; while the precise scope of the State’s obligation to provide medical care to pretrial detainees injured during arrest is unclear, a showing of deliberate indifference within the meaning of Eighth Amendment jurisprudence is sufficient to establish a due process violation. *Id.* But see *Mays v. Sprinkle*, 992 F.3d 295 (4th Cir. 2021) (discussing holding of *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466 (2015)—that the officer’s state of mind is not a required element for pretrial excessive force claims—and whether the deliberate indifference standard for pretrial detainees continues to include a subjective component).

Pretrial detainees and prisoners have no constitutional right to have their medical information kept private. *Sherman v. Jones*, 258 F. Supp. 2d 440 (E.D. Va. 2003).

For suicide cases, see *Hearn v. Lancaster County*, No. 13-1588 (4th Cir. Apr. 15, 2014) (officer must know of suicidal intent); *Brown v. Harris*, 240 F.3d 383 (4th Cir. 2001) (officials responded reasonably to risk they knew); *Hill v. Nicodemus*, 979 F.2d 987 (4th Cir. 1992) (jail officials not deliberately indifferent when pretrial detainee committed suicide while officials were attempting to obtain medical assistance); *Buffington v. Baltimore County*, 913 F.2d 113 (4th Cir. 1990); *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990).

19-6.03(c) Prison Conditions

Prison conditions are evaluated under the same standard as medical care. Deliberate indifference is proved if an official knew of a substantial risk of serious harm and disregarded the risk by failing to take reasonable steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994); see also *Williams v. Benjamin*, 77 F.3d 756 (4th Cir. 1996).

In *Taylor v. Freeman*, 34 F.3d 266 (4th Cir. 1994), the Fourth Circuit vacated a sweeping preliminary injunction imposed by the district court to correct alleged unconstitutional prison conditions. The appellate court emphasized that, even when unconstitutional conditions exist, federal courts must proceed cautiously and incrementally with great deference to state officials' plans to correct the problems. Significantly, the court said that even plans implemented or adopted after the suit was filed were relevant to show that there was not deliberate indifference.

The Eighth Amendment obligates prison officials to protect a prisoner from violence by another prisoner. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994). Officials need not be subjectively aware of a risk to a specific prisoner to be found deliberately indifferent; all that is necessary is that the official knew of a substantial risk to the inmate population in general. *Id.* Deliberate indifference may be proven by circumstantial evidence that a risk was so obvious that it had to have been known. *Makdessi v. Fields*, 789 F.3d 126 (4th Cir. 2015). Emphasizing the subjective element required in *Farmer v. Brennan*, the Fourth Circuit in *Danser v. Stansberry*, 772 F.3d 340 (4th Cir. 2014), held that, although a guard negligently failed to follow procedures, there was insufficient evidence as a matter of law that the guard knew of and disregarded an excessive risk to the inmate's safety; therefore, there was no Eighth Amendment violation. See *Rich v. Bruce*, 129 F.3d 336 (4th Cir. 1997) (similar holding); see also *Cox v. Quinn*, 828 F.3d 227 (4th Cir. 2016) (no qualified immunity when officers subjectively aware of risk of substantial harm and action taken to remedy risk was unreasonable); *Odom v. S.C. Dep't of Corr.*, 349 F.3d 765 (4th Cir. 2003) (no qualified immunity because of deliberate disregard of risk of harm); *Price v. Sasser*, 65 F.3d 342 (4th Cir. 1995); *Rucker v. Piedmont Reg'l Jail Auth.*, No. 3:21cv412 (E.D. Va. Aug. 30, 2021) ("[W]hen facts exist to show that a plaintiff would be particularly vulnerable in the presence of another inmate and susceptible to violence at their hands, and defendant correctional officers disregard these facts to purposefully bring these inmates in contact with each other, the plaintiff may state a viable Eighth Amendment claim."); *Hedrick v. Roberts*, 183 F. Supp. 2d 814 (E.D. Va. 2001) (harm by other inmate; summary judgment for defendants); *Madison v. Ferguson*, No. 2:95cv992 (E.D. Va. Jan. 3, 1996) (same); *Westmoreland v. Brown*, 883 F. Supp. 67 (E.D. Va. 1995) (applying *Farmer v. Brennan* analysis to pretrial detainees and holding that neither city nor sheriff was liable because neither knew of any substantial risk of a guard-initiated assault on detainee); cf. *Wilson v. Wright*, 998 F. Supp. 650 (E.D. Va. 1998) (no summary judgment because jury could find guard's testimony not credible).

In *Brown v. Mitchell*, 308 F. Supp. 2d 682 (E.D. Va. 2004), the court held that a claim against a city was stated because the plaintiff alleged that overcrowded and unsanitary conditions in the jail increased the likelihood of bacterial infections. The court in *Johnson v. Pearson*, 316 F. Supp. 2d 307 (E.D. Va. 2004), *aff'd as to denial of qualified immunity*, No. 04-6574 (4th Cir. Jan. 28, 2005), held that the exposure of a prisoner to

unreasonable levels of second-hand smoke violated the Eighth Amendment and that qualified immunity was not available.

In *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), the Fourth Circuit found that the “extensive—and growing—body of literature” regarding the “the serious psychological and emotional harm caused by segregated or solitary confinement” established a substantial risk of serious harm. The inmates established deliberate indifference to the risk of harm through testimony by prison officials (e.g., “humans . . . don’t survive very well . . . with lack of human contact”) and because they did not revisit the policy as a result of the extensive body of literature. The court noted that there may be a penological justification for solitary confinement, but the state had waived that argument on appeal. See *also Smith v. Collins*, 964 F.3d 266 (4th Cir. 2020) (for purposes of summary judgment, prisoner had shown his “conditions of confinement imposed a significant and atypical hardship in relation to the ordinary incidents of prison life” when he spent over four years in solitary confinement, such that he had demonstrated the existence of a protected liberty interest).

In *King v. Riley*, 76 F.4th 259 (4th Cir. 2023), inmate King was brutally murdered by two fellow inmates. King's estate brought three deliberate indifference claims. First, King alleged that the sergeant on duty was deliberately indifferent to a substantial risk to King's safety because he failed to protect King by conducting proper security checks. Second, King asserted that the sergeant and a fellow officer were deliberately indifferent to King's medical needs by calling for medical personnel without checking for a pulse or performing first aid when they discovered his body. Third, King claimed that supervisors were deliberately indifferent to a substantial risk to King's safety under a failure to supervise theory. The court held that the individual defendants were entitled to qualified immunity because they did not violate King's clearly established rights in their failure to look in each cell during security checks, and in their failure to render medical assistance. As to the supervisory liability claims, the court held that King failed to put forward evidence specific to any of the remaining defendants to show that they were liable under a theory of failure to supervise. In granting a dismissal on qualified immunity grounds, the court noted the doctrine “is controversial and roundly criticized . . . but it is also binding, and so we must faithfully apply it.” *Id.* (internal citations omitted).

19-6.03(d) Use of Force

For excessive force cases under the Eighth Amendment, the subjective component has a higher standard than under the medical needs test. The plaintiff must prove that officials applied force maliciously and sadistically for the very purpose of causing harm. *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078 (1986). Thus, a prisoner who suffers a minor, but malicious, injury may be able to prevail on an excessive force claim under the Eighth Amendment but not on a deliberate indifference claim, which requires a substantial risk of significant harm. *Thompson v. Commonwealth*, 878 F.3d 89 (4th Cir. 2017) (malicious “rough ride” in police van can constitute excessive force).

Factors that should be considered are (1) the need for application of the force, (2) the relationship between that need and the amount of force used, (3) the threat reasonably perceived by the responsible officers, and (4) any effort made to temper the severity of a forceful response. *Id.* But see *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466 (2015), discussed in section [19-6.02\(c\)](#), where the Supreme Court noted but declined to address the fact that its *Kingsley* decision “may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners.” In *Brooks v. Johnson*, 924 F.3d 104 (4th Cir. 2019), the Fourth Circuit held that the subjective question as to why the officer applied force precluded summary judgment. Interestingly, there was video of the entire event.

While the substantiality of the injury can be a factor, it is the nature of the force that ultimately counts. *Wilkins v. Gaddy*, 559 U.S. 34, 130 S. Ct. 1175 (2010) (per curiam) (criticizing Fourth Circuit precedent which had held that there could be no excessive force if injury was de minimis); *see also Jackson v. Holley*, No. 16-6896 (4th Cir. Nov. 18, 2016) (unpubl.) (holding that sexual harassment by a prison staff psychologist, which did not include any physical contact, did not rise to the level of an Eighth Amendment violation and qualified immunity applied). The Fourth Circuit has held that officers are entitled to qualified immunity regarding claims of excessive force with de minimis injury that occurred prior to the *Wilkins* decision, as that standard was established, albeit erroneously, by Fourth Circuit precedent. *Hill v. Crum*, 727 F.3d 312 (4th Cir. 2013); *see Ussery v. Mansfield*, 786 F.3d 332 (4th Cir. 2015) (lacerations, bruising, vision and hearing problems, and migraines resulting from force used constitute more than de minimis injuries, so *Crum* does not require qualified immunity).

19-6.03(d)(1) Punishment

The gratuitous infliction of punishment is unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002) (practice of punishing disruptive prisoners by handcuffing them to a hitching post for several hours violated the Eighth Amendment). The unnecessary and wanton infliction of pain without penological justification constitutes cruel and unusual punishment forbidden by the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 106 S. Ct. 1078 (1986); *Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392 (1981). In making this determination in the context of prison conditions, courts must ascertain whether the officials involved acted with “deliberate indifference” to the inmates’ health or safety. *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995 (1992). The existence of this subjective state of mind may be inferred from the fact that the risk of harm is obvious. *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994). Apparently, the injury can be minimal. In *Hope v. Pelzer*, the punishment was held unconstitutional even though the issue of injury was not raised, and the facts indicated that temporary discomfort was the result of the punishment. *See also Sadler v. Young*, 325 F. Supp. 2d 689 (W.D. Va. 2004) (five-point restraint for forty-eight hours violates Eighth Amendment), *rev’d and remanded on separate grounds*, No. 04-7337 (4th Cir. Jan. 5, 2005) (interlocutory appeal on qualified immunity for due process violation); *Newell v. Angelone*, No. 7:01cv00241 (W.D. Va. Mar. 7, 2003) (five-point restraint for forty hours), *aff’d*, No. 03-6390 (4th Cir. Sept. 2, 2003); *Faison v. Damron*, No. 7:00cv00739 (W.D. Va. Mar. 25, 2002) (five-point restraint for forty-eight hours); *Davis v. Lester*, 156 F. Supp. 2d 588 (W.D. Va. 2001) (same). In *Robles v. Prince George’s County*, 302 F.3d 262 (4th Cir. 2002), the Fourth Circuit held that leaving a pretrial detainee alone for ten minutes after handcuffing him to a pole in a parking lot violated the Fourteenth Amendment (for the applicable standard for pretrial detainees, see section [19-6.02\(c\)](#)) because it served no legitimate law enforcement purpose and the fear induced was more than de minimis.

In *Campbell v. Florian*, 972 F.3d 385 (4th Cir. 2020), the court considered whether a deputy general counsel for the South Carolina Department of Corrections (SCDC) could be held liable for the prolonged detention of a prisoner based on the attorney’s interpretation of conflicting sentencing statutes. The court first suggested, without holding, that the failure to properly apply work and good-conduct credits leading to a longer detention than authorized is more appropriately framed as a Fourteenth Amendment due process claim rather than as an Eighth Amendment claim. However, even assuming a sufficiently serious Eighth Amendment claim, the court found that the plaintiff had not demonstrated that the deputy general counsel acted with deliberate indifference to the plaintiff’s rights. Rather, the attorney had explicitly noted the significant constitutional liberty rights implicated by the statutes and, moreover, had “approached the relevant statutory-interpretation questions as a careful attorney would.” This is true even though a lower court (the South Carolina Court of Appeals) had reached a different statutory interpretation than the deputy general counsel. Neither had his supervisor, the SCDC general counsel, been deliberately indifferent to any alleged misconduct by the

deputy general counsel, as the supervisor “could rely on the good judgment of his subordinates until he had reason to believe otherwise.” Therefore, both attorneys were entitled to qualified immunity.

19-6.03(e) Fourteenth Amendment Interests and Other Rights

19-6.03(e)(1) Atypical and Significant Hardship Test

In *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293 (1995), the Supreme Court held that inmates have a liberty interest protected by procedural due process from prison rules only if they impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. *See also Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384 (2005) (inmates have a protected liberty interest in avoiding assignment to super-maximum security facilities with highly restrictive conditions, but state provided sufficient procedural due process). The prior test for determining a protected liberty interest was whether state laws or regulations regarding confinement conditions were discretionary or mandatory.

Based on dicta in *Wilkinson*, the Fourth Circuit held that atypical and harsh confinement conditions, in and of themselves, cannot give rise to a protected liberty interest. A threshold question is whether there is a basis for an interest or expectation created by state regulations, the denial of which must result in an atypical or significant hardship. *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015) (stating that *Sandin* only held that mandatory language automatically created a right to procedural protection). Finding that a policy that provides for security detention review every thirty days met the threshold question, the Fourth Circuit held that two decades in solitary confinement was an atypical and significant hardship that required more than minimal review. *Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015); *see also Velazquez v. Va. Dep’t of Corr.*, No. 7:15cv157 (E.D. Va. Sept. 27, 2016) (administrative segregation policy not an atypical and significant hardship when it allows for reclassification to lower security statuses); *Anderson v. Warden*, 297 Va. 191, 824 S.E.2d 481 (2019) (allegations failed to show that prison disciplinary hearing was fundamentally unfair); *cf. Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019) (finding that solitary confinement of death row inmates violates the Eight Amendment; see fuller discussion in section [19-6.03\(c\)](#)).

The *Sandin* “atypical and significant hardship” test does not apply to pretrial detainees. Because they have not been convicted, they have a liberty interest in not being punished that is protected by due process. In *Dilworth v. Adams*, 841 F.3d 246 (4th Cir. 2016), the court found that disciplinary segregation of a pretrial detainee was punishment and that the failure to provide a hearing violated due process. In *Williamson v. Stirling*, 912 F.3d 154 (4th Cir. 2018), the court distinguished between the procedural due process that is due for disciplinary and administrative restrictions. For disciplinary restrictions, the detainee is entitled to notice of the alleged misconduct, a hearing, and a written explanation of the resulting decision. The court stated that for administrative restrictions, which include managerial and security needs, the level of process due is diminished. The court also stated that either type of restriction can be so disproportionate, gratuitous, or arbitrary that it becomes categorically prohibited as a substantive due process violation. In all circumstances, pretrial detainees are entitled at a minimum to the due process rights of convicted prisoners.

19-6.03(e)(2) Legitimate Penological Interests Test

In *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987), the Supreme Court held that when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Based on *Turner’s* reasoning, the Court subsequently held in *Beard v. Banks*, 548 U.S. 521, 126 S. Ct. 2572 (2006), that the deprivation of newspapers, magazines, and photographs from the most dangerous and recalcitrant inmates was reasonably related to legitimate penological interests and thus did not violate the First Amendment. The Court emphasized the

deference due to the prison administrators' judgment as to whether the action at issue has a penological effect.

Construing *Turner*, a federal district court stated there are four factors that a court must consider to determine the reasonableness of a challenged prison regulation: (1) is there a valid, rational connection between the regulation and a legitimate and neutral government interest; (2) are there alternative means for the inmates to exercise the asserted constitutional right; (3) will accommodating the asserted right have a negative impact on prison staff, other inmates, and the allocation of the prison resources; and (4) is the regulation an exaggerated response to prison concerns. *Holley v. Johnson*, No. 7:08cv00629 (W.D. Va. June 20, 2010).

See *Overton v. Bazzetta*, 539 U.S. 126, 123 S. Ct. 2162 (2003) (limitations on visitations upheld); *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002) (penological interest in not double-celling homosexual prisoners); see also *Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243 (4th Cir. 2005) (imposition of daily fee to defray costs of incarceration is reasonably related to a legitimate penological interest and does not violate a constitutional right); *Waters v. Bass*, 304 F. Supp. 2d 802 (E.D. Va. 2004) (same). In *Altizer v. Deeds*, 191 F.3d 540 (4th Cir. 1999), the court held routine inspection of outgoing prisoner mail was reasonably related to a legitimate penological interest. Inmate-to-inmate legal advice is not entitled to extra constitutional protection beyond the *Turner* test. *Shaw v. Murphy*, 532 U.S. 223, 121 S. Ct. 1475 (2001).

See *Wall v. Wade*, 741 F.3d 492 (4th Cir. 2014), *In re Long Term Administrative Segregation*, 174 F.3d 464 (4th Cir. 1999), *Hines v. South Carolina Department of Corrections*, 148 F.3d 353 (4th Cir. 1998), and *Brock v. Carroll*, 107 F.3d 241 (4th Cir. 1997), for discussions of the standard to use when evaluating free exercise of religion claims by inmates. See *Nusbaum v. Terrangi*, 210 F. Supp. 2d 784 (E.D. Va. 2002) (mandatory assignment of inmate to therapeutic program that included a "spirituality" component violated establishment clause); *Ross v. Keelings*, 2 F. Supp. 2d 810 (E.D. Va. 1998) (same); see also *Jenkins v. Angelone*, 948 F. Supp. 543 (E.D. Va. 1996); *Johnson v. Commonwealth*, No. LB-374-4 (City of Richmond Cir. Ct. Sept. 18, 1997); cf. *Deblasio v. Johnson*, 128 F. Supp. 2d 315 (E.D. Va. 2000) (grooming policy upheld), *aff'd*, No. 00-6999 (4th Cir. June 27, 2001); *Mitchell v. Angelone*, 82 F. Supp. 2d 485 (E.D. Va. 1999) (restriction on possession of certain religious items upheld); *Shaheed v. Winston*, 885 F. Supp. 861 (E.D. Va. 1995) (certain restrictions on Muslim religious services upheld).

See *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989) (when prison administrators draw distinctions about publications based solely on their potential implications for prison security, the regulation is neutral); *Hodges v. Virginia*, 871 F. Supp. 873 (W.D. Va. 1994) (restriction on pornographic magazines does not violate inmates' First Amendment rights), *rev'd on other grounds sub nom. Montcalm Publ'g Corp. v. Beck*, 80 F.3d 105 (4th Cir. 1996) (publishers entitled to procedural due process); *Haze v. Harrison*, 961 F.3d 654 (4th Cir. 2020) (prisoner's First Amendment claims survive summary judgment because no reasonable nexus exists between prison's interest in security and opening prisoner's legal mail outside of his presence, and fifteen incidents of interference with his legal mail could constitute deliberate pattern or practice; however, defendants entitled to qualified immunity on Fourth Amendment claims because no clearly established law that incarcerated persons have a reasonable expectation of privacy in their legal mail).

19-6.03(e)(3) Racial Classifications in the Prison Context

Any prison regulation based on racial classifications is subject to a strict scrutiny test. In *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141 (2005), all California male inmates were assigned to racially segregated double cells for the first sixty days of incarceration or transferred to a new facility. The state justified the policy as assisting it in moderating

racial violence in the prison system and argued that its policy thus satisfied the *Turner v. Safley* legitimate penological interest test. The Court held that all racial classifications imposed by the government must be analyzed under strict scrutiny. *Turner's* reasonable-relationship test applies only to rights that are inconsistent with proper incarceration. Note that the court's analysis of the issue under the *Turner v. Safley* test in *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001), is no longer a valid approach.

19-6.03(e)(4) Access to Courts

In *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174 (1996), the Supreme Court held that there is no freestanding right to prisoner access to a law library and legal assistance. An inmate's constitutional right to access the courts depends on the existence of an actual injury. Moreover, to be entitled to systematic relief, plaintiffs must show the existence of widespread actual injury.

19-6.04 Public Employment

19-6.04(a) Due Process

Public employees must be afforded procedural due process whenever their property or liberty interests are affected. Thus, the first question is whether there is a property or liberty interest.

19-6.04(a)(1) Property Interest

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972), the Supreme Court held that when the employee has a legitimate claim of continued employment, he has a constitutionally protected property interest. Thus, pure probationary employees normally do not have to be afforded procedural due process. The question of whether an employee has a claim of entitlement to his job is a question of state law. *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074 (1976). Recognizing that the Fourth Circuit has not directly addressed the issue, a federal district court held that tenured public employment is not a fundamental property interest entitled to substantive due process protection. *Copenny v. City of Hopewell*, 7 F. Supp. 3d 635 (E.D. Va. 2014); *see also Herring v. Cent. State Hosp.*, No. 3:14cv738 (E.D. Va. July 29, 2015) (in government employment settings, due process violations require especially egregious conduct because state tort law generally governs the substance of the employer relationship; also holding that government employees do not have a constitutional right to immediate medical treatment when injured on the job), *aff'd on other grounds sub nom Herring v. Montgomery*, No. 16-1916 (4th Cir. Mar. 3, 2017); *Baker v. McCall*, 842 F. Supp. 2d 938 (W.D. Va. 2012) (public employment is not a fundamental property interest entitled to substantive due process protection); *cf. Willis v. City of Virginia Beach*, 90 F. Supp. 3d 597 (E.D. Va. 2015) (Va. Code § 9.1-500 et seq. establishes a constitutionally protected property interest in continued public employment for law enforcement officers, but also holding for a separate claim that continued public employment is not a fundamental property interest entitled to substantive due process protection); *Charles v. Front Royal Volunteer Fire & Rescue Dep't*, No. 5:13cv20 (W.D. Va. Sept. 18, 2014) (plaintiff may have property interest in membership in volunteer fire department because of tax relief granted to such members).

Property interests may also be created by (1) statute, *see Detweiler v. Virginia Department of Rehabilitative Services*, 705 F.2d 557 (4th Cir. 1983), (2) written contract guaranteeing a fixed term of employment, or (3) rules and mutually explicit understandings that support an entitlement claim, *see Bradley v. Colonial Mental Health & Retardation Services Board*, 856 F.2d 703 (4th Cir. 1988). In this regard, employee handbooks, grievance procedures, etc., must be examined to determine if the employee has a right to continued employment and whether dismissal is permissible only for cause. *See Hesse v. Town of Jackson*, 541 F.3d 1240 (10th Cir. 2008) (town attorney working under employment contract did not have a property interest in his continued public employment where contractual agreement made it abundantly clear that attorney's employer could terminate him without cause at any time); *Jenkins v. Weatherholtz*, 909

F.2d 105 (4th Cir. 1990) (no property interest for at-will employees); *Willey v. Cnty. of Roanoke*, No. 7:02cv000901 (W.D. Va. July 21, 2005) (handbook that includes a statement preserving at-will relationship and a procedure for implementing a reduction in force that allegedly was not followed was conflicting and did not rebut the presumption of at-will employment); *Garner v. Steger*, 69 F. Supp. 3d 581 (W.D. Va. 2014) (handbook parsed to determine “close call” of whether employment change was reassignment (no protected property interest) or severe sanction (procedural due process required)); *Taylor v. City of Bristol*, No. 1:12cv00003 (W.D. Va. Aug. 30, 2012) (state-required grievance procedure establishes property interest in continued employment); *Williams v. McDonald*, 69 F. Supp. 2d 795 (E.D. Va. 1999) (no property interest in being reappointed); *Cnty. of Giles v. Wines*, 262 Va. 68, 546 S.E.2d 721 (2001) (no property interest created by policy manual that stated employee *may* be terminated for cause); *Norfolk S. Ry. Co. v. Harris*, 190 Va. 966, 59 S.E.2d 110 (1950). An oral agreement to continue an employee’s employment for more than one year violates the statute of frauds and cannot be enforced and, in any case, there was no evidence the assistant or deputy superintendent had the power to bind the school board to an employment contract. *Socol v. Albemarle Cnty. Sch. Bd.*, 399 F. Supp. 3d 523 (W.D. Va. 2019). The determination regarding the existence of a property interest in continued employment must be made on a case-by-case basis. For procedural rules to give rise to a property entitlement in a job, the rules must meaningfully limit the decision-makers’ discretion. *Glass v. Cropper*, No. 96cv895-R (W.D. Va. Mar. 18, 1998).

In *Garraghty v. Virginia Department of Corrections*, 52 F.3d 1274 (4th Cir. 1995), the Fourth Circuit held that the retroactive application of state law could not be used to eliminate an employee’s property interest in continued employment. The employee’s property interest attached under the law in effect at the time he was initially employed. In *Mandel v. Allen*, 81 F.3d 478 (4th Cir. 1996), however, a different panel held that the state law in effect at the time of the contested actions was the appropriate law to determine if the property interest existed. See also *McBride v. City of Roanoke Redev. & Hous. Auth.*, 871 F. Supp. 885 (W.D. Va. 1994) (property interest in continued employment eliminated by a change in a public employer’s policy that a position terminable only for cause was terminable at will), *aff’d*, 78 F.3d 579 (4th Cir. 1996).

In *Baker v. McCall*, 842 F. Supp. 2d 938 (W.D. Va. 2012), the district court held that, assuming the employee had a protected property interest in continuing employment and that he was deprived of that interest as a result of his termination, a procedural due process violation is not complete unless the government fails to provide due process, citing *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990). To prevail on a procedural due process claim, a plaintiff must take advantage of available processes unless those processes are unavailable or patently inadequate. The court also held that the employee had no substantive due process claim as public employment is not a fundamental property interest entitled to substantive due process protection.

In contrast to continued employment in an existing job, employees generally do not have a constitutionally protected property interest in any particular job classification, *Mandel v. Allen*, 81 F.3d 478 (4th Cir. 1996), in the continued existence of the job itself, *Dionne v. Mayor of Baltimore*, 40 F.3d 677 (4th Cir. 1994), in a particular position, *Huang v. Board of Governors*, 902 F.2d 1134 (4th Cir. 1990), or in participation in the grievance procedures, *Garraghty*, 52 F.3d 1274 (4th Cir. 1995). See also *Leonard v. Suthard*, 927 F.2d 168 (4th Cir. 1991) (no property right to perform duties in particular location); *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990) (no property right to perform particular services); *Hibbitts v. Buchanan Cnty. Sch. Bd.*, 685 F. Supp. 2d 599 (W.D. Va. 2010) (probationary status does not implicate property interests when paid full salary and continued working), *aff’d*, 433 Fed. Appx. 203 (4th Cir. 2011); *Echtenkamp v. Loudoun Cnty. Pub. Schs.*, 263 F. Supp. 2d 1043 (E.D. Va. 2003) (no property interest deprivation if paid full salary; no constitutionally protected right to grievance procedure); *Mills v. Steger*, 179 F. Supp. 2d

637 (W.D. Va. 2002), *aff'd*, No. 02-1153 (4th Cir. May 14, 2003); *Schneeweis v. Jacobs*, 771 F. Supp. 733 (E.D. Va. 1991) (no property interest implicated when suspended employee paid full salary), *aff'd*, 966 F.2d 1444 (4th Cir. 1992).

In *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977 (1999), the Supreme Court held that while employees have a protected property interest in “reasonable and necessary” workers’ compensation medical benefits, the property interest does not attach until the treatment is determined to be reasonable and necessary. Thus, employees have no due process right to a pre-deprivation hearing prior to such determination.

Compare *Sullivan* to *Mallette v. Arlington County Employees’ Supplemental Retirement System II*, 91 F.3d 630 (4th Cir. 1996), in which the Fourth Circuit held that a county ordinance mandating benefit payments to “eligible applicants” created a property interest in the benefits such that due process was required even before applicant eligibility was administratively determined. It rejected the position that only a recipient of benefits can have a property interest but noted that the degree of process due would be different.

19-6.04(a)(2) Liberty Interest

Employees have a liberty interest in not being fired with stigmatizing charges publicly disseminated without an opportunity to refute the charges. *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). Such statements must imply serious character defects to implicate liberty interests. *Robertson v. Rogers*, 679 F.2d 1090 (4th Cir. 1982); *Gilbertson v. Jones*, No. 3:16cv255 (E.D. Va. Aug. 18, 2016) (allegations of incompetence, standing alone, do not imply serious character defects and do not violate the due process clause). Harm to reputation alone is not sufficient to implicate liberty interest. *Zepp v. Rehrmann*, 79 F.3d 381 (4th Cir. 1996). The employee must be fired or significantly demoted; lesser sanctions do not implicate the liberty interest. *Ridpath v. Bd. of Governors of Marshall Univ.*, 447 F.3d 292 (4th Cir. 2006); *Sailes v. Richardson*, No. 3:16cv00325 (E.D. Va. Dec. 22, 2017); *Garner v. Steger*, 69 F. Supp. 3d 581 (W.D. Va. 2014); *Echtenkamp v. Loudoun Cnty. Pub. Schs.* 263 F. Supp. 2d 1043 (E.D. Va. 2003); *Flanagan v. Searce*, No. 7:19cv00413 (W.D. Va. Aug. 23, 2021) (plaintiff’s difficulty finding new job and her eventual employment making \$25,000 less per year than in her previous position sufficient to demonstrate stigmatization). However, the damaging disclosure need not “effectively foreclose” future public employment for the disclosure to be actionable under the Fourteenth Amendment.” *Cannon v. Vill. Of Bald Head Island*, 891 F.3d 489 (4th Cir. 2018) (quoting appellants’ brief); *Flanagan v. Pittsylvania Cnty.*, No. 7:19cv413 (W.D. Va. Aug. 24, 2020) (plaintiff’s new job, three-and-a-half hours from home, lower in the chain of command, and with \$25,000 pay cut, sufficient to establish stigma). Statements that are not incident to the termination do not implicate the employee’s liberty interest. *Siebert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789 (1991) (alleged stigmatizing statements made in subsequent letter of recommendation).

The Fourth Circuit summarized the test in *Sciolino v. City of Newport News*, 480 F.3d 642 (4th Cir. 2007). To state this type of liberty interest claim under the Due Process Clause, a plaintiff must allege that the charges against him (1) placed a stigma on his reputation; (2) were made public by the employer; (3) were made in conjunction with his termination or demotion; and (4) were false. The court further held that the employee must allege and prove a likelihood that prospective employers (i.e., employers to whom he will apply) or the public at large will inspect the personnel file that contains the derogatory material in order to meet the public disclosure element of a liberty interest due process claim. *See also Willis v. City of Virginia Beach*, 90 F. Supp. 3d 597 (E.D. Va. 2015) (second and third prongs not met when allegations in complaint do not refer to public dissemination and when employment action was a short suspension); *Hall v. City of Newport News*, No. 4:09cv136 (E.D. Va. Feb. 6, 2013) (construing *Sciolino* and stating that the public dissemination can be more general than just physical inspection of the

personnel file); *Waters v. Gaston Cnty.*, 57 F.3d 422 (4th Cir. 1995) (county's anti-nepotism policy did not violate due process right to marry).

19-6.04(a)(3) Process Due

If the employee possesses a property or liberty interest, the next question is what process is due.

19-6.04(a)(3)(i) Pre-Deprivation

The Supreme Court held in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985), that prior to an employee's termination, the employee is entitled to a due process hearing with oral or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity to respond. The process does not need to be formal. *Riccio v. Cnty. of Fairfax*, 907 F.2d 1459 (4th Cir. 1990); *Crocker v. Fluvanna Cnty. Bd. of Pub. Welfare*, 859 F.2d 14 (4th Cir. 1988); *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987); *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984); *Lawrence v. Hanson*, No. 3:01cv00107 (W.D. Va. July 31, 2003). There is no right to have an opportunity to respond to the ultimate decision-maker. *Riccio, supra*; see also *Dennison v. Cnty. of Frederick*, 921 F.2d 50 (4th Cir. 1990); *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990).

In *Holland v. Rimmer*, 25 F.3d 1251 (4th Cir. 1994), the Fourth Circuit held that pre-termination notice, an opportunity to respond, and post-termination administrative procedures meet procedural due process requirements. This case is interesting because the defendants discharged plaintiff without following the proper procedures. The plaintiff was then rehired with back pay before being fired again following proper procedures.

A pre-termination decisionmaker is not immune from liability as a matter of law because any denial of Due Process Clause rights could have been, but was not, cured by an adequate post-termination hearing. *Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274 (4th Cir. 1995).

19-6.04(a)(3)(ii) Post-Deprivation

The minimal, informal pre-deprivation process is sufficient only when a full post-deprivation hearing is provided. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985); *Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274 (4th Cir. 1995). There may not be an unreasonable delay between the termination and the hearing. *Loudermill, supra* (nine-month delay not unreasonable *per se*).

In *Dennison v. County of Frederick*, 921 F.2d 50 (4th Cir. 1990), the Fourth Circuit reaffirmed the holding in *Detweiler v. Virginia Department of Rehabilitative Services*, 705 F.2d 557 (4th Cir. 1983), that the grievance procedure established in the Code of Virginia provides sufficient post-deprivation procedural due process. See *Supinger v. Va.*, No. 6:15cv17 (W.D. Va. July 20, 2016), *aff'd sub nom Supinger v. Holcomb*, No. 16-1984 (4th Cir. Dec. 4, 2017) (holding failure to allow plaintiffs to grieve termination under the Law Enforcement Officer's Procedural Guarantee Act violated due process; no qualified immunity); *Wootten v. Virginia*, 154 F. Supp. 3d 322 (W.D. Va. 2016) (same).

An employee has a right to an impartial hearing officer. *Boston v. Webb*, 783 F.2d 1163 (4th Cir. 1986). There is a presumption that government officials will decide particular controversies conscientiously and fairly despite earlier involvement in the investigation. A plaintiff must show "extrajudicial" bias to rebut the presumption. *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984).

The right to direct confrontation and cross-examination depends on the interest protected. *Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274 (4th Cir. 1995) (right to confront and examine witnesses must be provided either pre- or post-termination to protect

property interest in continued employment); *cf. Boston v. Webb, supra* (right not required for protection of liberty interest).

In liberty interest cases, an employee has the burden of proof. *Boston v. Webb, supra*.

Importantly, if an employee or his lawyer does not object to what the employee considers to be due process deprivations concerning the conduct of the hearing (such as panel member bias or inability to call witnesses) at the time, the employee may waive the right to present them at trial. *Fuller v. Laurens Cnty. Sch. Dist.*, 563 F.2d 137 (4th Cir. 1977); *Satterfield v. Edenton-Chowan Bd. of Educ.*, 530 F.2d 567 (4th Cir. 1975).

19-6.04(a)(3)(iii) Suspensions

Assuming without deciding that due process protections apply to disciplinary actions short of termination, the Supreme Court held that no notice or hearing is required to suspend without pay a public official charged with a felony, so long as the suspendee receives a sufficiently prompt post-suspension hearing. Whether the same applies to conduct short of a felony apparently depends on the significance of the governmental interest and the likelihood of erroneous deprivation. *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807 (1997); see *Myers v. Shaver*, 245 F. Supp. 2d 805 (W.D. Va. 2003) (qualified immunity for official who suspended police officer without notice and a hearing).

Prior Fourth Circuit court cases include *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987), in which the court held that as long as the person who was making the decision to suspend gave the employee an opportunity to sit down and explain his side of the story, due process was satisfied, even where there was no right to a further hearing. The court also cited *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270 (6th Cir. 1985), for the proposition that a two-day suspension without pay is de minimis and does not require any due process. See also *Angell v. Leslie*, 832 F.2d 817 (4th Cir. 1987).

Suspension with pay does not implicate constitutional due process concerns. *Mansoor v. Cnty. of Albemarle*, 124 F. Supp. 2d 367 (W.D. Va. 2000) (also holding deprivation of incidental benefits of employment does not implicate Fourteenth Amendment), *aff'd on other grounds*, 319 F.3d 133 (4th Cir. 2003).

19-6.04(a)(3)(iv) Violation of Own Rules or State Law as Due Process Violations

A state's violation of its own laws or procedural rules, creating rights beyond those guaranteed by the U.S. Constitution, cannot support a Due Process Clause claim. *Hodge v. Jones*, 31 F.3d 157 (4th Cir. 1994); see also *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995); *Riccio v. Cnty. of Fairfax*, 907 F.2d 1459 (4th Cir. 1990); *Davis v. Pak*, 856 F.2d 648 (4th Cir. 1988); *Brickey v. Hall*, No. 1:13cv00073 (W.D. Va. Jan. 23, 2014), *rev'd on other grounds*, 828 F.3d 298 (4th Cir. 2016); *Echtenkamp v. Loudoun Cnty. Pub. Schs.*, 263 F. Supp. 2d 1043 (E.D. Va. 2003); *Hutto v. Waters*, 552 F. Supp. 266 (E.D. Va. 1982).

19-6.04(b) Employee Speech

Reviewing First Amendment free speech claims requires a two-step analysis. First, the court must consider whether the speech was constitutionally protected as a matter of law. Speech is constitutionally protected only if it relates to matters of public concern. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983). Second, the court must decide whether the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an effective workplace. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968). See *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998), for an extensive discussion of the legal principles concerning employee speech; including that policymaking employees enjoy less First Amendment protection than rank-and-file employees because senior employees' speech would be more disruptive to the workplace. The Fourth Circuit often calls the two-step analysis the *McVey* test. The government's burden is greater when it restricts potential speech. *Mansoor v. Trank*, 319 F.3d 133 (4th

Cir. 2003); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 131 S. Ct. 2488 (2011) (public employee Petition Clause claims to be analyzed in same manner as Speech Clause claims); *Williams v. Morris*, 956 F. Supp. 679 (W.D. Va. 1996) (on summary judgment, speech not of public concern), No. 96-0008-D (W.D. Va. June 17, 1996) (on motion to dismiss, action taken because of intent to convey protected speech enough to state a claim; not required for action to be taken after speech).

With regard to social media, the Fourth Circuit has held that it fits “comfortably within the existing balancing inquiry: A social media platform amplifies the distribution of the speaker’s message—which favors the employee’s free speech interests—but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer’s interest in efficiency.” *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016).

In *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013), the court of appeals held that “liking” the Facebook page of a political candidate was constitutionally protected speech. *See also Mattingly v. Milligan*, No. 4:11cv00215 (E.D. Ark. Nov. 1, 2011) (the court held that a post on the plaintiff’s Facebook wall was constitutionally protected speech); *Gresham v. City of Atlanta*, No. 1:10cv1301-RWS-ECS (N.D. Ga. Sept. 30, 2011) (post on plaintiff’s Facebook wall held to constitute enough speech to be considered speaking out as a matter of public concern), *aff’d*, No. 12-12968 (11th Cir. Oct. 17, 2013).

A federal district court noted that the *McVey* factors are often more appropriately resolved at the summary judgment stage than the dismissal stage. *Willis v. City of Va. Beach*, 90 F. Supp. 3d 597 (E.D. Va. 2015).

19-6.04(b)(1) Public Concern

Determining whether the speech is of public concern is a question of law. *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983). Whether the speech was protected because it was of public concern does not depend on what was actually said, but on what the government employer reasonably thought was said. *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878 (1994) (plurality opinion). *Waters* imposes some duty on the employer to investigate disputed speech, although the Court gave little direction on the scope of such investigation, effectively saying it depends on the circumstances. In *Scruggs v. Keen*, 900 F. Supp. 821 (W.D. Va. 1995), a district court held that whether speech is of public concern is question of law, but whether an employer conducted an adequate investigation into what was actually said is a question of fact.

In *Heffernan v. City of Paterson*, 578 U.S. 266, 136 S. Ct. 1412 (2016), a police officer was demoted when the chief of police mistakenly thought he was supporting a particular mayoral candidate. As such conduct would have been constitutionally protected, the city sought to avoid liability by asserting that no protected speech had actually occurred. Construing *Waters*, the Court noted that while the employer in *Waters* had reasonably but mistakenly thought that the employee *had not* engaged in protected speech, the employer in *Heffernan* mistakenly thought the employee *had* engaged in protected speech. Stating that “what is sauce for the goose is normally sauce for the gander,” the Court held that in the case of a factual mistake regarding speech, it is the employer’s *motive* for taking action, and not the actual speech, that matters.

Determining whether speech was of public concern often involves fine distinctions and depends very much on the circumstances surrounding the speech. As the Court has noted, “the boundaries of the public concern test are not well defined.” *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207 (2011) (articulating “guiding principles”). Critical to determining whether employee speech is protected by the First Amendment is whether the speech is made primarily in the employee’s role as citizen or primarily in his role as employee. In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), the Court held

in a 5-4 decision that a public employee may still be speaking as a citizen in the workplace, even regarding matters of employment. But if the speech is made pursuant to the employee's employment duties, then there is no First Amendment protection, even if the speech concerns government misconduct. *See also Flanagan v. Searce*, No. 7:19cv413 (W.D. Va. Aug. 23, 2021) (plaintiff spoke as private citizen on a matter of public concern; she took personal time off from work to appear before the DSS Board and discussed the social services system as a whole).

The Supreme Court held in *Lane v. Franks*, 573 U.S. 228, 134 S. Ct. 2369 (2014), that providing truthful subpoenaed testimony outside the course of ordinary job responsibilities was speech as a citizen of public concern even when the testimony concerned information learned in the course of public employment. Following *Franks*, the Fourth Circuit held that police officers who called the state governor's office to allege corruption in their own department were not acting pursuant to their professional duties but were speaking as private citizens. *Hunter v. Town of Mocksville*, 789 F.3d 389 (4th Cir. 2015) (extensive discussion of case law); *see also Crouse v. Town of Moncks Corner*, 848 F.3d 576 (4th Cir. 2017) (qualified immunity granted because reasonable for employer to conclude speech was within scope of occupational duties of employees).

The Court noted in *Garcetti*, but did not decide, that employee expression in an academic setting might implicate additional constitutional interests. In *Adams v. Trustees of the University of North Carolina*, 640 F.3d 550 (4th Cir. 2011), the court of appeals, construing *Garcetti*, held that a university professor was still engaging in protected speech when he submitted his articles that addressed matters of clear public concern as part of his application for promotion. Construing *Adams* and *Garcetti*, a federal district court assumed that an applicant for a job is an employee for First Amendment purposes and held that there is no constitutional protection for an applicant's speech that addresses employment duties. *Heap v. Carter*, 112 F. Supp. 3d 402 (E.D. Va. 2015).

The Fourth Circuit has indicated that publicly posting on social media indicates an intent to communicate a position on a matter of public concern. *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016). Moreover, even though some comments may seem like a personal grievance, the statements must be viewed "as a single expression of speech to be considered in its entirety." *Id.* However, in *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017), the court stated that whether a series of related social media posts and likes over a several-week period constitute a "single expression of speech" is an "open question." Finding some of the comments implicated matters of public concern, the court undertook the *Connick-Pickering* balancing analysis and concluded that the fire department's interest in efficiency and preventing disruption outweighed the employee's interest in speaking about gun control and the department's social media policy.

In *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013), the Fourth Circuit held that an employee's dissemination to the media of his grievance documents that he alleged demonstrated misconduct in the sheriff's office was protected as being of public concern. The court also held that the sheriff was not entitled to qualified immunity for retaliation against the employee for the exercise of that speech. *But see Brooks v. Arthur*, 685 F.3d 367 (4th Cir. 2012) (speech pertained to personal grievances and complaints about conditions of employment rather than broad matters of policy meriting the protection of the First Amendment); *Silverman v. Town of Blackstone*, 843 F. Supp. 2d 628 (E.D. Va. 2012) (concerns raised about issues in utility department made in performance of employment duties), *aff'd*, No. 12-1278 (4th Cir. Aug. 23, 2012); *cf. Altizer v. Town of Cedar Bluff*, 104 F. Supp. 3d 760 (W.D. Va. 2015) (terminated employee's allegation of

malfeasance by town officials was personal in nature and not of public concern)⁸, *aff'd*, No. 15-1514 (4th Cir. Nov. 5, 2015); *Vollette v. Watson*, 978 F. Supp. 2d 572 (E.D. Va. 2013) (lawsuits contesting constitutionality of strip searches of jail contractors are speech of public concern); *Williams v. Virginia*, No. 3:11cv863 (E.D. Va. July 13, 2012) (employee's use of fraud hotline to report concern about a contract entered into at a place of employment was speech of public concern made as a citizen), *aff'd on other grounds*, No. 12-2485 (4th Cir. May 13, 2013).

Contrasting the decision in *Durham*, the Fourth Circuit held in *Brickey v. Hall*, 828 F.3d 298 (4th Cir. 2016), that a sheriff was entitled to qualified immunity for terminating a deputy campaigning for town council who made allegations regarding the misuse of funds in the sheriff's office. Whether the speech was constitutionally protected was not at issue, as the sheriff only appealed that its protection was not clearly established. The court held that, unlike in *Durham*, the allegations did not involve allegations of "serious governmental conduct" such as core abuse of the mission of the police department, and the deputy later admitted that "misuse" of funds was an overstatement. Thus, the speech was of less public concern than in *Durham*. The court also held that it was clearly established that police officials are entitled to impose more restrictions on speech than other public employers because a police force is "paramilitary."

By contrast (and without mentioning *Brickey*), the Fourth Circuit in *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016), held that a police department's social media policy that prohibited "negative comments" on internal operations or the conduct of supervisors or peers clearly regulated public employees' rights to speak on matters of public concern and the policy was constitutionally overbroad. The court noted that the government is held to a stricter standard when its policy acts as a prior restraint on speech as opposed to a post-hoc disciplinary action.

In *Campbell v. Galloway*, 483 F.3d 258 (4th Cir. 2007), the court held that sexual harassment complaints are not per se matters of public concern; it depends on the complaint's content, form, and context. Here, the complaints touched upon a matter of public concern, but it was not unreasonable for the defendants to view the complaints as personal grievances, so they were entitled to qualified immunity. *See also Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc); *Al-Habashy v. Va.*, No. 7:13cv459 (W.D. Va. Sept. 24, 2014) (complaints of employment discrimination were personal grievances), *aff'd on other grounds*, No. 15-2401 (4th Cir. Apr. 25, 2016); *Stickley v. Sutherly*, 667 F. Supp. 2d 664 (W.D. Va. 2009) (that employee's grievance was matter of public discussion made public concern a "close call" and, therefore, qualified immunity was appropriate), *aff'd*, No. 09-2317 (4th Cir. 2011); *Mann v. City of Virginia Beach*, No. 2:20cv303 (E.D. Va. Jan. 22, 2021) (employee's speech regarding workplace abuse and harassment were individualized grievances regarding workplace relationships more than matters of public concern about workplace safety or gun violence).

See Lee v. York Cnty. Sch. Div., 484 F.3d 687 (4th Cir. 2007) (school may remove certain religious postings in a teacher's classroom as the postings were held to be curricular in nature and thus per se not of public concern); *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004) (assistant principal's speech regarding racial discrimination in discipline of students inherently of public concern); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (en banc) (selection of a play by a high school drama teacher did not involve a matter of public concern because choice made by teacher in capacity as teacher in a matter dealing with curriculum); *Holland v. Rimmer*, 25 F.3d 1251 (4th Cir. 1994) (speech by supervisor disciplining subordinates not speech as private

⁸ Interestingly, the district court had found at the motion to dismiss stage that the complaint sufficiently alleged that the allegations of malfeasance were of public concern. No. 1:14cv00007 (W.D. Va. June 5, 2014).

citizen on matters of public concern because it constituted in-house communications between employees speaking as employees); *Newton v. Slye*, 116 F. Supp. 2d 677 (W.D. Va. 2000) (teacher's banned books list was curriculum-related); see also *Robinson v. Balog*, 160 F.3d 183 (4th Cir. 1998) (employees' speech at a public forum was as citizens and regarded environmental hazards and misuse of public funds clearly of public concern); *DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995) (noting the Supreme Court distinguished between speaking as a citizen and as an employee); cf. *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004) (speech not of public concern merely because employee spoke at public hearing).

See also *Mansoor v. Trank*, 319 F.3d 133 (4th Cir. 2003) (prior restraint of negative employee speech on matters relating to employment violated First Amendment); *Lilienthal v. City of Suffolk*, 275 F. Supp. 2d 684 (E.D. Va. 2003) (firefighter's complaints to city council members and staff regarding fire department policies matter of public concern); *Merritt v. Mullen*, 49 F. Supp. 2d 846 (E.D. Va. 1999) (speech regarding policy disagreement not of public concern even though included racial issues), *aff'd*, 188 F.3d 502 (4th Cir. 1999); 2005 Op. Va. Att'y Gen. 27 (blanket prohibition against principals and other staff members speaking at private baccalaureate events is constitutionally unwarranted and would violate their First Amendment rights of free speech as private citizens).

Speech on matters of public concern is protected even though it occurs in a private setting. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc) (place where speech occurs is irrelevant); *Goldstein v. Chestnut Ridge Vol. Fire Co.*, 218 F.3d 337 (4th Cir. 2000); *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999) (employee can engage in speech of public concern when off job); *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996) (deputy's letter to sheriff of public concern even though given only to sheriff); *Dunn v. Millirons*, 176 F. Supp. 3d 591 (W.D. Va. 2016) (speech made in the confines of an employer's office may still be of public concern if the speech concerns allegations of misuse or illegality; no qualified immunity), *aff'd on qualified immunity grounds*, No. 16-1492 (4th Cir. Feb. 1, 2017); *Scruggs v. Keen*, 900 F. Supp. 821 (W.D. Va. 1995) (speech that occurs in private setting may be protected).

Speech made on an employee's own time that is unrelated to his employment and has no effect on the mission and purpose of the employer is generally protected by the First Amendment. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 115 S. Ct. 1003 (1995). If, however, this "unrelated" speech is nonetheless "detrimental" to the missions or functions of the employer, the employer may take action, and that action is evaluated under the *Connick/Pickering* test. *San Diego v. Roe*, 543 U.S. 77, 125 S. Ct. 521 (2004) (per curiam). In *San Diego*, the Court found that a police officer's wearing of a non-specific police uniform in a pornographic video was not an expression of public concern and thus the *Pickering* balancing did not come into play.

19-6.04(b)(2) Outweighed by Workplace Concerns

In balancing the public employee's interest in speaking on matters of public concern against the government's interest in providing effective and efficient government through its employees, courts are to take into account the context of the employee's speech, including the employee's role in the government agency, and the extent to which it disrupts the operation and mission of the agency. See *Rankin v. McPherson*, 483 U.S. 378, 107 S. Ct. 2891 (1987). Factors relevant to this inquiry include whether the employee's speech (1) impairs discipline by superiors; (2) impairs harmony among co-workers; (3) has a detrimental impact on close working relationships; (4) impedes the performance of the public employee's duties; (5) interferes with the agency's operation; (6) undermines the agency's mission; (7) is communicated to the public or to co-workers in private; (8) conflicts with the employee's responsibilities within the agency; and (9) uses the authority and public accountability that the employee's role entails. *McVey v. Stacy*, 157 F.3d 271

(4th Cir. 1998). The government bears the burden of proof for this prong of the *McVey* test. *Smith v. Gilchrist*, 749 F.3d 302 (4th Cir. 2014); *see also Brickey v. Hall*, 828 F.3d 298 (4th Cir. 2016) (reasonable apprehension of disruption shown). Whether the employee's interest in speaking outweighs the government's interest is a question of law for the court. *McVey, supra*; *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987). Although the balancing is a "subtle" process, the government employer must produce evidence that the speech could negatively impact the agency's efficiency. *Smith v. Gilchrist*, 749 F.3d 302 (4th Cir. 2014). If the government proves that it does not violate an employee's association rights through termination for political disloyalty (see section 19-6.04(c)), then the employer also does not violate employee free speech rights by termination for speech displaying that political disloyalty. *McCaffrey v. Chapman*, 921 F.3d 159 (4th Cir. 2019).

In *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016), the court acknowledged that the police department's concern that divisive social media use might undermine its legitimate interests in officer camaraderie and community trust and that police departments are entitled to a wide degree of deference because of the paramilitary discipline required. The court, nevertheless, found that the department failed to demonstrate "actual disruption to its mission," holding that "speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers' freedom to debate matters of public concern."

The Fourth Circuit in *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017), conversely found that an employee's (fire department battalion chief) social media comments sufficiently impaired the efficiency of the workplace. While noting (in contrast to *Liverman*) that the employer need not show that the employee's speech was actually disruptive, the court did find that the employee's comments on gun control and the department's social media policy interfered with working relationships within the department, conflicted with the employee's supervisory responsibilities, and threatened community trust in the department.

The Fourth Circuit has stated that to evaluate whether speech of public concern is outweighed by workplace concerns, the court should assess the First Amendment value of the speech, the time, place, and manner of speech, and the context in which the speech arose. *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999). In *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004), the Fourth Circuit held that the substantial public interest in speech relating to racial discrimination in student discipline outweighed the disharmony the assistant principal caused within the school. In *Stroman v. Colleton County School District*, 981 F.2d 152 (4th Cir. 1992), the Fourth Circuit held that a teacher's letter inciting other faculty to be absent from classes, in violation of their contract was not protected by the First Amendment. That the letter contained some protected speech was outweighed by the public interest in having public education provided by teachers who were loyal to their contract obligations. *See also Hanton v. Gilbert*, 36 F.3d 4 (4th Cir. 1994) (speech of doubtful public concern outweighed by employer's interest in maintaining workplace order).

Compare *Hall v. Marion School District*, 31 F.3d 183 (4th Cir. 1994), in which the court held that a teacher's letters to the editor and Freedom of Information Act requests were issues of public concern protected by the First Amendment and that this protected speech was the motivating factor for her discharge. Her First Amendment rights were not outweighed by a countervailing interest in maintaining order despite her clear unpopularity with other teachers.

In *Billioni v. Bryant*, 998 F.3d 572 (4th Cir. 2021), the Fourth Circuit weighed the interest of an employee in speaking on a matter of public concern—the death of an inmate while in the custody of the sheriff's office—with the right of the sheriff to prevent workplace

disruption. The court first noted that “police officials are entitled to impose more restrictions on speech than other public employers because a police force is paramilitary – discipline is demanded, and freedom must be correspondingly denied.” *Id.* (quoting *Brickey v. Hall*, 828 F.3d 298 (4th Cir. 2016)). It then held that the employee’s interest was diminished because he had no first-hand knowledge of the incident and, “most critically,” he made no effort to convey his concerns up the sheriff’s office chain of command or to another law enforcement agency before sharing the confidential information with his wife, who worked at a local news organization. The court inferred that the employee was more concerned with getting his colleagues in trouble than ensuring an appropriate departmental response. By contrast, the sheriff had a reasonable apprehension of disruption within the office, particularly considering the “frenzy of media attention” that followed the employee’s speech regarding the inmate’s death. Thus, the employee’s speech was not protected by the First Amendment.

19-6.04(b)(3) Motivating Factor and “But For” Test

In addition to proving that the speech was protected speech, the employee must prove that the speech was a substantial or motivating factor in his dismissal. *Hughes v. Bedsole*, 48 F.3d 1376 (4th Cir. 1995). An employer can still avoid liability if it can meet the burden of showing that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568 (1977); *see also Wagner v. Wheeler*, 13 F.3d 86 (4th Cir. 1993).

See Goldstein v. Chestnut Ridge Vol. Fire Co., 218 F.3d 337 (4th Cir. 2000) (although speech not outweighed by workplace concerns, failed to prove substantial factor in suspension); *Conley v. Town of Elkton*, 381 F. Supp. 2d 514 (W.D. Va. 2005) (no causal connection between speech and termination), *aff’d*, 190 F. App’x 246 (4th Cir. 2006); *Harris v. Wood*, 888 F. Supp. 747 (W.D. Va. 1995) (deputy sheriffs failed to prove discharge solely motivated by their support for sheriff’s opponent), *aff’d*, 89 F.3d 828 (4th Cir. 1996); *cf. Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007) (magistrate clerk firing because son’s political candidacy would hinder efficient administration of judicial system was constitutional); *Conner v. McGraw*, No. 92-0599-R (W.D. Va. Apr. 8, 1993) (deputy clerk impermissibly fired solely because of her protected free speech right to support clerk’s political opponent); *Flanagan v. Searce*, No. 7:19cv413 (W.D. Va. Aug 23, 2021) (temporal proximity of plaintiff’s speech and her termination was sufficient to create genuine issue of material fact regarding whether the speech was the but-for cause of her termination).

19-6.04(b)(4) Independent Contractors

In *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342 (1996), the Supreme Court held that independent contractors’ speech is protected by the same *Connick-Pickering-Mt. Healthy* framework as government employees’ speech. The balancing of protection for speech of public concern with the concerns of the government in its efficient workings is adjusted to reflect the government’s status as a contractor rather than as an employer. The Court held that substantial deference is due the government’s reasonable assessment of its interests as contractor. *Umbehr* protects speech that results in the termination or nonrenewal of a contract. The Court expressed no opinion on whether an independent contractor’s speech is protected at the initial hiring stage.

19-6.04(c) Political Affiliations

The seminal cases on political patronage jurisprudence are *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980). *Elrod/Branti* hold that dismissals of public employees based on political beliefs are unconstitutional unless the public employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the position held or the action would have been taken in any event for nonpolitical affiliation reasons. *See O’Hare Truck*

Serv., Inc. v. City of Northlake, 518 U.S. 712, 116 S. Ct. 2353 (1996). That the position was historically one of political patronage is of no consequence. The parties' burdens of proof are under the *Mt. Healthy* framework. *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342 (1996).

In *Rutan v. Republican Party*, 497 U.S. 62, 110 S. Ct. 2729 (1990), the Court extended the prohibition against patronage practices to include promotions, transfers, and post-layoff recalls of lower-level public employees. In *O'Hare* and *Umbehr*, the Court held that the *Elrod/Branti* protection applies to governmental retaliation against independent contractors for their political beliefs.

The specific duties of the public employee's position govern whether political allegiance to an employer is an appropriate job requirement. Thus, in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc) (interpreting North Carolina law), the Fourth Circuit expressly overruled the holding in *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), that a deputy sheriff can never be a policymaker such that political affiliation was an appropriate job requirement. Finding that deputies with law enforcement duties are policymakers, the court in *Jenkins* held their political dismissal constitutional. However, in *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000), the court held that a jailer may not be dismissed for political reasons because her duties were routine. Construing *Jenkins* and *Knight*, the Fourth Circuit in *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013), held that although non-reappointed employees had the title of "deputy sheriff," their actual employment duties were more like those of the jailer in *Knight* and thus termination for lack of political allegiance violated their associational rights. Analyzing these cases, the Fourth Circuit held in *McCaffrey v. Chapman*, 921 F.3d 159 (4th Cir. 2019), that a deputy sheriff performing law enforcement duties is carrying out the policy goals that a sheriff campaigns on and that under Virginia law a deputy sheriff is a policymaker. Accordingly, the *Elrod/Branti* exception applied.

Construing this line of cases, the Fourth Circuit held that a deputy clerk who runs for election against the current clerk cannot be terminated for political reasons because a deputy clerk performs largely administrative and ministerial tasks and does not possess "significant discretion." Therefore, political loyalty is not required. *Lawson v. Gault*, 828 F.3d 239 (4th Cir. 2016). By contrast, an assistant state's attorney (Maryland equivalent of commonwealth's attorney), is a policymaker who makes "politically charged decision[s]." Because the government has "a strong interest in maintaining harmony between elected prosecutors and their policymaking subordinates," termination of employment does not unconstitutionally burden free speech. *Borzilleri v. Mosby*, 874 F.3d 187 (4th Cir. 2017).

Note that, statutorily, no locality may prohibit an employee from participating in political activities while off duty and off the employer's premises. Va. Code § 15.2-1512.2. In *Loftus v. Bobzien*, No. 15-2164 (4th Cir. Feb. 8, 2017) (unpubl.), the Fourth Circuit held that a county employee who was terminated *after* election to a city office was terminated because of an apparent conflict of interest, not because of positions espoused or the election itself. It also held that under the reasoning of *Clements v. Fashing*, 457 U.S. 957, 102 S. Ct. 2836 (1982), a public employee may be constitutionally barred from holding elective office while remaining a public employee. Virginia Code § 15.2-1512.2 did not apply because it prohibited interference with becoming a candidate, not holding office, and it provides no private right of action.

See also *Pike v. Osborne*, 301 F.3d 182 (4th Cir. 2002) (assumed retaliatory termination of dispatchers unconstitutional); *McCrerey v. Allen*, 118 F.3d 242 (4th Cir. 1997) (anti-patronage statute does not prohibit patronage firing per se; question was one of federal law under *Elrod/Branti*, and evidence indicated that political affiliation was appropriate consideration for state regulatory boards); *Stott v. Haworth*, 916 F.2d 134

(4th Cir. 1990) (examine position to determine if related to partisan political interests and then job responsibilities to determine if party affiliation appropriate for job performance); *Vanterpool v. Cuccinelli*, 998 F. Supp. 2d 451 (E.D. Va. 2014) (assistant state attorneys general meet the *Elrod/Branti* exception and may be fired for politically disloyal speech).

Without any discussion of *Medford*, the Fourth Circuit reiterated that the appointment of assistant registrars cannot be politically based in holding that an electoral board could be liable under § 1983 for directly or indirectly influencing the registrar to make an unconstitutional political choice. *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998); *cf. Cooper v. Lee Cnty. Bd. of Sup'rs*, 188 F.3d 501 (4th Cir. 1999) (termination of employee's benefits based on policy consistency, not political affiliation), *rev'g*, 7 F. Supp. 2d 780 (W.D. Va. 1998).

19-6.04(d) Fourth Amendment

The Fourth Amendment's prohibition against unreasonable searches and seizures includes those by government employers and supervisors. *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987) (plurality opinion). Whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis. In determining the appropriate standard for a public employer's search of areas where an employee has a reasonable expectation of privacy, what constitutes a reasonable search depends on the context of the search and requires balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace. Neither a warrant nor probable cause is required.

Office policies and practices can reduce legitimate expectations of privacy. *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000) (no expectation of privacy in workstation computer). In *Chadwell v. Brewer*, 59 F. Supp. 3d 756 (W.D. Va. 2014), the federal court assumed that a school employee had some expectation of privacy in his office but found that clearly established constitutional law was not violated when the office was placed under surreptitious video surveillance because of individualized suspicion that the employee was consuming alcohol during school hours. *See also Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001) (reasonable expectation of privacy in password-protected files on shared home computer, and thus consent to search cannot be given by person with whom computer shared); *cf. United States v. Buckner*, 473 F.3d 551 (4th Cir. 2007) (distinguished *Trulock* because the police did not know that the files were password protected and, thus, reasonably assumed co-user had authority to consent). Note that all localities except small towns are required to adopt a personnel policy addressing employees' use of government property for personal use or political activities. Va. Code § 15.2-1505.2.

The courts have held that a requirement that employees follow their supervisors' orders does not violate the "seizure" clause of the Fourth Amendment. *Aguilera v. Baca*, 510 F.3d 1161 (9th Cir. 2007) (law enforcement officers were not "seized" by their supervisors' orders to cooperate with an internal criminal investigation).

See also Chapter 6, Federal Employment Law Issues, section [6-10](#).

19-6.04(e) Fifth Amendment

The Fifth Amendment does not prohibit compelling a public employee to submit to a job-related polygraph examination upon threat of job loss. The Fifth Amendment would be implicated, however, if the employee was compelled to waive his privilege against self-incrimination or the statements were used in a criminal proceeding against the employee. *Wiley v. Mayor of Baltimore*, 48 F.3d 773 (4th Cir. 1995). However, a violation of the Fifth Amendment right against self-incrimination caused by a police officer's failure to provide a *Miranda* warning does not give rise to a claim for damages under § 1983. *Vega v. Tekoh*, 597 U.S. ___, 142 S. Ct. 2095 (2022).

19-6.04(f) Equal Protection

White contractors challenging a minority set-aside program need not show they would have been awarded a contract but for the program in order to establish standing for a § 1983 equal protection claim. *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 113 S. Ct. 2297 (1993). In *Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979), the appellate court held that § 1983 challenges to personnel decisions brought under the guise of the Equal Protection Clause are only justifiable if they allege discrimination on the basis of race, gender, or First Amendment rights.

In *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001), the court held that an employment leave policy that irrebuttably presumed that only a mother could be a primary caregiver was a clearly established violation of the Equal Protection Clause.

In *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146 (2008), the Supreme Court held that the equal protection “class-of-one” theory, where the plaintiff does not allege membership in a class or group, does not apply in public employment. See also section 19-6.01(c), discussing *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000) (regarding class-of-one equal protection theory).

In a matter of first impression, the Fourth Circuit held in *Wilcox v. Lyons*, 970 F.3d 452 (4th Cir. 2020), that a former employee’s claim that she was fired in retaliation for her complaint of sexual harassment and gender discrimination was not actionable under § 1983 as a violation of the Equal Protection Clause. Such retaliation claims are more properly characterized as First Amendment violations, even if the subjects of her complaints were sex discrimination and harassment.

19-6.04(g) Contract Clause

In *Crosby v. City of Gastonia*, 635 F.3d 634 (4th Cir. 2011), retired city police officers asserted a § 1983 claim alleging a constitutional violation of their Contract Clause rights as a result of the failure of their pension fund. The Fourth Circuit held that recourse to § 1983 for the deprivation of rights secured by the Contracts Clause is limited to instances where a state has denied a citizen the opportunity to seek adjudication through the courts as to whether a constitutional impairment of a contract has occurred or has foreclosed the imposition of an adequate remedy for an established impairment. Section 1983 provides no basis to complain of an alleged impairment in the first instance. The court recognized, however, that the Ninth Circuit had reached the opposite conclusion.

19-6.05 Regulation of Non-Employment Speech**19-6.05(a) Public Forums**

Traditional public forums are open for expressive activity regardless of the government’s intent. The objective characteristics of these properties require the government to accommodate private speakers. The government is free to open additional properties for expressive use by the general public or by a particular class of speakers, thereby creating designated public forums. Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all. *United States v. Am. Library Ass’n*, 539 U.S. 194, 123 S. Ct. 2297 (2003) (internet access in public libraries is not a public forum); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 118 S. Ct. 1633 (1998) (public television editorials). In *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (LGA filed [amicus brief](#)), the Fourth Circuit held that the comment section on a public official’s webpage was a public forum, although it did not decide if it was a traditional or limited public forum because the deletion of a comment was viewpoint discrimination, prohibited in all forums.⁹

⁹ In dictum, the appellate court suggested that a local government might be violating the First Amendment by using a social media site such as Facebook whose posting rules allow third parties to restrict who can see their postings on the governmental page.

Cf. Davison v. Plowman, 247 F. Supp. 3d 767 (E.D. Va. 2017) (Facebook pages are limited public forums; deletion of Facebook post not First Amendment violation because done pursuant to viewpoint neutral policy; qualified immunity for blocking commenter because not clearly established First Amendment right to make posts); *Davison v. Rose*, No. 1:16cv540 (E.D. Va. July 28, 2017) (qualified immunity for school officials because not clearly established that Facebook pages of officials were a public forum).

19-6.05(a)(1) Traditional Public Forum

A traditional public forum is defined by the objective characteristics of the property, such as whether, by long tradition or government fiat, the property has been devoted to assembly and debate. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983). The archetypical examples of traditional public forums are streets, sidewalks, and parks. *McCullen v. Coakley*, 573 U.S. 464, 134 S. Ct. 2518 (2014). A pedestrian downtown mall is a traditional public forum. *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013) (also holding that begging is expressive speech entitled to First Amendment protection), *abrogated on other grounds by Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218 (2015). The Attorney General has opined that a county fair is a public forum and thus political booths may neither be excluded nor charged more than other organizational booths. 2014 Op. Va. Att'y Gen. 184.

19-6.05(a)(1)(i) Content Based or Content Neutral

A key determination in the constitutionality of a speech regulation is whether it is content based or content neutral. If the exclusion is content based, the regulation must be necessary to serve a *compelling* state interest and be narrowly drawn to serve that interest, i.e., strict scrutiny. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439 (1985). Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218 (2015). In *Reed*, the Court held a regulation is content based if “on its face” it makes distinctions based on the message the speaker conveys. The Court noted that such distinctions can be obvious, based on subject matter, or subtle, based on the speech’s function or purpose. Even if a regulation is content neutral on its face, it can still be a content-based regulation if the government’s purpose or justification for the law is based on disagreement with the message or if the regulation cannot be justified without reference to the content of the regulated speech. If the speech is content based on its face, however, the government’s purpose or motive for the regulation is irrelevant.

Based on these premises, the Supreme Court held that a sign ordinance that imposed different restrictions on temporary directional signs, political signs, and ideological signs was a facially content-based regulation, and the innocuous justifications of the government were irrelevant. Although the restrictions were neutral within each category, the Court found that distinguishing between the categories rendered the ordinance content based, holding a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. In *Reed*, the Court found that an ordinance treating ideological messages more favorably than political messages, which were treated more favorably than temporary event signs, was “a paradigmatic example of content-based discrimination.”

Regarding what type of sign regulation would be constitutional, the Supreme Court suggested that restrictions on size, building material, lighting, moving parts, and portability are content neutral and noted that localities can forbid signs on public property. Justice Alito’s concurrence suggested other types of regulations that would survive strict scrutiny, including rules that distinguished between the placement of signs on commercial and private property.

The Supreme Court's decision in *Reed* abrogates the reasoning of the Fourth Circuit's line of cases that held that the regulation is content neutral even if it facially differentiates between types of speech if there is no "censorial" purpose in the regulation. See *Cent. Radio Co. v. City of Norfolk*, 776 F.3d 229 (4th Cir. 2015); *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013).

The Supreme Court remanded an appeal of *Central Radio* back to the Fourth Circuit for reconsideration in light of its opinion in *Reed*, and the court of appeals subsequently held that the city's sign ordinance was content based and could not withstand strict scrutiny. *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016).

In the *Central Radio* remand, the court noted that neither it nor the Supreme Court had ever held that "aesthetics and traffic safety" are compelling governmental interests. Even if they were, the city's ordinance was not narrowly tailored as the exemptions were underinclusive. The city had no evidence that secular flags were less aesthetically pleasing than governmental flags or that artwork that referenced a commercial service detracted from the city's physical appearance more than other works of art. Similarly, there was no evidence that the restricted signs created more traffic hazards than the exempt signs. *Id.*

Also, in light of *Reed*, the Fourth Circuit found that an anti-robocall statute was content based when it banned unsolicited consumer calls and calls of a political nature but allowed others. *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015). Assuming that protecting residential privacy was a compelling government interest, the appellate court held that the government failed to prove that its prohibition was narrowly tailored to serve that interest as less restrictive means, such as time of day limitations, do-not-call lists, and mandatory caller identity disclosure, were not shown to be ineffective. The court found that the statute was also over-inclusive (studies show consumer calls more unwanted than political calls) and underinclusive (unlimited number of other types of calls allowed).

There is likely no special category of "professional speech" that is exempt from ordinary First Amendment principles, including strict scrutiny if the restriction is content based. *Nat. Inst. of Family and Life Advocates v. Becerra*, 585 U.S. ___, 138 S. Ct. 2361 (2018) (discussing with disfavor *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560 (4th Cir. 2014)). Although the Supreme Court gave itself some wriggle room (finding no "persuasive reason" such a special category should exist but not "foreclose[ing] the possibility"), the Court held that a state requirement that pregnancy crisis centers post information about state-sponsored abortion services did not even survive intermediate scrutiny as the regulation was not sufficiently narrowly drawn to achieve the assumed substantial state interest of providing low-income women with information about state-sponsored services.

19-6.05(a)(1)(ii) Time, Place or Manner

If the exclusion is content neutral, i.e., a time, place, or manner regulation, it must be narrowly drawn to serve a *significant* government interest and leave open ample alternative channels of communication, i.e., intermediate scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 134 S. Ct. 2518 (2014) (abortion clinic buffer zones content neutral but not narrowly tailored); *Packingham v. North Carolina*, 582 U.S. 98, 137 S. Ct. 1730 (2017) (prohibiting registered sex offenders from accessing all social media does not pass intermediate scrutiny; in dicta the Court equated the internet with streets or parks, describing it as the "quintessential forum for the exercise of First Amendment rights"); *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983); see also *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015) (county ban on solicitation from roadway median not narrowly tailored because applies even at non-busy intersections); *Am. Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001) (restricting flag size reasonable time,

place, and manner regulation); *Kessler v. City of Charlottesville*, 441 F. Supp. 3d 277 (W.D. Va. 2020) (city's declaration of unlawful assembly, a content-neutral action, "was appropriately tailored to the substantial governmental interests of limiting the spread of violence and protecting officer safety"; city not required to identify non-violent participants to remain on site).

A content-neutral regulation need not adhere to the procedural safeguards required for content-based regulation imposed by *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965) (expeditious judicial review with burden on locality). *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 775 (2002).

19-6.05(a)(1)(iii) Burden of Proof

Once a plaintiff has demonstrated that his speech has been restricted, the burden is on the government to prove the constitutionality of the speech restriction. *McCullen v. Coakley*, 573 U.S. 464, 134 S. Ct. 2518 (2014). Construing *McCullen*, the Fourth Circuit held in *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015) (solicitation ordinance unconstitutional), that the existence of a governmental interest may be established by reference to case law and that objective evidence is not always required to show that a speech restriction furthers the government's interests. However, the government must present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary. In *Reed*, the Supreme Court held that the sign code distinctions, enacted to preserve the presumed compelling interests of aesthetic appeal and traffic safety, were "hopelessly underinclusive." In a pre-*Reed* decision, the district court in *Clatterbuck v. City of Charlottesville*, 92 F. Supp. 3d 478 (W.D. Va. 2015), held the city failed to show its panhandling ordinance was the least restrictive means of meeting its compelling governmental interest in pedestrian safety.

See also *Benham v. City of Charlotte*, 635 F.3d 129 (4th Cir. 2011) (no standing to challenge city's denial of public assembly permit when group allowed by right to "picket"; no injury in fact); *Kessler v. City of Charlottesville*, No. 3:17cv56 (E.D. Va. Aug. 11, 2017) (preliminary injunction granted; revocation of permit content-based); *McLean v. City of Alexandria*, 86 F. Supp. 3d 475 (E.D. Va. 2015) (challenge to sign ordinance not moot even though city suspended enforcement).

19-6.05(a)(2) Designated and Limited Public Forum

Designated public forums, in contrast, are created by purposeful governmental action. The government does not create a designated public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439 (1985); accord *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S. Ct. 2701 (1992) (designated public forum is property state opened for expressive activity by all or part of the public); *ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005) (outdoor areas of college campus). Courts should look to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The government may end a designated forum's public status.

Once the government creates a designated or limited public form, the government cannot exclude entities of a similar character to those generally allowed. *ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005). Strict scrutiny applies if the government excludes a speaker who is within the class to which a designated public forum is generally available. *Cornelius*, *supra*. The exclusion cannot be based on the speaker's viewpoint. *Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294 (2019) (prohibiting "immoral or scandalous" trademarks is viewpoint discrimination); *Matal v. Tam*, 582 U.S. 218, 137 S. Ct. 1744 (2017) (preventing disparaging speech is viewpoint discrimination; "giving offense is a viewpoint"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 S. Ct. 2093 (2001) (excluding an

elementary school-age Christian club from after-school use of school property was unconstitutional viewpoint discrimination); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (deleting a comment on a Facebook page was viewpoint discrimination); *Bach v. Sch. Bd. of Va. Beach*, 139 F. Supp. 2d 738 (E.D. Va. 2001) (bylaws prohibiting “personal attacks” by public speakers against board members unconstitutional); 2016 Op. Va. Att’y Gen. 161 (cannot prohibit speakers from discussing specific school employees or officials during open meetings; unconstitutional to prohibit all “personal attacks”). If the regulation is viewpoint-neutral, the regulation must be narrowly drawn to serve a significant government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989). That is, as regards the class for which the forum has been designated, a limited public forum is treated as a traditional public forum. The government, however, is not required to indefinitely retain the open character of the designated or limited forum and may close it when it wants, even if the reason for closing the designated forum is to prevent the expression of a particular viewpoint. *Sons of Confederate Veterans v. City of Lexington*, 722 F.3d 224 (4th Cir. 2013).

The government’s ability to designate the class for whose special benefit the forum has been opened is also restricted. The Supreme Court has stated that content discrimination may be permissible if it preserves the purposes of that limited forum, *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), and that, once a limited forum has been created, entities of a similar character to those allowed access may not be excluded, *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 103 S. Ct. 948 (1983). Conversely, the public entity can require that organizations with access to the limited public forum accept everyone who applies for membership to that organization even if they profess beliefs contrary to the mission or purpose of the organization. *Christian Legal Soc’y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971 (2010) (analysis of “expressive association”; all-comers policy is a reasonable, viewpoint-neutral condition on access). The Fourth Circuit has stated that because designated public forums, in the absence of an affirmative governmental designation, would be treated as nonpublic forums, class selection would only be subject to the standards applicable to restrictions on nonpublic forum speakers. That is, government class selection must only be viewpoint-neutral and reasonable considering the objective purposes served by the forum. *Warren v. Fairfax Cnty.*, 196 F.3d 186 (4th Cir. 1999) (en banc).

In *Goulart v. Meadows*, 345 F.3d 239 (4th Cir. 2003), the court found that community centers were limited public forums. The locality’s restriction on the centers’ use for private educational activities for state educational credit (e.g., home-schooling instruction) was viewpoint-neutral and reasonable. The case turned on whether the home-schooling activities should be evaluated based on their similarity in character to the general community education courses that were offered or the distinction between formal versus informal education. The court chose the latter, and thus the restriction was not subject to strict scrutiny. A similarly fine distinction was crucial in *Demmon v. Loudoun County Public Schools*, 342 F. Supp. 2d 474 (E.D. Va. 2004), in which the court determined that selling inscribed walkway bricks was intended to reflect students’ extracurricular interests, as opposed to only school activities, and thus it was viewpoint discrimination to prohibit crosses on the bricks.

In *ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005), the court described these distinctions as determining whether an “internal” or “external” standard should apply. An internal standard applies, and the restriction is subject to strict scrutiny if the government excludes a speaker who falls within the class to which a designated or limited public forum is made generally available. An external standard applies if the person excluded is not a member of the group for which the forum was generally available. Under the external standard, the selection of a class by the government must only be viewpoint neutral and reasonable in light of the objective purposes served by the forum. The only constitutional

limit placed on restrictions on public access in external cases is that entities of a “similar character” to those allowed access may not be excluded. In *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006), the Fourth Circuit attempted to condense the various cases regarding forum types and standards of scrutiny, summarizing as follows:

In a traditional public forum the government may only establish content-neutral “time, place, and manner” restrictions or content-based rules that are “necessary to achieve a compelling state interest” and are “narrowly drawn to achieve that interest.” A designated public forum is “subject to the same limitations as that governing a traditional public forum.” In a limited public forum, however, the government may restrict access to “certain groups” or to “discussion of certain topics,” subject to two limitations: the government restrictions must be both reasonable and viewpoint neutral. Finally, in a nonpublic forum the government may employ a “selective access” policy in which “individual nonministerial judgments” govern forum participation, again subject to the same two limitations: the policy must be reasonable and viewpoint neutral.

Id.

Construing *Mote*, a federal district court held that the “internal standard” applied to a city council’s public comment period, which the court described as an “open invitation to all speakers on all topics,” and thus strict scrutiny applied to the council’s policy of prohibiting speech that was “defamatory” to a group. *Draego v. City of Charlottesville*, No. 3:16cv57 (E.D. Va. Nov. 18, 2016). A speaker made derogatory remarks regarding Muslims in the context of public safety, and the council had the speaker removed. The court found the policy was unconstitutional both facially and as applied. It found that under *Reed*, the policy was not content neutral because its application depended on the message expressed. The court distinguished *Steinburg v. Chesterfield Cnty. Planning Comm’n*, 527 F.3d 377 (4th Cir. 2008) (planning commission meeting was limited public forum, and content neutral policy against personal attacks not facially unconstitutional if adopted and used to serve legitimate public interest of decorum and order), on the grounds that *Reed* undermined *Steinburg*’s reasoning and that it was factually distinct because the forum’s scope was narrower.

If the government decision-maker retains unfettered discretion to ultimately control access to a limited public forum, then viewpoint neutrality is not protected, and the policy is unconstitutional. *Child Evangelism Fellowship, Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376 (4th Cir. 2006); *Child Evangelism Fellowship v. Anderson Sch. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006); see also *Draego v. City of Charlottesville*, No. 3:16cv57 (E.D. Va. Nov. 18, 2016) (council had too much discretion as to what constituted defamatory speech); *Davison v. Loudoun Cnty. Bd. of Sup’rs*, No. 1:16cv932 (E.D. Va. Sept. 14, 2016) (reservation of right to moderate social media page does not negate First Amendment implications of removal of comment critical of board of supervisors).

19-6.05(a)(3) Nonpublic Forum

Other government properties are either nonpublic forums or not forums at all. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S. Ct. 2701 (1992). There is no guarantee of access just because it is government property. The government can restrict access to a nonpublic forum to its intended purpose as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker’s view (viewpoint-neutral). *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439 (1985). Inherent in a nonpublic forum is the ability to make distinctions based on subject matter and speaker identity, so long as the

distinctions are reasonably based on the forum's purpose. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983).

In *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1, 138 S. Ct. 1876 (2018), the Supreme Court held that a polling place was a nonpublic forum and that states may prohibit certain speech there, specifically certain campaign-related messages, so that voters may "focus on the important decisions immediately at hand." The line drawn, however, must be reasonable. While "narrow tailoring" is not required, there must be a sensible, articulable reason for excluding certain messages. The Court held that Minnesota's ban on a "political badge, political button, or other political insignia" was too expansive and indeterminate. For instance, pursuant to its policy, the state asserted that as gun control was a political issue, a shirt with the text of the Second Amendment would be banned, although one with the text of the First would be allowed. A shirt with a rainbow on it would be allowed unless gay rights was an election issue. The Court held Minnesota's law unconstitutional but cited the laws of other states that were more circumscribed in describing the types of messages that were banned.

See also *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008) (the use of linked websites did not turn a school district's websites into a limited public forum); *United States v. DeMott*, 151 F. Supp. 2d 706 (E.D. Va. 2001) (Pentagon grounds nonpublic forum), *aff'd*, No. 01-4569 (4th Cir. Aug. 30, 2002).

19-6.06 Government Retaliation

A plaintiff must establish three elements to prove a First Amendment § 1983 retaliation claim. *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998). First, the plaintiff must demonstrate that his or her speech was protected. In *Buxton v. Kurtinitis*, 862 F.3d 423 (4th Cir. 2017), an applicant for an exclusive program at a community college sued alleging a violation of his free speech right to discuss religion during the interview process. After noting that there are three categories for First Amendment protected activity: (1) employment cases; (2) public forum cases; and (3) cases where the government is providing a public service that requires speech-based distinctions (e.g., public broadcasting or public library discretionary decisions about content), the Fourth Circuit held that the public forum legal framework was inapplicable to free speech retaliation claims. With regard to the third category, it held that the Free Speech Clause has no application in the context of speech expressed in a competitive interview. See also *Huang v. Bd. of Governors*, 902 F.2d 1134 (4th Cir. 1990); *Carey v. Throwe*, 957 F.3d 468 (4th Cir. 2020) (former employee's website posts not protected speech because they amounted to personal grievances, not matters of public concern). Prisoners have a First Amendment right to be free from retaliation for not only filing a grievance, *Booker v. S.C. Dep't of Corrs.*, 855 F.3d 533 (4th Cir. 2017), but for threatening or stating an intention to file a grievance. *Proctor v. Edmonds*, No. 7:18cv00087 (W.D. Va. Aug. 14, 2020) (citing cases).

Second, the plaintiff must demonstrate that the government's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech. See *McClure v. Ports*, 914 F.3d 866 (4th Cir. 2019) (union officials not entitled to uninhibited access to government property); *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006) (reporters' speech not "chilled" by directive that government employees not speak to them); *ACLU v. Wicomico Cnty.*, 999 F.2d 780 (4th Cir. 1993) (stating that "a showing of adversity is essential to any retaliation claim"). This is a fact-specific inquiry that "considers the actors involved and their relationships." *Roncales v. Cnty. of Henrico*, 451 F. Supp. 3d 480 (E.D. Va. 2020) (citing *Ehrlich*, *supra*).

Third, the plaintiff must demonstrate that a causal relationship exists between his or her speech and the defendant's retaliatory action. If the plaintiff satisfies that burden, the defendant must demonstrate by a preponderance of the evidence that the same action would have been taken absent the protected expression. *Penley v. McDowell Cnty. Bd. of*

Educ., 876 F.3d 646 (4th Cir. 2017); *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013); see also *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676 (4th Cir. 2000); *Stultz v. Virginia*, 203 F. Supp. 3d 711 (W.D. Va. 2016) (triable issue whether protected speech was motivating factor in termination of employment), *decision ordered to be held in abeyance sub nom Supinger v. Holcomb*, No. 16-1984 (4th Cir. Dec. 4, 2017); *Meredith v. Russell Cnty. Sch. Bd.*, 133 F. Supp. 3d 838 (W.D. Va. 2015) (thirteen months between speech and termination negates causation), *aff'd*, No. 15-2293 (4th Cir. Oct. 4, 2016); *Echtenkamp v. Loudoun Cnty. Pub. Sch.*, 263 F. Supp. 2d 1043 (E.D. Va. 2003) (incident's timing may support an inference of a retaliatory motive). See *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013) (arrest at TSA screening of bare-chested protester with Fourth Amendment written on chest), for an opinion extensively discussing and applying these factors.

After holding that a police officer's testimony in another officer's grievance hearing was not of public concern, the Fourth Circuit in *Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2004), held that the officer's grievance over the reprimand received, allegedly in retaliation for his truthful testimony in the hearing, was a matter of public concern because of the potential chilling effect that an unwarranted reprimand could have on testimony relating to matters of public, as well as private, concern. Because the issue was a "close" one, his supervisors were entitled to qualified immunity. The court in *Kirby* also held that the right of petition was coextensive with that of free speech. In *Vollette v. Watson*, 978 F. Supp. 2d 572 (E.D. Va. 2013), the federal district court ordered the reinstatement of security clearances for jail contractors whose clearances were revoked after they filed lawsuits challenging the constitutionality of their strip searches conducted by the sheriff in search of contraband. The court found that the sheriff acted in retaliation for the filing of the lawsuits, which were speech of public concern.

The retaliatory action need not be the substantial equivalent of a dismissal. Failing to rehire, denying a promotion, or denying a transfer may constitute a deprivation of a valuable government benefit. *DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995). In *Echtenkamp v. Loudoun County Public Schools*, 263 F. Supp. 2d 1043 (E.D. Va. 2003), the court held that a threat to terminate could sufficiently chill protected speech. Government speech is generally not actionable retaliation unless it contains threats, coercion, intonation of punishment or sanction, or damaging private information about an individual. *Id.*; *Greer v. Petersburg Bureau of Police*, No. 3:16cv850 (E.D. Va. Apr. 20, 2017). Whether protected speech is "chilled" is an objective standard—the government's allegedly retaliatory conduct must likely deter "a person of ordinary firmness" from the exercise of First Amendment rights. *Constantine v. Rectors, George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); see also *McWaters v. Cosby*, No. 02-1430 (4th Cir. Dec. 27, 2002) (while First Amendment retaliation claim sufficiently alleged by elected public official, board members and county attorney entitled to qualified immunity because law not clearly established); *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001) (allegation sufficient that illegal search of computer was in retaliation for protected speech); *Saleh v. Upadhyay*, 11 F. App'x 241 (4th Cir. 2001) (retaliation proved).

Virginia Code § 15.2-1512.4 provides that a local employee may express opinions to state or local elected officials on matters of public concern, defined as those matters of interest to the community as a whole, whether for social, political, or other reasons, and which shall include discussions that disclose any (i) evidence of corruption, impropriety, or other malfeasance on the part of government officials; (ii) violations of law; or (iii) incidence of fraud, abuse, or gross mismanagement. A local employee may not be retaliated against because the employee has expressed such opinions. A sheriff and employees of a sheriff are not local employees for purposes of Va. Code § 15.2-1512.4. *Roop v. Whitt*, 289 Va. 274, 768 S.E.2d 692 (2015).

19-7 RIGHT NOT TO SPEAK

In *Janus v. American Federation of State, County, and Municipal Employees*, 585 U.S. ___, 138 S. Ct. 2448 (2018), the Supreme Court held that a state statute that required non-union members to pay a percentage of union dues to support the collective bargaining aspect of union purposes (as opposed to political or ideological) was a violation of the objecting employee's First Amendment rights. Noting that the Court has "held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all," the Court held that requiring the payment of any portion of dues compelled individuals to support views they find objectionable.

Finding that *Janus* only implicated compelling speech, the Fourth Circuit held that anti-disparagement clauses in settlement agreements were not simply exercises of a right not to speak but were an unenforceable waiver of First Amendment rights. *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019).

19-8 GOVERNMENT SPEECH

The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 125 S. Ct. 2055 (2005) (government's own speech is exempt from First Amendment scrutiny). A government entity has the right to "speak for itself." *Bd. of Regents v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346 (2000). It is entitled to say what it wishes, *Rosenberger v. Rector of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), and to select the views that it wants to express, see *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759 (1991). Thus, whether speech is private and subject to the whole panoply of First Amendment protections or government speech is a crucial determination.

In *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125 (2009), the Court noted that it can be difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but it held that permanent monuments displayed on public property typically represent government speech. Accordingly, the free speech forum doctrine did not apply to the city's decision to reject a donated monument for placement in a city park. Following *Summum*, the Court held in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 135 S. Ct. 2239 (2015), that license plates also convey government speech and, accordingly, the government can refuse to issue plates requested by an organization whose message it determines it does not want to promote. This decision refuted a line Fourth Circuit cases that had held that license plates were mixed private and government speech entitled to free speech protection. See, e.g., *ACLU v. Tata*, 742 F.3d 563 (4th Cir. 2014).

Walker has been expressly identified by the Supreme Court as likely representing the "outer bounds" of the government-speech doctrine. *Matal v. Tam*, 582 U.S. 218, 137 S. Ct. 1744 (2017) (although registered by the government, the content of trademarks is not government speech). The *Matal* Court noted that the government-speech doctrine was "susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents."

19-8.01 Governmental Displays with Religious Content

While government speech is not subject to Free Speech Clause restrictions, it is subject to Establishment Clause analysis. For decades, the Supreme Court struggled with the constitutionality of government-sponsored displays that include religious content. The Court historically relied on the seminal case of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), to analyze each case. In *Lemon*, the Court outlined a three-pronged test to determine whether a public policy is consistent with the Establishment Clause: (1) the

governmental policy must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the policy must not foster an excessive government entanglement with religion. In its holiday display cases, the Court has engaged in fine-line drawing. In *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355 (1984), the Court found that a city-sponsored display in a private park that included a city-owned crèche along with a Santa figure with reindeer, carolers, and cutouts of clowns and elephants met the *Lemon* test because the crèche met the secular purpose of representing the historical origins of a long-recognized traditional holiday. However, in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989), the Court held that a crèche alone in a display on courthouse property violated the Establishment Clause. In an extensive opinion construing the state and federal constitutions, the Virginia Attorney General opined that Christmas and other holiday displays are not per se impermissible provided that the locality is careful with respect to content and context. 2010 Op. Va. Att’y Gen. 34.

In a pair of decisions issued on the same day, the Court similarly drew fine distinctions regarding the posting of the Ten Commandments on courthouse property. In *McCreary County v. ACLU*, 545 U.S. 844, 125 S. Ct. 2722 (2005) (5-4 decision), the posting was unconstitutional, and in *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854 (2005) (5-4 decision), the posting was constitutional. The analysis in both cases began with the Court’s *Lemon* decision and its decision in *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192 (1980) (per curiam), in which the Court held that the posting of the Commandments in a school violated the Establishment Clause despite the avowed secular purpose of demonstrating the foundation of the legal code of western civilization. *McCreary* was decided along similar lines to *Stone v. Graham*, with the Court holding that the timing of the display (1999) and the context (originally included with several public documents of religious moment) sufficiently demonstrated that the government’s purpose was not secular despite assertions that it was erected as representing the basis of our legal code. In *Van Orden*, the Court held that a six-foot high monolith inscribed with the Ten Commandments located on the courthouse grounds did not violate the Establishment Clause. Although there were six opinions expressing varying views of the proper Establishment Clause analysis, again the timing of the display (in existence for forty years) and context (one of twenty-one historical markers and seventeen monuments on the courthouse grounds) were effectively the deciding factors. If the Court divines a religious intent in posting the Ten Commandments displays, then they are unconstitutional even if the government expresses the fig leaf of a secular purpose. Older displays will probably be found constitutional if they manifest a historical, philosophical, legal, or cultural context and a long period of acceptance. The Ten Commandments depiction inside the Supreme Court chamber, mentioned in several places in both decisions, is the paradigm of an acceptable display. On a frieze above the justices, Moses is seen holding the tablets with the Ten Commandments, but he is among seventeen lawgivers both secular and religious.

In another fractured decision (six opinions), the Supreme Court reversed and remanded a lower court decision to enjoin the maintenance of a cross on federal land erected to honor American soldiers killed in World War I. *Salazar v. Buono*, 559 U.S. 700, 130 S. Ct. 1803 (2010). While the reversal was based on injunction review and standing issues, the plurality again noted that original intent and passage of time were factors weighing against an Establishment Clause challenge.

Overruling the Fourth Circuit, the Supreme Court held in *American Legion v. American Humanist Assn.*, 588 U.S. ___, 139 S. Ct. 2067 (2019), that governmental maintenance of a large cross at the center of a busy intersection that memorialized World War I soldiers did not violate the Establishment Clause. A plurality of the court believed that the *Lemon* test should be abandoned. In any event, the majority did not apply the *Lemon* test in holding that there should be a presumption of constitutionality for longstanding monuments, symbols, and practices. The presumption should exist because

(1) it is difficult to determine the original purpose of the monument, symbol, or practice; (2) as time passes, the purposes may change or multiply, representing historical significance or common cultural heritage as well as religious significance; (3) the religious message may dissipate over time; and (4) removal may appear as aggressively hostile to religion.

19-8.02 Legislative Prayer

Legislative prayer can implicate both government/private speech distinctions and Establishment Clause issues, and the Supreme Court's decisions have not been models of clarity. The Supreme Court held in *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330 (1983), that a prayer conducted prior to each day's session of the state's legislature did not violate the Establishment Clause. The determinative factor was the long historical practice of legislative prayer, dating back to the first Congress, which the Court found demonstrated the Founders' intent that it could not violate the First Amendment. As noted by the dissent, the Court did not address the issue within the *Lemon* framework. The Fourth Circuit followed *Marsh* in *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005), upholding the county's refusal to include a wiccan priestess on its list of clergy that conducted opening prayers before board of supervisors' meetings. The appellate court found that the prayers were government speech and thus not subject to Free Speech Clause analysis. Under Establishment Clause analysis, the court found that the Chesterfield prayers were non-sectarian and conducted for the benefit of board members, not the public. The limitation to religious leaders of monotheistic tradition did not violate the Establishment Clause because *Marsh* indicates a reduced level of scrutiny for legislative decisions regarding legislative prayer.

While the *Simpson* decision surprised many, the Supreme Court went even further in *Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811 (2014), holding that the Establishment Clause does not prohibit sectarian legislative prayers. Dismissing the application of the *Lemon* test and dictum from *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989) ("legislative prayers involved in *Marsh* did not violate [Establishment Clause] because the . . . chaplain had removed all references to Christ"), the Court stated that "[g]overnment may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." Although sectarian prayers that overtly refer to a specific faith can go too far if the invocations "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," there must be a pattern of such invocations before the practice becomes unconstitutional. The government also cannot discriminate in favor of Christian invocations.

A plurality also asserted that prayers before local government bodies are not unconstitutional just because attendees at the meetings have business before the boards and may not want to join in the prayer. However, coercion could be possible "if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."¹⁰

This opinion negates the holdings of *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292 (4th Cir. 2004). It is possible that *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008), is still good law. The Fourth Circuit upheld the city council's policy requiring nondenominational prayer. The policy did not violate the Establishment Clause or council members' free-speech or free-exercise rights. Council members rotated offering a prayer at the beginning of each council meeting. A council member, who was

¹⁰ See also *American Legion v. American Humanist Assn.*, 588 U.S. ___, 139 S. Ct. 2067 (2019), which extensively discusses the legislative prayer cases in determining that there is a presumption of constitutionality for longstanding monuments, symbols, and practices.

an ordained minister, intended to pray “in the name of Jesus Christ.” He sued after he was not allowed to offer the prayer. The court held the city council’s policy was designed to make prayers accessible to people with variety of backgrounds and was squarely within the range of conduct permitted by *Marsh* and *Simpson*. While *Town of Greece* held that a locality is not required to have a policy requiring nonsectarian prayer, it did not say that a locality could not choose to have one.

The district court judge deciding *Hudson v. Pittsylvania County*, No. 4:11cv43 (W.D. Va. Mar. 27, 2013), stated that case is distinguishable from *Town of Greece*. Modifying its permanent injunction, the court clarified that while prayer before a board meeting could be sectarian, the active role of the board of supervisors in leading the prayers, and, importantly, dictating their content, was still unconstitutional. *Hudson v. Pittsylvania Cnty.*, 107 F. Supp. 3d 524 (W.D. Va. 2015).

Disagreeing with the panel decision, the en banc Fourth Circuit’s decision in *Lund v. Rowan Cnty.*, 863 F.3d 268 (4th Cir. 2017), supports the *Hudson* holding. The Fourth Circuit held that sectarian prayers that promoted a single religion, and which were solely led by elected officials prior to conducting public business, and to which the audience was invited to participate, violated the Establishment Clause. The court held that it was these factors as a whole (the “totality of the circumstances”) that made the county’s practice unconstitutional. Although the court emphasized that *Town of Greece* only applied to sectarian prayer led by outside clergy, it expressly stated that not all legislator-led prayer was constitutionally suspect and that each factor evaluated independently may have withstood constitutional scrutiny. The court refused, however, to detail what prayer practice would be permissible beyond stating that the “ultimate criterion is simply one of conveying a message of respect and welcome for persons of all beliefs and adopting a prayer practice that advances the core idea behind legislative prayer, that people of many faiths may be united in a community of tolerance and devotion.”

19-9 RELIEF AVAILABLE

19-9.01 Compensatory Damages

The basic purpose of damages under § 1983 is compensatory. See *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042 (1978). The measure of damages under § 1983 must be based on the interests designed to be protected by the right that was violated. It is not a simple matter of applying damage formulas from tort law or of quantifying out-of-pocket expenses. Damages may include compensation for pain and suffering, medical expenses, lost wages, damage to property, and also such injuries as impairment of reputation, personal humiliation, and mental anguish and suffering. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537 (1986).

The Fourth Circuit requires close scrutiny of compensatory damages for emotional distress. The damages must be causally connected to a specific constitutional violation. Although a plaintiff’s testimony alone can support such damages, it will be closely scrutinized and must provide evidence of demonstrable mental anguish. *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996) (denying emotional distress damages). In *Hetzel v. Cnty. of Prince William*, 89 F.3d 169 (4th Cir. 1996) the court remanded the case with instructions to the district court to limit \$500,000 award for emotional distress damages to minimal amount. On remand, the district court recalculated the damages to \$50,000 and granted the plaintiff’s demand for a new trial on damages. In an unpublished opinion, the Fourth Circuit denied the demand for a new trial. The Supreme Court held, however, that the Fourth Circuit’s order to the district court to recalculate the damages was in effect a remittitur and the Seventh Amendment entitled the plaintiff to a new trial if she declined the recalculated amount. *Hetzel v. Cnty. of Prince William*, 523 U.S. 208, 118 S. Ct. 1210 (1998). In an extensive opinion justifying its previous decisions, see *In re Bd. of Cnty. Sup’rs*, 143 F.3d 835 (4th Cir. 1998), the Fourth Circuit again ordered the recalculation of damages to a minimal amount, but the district court, after making the recalculation and

granting the demand for a new trial on damages, refused to reduce the second jury award of \$45,000. No. 94019-A (E.D. Va. Feb. 11, 1999) (second suit by Hetzel was dismissed at summary judgment); *see also Saleh v. Upadhyay*, No. 99-2137 (4th Cir. May 31, 2001) (unpubl.) (medical evidence regarding emotional distress justifies one plaintiff's award and lack thereof justifies reduction in another's); *Norwood v. Bain*, 166 F.3d 243 (4th Cir. 1999) (en banc) (per curiam) (no entitlement to compensatory or punitive damages for emotional distress); *Cooper v. Lee Cnty. Bd. of Sup'rs*, 7 F. Supp. 2d 780 (W.D. Va. 1998) (\$85,000 excessive award reduced to \$15,000), *rev'd on other grounds*, No. 98-2083 (4th Cir. Aug. 19, 1999); *McClam v. City of Norfolk Police Dep't*, 877 F. Supp. 277 (E.D. Va. 1995) (\$15,000 for emotional distress "consistent" with awards for damages for intangible injuries resulting from constitutional violations). Anxiety, stress, or other unpleasantness experienced as a by-product of litigation or a grievance process is not caused by the constitutional deprivation itself and should not be a factor in determining emotional distress damages. *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).

An award of substantial damages, as opposed to nominal damages, must be proportional to the actual injury imposed. *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987). While damages in the case of many constitutional violations, such as those in the First Amendment area, are difficult to determine, injury to the protected interest itself can be a basis for substantial damages but only to the extent that the damages are "reasonably quantifiable." Damages should not be based on the "so-called inherent value of the rights violated." *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir. 1991). An employee can only get damages if it is determined that the employee would not have been fired if a due process hearing had been held. An employee who would have been fired anyway can get back pay from the date of termination to the earliest date the discharge could have taken effect had the proper procedures been followed.¹¹

19-9.02 Nominal Damages

Nominal damages may be awarded if a constitutional violation is proved, even if actual injury cannot be proved. *Norwood v. Bain*, 166 F.3d 243 (4th Cir. 1999) (en banc) (per curiam); *see also Int'l Ground Transp., Inc. v. Mayor & City Council of Ocean City*, 475 F.3d 214 (4th Cir. 2007); *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987); *Kincaid v. Rusk*, 670 F.2d 737 (7th Cir. 1982) (allowing nominal damages of one dollar for denial of access to reading material in prison); *Ward v. Johnson*, 667 F.2d 1126 (4th Cir. 1981). Holding there was no proof of actual injury, the Fourth Circuit reduced a \$50,000 award of damages to one dollar for nominal damages. *Park v. Shiflett*, 250 F.3d 843 (4th Cir. 2001). A trial court ordered a new trial on damages when the jury awarded nominal damages after the defense attorney had implied in questioning that the police officer defendant might personally have to pay the damages. *Adkins v. McClanahan*, No. 1:12cv34 (W.D. Va. Sept. 16, 2013).

19-9.03 Punitive Damages

Punitive damages are allowed in a proper § 1983 case to punish defendants who act with a malicious intent to deprive plaintiffs of their rights or to do them injury or with reckless or callous indifference to federally protected rights. *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625 (1983); *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987). A punitive award may accompany either a nominal award or a substantial compensatory award. Punitive damages are not available against local governments themselves. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981); *Brown v. Mitchell*, 308 F. Supp. 2d 682 (E.D. Va. 2004); *Lee v. City of Roanoke*, No. 95-0453-R (W.D. Va. 1995). The Seventh Circuit has held, however, that a state statute that indemnifies officials for individual liability and fails to distinguish between compensatory and punitive

¹¹ However, the employee can still recover attorney fees and nominal damages.

damages constitutes a waiver as to both types of damages. *Kolar v. Cnty. of Sangamon*, 756 F.2d 564 (7th Cir. 1985).

19-9.04 Equitable Relief

Injunctive and declaratory relief are generally available in § 1983 litigation. *See, e.g., Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978). *But see Chadwell v. Brewer*, 59 F. Supp. 3d 756 (W.D. Va. 2014) (reinstatement is an equitable remedy that may be directed only at liable defendants in their official capacities or at municipal entities themselves).

19-9.05 Attorney's Fees

In § 1983 litigation, the right to attorney's fees is established by statute. 42 U.S.C. § 1988. The application of the attorney's fee provisions is outside the scope of this chapter.