IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 22-30691

JARIUS BROWN,

Plaintiff-Appellant,

v.

JAVARREA POUNCY; JOHN DOE #1; JOHN DOE #2,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Louisiana,
No. 5:21-cv-3415

NATIONAL POLICE ACCOUNTABILITY PROJECT, INC.'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT JARIUS BROWN

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February 2, 2023

CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record certifies that in addition to those persons listed in the briefs previously filed by the parties to this appeal, the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Amicus Curiae National Police Accountability Project, Inc.; and

B. Brian S. Fraser and Angad Singh Bhai, counsel for Amicus Curiae National Police Accountability Project, Inc.

SO CERTIFIED, this 2nd day of February, 2023.

/s/ Brian S. Fraser

Attorney of record for Amicus Curiae National Police Accountability Project, Inc.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure, National Police Accountability Project, Inc. ("NPAP") hereby moves for leave to file a brief as *amicus curiae* in support of Plaintiff-Appellant. The prospective *amicus curiae* has sought consent for this filing from the parties' counsel. Plaintiff-Appellant consents. Defendants-Appellees do not consent. The proposed *amicus curiae* brief is filed herewith.

INTEREST OF AMICUS CURIAE

NPAP is a non-profit organization created to protect the human and civil rights of individuals in their encounters with law enforcement and detention facility personnel. NPAP has approximately five hundred and fifty attorney-members practicing in every region of the United States, including a number of members who represent clients bringing § 1983 actions. NPAP aims to promote the accountability of law enforcement officers and their employers for violations of the Constitution and the laws of the United States. To that end, NPAP pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of individuals whose civil rights have been violated in order to enable them to seek redress for their injuries in the civil court system.

This case is of interest to NPAP because it raises questions regarding the time-consuming practical and trauma-related challenges individuals experience when

attempting to bring § 1983 actions in federal courts in Louisiana. With respect to challenges plaintiffs face when conducting necessary pre-complaint investigation, NPAP provides pre-complaint investigation assistance to its clients and the clients of its member-attorneys. Having encountered these challenges firsthand, NPAP is acutely aware of the difficulties a short statute of limitations period presents to plaintiffs in § 1983 actions. Therefore, NPAP is in a unique position to provide this Court with information regarding the same. Furthermore, NPAP has an interest in its clients and those of its member-attorneys being able to have their day in court without their § 1983 claims being subjected to an unconstitutional procedural barrier.

NPAP has observed that Louisiana's one-year liberative prescriptive period applicable to § 1983 claims coupled with the challenges detailed in its brief creates major barriers for its clients and those of its member-attorneys, undermines vindication of rights that § 1983 was specifically designed to secure and further impedes police accountability.

LEGAL STANDARD

"Courts enjoy broad discretion to grant or deny leave to amici under [FRAP 29]." *Lefebure v. D'Aquilla*, 15 F. 4th 670, 673 (5th Cir. 2021) (internal citation omitted). "A restrictive policy with respect to granting leave to file may . . . create at least the perception of viewpoint discrimination." *Id.* at 674 (internal quotation and citation omitted). "Whether to permit a nonparty to submit a brief, as amicus

curiae, is, with immaterial exceptions, a matter of judicial grace." *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (internal quotation and citation omitted). Courts should "grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet [FRAP 29's] criteria as broadly interpreted." *Neonatology Associates, P.A. v. C.I.R.*, 293 F. 3d 128, 133 (3d Cir. 2002) (cited with approval by *Lefebure*, 15 F. 4th 670, 676). Rule 29(a)(3) of the Federal Rules of Appellate Procedure "only requires amici to state their interest in the case—along with the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." *Lefebure*, 15 F. 4th 670, 673 (internal quotation omitted).

"[A]n amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *In re Halo Wireless*, 684 F.3d 581, 596 (internal quotation and citation omitted).

ARGUMENT

This Court should grant leave to file the accompanying *amicus curiae* brief because it imparts the unique time-consuming practical and trauma-related challenges plaintiffs in § 1983 actions face when attempting to bring their claims in federal court. It does so from the unique perspective of NPAP based upon its experience in encountering these challenges on behalf of its clients, and its

knowledge drawn from the experiences of NPAP member-attorneys who have encountered these challenges as well. This perspective and empirically-based legal arguments relating to it are distinct from the perspective and arguments made by the parties. From its distinct vantage point, NPAP presents arguments relating to the time-consuming, measurable practical challenges plaintiffs in § 1983 actions encounter. Furthermore, NPAP presents arguments supported by empirical research that demonstrate the unique trauma experienced by victims of police violence and the direct impact that trauma has on a plaintiff's ability to timely file suit. NPAP submits that the forgoing is useful to this Court in its determination of whether Louisiana's application of a one-year statute of limitations to § 1983 actions is inconsistent with the federal policy underlying § 1983 claims.

This Court should exercise its discretion and grant leave. First, this motion for leave is timely because it has been filed within seven (7) days of Plaintiff-Appellant's principal brief. *See* FRAP 29(a)(6). Second, NPAP's proposed *amicus curiae* brief is useful to this Court because, as argued above, it offers unique information from a unique perspective that may aid the court in determining whether Louisiana's application of a one-year statute of limitations to § 1983 actions is inconsistent with the federal policy underlying § 1983 claims. Addressing that issue is essential to determining whether such application is unconstitutional. *See Owens v. Okure*, 488 U.S. 235, 239 (1989) ("Title 42 U.S.C. § 1988 endorses the borrowing

of state-law limitations provisions where doing so is consistent with federal law[.]"); *see also* *Burnett v. Grattan*, 468 U.S. 42, 48 (1984), *holding modified by* *Wilson v. Garcia*, 471 U.S. 261 (1985) (internal quotation and citation omitted) ("courts are to apply state law only if it is not inconsistent with the Constitution and laws of the United States"). Grounded in NPAP's unique perspective, the proposed *amicus curiae* brief raises relevant points not raised by the parties, and expounds upon points raised by the parties in a non-duplicative, non-cumulative fashion.

Therefore, this Court should grant NPAP leave to file its *amicus curiae* brief because it is timely, Defendants-Appellees will have ample opportunity to respond, and it offers unique information from a unique perspective regarding the application of Louisiana's one-year statute of limitations to § 1983 claims, as detailed in NPAP's brief.

CONCLUSION

For the reasons above, this Court should grant NPAP leave to file the accompanying *amicus curiae* brief in support of Plaintiff-Appellant.

Dated: February 2, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 1,087 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14 point Times New Roman font in text and 12 point Times New Roman font in footnotes.

Dated: February 2, 2023

/s/ Brian S. Fraser
Brian S. Fraser

CERTIFICATE OF SERVICE

The undersigned certifies that on February 2, 2023, the foregoing motion was submitted to the office of the Clerk for the United States Court of Appeals for the Fifth Circuit for filing using the appellate CM/ECF system, which will transmit an electronic copy to all counsel of record in accordance with the Federal Rules of Civil Procedure.

/s/ Brian S. Fraser
Brian S. Fraser

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SO CERTIFIED, this 2nd day of February, 2023.

/s/ Brian S. Fraser
Attorney of record for Amicus Curiae National Police Accountability Project, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, National Police Accountability Project, Inc. certifies that it is not a publicly held corporation or other publicly held entity, it does not have a parent corporation, and that no publicly held corporation or other publicly held entity owns more than 10% of its stock.

Dated: February 2, 2023

Respectfully submitted,

By: */s/ Brian S. Fraser*

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I. INTEREST OF AMICUS CURIAE[1]

National Police Accountability Project, Inc. ("NPAP") is a project of the National Lawyers Guild, which was founded in 1937 as the first racially integrated national bar association. In 1999, NPAP was created as a non-profit organization to protect the human and civil rights of individuals in their encounters with law enforcement and detention facility personnel. NPAP aims to promote the accountability of law enforcement officers and their employers for violations of the Constitution and the laws of the United States. To that end, NPAP pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of individuals whose civil rights have been violated in order to enable them to seek redress for their injuries in the civil court system.

This case raises the question whether the Louisiana one-year statute of limitations applies to a 42 U.S.C. § 1983 ("§ 1983") claim against police officers for assault or other misconduct attendant upon an arrest is consistent with the federal policy underlying §1983 claims. It is not. The time-consuming practical and trauma-related challenges individuals experience when attempting to bring a § 1983 action in federal courts in Louisiana is antithetical to the federal policy underlying that statute. NPAP has observed that Louisiana's one-year liberative prescriptive period

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No one other than *amicus* and its members made monetary contributions to its preparation or submission.

applicable to § 1983 claims coupled with those challenges creates major barriers for its clients and its attorney members' clients and undermines vindication of rights that § 1983 was specifically designed to secure, and further impedes police accountability. Although under 42 U.S.C. § 1988, courts are instructed to borrow and apply state statutes of limitations to § 1983 claims, courts may do so only if that application is not inconsistent with federal policy underlying those claims. For all the reasons stated in this brief, the application of Louisiana's limited one-year statute of limitations to § 1983 claims, such as those brought by appellant Jarius Brown ("Mr. Brown"), is inconsistent with the federal policy underlying those claims. Therefore, Louisiana's limited one-year statute of limitations cannot bar Mr. Brown's § 1983 claims.

II. SUMMARY OF ARGUMENT

Although 42 U.S.C. § 1988 instructs courts to borrow and apply state statutes of limitations to § 1983 actions, the Supreme Court has clearly stated that such application is permissible only if it is not "inconsistent with the federal policy" underlying the federal cause of action under consideration. *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 465 (1975); *see also Owens*, 488 U.S. at 239 ("Title 42 U.S.C. § 1988 endorses the borrowing of state-law limitations provisions where doing so is consistent with federal law[.]"); *Burnett v. Grattan*, 468 U.S. 42, 48 (1984), *holding modified by Wilson v. Garcia*, 471 U.S. 261 (1985) (internal

quotation and citation omitted) ("courts are to apply state law only if it is not inconsistent with the Constitution and laws of the United States"). In Louisiana, where there is only one statute of limitations for personal injury actions, courts have held that the state's one-year personal injury statute of limitations applies to § 1983 actions. *Stringer v. Town of Jonesboro*, 986 F.3d 502, 509 (5th Cir. 2021).[2]

This brief argues that in light of the measurable, state-created and time-consuming challenges that are specific to victims of police violence, Louisiana's application of a one-year statute of limitations to §1983 actions results in an inability to obtain redress for civil rights violations, which is inconsistent with the policy underlying §1983 and is therefore unconstitutional. It is also an impediment to police accountability. Recovery from physical and psychological trauma caused by injury, pre-complaint investigation, pre-complaint litigation required to obtain necessary public records, compliance with procedural rules, discovery required to perfect a complaint, including ascertaining identities of defendants, and resolution of parallel criminal proceedings prior to commencing civil suit all consume substantial time while the limited one-year statute of limitations continues to run. This holds true even assuming that the case unfolds exactly according to plaintiff's plan, i.e., plaintiff recovers from injuries rapidly, return dates are not adjourned, extensions are not

[2] Notably, other than Louisiana, only Kentucky, Tennessee and Puerto Rico have one-year limitations provisions that apply to Section 1983 claims. *See* Ky. Rev. Stat. § 413.140(1)(a); Tenn. Code. § 28-3-104(a)(1); P.R. Laws Ann. tit. 31, § 5298(2).

sought, discovery is fully produced on due dates, public records are timely produced in response to public records requests, motion practice to enforce applicable court and statutory rules to obtain information required to perfect a complaint that will survive heightened pleading standards is not necessary, discovery orders are not challenged through reargument or otherwise and parallel criminal proceedings are favorably resolved immediately after arrest. Although the Fifth Circuit has implicitly advised that plaintiffs should perfect and file a § 1983 complaint well in advance of the one-year limitations period, *Balle v Nueces County, Texas*, 952 F3d 552, 558 (5th Cir. 2017), doing so may not be possible due to the measurable, practical challenges listed above and more fully discussed *infra*.

Because these practical challenges render application of a one-year statute of limitations inconsistent with the federal policy underlying § 1983 claims, which is to provide a federal remedy in federal court for violations of an individual's civil rights,[3] the application of Louisiana's one-year statute of limitations to these cases is unconstitutional and should not bar Mr. Brown's § 1983 claims.

[3] Specifically, the legislative purpose was to provide a federal remedy in federal court because the state governments and courts, "by reason of prejudice, passion, neglect, intolerance or otherwise," were unwilling to enforce the due process rights of Black Americans guaranteed by the 14th Amendment. *Monroe v. Pape*, 365 U.S. 167 (1961).

III. ARGUMENT

a. The Harmful Act Itself Requires Time To Recover And Causes Deleterious Physical, Psychological And Emotional Effects, Which Impedes Filing Suit On Such an Expedited Schedule.

Victims who attempt to seek relief under § 1983 need time to recover from their physical injuries, including hospital stay, physical therapy and other treatment. During this recovery period, victims may not have time to devote to searching for counsel, conducting pre-complaint investigation and generally building their case. Furthermore, because of the need to recover from grief associated with the particular trauma caused by police violence,[4] it may take relatively more time for a plaintiff or a family member to file a complaint.

[4] *See* Smith Lee *et ano*, *"That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, Journal of Black Psychology, Vol. 45, Issue 3 at p. 150 (2018) (internal citations omitted) ("[T]raumatic loss describes experiences of death that are characterized by one or more of the following features: sudden or unexpected, untimely, violent, victim mutilation, suffering, harmful intent of the perpetrator, preventable in nature, unfair or unjust, multiple deaths, or a death that was witnessed. These features can complicate healthy grief processes and lead to the development of poor mental health. . . . When grief follows a traumatic loss, trauma responses may interact with grief and complicate healing. Research examining traumatic loss resulting from homicide largely reports adverse health outcomes associated with this experience, including PTSD, substance use, social isolation and stigma, and complex bereavement.") (https://journals.sagepub.com/doi/full/10.1177/0095798419865152); *see also* Bryant-Davis, *et al.*, *The Trauma Lens of Police Violence against Racial and Ethnic Minorities*, The Journal of Social Issues, Vol. 73, No. 4 at p. 854 (internal citations omitted) ("According to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the traumatized person may be the direct victim of the act of aggression, may witness or learn that it has happened to someone close to him or her, or may be repeatedly exposed to the details of the event. Psychological trauma may result in posttraumatic stress disorder (PTSD; intrusive thoughts, avoidance, and hypervigilance) but it is also associated with depression, distrust, affect dysregulation, panic, substance dependence, selfharming behaviors, shame, and difficulty focusing and functioning. Applying this definition to police brutality against racial and ethnic minorities, we define racially motivated police brutality trauma as an act of violence or the threat of violence perpetrated by police officers against racial or ethnic minorities.")

In fact, in other contexts, Louisiana has acknowledged and legislatively addressed the impact that recovery from injury-caused physical and mental trauma has on the time to file suit. For example, "[t]he Louisiana State Legislature extended the one-year statute of limitations to three years (in H.B. 724) for victims of child abuse, so as to provide those victims a chance to recover and still have time to file suit."[5] The State Legislature similarly "extended the one-year statute of limitations to two years (in S.B. 156) for victims of crimes of violence, so [those victims would] not have to face discovery associated with litigation after suffering trauma."[6] The State Legislature also "extended the one-year statute of limitations to three years (in H.B. 556) for victims of sexual assault, so as to provide those victims with more time to cope with the trauma of their situation before having to decide whether to pursue civil litigation."[7] Therefore, the Louisiana State Legislature has previously recognized the impact that the time needed for recovery has on the ability to timely file suit.

(https://www.riprc.org/wp-content/uploads/2020/06/josi.12251_Trauma-Lens-of-Police-Violence-against-Racial-Ethnic-Minorities-2017.pdf).

[5] H.R. Civ. L. and Proc. Comm., Meeting Minutes on H.B. 724, at 3 (La. May 10, 1988).

[6] Hearing Before the H.R. Civ. L. and Proc. Comm. on S.B. 156, at 22:58 (La. June 7, 1999) (https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/1999/jun/0607_99_CL).

[7] Hearing Before the H.R. Civ. L. and Proc. Comm. on H.B. 556, at 41:54 (La. April 12, 2016) (https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2016/apr/0412_16_CL); S. Judiciary A Comm., Meeting Minutes on H.B. 556, at 6 (La. May 17, 2016); Hearing Before the S. Judiciary A Comm. on H.B. 556, at 28:39, (La. May 17, 2016) (https://senate.la.gov/s_video/videoarchive.asp?v=senate/2016/05/051716JUDA_0).

The time needed for victims of police misconduct to recover from the resulting trauma warrants at least the same level of recognition. In particular, people of color who have been victims of police violence may suffer from psychological trauma that requires additional recovery time.[8] For instance, young Black men who report intrusive police contact display relatively higher levels of anxiety and trauma associated with those experiences, including symptoms of PTSD and emotional distress, subsequent to the contact.[9] Empirical studies of the impact of negative interactions with police and other institutions perceived as legal in nature have also shown that these interactions lead Black individuals with lower incomes who have experienced them to avoid interaction with legal institutions altogether, including the civil court system.[10] Additionally, the same factors that lead any victim to delay reporting a crime may be particularly heightened in instances of police violence and seeking redress for that violence may be delayed because police violence is unique

[8] Bryant-Davis, *et al.*, *The Trauma Lens of Police Violence against Racial and Ethnic Minorities*, The Journal of Social Issues, Vol. 73, No. 4 at p. 854 (internal citations omitted) ("Ethnic minorities who have experienced police brutality, directly or indirectly, may think about these instances when they do not want to think about them (nightmares, flashbacks, etc.), attempt to avoid interface with police officers (running from police, etc.), and remain in a psychological state of high vigilance, on guard against the possibility of abuse at the hands of the police.") (https://www.riprc.org/wp-content/uploads/2020/06/josi.12251_Trauma-Lens-of-Police-Violence-against-Racial-Ethnic-Minorities-2017.pdf).

[9] Amanda Geller, et. al, *Aggressive Policing and the Mental Health of Young Urban Men*, American Journal of Public Health 104, no. 12 at 2324 (Dec. 2014); *see also* Dylan B. Jackson et. al, *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, Journal of Adolescent Health (Sep. 6, 2019) (Young people in urban settings who have been subjected to intrusive police stops are more likely to experience symptoms of PTSD and emotional distress following the stop).

[10] Sara Sternberg Greene, *Race Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263 (2015).

in nature. The uniqueness of police violence relative to other forms of violence may be identified using several factors: police violence is state sanctioned; police are a pervasive presence; limited options for recourse exist; police culture deters accountability; police violence alters deeply held beliefs; there are racial and economic disparities among those who are and are not exposed to police violence; police violence has a stigmatizing effect; and police are typically armed.[11] Simply put, victims of police misconduct are not ordinary victims of personal injury.

But as long as it is applied, Louisiana's one-year statute of limitations on § 1983 claims leads to an unfair and facially absurd result: while victims of crimes of violence have two years to file suit, and victims of sexual assault or child abuse have three years to file suit, a plaintiff who sues a state or local official under § 1983 for assault, sexual abuse or abuse of a minor only has one year to file suit. Clearly, this unfair result "flies in the face of Louisiana's decision to give victims of serious offenses extra time to complete criminal proceedings and recover from their trauma before beginning a civil suit."[12]

[11] *See* Jordan DeVylder, et. al, *Impact of Police Violence on Mental Health: A Theoretical Framework*, American Journal of Public Health 110, no. 11 (Nov. 1, 2020).
[12] Dani Kritter, *The Overlooked Barrier to Section 1983 Claims: State Catch-All Statutes of Limitations*, Calif. L. Rev. Online (Mar. 2021) (https://www.californialawreview.org/the-overlooked-barrier-to-section-1983-claims-state-catch-all-statutes-of-limitations/).

b. Victims Of Police Misconduct Face Measurable Practical Challenges That Impair Their Ability To Bring A § 1983 Claim Within One Year

Even after recovering from trauma, plaintiffs in § 1983 actions face significant hurdles which underscore the compounding effect a one-year statute of limitations has on their ability to bring and prevail on a § 1983 claim. In a case such as this one where the relief sought is an apology, such relief is often refused on the grounds that an internal investigation is pending. However, conducting internal investigations of police officers' misconduct in a timely manner is an issue in many police departments.[13] Waiting for the internal investigation to conclude to determine whether such relief may be had eats into the one-year statute of limitations.

Victims of police misconduct in particular face other unique challenges that impair their ability to timely file a § 1983 claim within one year.[14] The Supreme Court has observed the practical difficulties plaintiffs like Mr. Brown face when bringing a § 1983 claim:

> Litigating a civil rights claim requires considerable preparation. An injured person must recognize the

[13] *See* Mrozla, *Complaints of police misconduct: Examining the timeliness and outcomes of internal affairs investigations*, The Social Science Journal (May 2019) at pp. 1-3.

[14] The legal and practical difficulties in successfully mounting a § 1983 claim are borne out by the statistics. A 1994 study of the disposition of 4,453 § 1983 suits filed in several states (including Louisiana) found that "[t]he most frequent manner of disposition [of a § 1983 suit] is a court dismissal of the case (74%) . . . . Twenty percent of the issues are disposed of by the court granting the motion of the defendant. Finally, four percent of the issues result in stipulated dismissal, and another two percent end in trial." Roger A. Hanson and Henry W.K. Daley, *Challenging the Conditions of Prisons and Jail: A Report on Section 1983 Litigation*, U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, December 1994.

> constitutional dimensions of his injury. He must obtain counsel, or prepare to proceed pro se. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed in forma pauperis, and file and serve his complaint. At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery.

Burnett, 468 U.S. at 50–51. And although pleading standards in federal courts are "liberally construed," "the administration of justice is not well served by the filing of premature, hastily drawn complaints." *Id.* at 50, fn. 13 (citing FRCP 11).

Particularly for plaintiffs in § 1983 actions, lengthy pre-complaint investigation is critical to perfecting a complaint that satisfies heightened pleadings standards and can survive a motion to dismiss. FRCP 11(b)(3) states that, by signing a pleading, an attorney represents that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." However, plaintiffs in 1983 actions are subject to even higher pleading standards.

First, plaintiffs currently are subject to lengthy discovery stays where a defendant raises an immunity defense, which courts must decide on the pleadings. *Carswell v. Camp*, 37 F.4th 1062, 1066 (5th Cir. 2022). Some district courts stay all discovery, including discovery against municipal co-defendants that are not entitled

to immunity, while dispositive motions invoking immunity are pending. *See, e.g.*, *Jordan v. City of Plaquemine*, 2022 U.S. Dist. LEXIS 212031 at *5-6 (M.D. La. Nov. 21, 2022). As a result, more importance is placed on lengthy pre-complaint investigation relating to qualified immunity, which delays filing suit. A complaint is subject to this heightened pleading through an FRCP 7(a) motion, either brought by defendants or the court itself. Therefore, due to the issue of qualified immunity, the *Iqbal/Twombly* standard is not the standard that a § 1983 plaintiff's lawyer looks to in drafting the complaint, but rather the heightened pleading standard that accompanies Rule 7(a). *See, e.g.*, *Morgan v. Hubert*, 335 F. App'x 466, 469 (5th Cir. 2009) (applying a heightened pleading standard under Rule 7 of the Federal Rules of Civil Procedure "tailored directly at the defendant's assertion of qualified immunity"); *see also* *Davis v. Fernandez*, 2022 WL 1320431 (EDLA May 3, 2022).

Second, the Fifth Circuit has often found that § 1983 plaintiffs are required to specify past incidents that put policymakers on notice or specifically describe deficiencies in training or hiring practices. *Westfall v. Luna*, 903 F.3d 534, 552 (5th Cir. 2018); *see also* *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978) (specific allegations regarding the existence of the implementation of a policy or practice adopted by officers are required to survive a motion to dismiss). This is yet another reason why lengthy pre-complaint investigation is necessary for § 1983 actions.

Third, in order to survive a motion to dismiss under FRCP 12(b)(6), a complaint must meet a "plausibility" standard, but plaintiffs in § 1983 suits are relatively more disadvantaged in this regard than plaintiffs in other types of actions because of "information inequities"[15] between the parties. For example, information identifying the identities of defendants may be in the sole possession of the defendants in such a suit, and plaintiff's counsel may be required to conduct pre-complaint discovery in order to obtain this and other information necessary to satisfy pleading standards.[16] Accordingly, the importance of pre-complaint discovery, and the time needed to conduct it, is particularly heightened in § 1983 actions. Furthermore, pre-complaint investigation may entail conducting witness interviews and hiring experts, all of which are time-consuming, especially for an individual with limited financial resources or who may be incarcerated.[17]

Fourth, access to public records may also be necessary in order to assert allegations supporting *Monell* liability that will pass muster under the applicable heightened pleading standards. Although access to public records is a fundamental

[15] Suzette M. Malveux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 Lewis & Clark L. Rev. 66, 92, 130 (2010).
[16] *Id.*; *see also* Karen Blum, *Section 1983 Litigation: The Maze, the Mud, the Madness*, 23 Wm. & Mary Bill Rts J. 913, 916 (2015) ("Municipal liability claims have become procedurally more difficult for plaintiffs to assert since the Court's imposition of a more stringent pleading standard in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*[.]").
[17] Michael Avery et. al., *Police Misconduct and Litigation*, 691-92 (3ed. 2021).

right under Louisiana's liberally construed Public Records Law[18] (the "PRL"), *see* *Title Research Corp. v. Rausch*, 450 So.2d 933, 936 (La. 1984), certain documents are exempted from the PRL, including investigative records held by sheriffs, police departments, and others, *see* La Stat. Ann. 44:3, and these are generally the type of records a § 1983 plaintiffs seeks. An applicant must receive a response, which is not necessarily a production, within three (3) days of serving a request for public records. La Stat Ann 44:3(B) and (D). However, in reality, the average response time for requests made under the PRL is 114 days.[19] Under the PRL, any person who has been denied access to public records "has a right of action to proceed with a mandamus following a final determination of the custodian or the passage of five days, exclusive of Saturdays, Sundays, and legal public holidays, from the date of his request without receiving a final determination in writing by the custodian." *Vandenweghe v. Par. of Jefferson*, 11-52, p. 4 (La.App. 5 Cir. 5/24/11); 70 So.3d 51, *writ denied*, 2011-1333 (La. 9/30/11); 71 So.3d 289. If access is denied, then the applicant must proceed by filing a mandamus petition in Louisiana state court by way of a rule to show cause returnable ten (10) days from the date fixed by the court.

[18] La. Rev. Stat. Ann. § 44:1, *et seq.*

[19] *See* https://www.muckrock.com/place/united-states-of-america/louisiana/ (last visited February 2, 2022). Of the law enforcement agencies with the most requests, the average response times are: 87 days (New Orleans Police Department), 104 days (Department of Corrections); 116 days (Louisiana State Police); 139 days (Baton Rouge Police Department; and 173 days (Shreveport Police Department). *Id.*

Therefore, a § 1983 plaintiff must litigate in state court and wait for a decision to be rendered on his rule to show cause in order to obtain public records necessary to sufficiently allege *Monell* liability. As discussed below, relevant records must also be obtained through this process in order to obtain the identities of unnamed defendants in the complaint, and the courts may not allow a plaintiff to amend his complaint to add their identities if they are obtained after filing. Therefore, a plaintiff may need to wait for the PRL litigation to conclude before filing his complaint, which further eats into the one-year period.

c. Procedural Rules And Rules of Discovery Create Time Constraints That Frustrate A § 1983 Plaintiff's Ability To Timely Perfect A Complaint More Than Other Types Of Plaintiffs

Having examined the type of information specifically necessary for a § 1983 complaint to satisfy heightened pleading standards and stand a chance surviving a motion to dismiss, a review of relevant procedural and discovery rules demonstrates the time-consuming nature of the process required to obtain this information.

First, FRCP 26(d)(1) states that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order."In cases where identities of defendants are unknown, only after filing suit can discovery be had and identities ascertained. However, discovery regarding these identities cannot be had until the

parties have met and conferred as required by FRCP 26(f). The meet and confer must take place at least 14 days before a scheduling conference or an FRCP 16(b) scheduling order is entered. As for the scheduling order, FRCP 16(b) requires that it be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant. Therefore, under FRCP 26(f) and FRCP 16(b), the meet and confer may occur as late as 106 days after the complaint is served or even later if the first appearance of a defendant is dilatory, and because of the provisions of FRCP 26(d)(1), no discovery may be had during this period. Equally important is the fact that, due to the prescribed time allowances which draw out discovery that are built into the rules, pre-complaint investigation becomes particularly critical, and the statute of limitations keeps running while this necessary investigation is conducted.

Second, after the meet and confer takes place, a party must make initial disclosures within 14 days after the FRCP 26(f) conference. FRCP 26 (a)(1)(C). For parties served or joined after the FRCP 26(f) conference, initial disclosures must be made within 30 days after being served or joined. FRCP 34(a)(1)(D). Even after initial disclosures are made, if the information identifying unnamed defendants is not disclosed, then a plaintiff must litigate discovery disputes. It should be borne in mind that this discovery dispute may be solely for the purpose of obtaining the information necessary to name the defendants and satisfy the statute of limitations

as to those defendants. This process is a true "race against the clock" because courts may reject a plaintiff's motion to amend his complaint to add the identities of John Does learned during discovery and have plaintiff's claims relate back as to those defendants.[20] Therefore, the discovery process required to obtain these identities is time-consuming and particularly high-stakes due to the unavailability of the relation back doctrine. Additional rules further draw out this aspect of the discovery process, including:

- Responding party has 30 days to respond or object to interrogatories. FRCP 33(b)(2).
- Responding party has 30 days to produce in response or object to document requests. FRCP 34(b)(2)(A).

[20] *See Balle v. Nueces County, Texas*, 952 F3d 552, 558 (5th Cir. 2017), where plaintiff filed a 1983 action within Texas' two-year statute of limitations. After filing, and through discovery, plaintiff learned the identities of medical personnel responsible for his injuries while in custody. However, at the time he discovered their identities, the statute had run as against those medical personnel. The court denied his motion to amend his complaint to add those medical personnel, reasoning that plaintiff's amendment did not relate back to the original complaint because the amendment was not necessitated by mistake or misidentification, but rather, by inability to identify. Furthermore, the court rejected plaintiff's equitable tolling argument, stating plaintiff's "inability to determine the identities of the Jane Does before the limitations period had run was attributable to his own decision to file his suit so close to the end of the limitations period." *Id.* Therefore, this case instructs that if a complaint names John Does, then the complaint must be filed well before the statute runs because time is needed to conduct discovery to ascertain the identities of defendants, and if by the time plaintiff discovers those identities the statute has run as against those defendants, the court may not allow the plaintiff to proceed with a claim against those defendants. However, as discussed above, plaintiff must conduct significant pre-complaint investigation before filing so that critical information regarding *Monell* liability and qualified immunity can be sufficiently alleged to satisfy the heightened pleading standards. *See also Green v. Doe*, 260 Fed Appx 717, 720 [5th Cir 2007] (equitable tolling is only available when plaintiff diligently seeks, but is ultimately unable to obtain within the limitations period, discovery regarding the identities of defendants, and files suit in advance of the statute running. Notably, plaintiff filed 11 months before the statute ran, so this case suggests that only by filing far in advance and diligently pursuing discovery will an amended claim against a named defendant after the statute runs be able to survive dismissal based on equitable tolling).

- Responding party has 30 days to respond or object to Requests for Admission. FRCP36(a)(3).

- Time needed to move to compel discovery. Motions must be noticed at least 15 days before the return date. LR 7.2. Then the movant must wait for a decision on the discovery motion. If the decision is favorable, it will most likely provide defendant with additional time to produce or answer. The defendant may also move for reargument, which is another motion cycle. If defendant still refuses to comply with the court order, plaintiff must move for contempt or other means of enforcement, which is yet another motion cycle.

While the forgoing process, a purpose of which is to enable plaintiff to name defendants, takes its course, the statute of limitations as to defendants keeps running.

d. Delays In Bringing §1983 Actions Necessitated By Resolution Of Parallel Criminal Proceedings

Plaintiffs alleging certain § 1983 claims also face unique dilemmas that further inhibit their ability to timely file suit under a one-year statute of limitations. For example, if an individual is subjected to false arrest, that individual may need to challenge the false arrest in their criminal proceeding and obtain resolution on that issue first, and only then file a § 1983 claim in federal court. Otherwise, the individual runs the risks attendant to parallel criminal and civil proceedings, which include self-incrimination in the civil proceeding in the course of attempting to prove the § 1983 claim that may then be offensively used by the State in the criminal proceeding. As a result, individuals are often counseled to wait to file suit until the criminal proceeding is resolved. However, during this waiting period—which could

be at least several months if the case goes to trial—the one-year statute of limitations keeps running. This tension created by parallel proceedings and the one-year statute of limitations further contributes to individuals being deprived of their ability to vindicate their civil rights in federal court. Indeed, the Louisiana State Legislature has recognized and addressed the issue of parallel proceedings in the context of other torts. Specifically, "[The Louisiana State Legislature] also extended the one-year statute of limitations to two years (in S.B. 156) for victims of crimes of violence, so as to provide those victims with more time to deal with parallel criminal and civil proceedings . . . . "[21] The time needed for victims of police misconduct to deal with parallel criminal and civil proceedings warrants at least the same level of recognition.

As a consequence of the forgoing, by the time a potential plaintiff has gathered enough information to support their allegations, the limitations period may have already passed and they do not file suit. Cases that do get filed are ripe for dismissal before a plaintiff has a chance to prove their case despite the plaintiff having spent significant time and resources building a case, including conducting factual and legal research, obtaining counsel, hiring experts, researching defendants and filing a

[21] Hearing Before the H.R. Civ. L. and Proc. Comm. on S.B. 156, at 22:58 (La. June 7, 1999) (https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/1999/jun/0607_99_CL).

complaint. In both instances, the state actors who violate individuals' civil rights are not held accountable.

IV. CONCLUSION

The unique circumstances of victims of police violence requires this Court to hold that application of Louisiana's one-year statute of limitations to § 1983 cases is inconsistent with the federal policy underlying § 1983 claims and, therefore, should not bar Mr. Brown's § 1983 claims.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,191 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14 point Times New Roman font in text and 12 point Times New Roman font in footnotes.

Dated: February 2, 2023

/s/ Brian S. Fraser
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CERTIFICATE OF SERVICE

The undersigned certifies that on February 2, 2023, the foregoing Brief was submitted to the office of the Clerk for the United States Court of Appeals for the Fifth Circuit for filing using the appellate CM/ECF system, which will transmit an electronic copy to all counsel of record in accordance with the Federal Rules of Civil Procedure.

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