ORIGINAL

21-8049

NO. 22-_____

In The

Supreme Court of the United States

THOMAS TATE TUNSTALL,

Petitioner,

v.

HOPE DAIGLE, formerly known as, Hope D. Theriot,

Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas T. Tunstall V
Petitioner
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QUESTIONS PRESENTED

Respondent, a Louisiana state agent, procured the post-legal-process seizures of petitioner and his property (seaman's wages and tax refunds) through knowing use of deliberately falsified state records and intentionally perjured affidavits of state agents and others. After spending two years in state custody, petitioner's criminal contempt conviction was invalidated. The state court found neither petitioner nor his property were subject to seizure in the first instance. Despite being statutorily compulsory, respondent refuses to take any action to return petitioner's unlawfully seized federally protected property.

The questions presented:

(1) Whether the doctrine of *Ex parte Young* allows a federal court to exercise jurisdiction over a claim seeking return of illegally seized property that the State does not have possession of or a possessory interest in (as the Ninth Circuit and this Court have held), or whether under this Court's holding in *Edelman v. Jordan,* the Eleventh Amendment bars a federal court exercising jurisdiction over such a claim simply because the illegally seized property happens to be money (as the Fifth Circuit held below).

(2) Whether the Fourth Amendment applies to people and property alike; and if so, whether the deferred-accrual rule applicable to §1983 claims for unlawful post-legal-process seizures of persons is equally applicable to §1983 claims for unlawful post-legal-process seizures of property (as the Ninth Circuit, and a panel of the Fifth Circuit have held), or whether the

limitations period accrues when the property is initially unlawfully seized (as held by the Eighth Circuit, and Fifth Circuit below).

(3) Whether the statute of limitations for §1983 claims for a state official's intentional and arbitrary discrimination in application of state and federal laws begins to run when the state official first violates the Equal Protection Clause (as the Fifth Circuit held below), or whether each day the state official persists in her unconstitutional conduct constitutes a separate violation with its on limitation period (as the Sixth, Seventh, Ninth, and Eleventh Circuits, following this Court's guidance, held).

PARTIES TO THE PROCEEDING

Petitioner Thomas Tate Tunstall was the plaintiff in the district court and appellant in the court of appeals. Respondent Hope Daigle, formerly known as Hope D. Theriot, individually and in her official capacity as agent of the Louisiana Department of Children and Family Services, was the defendant in the district court and appellee in the court of appeals.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Superior Court of Liberty County Georgia

Tunstall v. Tunstall, Civil Action No. 94-V-01246 (October 13, 1994)(Final Judgment and Decree divorcing the parties)

28th Judicial Circuit Court of Baldwin County Alabama

State of Alabama ex rel. Manci v. Tunstall, Case No. CS 1995-166.00 (June 24, 1995) (original support order)

State of Alabama ex rel Glidewell v. Tunstall, Case No. CS 1995-166.02 (February 13, 2004)(modification order, terminating support for eldest son, increasing support for youngest son)

State of Alabama ex rel. Glidewell v. Tunstall, Case No. CS 1995-166.02 (March 2, 2008) (order terminating support obligations for youngest son)

Glidewell v. Tunstall, Case No. CS 1995-166.04 (March 10 & April 11, 2017)(orders vacating April 11, 2011 Default Judgment and dismissing case)

Glidewell v. Tunstall, Case No. CS 1995-166.05 (March 30, 2018)(order vacating June 29, 2017 order as per appellate court mandate)

State of Alabama, Glidewell v. Tunstall, Case No. DR 2017-900632 (July 27, 2017)(order dismissing state's petition to register foreign support order)

State ex rel. Glidewell v. Tunstall, Case Nos. CS 1995-166.00, .01, .02., .03 (June 11, 2018) (orders dismissing all cases)

Alabama Court of Civil Appeals

T.T. v. K.M.G., 186 So.3d 472 (Ala. App. Civ. 2015)(mandate directing juvenile court to vacate its order denying Rule 60b motion)

Ex parte T.T.T., 246 So.3d 126 (Ala. Civ. App. 2017)(order dismissing petition as moot upon juvenile court vacating April 18, 2011 Default Judgment and dismissing Case No. CS 1995-166.04)

Ex parte T.T.T., 249 So.3d 514 (Ala. Civ. App. 2017)(mandate directing the juvenile court vacate it June 29, 2017 order entered in Case No CS 1995-166.05)

Ex parte T.T.T., 285 So.3d 827 (Ala. Civ. App. 2018)(order denying petition as moot upon the juvenile court's dismissal of all case on June 11, 2018)

32nd Judicial District Court, Parish of Terrebonne Louisiana:

Louisiana v. Tunstall, No. 13230-IV-D, LASES No. 2029760-01 Division "H/O" (Civil) (January 12, 2010)(order dismissing state's petition, income assignment order, modification order and contempt rule)

Louisiana v. Tunstall, No. 13230-IV-D, LASES No. 2029760-01, Division "E" (Criminal) (July 6, 2017)(order vacating income assignment order retrospectively to date of issue, September 12, 2012)

Louisiana v. Tunstall, No. 13230-IV-D, LASES No. 2029760-01, Division "E" (Criminal) (February 16, 2018)(order invalidating July 15, 2015 criminal contempt conviction)

United States District Court (S.D. Alabama):

Tunstall v. Glidewell, et al., No. 18-0356-KD-B (September 30, 2020)(order granting Hope Daigle's motion to dismiss for lack of personal jurisdiction)

United States District Court (E.D. Louisiana):

Tunstall v. Daigle, No. 20-2773-JVM (August 10, 2021)(order and judgment dismissing official capacity claim for lack of subject-matter jurisdiction; and granting motion to dismiss §1983 individual capacity claims as prescribed)

United States Court of Appeals (5th Circuit):

Tunstall v. Daigle, No. 21-30510 (March 10, 2022 and April 1, 2022)(opinion, mandate and judgment affirming decision below)

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Louisiana Constitution

Louisiana Code Criminal Procedure

OPINIONS BELOW

The court of appeals' opinion (App. 1a-7a) is unpublished. The district court's order and reasons (App. 8a-33a) and judgment (App. 34a) are unpublished.

JURISDICTION

The Fifth Circuit entered its judgment on March 10, 2022.. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment, U.S. Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.

The Eleventh Amendment, U.S. Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by a citizen of another state, or by citizens or subjects of any foreign state.

The Fourteenth Amendment, U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 U.S. Code, provides:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Section 11109(a) of Title 46 U.S. Code provides:

> Wages due or accruing to a master or seaman are not subject to attachment or arrestment from any court, except for an order of a court about the payment by a master or seaman of any part of the master's or seaman's wages for the support and maintenance of the spouse or minor children of the master or seaman, or both. A payment of wages to a master or seaman is valid, notwithstanding any prior sale or assignment of wages or any attachment, encumbrance, or arrestment of the wages.

STATEMENT OF THE CASE

A. Factual Background.

1. By order dated June 24, 1995, the Baldwin County Alabama Juvenile Court ("juvenile court") established Tunstall's support obligations for his two minor sons. The court specifically

found that no arrears were owed. App. 36a.

By order dated February 13, 2004 the court terminated Tunstall's support obligations for his eldest son who attained the age of majority in November 2003. And on March 2, 2008 the court, belatedly, terminated Tunstall's support obligations for his youngest son who attained the age of majority in March 2007. Based on the state child support records Baldwin County Department of Human Resources' ("BCDHR") agent Kelley O. Edwards ("Edwards") maintained since November 2000, the court determined Tunstall did not owe any arrears accruing between June 1995 – March 2007. App. 36a-37a.

2. On November 20, 2008, Daigle, through the Terrebonne Parish District Attorney ("TPDA"), filed in the 32nd Judicial District Court, Parish of Terrebonne Louisiana ("Louisiana court") a Uniform Interstate Family Support Act ("UIFSA") petition. Through the petition, Daigle sought to register and enforce a [fictitious] support order BCDHR agent Edwards falsified state child support records to indicate the Superior Court of Liberty County Georgia ("Georgia court") entered on October 1, 1992, in *Tunstall v. Tunstall*, Civil Action No. 94-V-01246. And that pursuant to said [fictitious] order, Tunstall owed an arrearage of $150,117.17. App. 36a-37a.

At Daigle's request, on February 29, 2009 the TPDA file a contempt rule in the Louisiana court's Civil Division seeking to compel Tunstall's compliance with the [fictitious] Georgia court order and collect the fabricated arrearage.

During hearing on January 5, 2010, Tunstall presented unassailable evidence proving all allegations contained in the petition were patently false. And, that the affidavits and registration statement submitted in support thereof, perjured. On recommendation of the Hearing Officer and TPDA, by order dated January 12, 2010 the Louisiana court set aside the Income Assignment

and Modification orders Daigle had procured through use of the above described falsified state records, and dismissed the UIFSA Petition and Contempt Rule. On April 1, 2010, DCFS closed Tunstall's child support case. App. 37a.

3. On or about September 8, 2012 Daigle, through the TPDA, procured a new *ex parte* IAO. This time, falsely representing Tunstall owed $170,171.17 in arrears accruing pursuant to a [fictitious] order entered by the Louisiana court on September 25, 1992. App. 37a.

In October 2012 Daigle propounded an Income Withholding Order ("IWO") on Tunstall's company, M & T Oceanographic Research, LLC ("M & T"), falsely representing Tunstall owed $170,171.17 in arrears pursuant to the [fictitious] September 25, 1992 support order. In response, Daigle was provided a copy of the Louisiana court's January 12, 2010 order and informed that Tunstall's wages would not be garnished absent a valid and enforceable court order. App. 37a.

4. On or about March 18, 2013, Daigle, through the TPDA, filed a Contempt Rule in the Louisiana court's Criminal Division ("E"), charging Tunstall with knowingly refusing to pay support for his [falsely] alleged minor children in accordance with the Louisiana court's [fictitious] September 25, 1992 order. (At the time, Tunstall's sons were 24 and 29 years of age). App. 38a.

The contempt rule was set for hearing on April 3, 2014. Based on the falsified state records and perjured state agent affidavits attesting to the validity of the alleged arrearage, the Hearing Officer recommended the court adjudge Tunstall guilty of contempt, sentence him to 30 days confinement (suspended upon paying $7500.00); probation for a **definitive** period of two years;[1]

1 "That a determinate sentence is suspended and the contemnor put on probation does not make the remedy civil in nature, for a suspended sentence, without more, remains a determinate sentence, and a fix term of probation is itself a punishment that is criminal in nature. A suspended sentence with a term of probation is not equivalent to a conditional sentence that would allow the contemnor to avoid or purge sanctions." *Hicks v. Feiock*, 485 U.S. 624,

pay $500.00 per month toward satisfaction of the support arrearage; and a $25.00 monthly administrative fee. App. 38a.

5. In April 2014 M & T began garnishing Tunstall's seaman's wages as per the second IWO Daigle issued on 02/03/2014. M & T continued to garnish Tunstall's wages until November 2014, when his employment was terminated, a consequence of Daigle obtaining the unlawful suspension of his licenses. App. 38a-39a.

6. By order dated June 12, 2015, the Louisiana court held Tunstall in criminal contempt (of the non-existent September 25, 1992 court order) and imposed the recommended sentence. App. 39a.

7. On September 25, 2015 Tunstall filed in the Louisiana court, motion to annul or vacate his criminal contempt conviction. During hearing on November 17, 2015 the court deemed the motion premature in light of ongoing collateral proceedings in Alabama, and that upon termination of those proceedings the motion could be refiled.

8. In response to the orders and decisions issued in, *T.T. v. K.M.G.*, 186 So.3d 472 (Ala. App. Civ. 2015) and *Ex parte T.T.T.*, 246 So.3d 126 (Ala. Civ. App. 2017), on April 10, 2017, the Alabama juvenile court vacated all orders and judgments entered against Tunstall as void, *ab initio,* for want of subject-matter jurisdiction. However, the court would not dismiss the cases as mandated by *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025 (Ala. 1999)("Where 'the trial court ha[s] no subject-matter-jurisdiction, [it has] no alternative but to dismiss the action.'"). The juvenile court continued to act in want of subject-matter jurisdiction until the appellate court

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639 n.11 (1988).

issued its mandate in *Ex parte T.T.T.*, 249 So.3d 514 (Ala. Civ. App. 2017). Nevertheless, the juvenile court still refused to dismiss the pending cases.

While proceedings were ongoing in the Louisiana, Alabama appellate, and juvenile courts, Baldwin County Alabama Assistant District Attorney Harry M. D'Olive Jr. (BCDHR's contract attorney and Tunstall's ex-wife's relative), filed in the Baldwin County Alabama Circuit Court, on May 22, 2017, Petition to Register Foreign Support Order docketed as *State of Alabama, Glidewell v. Tunstall*, Case No. DR 2017-900632. Through the petition ADA D'Olive falsely represented that the Georgia court entered a support order on September 25, 1992 in Civil Action No. 94-V-01246 (see ¶2 *supra*), and that pursuant to said [fictitious] order Tunstall owed $108,719.04 in support arrears. It was also falsely represented that on or about April 13, 2017 the Georgia court's Clerk had requested registration and enforcement of the [fictitious] order.

On June 20, 2017, Tunstall objected to registration, presenting defenses of: lack of jurisdiction; of prescription; of abatement; of improper venue; of unclean hands; of failure to state a claim; and recusal of the trial judge. On June 22, 2017 the trial judge entered an order of recusal.

9. After Tunstall spent two years in State custody,[2] on July 6, 2017, the Louisiana court granted TPDA's *ex parte* motion to vacate the [fraudulently procured] Income Assignment Order retrospectively to its date of issue, September 12, 2012. App. 39a.

10. On July 26, 2017 ADA D'Olive requested the circuit court dismiss Case No. 2017-900632, inasmuch admitting the claims Tunstall owed an arrearage pursuant to the [fictitious] Georgia support order were patently false. On July 27, 2017 the court granted the motion.

2 "Custody" means detention or confinement or probation or parole supervision, after sentence following conviction for the commission of an offense. La. C. Crim. P. art. 924(2).

11. On December 4, 2017, Tunstall filed a renewed motion to vacate or annual his criminal contempt conviction. By order dated February 16, 2018, the court found neither Tunstall nor his property were subject to seizure in the first instance, fully invalidating his criminal contempt conviction. App. 39a.

12. The juvenile court remaining steadfast in its refusal to dismiss the pending cases, necessitating Tunstall to file yet another petition for writ of mandamus. After being ordered to answer the petition, docketed as *Ex parte T.T.T.*, 285 So.3d 827 (Ala. Civ. App. 2018), on June 11, 2018 respondent judge dismissed all pending cases for want of subject-matter jurisdiction. App. 41a.

B. Procedural Background.

1. On August 13, 2018, Tunstall filed a verified §1983 complaint against the responsible Alabama state agents and private parties in the U.S. District Court, S.D. Alabama. And on September 20, 2018 filed a Second Amended Complaint naming Daigle as a defendant. On September 30, 2020, the court dismissed Daigle for lack of personal jurisdiction. App. 41a.

2. On October 7, 2020, Tunstall filed a verified §1983 complaint against Daigle in the U.S. District Court, E.D. Louisiana. App. 19A, 35a. Both parties consented to the magistrate judge's jurisdiction. App. 3a. On August 10, 2021 the magistrate judge granted Daigle's 12(b)(1)/ 12(b)(6) motion to dismiss. App. 33a-34a.

As to the official capacity claim. The magistrate judge conflated the holdings in *Fontenot v. McGraw*, 777 F.3d 741, 754 (5th Cir. 2015) and *Zynda v. Arwood*, 175 F.Supp.3d 791, 801 (E.d. Mich. 2016) to reach the plainly erroneous conclusion the wages seized from Tunstall did not

exist as an identifiable piece of property. App. 16a. Rather, were fungible, and despite any evidentiary support, presumed the wages were commingled with other monies in a state treasury. The magistrate judge reasoned, under these circumstances, any order "declaring" their seizure wrongful and "enjoining" the state's continued retention would be "tantamount to an order that the state make plaintiff whole by paying him an equivalent amount of money." The magistrate judge concluded, the Eleventh Amendment barred the court from granting such relief, and dismissed the official capacity claim for declaratory and injunctive relief, without prejudice, for lack or subject-matter jurisdiction. App. 17a.

The magistrate judge also dismissed, with prejudice, the individual capacity claims seeking an award of damages for Daigle's past and present violations of Tunstall's Fourth and Fourteenth Amendment rights viz-a-viz the her continued interference with his possessory interest in the illegal seized property. The magistrate judge dismissed Tunstall's argument, finding under *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995), those claims accrued at the time of seizure, and at the latest, on July 6, 2017 when the Louisiana court set aside the IAO. App. 17a-19a. Notice of appeal was timely filed on August 16, 2021.

3. The Fifth Circuit affirmed the district court's dismissal of Tunstall's official capacity claim without reaching the merits. The Fifth Circuit reasoned that Tunstall's claims, although described as for "declaratory and injunctive relief," they still amount to a claim for money damages for retrospective harm. And because "the funds to satisfy the award [requested] must inevitably come from the general revenues of the State," Tunstall's claims against Daigle in her official capacity are barred by the Eleventh. App. 5a.

The Fifth Circuit also affirmed the district court's dismissal of Tunstall's Fourth and Fourteenth Amendment damage claims as prescribed. Relying on *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 421 (5th Cir. 2016), the appellate court determined that Tunstall's §1983 unlawful seizure claims accrued at the time state officials illegally seized his property. The court rejected Tunstall's argument that Daigle's unlawful post-legal process seizure and post-judgment refusal to return the illegally seized property constituted a continuing interference with his statutorily and constitutionally protected possessory interest in same, the statute of limitations for which would not begin to run until the property was returned. The appellate court, citing *Bd. Of Regents v. Tomanio*, 446 U.S. 478, 483-484 (1980), posited Tunstall's theory would undermine statutory periods of limitations. App 6a-7a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision narrows the doctrine of *Ex parte Young,* allowing state officials to invoke the Eleventh Amendment and use the state's sovereign immunity shield to avoid returning federally protected property that was illegally seized and transferred to a private individual. The Fifth Circuit supported its decision by expanding *Edelman v. Jordan* to include suits by private parties that would *not* impose a liability which must be paid from public funds in the state treasury, but rather, as state law mandates, from the income and resources of the recipient of the illegally seized property. The appellate court also disregards this Court's precedent holding that present violations of the Equal Protection Clause may be enjoined under *Ex parte Young.*

The Fifth Circuit's finding that the statute of limitations for a §1983 claim for unlawful post-legal-process seizure of property begins to run at the time the property is illegally seized

would require parallel civil litigation while Tunstall's criminal prosecution was ongoing. This Court rejected such a notion in *McDonough v. Smith*,139 S.Ct. 2149, 2158 (2019). The Fifth Circuit's accrual rule is also in direct conflict with this Court's decision in *Manuel v. City of Joliet, Ill.*, 137 U.S. 911, 920 (2017)(finding the Fourth Amendment governs the entirety of plaintiff's unlawful detention), which the Ninth Circuit and a panel of the Fifth Circuit in a published decision found applied equally to §1983 claims for unlawful post-legal-process seizure of property.

The questions presented are critically important to the adjudication of frequently recurring constitutional claims which seek to constrain state officials' refusal to return illegally seized personal property. The Court should grant review, reject the Fifth Circuit's expansion of *Edelman* and narrowing of the doctrine under *Ex parte Young*. The Court should also grant review to resolve the circuit split and lift the procedural bar the court of appeals erroneously imposed.

I. The Fifth Circuit's decision allows state official to use the Eleventh Amendment and state's sovereign immunity shield to violate federal law.

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only to conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc. v. Pub. Svc. Comm'n*, 533 U.S. 635, 645 (2001)(quoting *Idaho v. Coeur d'Arlene Tribe of Idaho*, 521 U.S. 261, 296 (1997)(O'Conner, J., concurring in part and concurring in judgment).

In Count I Daigle was sued in her official capacity for declaratory and injunctive relief, see *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985), to bring an end to her ongoing violations of

federal law. See *Coeur d'Alene*, 521 U.S. at 288; *Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977). Specifically, Tunstall requested the court declare Daigle's continued deprivation of his possessory interest in the unlawfully seized property is violative of the 14th Amendment U.S. Constitution and Article 1, §§2 and 3, Louisiana Constitution. And enter a permanent injunction compelling Daigle to take any and all actions necessary to return all of Tunstall's unlawfully seized property. App. 42A,44a.

The cost Daigle (DCFS) incurs recovering the unlawfully seized property, is simply an "ancillary effect on the state treasury." *Papasan v. Allain*, 478 U.S. 265, 278 (1986); *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977); *Edelman v. Jordan*, 451 U.S. 651, 668 (1974). A conclusion derived from, *inter alia*, Louisiana Revised Statute ("La. R.S.") La. R.S. 46 §233.1.C(2) and La. R.S. 46:236.9H which require Daigle (DCFS) to recover and return the unlawfully seized seaman's wages and tax refunds (erroneous child support payments). In refusing to recover and return the illegally seized property, Daigle is intentionally depriving Tunstall of the equal protection of the laws and his statutorily and constitutionally protected possessory interest in the illegally seized property in violation of the Fourth and Fourteenth Amendments.

This Court has explained, "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 560, 564 (2000)(per curiam)(quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)

(in turn quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)). See also *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993)(finding under *Ex parte Young*, suits seeking prospective relief "may be brought against state officials in federal court challenging the constitutionality of official conduct enforcing state law.)

Daigle "is acting in a manner that violates the Equal Protection Clause, such actions may be enjoined under *Ex parte Young*, 209 U.S. 123 (1908)." *Papasan*, 478 U.S. at 282 n.14. "A remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure "'compliance *in the future* with a substantive federal-question determination' "rather than bestow an award for accrued monetary liability." *Id.* at 282 (citing *Milliken*, 433 U.S. at 289)(in turn quoting *Edelman*, 451 U.S. at 668).

A. The Eleventh Amendment is not implicated.

If Tunstall had voluntarily paid money to the state, then requested a refund of of those funds held in the state's treasury, the state would be the real, substantial party in interest and "entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Edelman*, 415 U.S. at 663 (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S.459, 464 (1945)). *Ford Motor Co.*, and *Fontenot v. McGraw*, 777 F.3d 741 (5th Cir. 2015) (cited by the courts below) are wholly distinguishable in that: (1) there was no voluntary payment on Tunstall's part; (2) Daigle (DCFS) does not have actual possession of or a possessory interest in the unlawfully seized property; and (3) as per state law the funds to satisfy the relief sought would not be paid from the state's treasury.

Tunstall's wages were seized under the guise of a child support action for arrears. App. 40a-41a. Consequently, the money was deposited into a trust fund mandated by La. R.S.

§236.11.2.B.[4] Funds held in custodial trust are not state funds. See *Taylor v. Westly*, 402 F.3d 924, 932 (9th Cir. 2005)("Because the plaintiffs' money is held in a custodial trust, this case is inline with the circumstances in *United States v. Lee*, 106 U.S. 196 (1882) where the claimant sued for return of his own property, which was not property of the government."). The illegally seized money was then transferred through the State of Alabama to Tunstall's ex-wife. See *Boudreaux v. Boudreaux*, 180 So.3d 1245, 1254 (La. 2015)(citing La. R.S. 236.11B(2) ... The Department shall distribute such amounts collected pursuant to this Subsection in accordance with federal regulations.).

In finding Tunstall's wages were not subject to seizure in the first instance, the Louisiana court conclusively determined the statutes Daigle relied upon to perfect the illegal seizures, La. R.S. 46:236.2, .3, .6, and La. C. C. Article 1306.1 *et seq.*, did not vest DCFS or any third party with a possessory interest in the wages.[5] Put another way, the federal court is not being called upon to adjudicate the State's interest in the illegally seized property.

The Eleventh Amendment does not bar a federal court from exercising jurisdiction in *in rem* proceedings when the state does not have actual possession of the property (*res*), *California v. Deep Sea Research, Inc., et al.*, 523 U.S. 491, 507-508 (1998)(citations omitted), or in

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4 The State of Louisiana promulgated this law in accordance with P.L. 104-193 August 22, 1996 (110 STAT. 2015); P.L. 105-33 August 5, 1997 (111 STAT. 329); U.S. Department of Health & Human Services, Office of Child Support Enforcement Action Transmittal (OCSE-AT) 98-24; 42 U.S.C. §§654b(c) and 664(a)(3)(B).

5 Under the Full Faith and Credit Act, federal courts must give "state judicial proceedings 'the same full faith and credit ... as they have by law or usage in the courts of the State ... from which they are taken.'" *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 519 (1986); see also *Allen v. McCurry*, 449 U.S. 90, 96 (1980); 28 U.S.C. §1738. In Louisiana, "[w]hen a court renders a judgment that decides the merits of the case in whole or in part, the judgment is a final judgment. La. C. C. P. Art. 1841." *Tolis v. Board of Supervisors of Louisiana State University*, 660 So.2d 1206 (La. 1995). The Correctness of the findings to support the judgment does not affect it. *Milne v. Deen*, 121 U.S. 525 (1887). And it is conclusive as to all *media concludendi*, and cannot be impeached by a showing that it was based on a mistake of law. *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *American Express Co. v. Mullins*, 212 U.S. 311 (1909).

instances state officials do not have a colorable claim to possession of the property due to their unauthorized acts, *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 686-688 (1982) (citing *Ex parte Young*, 209 U.S. 123 (1908), *Tindal v. Wesely*, 167 U.S. 204 (1897), and *United States v. Lee*, 106 U.S. 196 (1882)).

B. The Fifth Circuit's findings contravene State law.

Citing *Edelman*, 415 U.S. at 665-666 and *Fontenot*, 777 F.3d at 752-755, the Fifth Circuit postulated: (1) although Tunstall's claims were for declaratory and injunctive relief "they still amount to a claim for money damages for retrospective harm"; and (2) because "[t]he funds to satisfy the award [requested] in this case must inevitably come from the general revenues of the State," Tunstall's claims against Daigle in her official capacity are barred by the Eleventh Amendment." App. 5a. State statutes governing return of erroneously collected child support payments repudiate the appellate court's postulations.

"If there is a specific statute concerning the disposition of the seized property, it shall be disposed in accordance with the provisions thereof. La.Rev.Stat. §15:41A." *Houston v. City of New Orleans*, 675 F.3d 441, 446(5th Cir. 2012). There are two primary, but not exclusive, statutes governing Tunstall's claim for return of his illegally seized wages and tax refunds (erroneous child support payments). The first, La. R.S. §46.233.1C, requires "the department promptly take all necessary steps to correct any overpayment, including collections ... and in the case of: (2) an overpayment to ... any individual who is no longer receiving assistance, recovery may be made by appropriate action against the income or resources of the individual ..." The statute has but one interpretation, the funds to satisfy the relief sought in this case will not come from the general revenues of the State, but, the income or resource of Tunstall's ex-wife.

The second, La. R.S. §46:236.9H, requires collections that result in overpayments to be refunded to the noncustodial parent. See *State ex rel S.L.J. v. Hammond*, 749 So.2d 814, 816 (La. App. 2nd, Cir. 1999)(finding under the provisions of La. R.S. 46:236.9H the state was responsible for returning payments collected that were not owed)(rehearing denied January 20, 2000); *Gallo v. Gallo*, 816 So.2d 168, 177 (La. 2003)(concurring with the determination the State is obligated to return erroneously collected child support payments in *State ex rel S.L.J. v. Hammond*, 749 So.2d 814, 816 (La. App. 2nd, Cir. 1999)). In relevant part, La. R.S. 46:236.9H states, "in no case shall the department be liable for damages due to any overpayment, or for any effort undertaken in the collection process that does not constitute a willful and wanton act." Under the plain language of La. R.S. 46:236.9H, Tunstall's claim seeking return of the erroneously collected child support payments is not a claim for damages for retrospective harm caused by Daigle's willful and wanton acts.

The Fifth Circuit supplants settled state law with its contradictory findings Tunstall's claims amount to a claim for money damages for retrospective harm, the award of which must be paid with funds from the state treasury. Federal courts are not to make state law, and certainly not "by analogy" to federal law. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state .... And no clause in the Constitution purports to confer such power upon federal courts."). Indeed, "the views of the State's highest court with respect to state law are binding on federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983)(per curiam).

1. Damage claims for retrospective harm.

All damage claims for retrospective harm were asserted against Daigle in her individual capacity. App. 43a-44a. A plaintiff may pursue a 42 U.S.C. § 1983 claim against a state official seeking to impose *personal* liability on that official, such that the money comes from the official's *own* resources. To succeed on the merits of such a claim, a plaintiff must show only that "the official, acting under color of state law, caused the deprivation of a federal right." *Hafer v. Melo,* 502 U.S. 21, 25 (1991). In that instance, "the Eleventh Amendment does not erect a barrier against suits to impose individual and personal liability on state officials under §1983. *Id.* at 30-31 (internal quotations omitted). See also *Wyatt v. Cole*, 504 U.S. 158, 165 (1992)(quoting *Malley v. Briggs*, 475 U.S. 335, 340-341 (1986)("In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause")(citations omitted)).

Satisfaction of any monetary judgment entered against Daigle in her individual capacity can be had, by among other means, garnishment of seventy-five percent of her disposable earnings for any week. La. R.S. 13:3881A(1)(a). See *Southard v. Belnue, Inc.*, 618 So.2d 27 (La. App. 3rd Cir. 1993)(cert denied. Judgment definitive 624 So.2d 1229 (La. 1993)(discussing La. R.S. 13:3881C, noting state agents nonexempt wages are subject to garnishment)). Although these funds are held in the state's treasury, the State of Louisiana has "by the most express language" waived its constitutional protections under the Eleventh Amendment.. *Edelman,* 451 U.S. at 673.

C. Congress guaranteed seamen a remedy at law to recover their wages.

The First Congress guaranteed seamen the right to collect their wages as soon as the voyage is ended; and, having and maintaining any action at common law for the recovery of his

wages. Act of July 20, 1790, §6, 1 Stat.133-134. Mr. Justice Story declared, as "the wards of admiralty" seamen are a favored class guaranteed a remedy at law to recover their wages. *Harden v. Gordon*, 2 Mason 541, 11 F.Cas. 480, 483-485 (No. 6047)(C.C.D. Me. 1823); see *Wilder v. Inter-Island Navigation Co.*, 211 U.S. 239, 246-249 (1908)(discussing Mr. Justice Story's declaration, finding seamen are guaranteed a remedy at law to recover their unlawfully withheld wages); see also *e.g. Bainbridge v. Merchants' & Miners' Transp. Co.* 287 U.S. 278, 282 (1932)("Seamen have always been regarded as wards of admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class.").

"Whenever congressional legislation in aid of seaman has been considered here since 1872, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of seamen." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952); *Bainbridge*, 287 U.S. at 282 (statutes enacted for seamen's benefit should be liberally construed). This applies to statutes concerning their wages. *Arguelles v. Bulk Carriers, Inc.*, 408 F.2d 1065, 1070 (4th Cir. 1969)("The wage statutes are to be liberally construed in favor of seamen."), *aff'd* 400 U.S. 351, 91 S.Ct. 409 (1971).

This Court made clear in *Wilder*, 211 U.S. 239 that the statutes prohibiting the seizure of seamen's wages, except in limited circumstances, applied to garnishment actions brought by third parties. See *id.* at 246-248. And more importantly, that seamen were guaranteed a remedy at law to recover unlawfully withheld wages. See *id.* at 248-249. See also *e.g. X-L Finance Company, Inc. v. Bonvillion*, 244 So.2d 826 (La. 1971)(discussing historical statutory protections of seamen's wages, finding seamen's wages are not subject to garnishment by third parties

except as authorized by 46 U.S.C. §601); *Thibodeaux v. Thibodeaux*, 454 So.2d 813, 816 (La. 1984)(discussing the anti-attachment protection afforded by Congress to seamen, as "wards of the courts").

1. Return of illegally seized seaman's wages is not tantamount to an award of damages for retrospective harm.

A claim for return of unlawfully withheld seaman's wages and a penalty wage claim are separate claims subject to factual determinations by the fact finder. That is to say, only claims asserted against the master or owner of a vessel under 46 U.S.C. §§10313(g)(1) or 10504(c)(1) are considered damage claims for retrospective harm. See *Pacific Mail S.S. Co. v. Schmidt*, 241 U.S. 245 (1916)(treating claims for withheld earned wages and penalty wages under §4529 as separate claims); *Shilman v. United States*, 164 F.2d 649 (2nd Cir. 1947)(discussing penal wage statute, 46 U.S.C.A. §596, and remedy to recover unlawfully withheld seaman's wages under 46 U.S.C.A. §600 as separate claims) cert. denied, 333 U.S. 837 (1948) implicitly *aff'd Isbrandtsen Co.*, 343 U.S. at 788 n.9 (1952); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (addressing proper application of penalty wage statute, 46 U.S.C. 596, finding it can only be asserted against the master or owner of a vessel.); see also *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn.App. 406, 24 P.3d 447 (2001)(distinguishing the difference between an award for wages withheld, and damages awarded for willful withholding of wages).

2. The refusal to return unlawfully seized seamen's wages is an ongoing violation.

The Louisiana court's orders dated: January 12, 2010 (finding Tunstall did not owe any support or arrears); July 6, 2017 (vacating the Income Assignment Order retrospectively to September 9, 2012 (date of issue)); and February 16, 2018 (finding Tunstall's wages were not subject to seizure in the first instance, invalidating his criminal contempt conviction), are an

affirmative adjudication Daigle violated §11109(a), manufacturing a child support arrearage pursuant to a nonexistent court order. See *Shilman*, 164 F.2d at 650 (noting §4536, recodified as amended at 46 U.S.C. §601, prohibits attachment or arrestment of seaman's wages, except by court order for the support of a wife and minor child); *Isbrandtsen*, 343 U.S. at 788 n.11 (finding the only deductions which may be made from a seaman's wages are those specifically authorized by R.S. Section §4596, 46 U.S.C.A. §701.); *Univ. of So. Ala. v. J.E. Graham & Sons*, 518 So.2d 111, 112 (Ala. 1987)(finding §11109(a) prohibits the attachment or arrestment of seaman's wages except by court order for payment for support or maintenance of the spouse or minor children); *Aguilera v. Alaska Juris F/V. O.N.569276*, 535 F.3d 1007, 1009 (9th Cir. 2008)(finding, Congress expressly recognized that a seaman's wages are subject to attachment under a **valid** support order. See 46 U.S.C. §11109(a))(bold emphasis added).

In refusing to recover and return Tunstall's illegally seized seaman's wages, Daigle continues to perpetuate the unlawful withholding thereof. See *Griffin*, 458 U.S at 572-577 (finding under 46 U.S.C. §596 each and every day a seaman's wages are withheld without sufficient cause violates the seaman's rights).

D. People in general have a constitutionally protected property interest in their wages.

"Property interests, of course, are not created by the constitution. Rather they are created and their dimensions are defined by existing rules or under-standings that stem from an independent source such as state law" *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Property, as defined by La. R.S. 40:2601(4), "means anything of value ... including currency, instruments, or securities, or any kind of privilege, claim, or right and includes any interest therein." The Louisiana Constitution, Article 1, §4(A) provides that "[e]very person has

the right to acquire, own, control, use, enjoy, protect, and dispose of private property." §4(B)(1) states, in relevant part: "Except as specifically authorized by Article VI, section 21 of this constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by a private person or entity; or (b) for transfer of ownership to any private person or entity." It is inarguable the State of Louisiana vested Tunstall with a protected possessory interest in his wages, and explicitly prohibited the seizure and transfer of same to a third party except, as applicable here, in enforcement of a valid court order for the support of spouse or minor child. *See supra*, pp. 10-14.

Tunstall's wages existed as an identifiable piece of property protected by the U.S. Constitution. Courts throughout the nation have embraced such a conclusion. *Toney v. Burris*, 650 F.Supp. 1227, 1234 (N.D. Ill. 1986)(citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969)("wages[are] a specialized type of property"); *Toney v. Burris*, 829 F.2d 622, 625 (7th Cir. 1987)(affirming district court's rationale and finding plaintiff had a property interest in his wages). A conclusion reached by district and circuit courts across the country. See *e.g. Sobin v. Dist. Of Columbia*, 480 F.Supp.3d 210 (D.C. 2020)(finding plaintiff has a "property interest in his money, which is not insignificant.")(quoting *Wernhoff v. City of Baltimore*, 591 F.Supp.2d 804, 810 (D.Md. 2008)(in turn relying on *Pulumer v. State of Md.*, 915 F.2d 927, 932 (4th Cir. 1990)); *McClelland v. Massinga*, 786 F.2d 1205, 1211 (4th Cir. 1986)(conceding that plaintiffs had a property interest in their tax refunds); *Wagner v. Duffy*, 700 F.Supp. 935, 942 (N.D. Ill. 1988)(stating that, "[t]here can be little doubt that a citizen has a property interest in his or her tax refund, which is in reality withheld wages."); *Childrens & Parents Rights Ass'n v. Sullivan*,

787 F.Supp. 738, 740 (N.D. Ohio 1992)(stating that, "[a]n interest in being assessed a fair amount for child support is sufficient to trigger the remaining requirements for due process").

Daigle's use of deliberately fabricated evidence and intentionally perjured affidavits of state agents and others to obtain the *ex parte* Income Assignment Order to seize Tunstall's property violated constitutional prohibitions against seizures "but upon probable cause." U.S. Const. Amend. IV. *Soldal v. Cook County*, 506 U.S. 56, 67 (1991)("seizures can only be justified if they meet the probable-cause standard.")(quotation omitted). "[W]here facts that follow the state tort of malicious prosecution also constitute an illegal seizure, ..." *Manuel v. City of Joliet, Ill.*, 137 S.Ct, 911, 917 (2017). Daigle's use of the known fabricated evidence and perjured affidavits to instigate the criminal contempt proceedings and procure Tunstall's criminal contempt conviction - maintaining the constitutionally infirm *ex parte* Income Assignment Order - violated the inhibitions of the Due Process Clause of the Fourteenth Amendment. See *e.g. Naupe v. Illinois*, 360 U.S. 264, 268-70 (1959) (due process right to a fair trial); *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976); *Schneider v. Estelle*, 522 F.2d 593, 595 (5th Cir. 1977) (same). As this case shows, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal*, 506 U.S. at 70.

The Louisiana court's orders[6] demonstrate the utter absence of any factual or legal basis for Daigle's refusal to comply with clearly established law compelling the recovery and return of Tunstall's illegally seized property. In so refusing, Daigle is depriving Tunstall of the equal protection of the laws in violation of the Equal Protection Clause. And by that unconstitutional conduct continues to meaningfully interfere with Tunstall's statutorily and constitutionally

6 See §A ¶2 pp.3-4 and ¶2 pp. 18-19 *supra*.

protected possessory interest in his illegally seized property. The refusal to return illegally seized property after state court proceedings have ended violates the Fourth Amendment. *Bruce v. Beary*, 498 F.3d 1232, 1248 (11th Cir. 2007). Daigle's ongoing post-judgment unconstitutional conduct is an abuse of power so clearly unjustified it is barred by the Fourteenth Amendment. *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

E. The Fifth Circuit's expansion of *Edelman* narrows the doctrine of *Ex parte Young*.

Edelman made clear that only suits by private parties seeking to impose a liability which must be paid from public funds in the state treasury are barred by the Eleventh Amendment. 415 U.S. at 663. As explained in detail above, Daigle must recover the illegally seized money from the income and resources of Tunstall's ex-wife, not the state treasury. An order compelling Daigle to recover and return Tunstall's illegally seized seaman's wages is not a request for money damages to compensate retrospective harm. These critical factual dissimilarities leave little doubt *Edelman* does not support the Fifth Circuit's finding Tunstall's claim is barred by the Eleventh Amendment. The appellate court, in effect, expands *Edelman* allowing Daigle to to employ the Eleventh Amendment and state's sovereign immunity shield to avoid compliance with federal law. See *P.R. Aqueduct*, 506 U.S. at 146 (finding *Ex parte Young* ensures that state officials do not employ the Eleventh Amendment to avoid compliance with federal law). See also *Va. Off. For Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011)(holding a "state official is 'not the state for sovereign-immunity purposes' when 'a federal court commands [her] to do nothing more than refrain from violating federal law.'")

"When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction ... The right of a party plaintiff to choose a

Federal court where there is a choice cannot be properly denied." *England v. Medical Examiners*, 375 U.S. 411, 415 (1946). See also *Ex parte Young*, 209 U.S. 123, 142-143 (1908)(Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."). After all, *Ex parte Young's* purpose is to "give[] life to the Supremacy Clause" and prevent violations of federal rights." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Although *Ex parte Young's* exception does not allow a federal court to vindicate state-law rights, *Pennhurst State Sch. & Hosp. v. Hladerman*, 465 U.S. 89, 106 (1984), it does, however, specifically authorize enjoinment of state officials knowing and willful violations of the Equal Protection Clause through intentional and arbitrary discrimination in application of state and federal laws. See *Olech*, 528 U.S. 564; and *Papasan*, 478 U.S. at 282 n.14.; *Milliken*, 433 U.S. at 289; *Edelman*, 451 U.S. at 668; *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 145. This includes current violations of the Fourth and Fourteenth Amendments. *Ex parte Young*, 209 U.S. at 159-160 (the State has no power to impart any immunity to state officials that violate the Federal Constitution).

The Fifth Circuit's expansion of *Edelman*, to include instances when state officials illegally seize property, is an unambiguous pronouncement that it will not, in all instances, enforce the authority *Ex parte Young* confers upon a federal court. Allowing the Fifth Circuit's decision to stand will have perverse consequences. State officials will be allowed to fabricate evidence to illegally seize legally earned wages/money, unjustly enrich third parties with the ill gotten gains, then invoke the Eleventh Amendment and sovereign immunity to escape liability for their intentional violations of federal law.

II. The courts of appeals are split over when the statute of limitations for §1983 claims for unlawful post-legal-process seizures begin to accrue.

The Fourth Amendment protects "[t]he right of the people to be secure in their ... effects, against unreasonable ... seizures." This Court has treated the term "effects" as being synonymous with personal property. See generally *United States v. Place*, 462 U.S. 696, 701-702 (1983). A "seizure" of property occurs when "there is some meaning interference with an individual's possessory interest in that property." *United State v. Jacobsen*, 466 U.S. 109, 113 (1984)). This definition follows from Supreme Court cases defining the seizure of a person within the meaning of the Fourth Amendment. See *id.* n.5. It has also been well established "that the Amendment's protection applies in the civil context as well." *Soldal*, 506 U.S. at 67.

The Fourth Amendment does not provide any different protection for seizures of persons and seizures of property. As Justice Gorsuch pointed out in his dissenting opinion in *Torres v. Madrid*, 141 S.Ct. 989 (2021)(joined by Justice Thomas and Justice Alito), "The Fourth Amendment's Search and Seizure Clause uses the word "seizures" once in connection with four objects (persons, houses, papers, and effects)." *Id.* at 1007. The text thus suggest parity, not disparity, in meaning. *Id.* A conclusion Justice Gorsuch posited was supported by usage of the same verb - "seized" - for both persons and objects in the Fourth Amendment's Warrant Clause, suggesting parity, not some hidden divergence between people and their possessions. See *id.* It only seems to reason precedent establishing accrual of §1983 claims for unlawful seizure/detention of persons, should, with like force and effect, govern §1983 claims for unlawful seizure/detention of property. "What is true of persons is true of property too, although the timetable need not be so abbreviated." *Johnson v. City of Evanston, Illl.*, 250 F.3d 560, 563 (7th Cir. 2001).

A. Accrual of §1983 claims for unlawful seizure of persons in the Third, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits.

"The wrong of detention without probable cause continues for the duration of the detention. That's the principal reason why the claim accrues when the detention ends." *Manuel v. City of Joliet, Ill.*, 903 F.3d 667, 670 (7th Cir. 2018)(*cert. denied City of Joliet, Ill., v. Manuel*, 139 S.Ct. 2777 (2019)). See also *Olrich v. Kenosha County*, 825 F.App'x 397, 399 (7th Cir. 2020)(finding claims for unlawful arrest accrue either when the detention ends, *Manuel,* 903 F.3d at 670, or when detention converts to one authorized by valid legal process (like arraignment), *Wallace v. Kato*, 549 U.S. 384, 389-90 (2007)). The Seventh Circuit's "continuing detention" holding is analogous with Justice Ginsburg's "continuing seizure" theory in *Albright v. Oliver*, 510 U.S. 266, 277-80 (1994)(Ginsburg, J. concurring), which the Third and Ninth Circuits adopted. See *Schneyder v. Smith*, 653 F.3d 313 (3rd Cir. 2011)(discussing *Gallo v. City of Philadelphia*, 161 F.3d 217, 222-224 (3rd Cir. 1998)(adopting Justice Ginsburg's "continuing seizure" theory)); *Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 2001)(same).

The Fifth Circuit has held that an unlawful seizure claim was cognizable under the Fourth Amendment and qualified immunity did not apply where a plaintiff "was wrongfully arrested due to the knowing or reckless misstatements and omissions" in a law officer's affidavits. *Winfrey v. Rogers*, 901 F.3d 483, 492 (5th Cir. 2018)(*cert. denied Johnson v. Winfrey*, ___ U.S. ___, 139 S.Ct. 1549, 203 L.E.2d 712 (2019)). The court explained, a false-imprisonment claim is based upon "detention without legal process," the statute of limitations for which begins to run at the time the claimant becomes detain pursuant to legal process." *Id.* (quoting *Wallace*, 549 U.S. 389-390). And a malicious-prosecution claim is based upon "detention accompanied ... by wrongful institution of legal process" *Id.* (quoting *Wallace* at 390). Such a claim "does not accrue until the

prosecution ends in the plaintiff's favor." *Id.* (quoting *Castellano v. Fragozo*, 352 F.3d 939, 953 (5th Cir. 2003)(en banc).

The Sixth Circuit recognizes that the statute of limitations for a §1983 false imprisonment (malicious prosecution) claim does not accrue when a judgment is vacated, rather, when the case is dismissed or when the false imprisonment ends. *King v. Harwood*, 852 F.3d 568, 578-579 (6th Cir. 2017)(*cert. denied Harwood v. King*, 138 S.Ct 640 (2018)).

In *Washington v. Howard*, 25 F.4th 891 (11th Cir. 2022) the Eleventh Circuit clarified that "a police officer cannot intentionally or recklessly make material misstatements or omissions in later testimony to continue detention, such as arraignment, indictment, or bond hearing." *Id.* at 907 (citing *Manuel*, 137 S.Ct. at 920 n.8). Through *Washington* the Eleventh Circuit subscribed to the "continuing unlawful detention" precept regardless of process, particularly for failure to take affirmative action to rectify the taint of fabricated evidence utilized at a legal proceeding.

B. Accrual of §1983 claims for unlawful seizure of property in the Ninth and Eleventh Circuits; and special cases in the Fifth Circuit.

In *Soldal*, 506 U.S. at 63-64 & n.8 this Court clarified that "while the holding in *Katz v. United States*, 389 U.S. 347 (1967) and its progeny may have shifted the emphasis in Fourth Amendment law from property to privacy, "[t]here was no suggestion that this shift in emphasis had snuffed out the previously recognized protection of property under the Fourth Amendment." *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1028 (9th Cir. 2012)(cert. denied *City of Los Angeles v. Lavan*,133 S.Ct. 2855 (2013). As the Ninth Circuit observed, the Fifth, Sixth and Eleventh Circuits were in accord this understanding. See *id.* at 1029. Relying on *San Jose Charter of Hells Angels Motorcycle Club v. San Jose*, 402 F.3d 962, 975 (9th Cir. 2005) the court found that the seizure and destruction of Appellees' unabandoned legal papers, shelters, and

personal effects, constituted a meaningful interference with their possessory interest in that property that was violative of the Fourth Amendment. *Lavan* at 1030-1031. *Lavan* stands for the proposition that a §1983 unlawful seizure of property claim survives state officials' destruction and/or disposal of illegally seized property.

The Ninth Circuit has also found the Fourth Amendment is implicated by a delay in returning property, whether seized for a criminal investigation, to protect the public, or to punish the individual. *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017), (*cert. denied Los Angles, California v. Brewster*, 138 S.Ct. 1284 (2018)). "The Fourth Amendment doesn't become irrelevant once an initial seizure has run its course." *Id.* at 1197 (citing *Jacobsen*, 466 U.S. at 124 & n.25; *Lavan*, 693 F.3d at 1030; and *Manuel*, 137 S.Ct. at 920 (holding that the Fourth Amendment governed the entirety of plaintiff's 48 day dentition)). "A seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force. Thereafter, the government must cease the seizure or secure a new justification." *Id.*

The Eleventh Circuit has long recognized that a plaintiff may state a Fourth Amendment claim if the initial seizure of property constituted an illegal seizure, then "[c]ertainly, the continued retention of [that] property after conclusion of the appeal would be a constitutional violation as well." *Bruce v. Beary*, 498 F.3d 1232, 1248 (11th Cir. 2007). The court's holdings clearly indicates the statute of limitations does not begin to run when the property is illegally seized, but after conclusion of state court proceedings.

In a published opinion, *Morgan v. Chapman*, 969 F.3d 238 (5th Cir. 2020), a panel of the Fifth Circuit applied the accrual rule governing claims of illegal seizure of persons - to plaintiffs illegal search and property seizure claim to find it was not time-barred. In that case, the plaintiff

alleged on July 18, 2013 state official illegally searched his medical clinics, resulting in the illegal seizure of property and patient records. See *id.* at 421-242. After hearing, in which it was determined state officials had fabricated evidence, the state court dismissed the indictment on January 20, 2016. *Id.* at 243. On January 20, 2017 Morgan filed suit. *Id.* Defendants moved to dismiss plaintiff's Fourth Amendment claim as being time-barred. *Id.* Applying the deferred accrual rule enunciated in *Winfrey*, 901 F.3d at 492, *Castellano*, 352 F.3d at 945, and *Manuel* 137 S.Ct. at 917, the panel found that allowing Morgan to amend his Fourth Amendment unreasonable seizure claim would not be futile – that is, it was not time-barred. See *id.* at 249-250.[7] On remand the district court judge, by order dated September 29, 2021 (Doc. 108), U.S.D.C., S.D. Tex., Victoria Division, in *Morgan v. Freshour*, Civ. Action No. 6:17-CV-00004, followed the Fifth Circuit's guidance, granted Morgan leave to amend his complaint to assert a §1983 unlawful seizure of property claim that would otherwise be time-barred.

C. In the Fourth, Fifth and Eighth Circuits, by contrast, §1983 claims for unlawful seizure of property accrue at the time of seizure.

In a published opinion, *Smith v. Travelpiece*, No. 20-1418, (4th Cir. April 20, 2022), the Fourth Circuit found it was of no consequence that plaintiffs' property was seized pursuant to a constitutionally infirm warrant nor that their criminal prosecution was not favorably terminated until four years after the fact, their §1983 unlawful seizure of property claims accrued at the time of the search and seizure. *Id.* at pp. 11-12 (citing *Cramer v. Crutchfield*, 648 F.2d 943 (4th Cir. 1981). The court reasoned that "the values of the Fourth Amendment are severed by ensuring that a 1983 plaintiff can vindicate their interest in property and privacy when they are violated,

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7 "In Texas, the applicable limitations period is two years." *Gartell v. Gaylor*, 981 F.2d 254, 257 (5th Cir. 1993). Had the panel not applied the deferred-accrual rule applicable to persons, Morgan's unlawful property seizure claim would have expired on or about July 18, 2015 under the standard Fifth Circuit "property" accrual rule discussed *infra* in ¶C.

no matter if a prosecution is commenced." *Id.* at p. 12. The court found that, "analogizing to trespass reflects Fourth Amendment principles. But, adopting the malicious-prosecution analogy for Fourth Amendment claims would not closely attend to the values and purpose of the constitutional right at issue." *Id.* at n.11 (quoting *Manuel*, 137 S.Ct. at 921)(internal quotation marks omitted). The tort of malicious prosecution focus on the integrity of criminal prosecution and requires favorable termination before suit can be brought. *Id.* (citing *McDonough*, 139 S.Ct).

In the Fifth Circuit, "a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Smith v. Regional Transit Authority*, 827 F.3d 412, 421 (5th Cir. 2016) As a result, the limitations period begins "when the plaintiff is in possession of the 'critical facts that he has been hurt and who has inflicted the injury.'" *Id.* See also *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995)("Under federal law, the limitations period begins to run the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know he has been injured.")

In the Eight Circuit, "[a] cause of action for unlawful seizure of property accrues at the time of seizure. *Martin v. Julian*, 18 F.4th 580, 583 (8th Cir. 2021)(citing *Kaster v. Iowa*, 975 F,2d 1381, 1382 (8th Cir. 1992). The *Martin* plaintiffs' asserted "that defendants fabricated statements and manufactured events leading to the search of plaintiffs' property, seizures of plaintiffs' persons and possessions, and the initiation of criminal proceedings against plaintiffs in violation of the Fourth Amendment." *Id.* The court reasoned that *dicta* in *Wallace*, 549 U.S. at 390 and *Manuel*'s favorable termination requirement, 137 S.Ct. at 921, "would obviously support plaintiffs contentions" that their claims were not time barred. See *id.* 584. Nevertheless, the

court found that because this Court has not "clearly decided whether there is a §1983 cause of action for malicious prosecution under the Fourth Amendment or Due process Clause"; the alleged Fourth Amendment violations – false imprisonment and seizure of property based on fabricated evidence – occurred before legal process began and are time-barred, despite Plaintiffs' claim that the unlawful seizures continued even after the criminal charges were *nolle prossed.*" *Id.*

D. The choice of rule is often outcome determinative.

As this case shows, deciding when the statute of limitations begins to run often determines whether the case will proceed on the merits. Here, the Fifth Circuit held that the one-year limitations period borrowed from Louisiana law began to run at the time Daigle illegally seized Tunstall's seaman's wages and tax refunds. App. 6a-7a. That is, while Tunstall was being criminally prosecuted for contempt. App. 37a-38a. Under the Fifth Circuit's holding, the statute of limitations expired before: the state court Income Assignment Order was set aside (July 6, 2017); or Tunstall's criminal contempt conviction been invalidated (February 16, 2018); and collateral proceedings in Alabama had been dismissed (June 18, 2018). App. 39a-41a

On August, 13, 2018, Tunstall filed his §1983 complaint in the S.D. Alabama, and on September 20, 2018, filed a Second Amended Complaint naming Daigle as a defendant. The court dismissed Daigle on September 30, 2020 for lack of personal jurisdiction. Seven days later on October 7, 2020 Tunstall filed his §1983 complaint against Daigle in the E.D. Louisiana. But it was to late for the Fifth Circuit. The Fifth Circuit does not recognize the unlawful post-legal-process seizure of property as a continuing Fourth Amendment violation – that is, a single cause of action, with prescription running from the date of abatement of the unlawful seizure. If the

Fifth Circuit had applied the deferred accrual rules governing the unlawful continuing detention of persons, see cases cited in ¶II §A pp. 25-26 *supra*, to Tunstall's §1983 unlawful seizure claims, the limitations clock would not have even started to run.

E. The split is entrenched and will persist without this Court's intervention.

Only this Court can resolve the circuit conflict here. The Eighth Circuit emphasized this point in *Martin*. *See supra* pp. 24-25. This Court's holding in *Manuel* is just as applicable §1983 unlawful post-legal-process seizures of property claims, a conclusion reached by the Ninth Circuit in *Brewster*, 859 F.3d at 1197 and the panel in *Morgan*, 969 F.3d at 249-250. Those appellate court decisions further evince the circuit split. Despite being aware of these decisions, the Fifth Circuit held that the limitations period began to run the moment Tunstall's property was illegal seized by Daigle. An accrual-rule this Court rejected in *McDonough*, 139 S.Ct. at 2158.

III. The Fifth Circuit's decision in the case below is wrong.

The Fifth Circuit was wrong to conclude that statute of limitations for Tunstall's §1983 unlawful seizure claim accrued when he knew or had reason to know of the injury giving rise to his cause of action and whether he filed suit within the prescriptive period from that date. That conclusion conflicts with the rule that a statute of limitations should begin to run only when the claim accrues. As *Heck v. Humphrey*, 512 U.S. 477 (1994), makes clear, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a plaintiff in a §1983 action had to first prove that his conviction had been invalidated in some way," *id.* at 486. What's more, the Fifth Circuit's conclusion disregards circuit precedent applying this Court's holding in *Manuel*, to §1983 unlawful post-legal-process seizure of property claim in *Morgan*,

969 F.3d at 249-250. And this Court's recent guidance in *McDonough*, "[F]ederalism, comit, consistency, and judicial economy" all reinforce accrual rules that avoid parallel litigation in state and federal court. *McDonough*, 139 S.Ct. at 2158.

1. The Fifth Circuit's determination fails even the first step of the accrual analysis. Courts begin that analysis with identifying "the specific constitutional right" alleged to have been infringed. *Id.* at 2155 (quoting *Manuel*, 137 S.Ct. at 920). Next the court must determine "when the plaintiff has a complete and present cause of action, that is, when they can file suit and obtain relief." *Id.* (quoting *Wallace*, 549 U.S. at 388). According to the Fifth Circuit, that moment occurred when Tunstall's property was illegally seized. But that makes little sense given that Tunstall's claims for damages imply the invalidity of his criminal contempt conviction and sentence. *Heck*, 512 U.S. 477, 486-87 (1994). Thus, until Tunstall's criminal contempt conviction had been invalidated his claims were not even cognizable under §1983. See *Heck,* at 487. Tunstall could not have challenged the illegal post-legal-process seizure of his property until the state court set aside the fraudulently procured Income Assignment Order and his criminal conviction had been invalidated. The Fifth Circuit finding otherwise disregards this Court's guidance in *McDonough*. "[F]ederalism, comity, consistency, and judicial economy" all reinforce accrual rules that avoid parallel litigation in state and federal court. *McDonough*, 139 S.Ct. at 2158.

2. The Fifth Circuit's approach disregards this Court's guidance in other ways too. "[T]he answer is not always so simple" as asking when a plaintiff has been injured or has a complete cause of action. *McDonough*, 139 S.Ct. at 2155. Instead, to avoid beginning a limitations period to early, even after plaintiff may have already "suffered harm," courts must also ask when a

claim may "realistically be brought," *id.* at 2155, 2160, and whether the proposed rule "respects the autonomy of state courts" and avoids unnecessary "cost to litigants and federal courts" *id.* at 2159. The Fifth Circuit's rule fails that inquiry too.

In cases like Tunstall's, the Fifth Circuit's rule would lead to "parallel criminal and civil litigation over the same subject-matter and the related possibility of conflicting civil and criminal judgments." *Id.* at 2157 (citing *Heck,* 512 U.S. at 484-485). The cases cited by the Fifth Circuit, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) and *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, (5th Cir. 2016) are factually inapposite with this case, in that the plaintiffs were not being civilly and criminally prosecuted when they first became aware of their injuries. What's more, their claims were not predicated on state officials' refusal to return federally protected property that had been seized through unlawful post-legal-process. Mary Tomanio had a complete and present cause of action and could file suit on the day officials denied her request for a waiver of professional licensing examination requirements. *Tomanio,* 446 U.S. at 480. Likewise, Mary Smith and the class plaintiffs had a complete and present cause of action and could have filed suit on the day they were informed of the changes in the Plan, and resulting denial of their benefits in a letter from RTA and TMSEL. *Smith,* 827, F.3d at 421. Simply stated, no barriers blocked the *Smith* and *Tomanio* plaintiffs access to the federal courthouse.

3. Contrary to the Fifth Circuit's view, the ongoing harm Tunstall continues to suffer is not irrelevant. App. 7a. The knowing, willful and ongoing deprivation of an individuals constitutional rights by state officials is not inconsequential. It is the reason Congress passed and President Grant signed the Civil Rights Act of 1871, now codified at 42 U.S.C. §1983. Applying the accrual rule for the unlawful seizure of persons to the unlawful seizure of property would not

undermine statutory periods of limitations. (App. 7a). This is not "Tunstall's theory" (App. 7a), but a conclusion reached by the Ninth Circuit, a panel of the Fifth Circuit and numerous United State District Courts that have followed those courts' guidance.

4. Furthermore, the Fifth Circuit gives short shrift to Daigle's repeated violation of the Equal Protection Clause, which perpetuated the post-judgment interference with Tunstall's protected possessory interest in the illegally seized property in violation of the Due Process Clause. Federal law distinguishes between continuing injury and continuing wrong, but also between discrete wrongs and cumulative wrongs. The Fifth Circuit was aware that precedent governing the Title VII statute of limitations applies with equal force to actions arising under section 1983. See *Heath v. Bd. Of Supervisors for Southern Umiv.*, 850 F.3d 731, (5th Cir. 2017) (collecting cases recognizing the statute of limitation rule enunciated in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) applied to section 1983 claims). *Morgan* illustrates the difference. In Morgan this Court held that each discrete act – say a refusal to hire someone – has its own period of limitations, even if the same defendant commits a series of similar acts. Each day Daigle denied Tunstall of the equal protection of the laws, constituted a separate violation of the Equal Protection Clause, "each of which gives rise to a new cause of action" and thereby "begins a new statute of limitations period as to that particular event." *Ellis v. Salt River Project Agricultural Impr.*, 24 F.4th 1262, 1273 (9th Cir. 2022)(quoting *Flynt v. Shimazu*, 940 F.3d 457, 462 n.3 (9th Cir. 2019)(in turn quoting *Knight v. Columbus*, 19 F.3d 579, 582 (11th Cir. 1994)). Where a plaintiff alleges "claims based on discrete acts," the claims "are only timely where such acts occurred within the limitations period." *Ellis*, 24 F.4th at 1273 (quoting *Cherosky v. Henderson*, 330 F.3d 1243, 1246 (9th Cir. 2003)).

Daigle was fully aware of the Louisiana court's orders vacating the Income Assignment Order and invalidating Tunstall's criminal contempt conviction. And more importantly, that state law required her to recover and return Tunstall's illegally seized property. "[A]n officer charged with enforcing Louisiana law can be presumed to know that law." *Rykers v. Alford*, 832 F.2d 895, 898 (5th Cir. 1987). Her lack of any rationale or objectively reasonable basis for refusing to recovery and return Tunstall's illegally seized property evinces her unconstitutional conduct is by design and purpose, intended to injure in someway unjustifiable by any government interest. See *Daniels*, 474 U.S. at 331 ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government official to deprive a person of life, liberty, or property" (emphasis in original)).

If the Fifth Circuit had followed in the footsteps of the Ninth and Eleventh Circuits and applied this Court statute of limitations guidance in *Morgan*, 536 U.S. 101, Tunstall's Fourteenth Amendment claims would not have been dismissed *in toto* as prescribed.

IV. The questions presented are recurring and exceptionally important.

As detailed above, the questions presented are critically important to the justice system nationwide. In thousands upon thousands of instances each and everyday throughout the United States, state officials seize personal property through state court legal process. The Fifth Circuit's rule requires those who's property has been seized pursuant to state court legal process to file suit in federal court before they even know whether the state court might yet grant relief. And, in state's like Louisiana with a one-year statute of limitations for §1983 claims, their claims would expire long before any adverse state court ruling could be challenged at the state appellate level.

In this context, statute of limitations perform a particularly important role. They tell individuals when they need to sue. They also clarify when individuals' challenges expire, even in a context where the individuals' claims would necessarily imply the invalidity of state court orders, judgments, and criminal convictions. This Court routinely grants review to resolve limitations questions that have divided the lower courts. See, *e.g. Reed v. Goertz,* U.S. Supreme Court Case No. 21-442, petition granted April 25, 2022; *Intel Corp. Inv. Pol'y Comm v. Sulyma*, 140 S.Ct. 768, 774-75 (2020); *Rotkiske v. Klemm*, 140 S.Ct. 355, 360 (2019); *McDonough*, 139 S.Ct. at 2154 (2019); *Artis v. District of Columbia*, 138 S.Ct. 594, 598 (2018). Certainty about timing rules is no less important in this context.

The Fifth Circuit's rule, as discussed above, produces serious problems. Like the Second Circuit's rule in *McDonough*, the Eighth Circuit's rule *Martin,* and the Fourth Circuit's trespass rule in *Travelpiece.* It forces defendants' to choose between letting their claims expire and filing a civil suit in the middle of state court proceedings. As previous stated, this Court rejected such a requirement in *McDonough*, 139 S.Ct. at 2158.

V. This case is an excellent vehicle.

This case is an excellent vehicle for resolving the questions presented. If the Fifth Circuit had applied the accrual-rule applicable to §1983 claims for unlawful post-legal-process seizure of persons to §1983 claims for unlawful post-legal process seizure of property, like the panel in *Morgan*, 969 F.3d 238 and the Ninth Circuit in *Brewster*, Tunstall's §1983 claims would have been timely. Because the Fourth Amendment does not provide for any different protection for persons or property accrual rules for one should apply to the other.

As to Tunstall's Fourteenth Amendment claims, if the Fifth Circuit had followed this Court's statute of limitations guidance enunciated in *Morgan*, 536 U.S. 101, like the Ninth and Tenth Circuits, those claims would not have been dismissed *in toto* as prescribed. IN declining to address the merits of Tunstall's claims, it appears as though the Fifth Circuit simply crafted its decision to avoid exercise its authority and jurisdiction under *Ex parte Young*. And there are no jurisdictional problems, procedural impediments or qualified immunity issues. The Fifth Circuit affirmed the dismissal of Tunstall's claims for the sole reason they were untimely. Thus, if this Court grants review and reverses, the Fifth Circuit will need to address these constitutional claims on the merits.

CONCLUSION

The petition for a writ of Certiorari should be granted.

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Respectfully submitted,

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