No. ___

IN THE

Supreme Court of the United States

DIYONNE L. MCGRAW,

Petitioner,

v.

KHANH-LIEN ROBERTS BANKO, SELDON J. CHILDERS, CHILDERS LAW LLC, RON DESANTIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Supremacy Clause and the Separation of Powers doctrine preclude the federal judiciary from relying upon the federal common law defense of "qualified immunity" to shield state officials from individual liability under 42 U.S.C. §1983.

Whether a 42 U.S.C. §1983 complainant is required to plead *inter alia* that the constitutional right at issue was "clearly established law" at the time of the state official's challenged conduct to survive a Rule 12(b)(6) motion to dismiss based upon "qualified immunity"; and if so, whether such a requirement should be imposed, if at all, by amending the rules of civil procedure or by judicial interpretation of precedent.

Whether the illegal removal of an elected official from office is a violation of the fundamental right to vote and have that vote count in federal and state elections under the substantive due process component of the fourteenth amendment to the U.S. Constitution; and if so, whether that is "clearly established law" in the Eleventh Circuit.

Whether private actors qualify as state actors subject to §1983 liability where it is alleged that: 1) they illegally pursued an emergency temporary injunction in state court to remove a duly elected official from office; and 2) after being denied relief in court, they forwarded the court's non-final order of denial to the Governor requesting and obtaining his assistance in removing the elected official from office based thereon in violation of the state's election laws.

PARTIES TO THE PROCEEDING

Petitioner Diyonne McGraw was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondents Khanh-Lien Roberts Banko, Seldon J. Childers, Childers Law LLC, and Ron DeSantis were the defendants in the district court proceedings and appellees in the court of appeals proceedings.

RELATED CASES

- *McGraw v. Banko et al.*, No. 1:21-cv-163, U.S. District Court for the Northern District of Florida. Judgement entered August 12, 2022.

- *McGraw v. Banko et al.*, No. 22-12987, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered October 26, 2023.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Table of Appendices

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

RULES

Page

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Diyonne McGraw respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Eleventh Circuit's opinion is unpublished but reported at *McGraw v. Banko et. al.*, 2023 U.S. App. LEXIS 28503, 2023 WL 7039511 (11th Cir. Fla., Oct. 26, 2023) and reproduced at App. 1a-6a. The Eleventh Circuit's denial of petitioner's motion for *en banc* and *panel* rehearing is reproduced at App. 25a-26a. The opinion of the District Court for the Northern District of Florida is reported at *McGraw v. Banko et al.*, 2022 U.S. Dist. LEXIS 240653 (N.D. Fla., Aug. 12, 2022) and reproduced at App. 16a-24a.

JURISDICTION

The Eleventh Circuit entered judgment on October 26, 2023. App. 1a-6a. Petitioner's timely motion for *en banc* and *panel* rehearing was denied on December 18, 2023. App. 25a-26a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Below, the court of appeals had jurisdiction pursuant to 28 U.S.C. §1291. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. §1331 and §1343(a)(4).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the following constitutional and statutory provisions: U.S. Const. Art. VI, cl. 2 reproduced at Appendix 29a; U.S. Const. Art. I, § 1 reproduced at Appendix 30a; U.S. Const. Art. III, § 1 reproduced at Appendix 31a; U.S. Const. Amdt. XIV, § 1 reproduced at Appendix 32a; U.S. Const. Amdt. XIV, § 5 reproduced at Appendix 33a; 42 U.S.C. § 1983 reproduced at Appendix 34a; 28 U.S.C. § 2072 reproduced at Appendix 35a.

INTRODUCTION AND STATEMENT OF THE CASE

This case involves important questions of federal law concerning the impact of the Supremacy Clause and the Separation of Powers Doctrine on the federal common law defense of "qualified immunity" – routinely used by the federal judiciary to shield state officials from individual liability under § 1983 – that have not been, but should be, settled by this Court. Additionally, this case involves the Eleventh Circuit's determination of important federal questions – concerning the pleading requirements necessary for a § 1983 Complainant to survive a Rule 12(b)(6) motion to dismiss on "qualified immunity" grounds and the circumstances under which private actors qualify as "state actors" subject to liability under § 1983 – in a way that conflicts with relevant decisions of this Court. Finally, this case questions whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power to restore *vertical stare decisis* in that court of appeals.

In short, the operative pleading under Eleventh Circuit review alleged the following. Petitioner Diyonne McGraw ("McGraw") beat Respondent Khanh-Lien Roberts Banko ("Banko") in the 2020 election for the district 2 seat on Alachua County's School Board. App. 42a. McGraw's victory over Banko was decisive; McGraw secured 30,278 votes which included a vote she cast for herself while Banko only received 27,550 votes. App. 42a. McGraw was sworn into office in November 2020. Seven months later, Banko with the help of Respondents, Seldon J. Childers and Childers Law LLC ("Childers"), filed a declaratory action in state court seeking to remove McGraw from office claiming that she was "unqualified" for the seat based upon residency requirements. App. 47a, 53a. However, under Florida's election law, the state court didn't have jurisdiction to consider whether McGraw was "unqualified" for office after she was elected. App. 45a, 47a. Moreover, Florida's election law precluded anyone from legally challenging McGraw's "eligibility" for office more than 10 days after the election results were certified. App. 47a.

Yet, within days of Banko filing her untimely state lawsuit over which the court had no jurisdiction and before obtaining service of process on McGraw, Banko sought an emergency temporary injunction against McGraw by ex parte motion. App. 53aa. After Banko's ex parte motion was denied, Banko forwarded the order of denial to Respondent Governor Ron DeSantis ("DeSantis") requesting that he assist her in removing McGraw from office based on the residency requirements. App. 54a. Based upon language in the order of denial, DeSantis issued Executive Order No. 21-147 declaring the district 2 schoolboard seat vacant, effectively removing McGraw

from office, and appointing Mildred Russell to the seat. App. 44a, 47a.

Thereafter, McGraw sued Banko, Childers, and DeSantis in federal court alleging *inter alia* § 1983 substantive due process claims under the fourteenth amendment against each of them. McGraw claimed that they violated her fundamental right to vote and have her vote count by jointly participating in her illegal removal from office. App. 36a-59a. Banko, Childers, and DeSantis filed Rule 12(b)(6) motions to dismiss McGraw's suit. The district court granted their motions. App. 16a. The district court concluded that McGraw did not allege the violation of a constitutional/federal right – even if she was illegally removed from office. App. 23a. The district court did not reach the question of "qualified immunity" nor did it determine whether Banko and Childers qualified as state actors subject to liability under § 1983. App. 23a.

On appeal, a panel of the Eleventh Circuit ultimately affirmed the district court's ruling on October 26, 2023, but did so on other grounds. App. 1a-6a. Initially, in an opinion dated August 18, 2023, the panel assumed that Banko and Childers were state actors (App. 13a) along with DeSantis but concluded that each was entitled to "qualified immunity", though DeSantis was the only one that raised the issue. App. 15a. McGraw moved for *en banc* and *panel* rehearing arguing that this Court's opinion in *Wyatt v. Cole* precluded the panel from extending "qualified immunity" to private actors Banko and Childers. McGraw also argued that "qualified immunity" was an affirmative defense and that this Court's opinion in *Gomez v. Toledo* precluded dismissal of her § 1983 claim against DeSantis based upon that defense. McGraw further argued that the

Fifth Circuit's September 28, 1981, opinion in *Duncan v. Poythress* gave DeSantis "fair warning" that "[i]t is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment", notwithstanding certain factual distinctions between the cases. McGraw's "fair warning" argument was premised upon this Court's rulings in *United States v. Lanier* and *Hope v. Pelzer* which permitted claimants to show that a constitutional/federal right was clearly established by pointing to broader principles recited in caselaw that might otherwise be considered factually dissimilar.

Nevertheless, McGraw's petition for *en banc* and *panel* rehearing was denied on October 11, 2023. App. 27a-28a. McGraw moved for a stay pending the filing and resolution of her petition for a writ of certiorari, reiterating the panel opinion's direct conflict with opinions of this Court. On October 26, 2023, the panel denied McGraw's motion to stay as moot (App. 7a), *sua sponte* vacated its October 11, 2023, order denying rehearing (App. 9a), and issued a newly revised opinion (App. 1a-6a) voiding the August 18, 2023, opinion.

The new opinion no longer extended qualified immunity to private actors, Banko and Childers, but instead determined that they were not state actors subject to liability under § 1983. (App. 4a, n. 1). McGraw again moved for *en banc* and *panel* rehearing reiterating the newly revised panel opinion's conflict with this Court's opinions in *Gomez v. Toledo*, *United States v. Lanier*, and *Hope v. Pelzer*. Additionally, McGraw argued that the panel's revised opinion conflicted with this Court's opinion

in *Singleton v. Wulff* because the panel determined the "qualified immunity" and state actor issues though they weren't considered by the district court. Further, McGraw argued that the panel's revised opinion conflicted with this Court's opinion in *Lugar v. Edmondson Oil Co.* where it determined that private actors, Banko and Childers, were not state actors subject to § 1983 liability.

On December 18, 2023, McGraw's motion for *en banc* and *panel* rehearing was denied. App. 25a-26a. McGraw moved for a stay pending the filing and resolution of her petition for a writ of certiorari. McGraw reiterated the existence of conflicts with this Court's opinions but further argued that the panel could not rely on *Ashcroft v. al–Kidd* to change the pleading requirements for McGraw's § 1983 claim because it was a federal statutory cause of action created by Congress pursuant to section 5 of the fourteenth amendment, not a judicially created *Bivens* claim. In short, McGraw contended that the federal judiciary could not encroach on Congress's power in that way, though it could change the pleading requirements for a judicially created *Bivens* claim. Ultimately, McGraw's motion to stay was denied.

REASONS FOR GRANTING THE PETITION

For decades, the federal common law defense of "qualified immunity" has been used to shield state officials from individual liability under 42 U.S.C. § 1983. This case questions the efficacy of that doctrine where § 1983 claims are concerned. Petitioner further posits that the federal judiciary's use of "qualified immunity" to undermine § 1983 claims is unconstitutional and reflects not only an abuse of power, but an improper encroachment on powers the Constitution reserves for Congress.

The Supremacy Clause makes the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties…the supreme Law of the Land." *See* U.S. Const. Art. VI, cl. 2 (App. 29a). "When the Supremacy Clause refers to '[t]he Laws of the United States…made in Pursuance [of the Constitution],' it means federal statutes, not federal common law." *See Collins v. Virginia*, 584 U.S. 586, 606-07 (2018) (Thomas, J., concurring) (citing *Ramsey, The Supremacy Clause, Original Meaning, and the Modern Law, Ohio St. L. J. 559, 572-599 (2013) (Ramsey)*; *Clark, Separation of Powers as a Safeguard of Federalism, 79 Texas L. Rev. 1321, 1334-1336, 1338-1367 (2001) (Clark)*; *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824) (Marshall, C. J.) ("The appropriate application of that part of the clause which confers…supremacy of laws…is to…the laws of Congress, made in pursuance of the constitution"); Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 500 (1954) ("[T]he *supremacy clause* is limited to those 'Laws' of the United States which are passed by Congress pursuant to the Constitution")).

A § 1983 claim is an express cause of action created by Congress. Indeed, § 1983 was enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment (App. 33a). *Hafer v. Melo*, 502 U.S. 21, 28 (1991). The Constitution vests all legislative powers in Congress, not the judiciary. *See* U.S. Const. Art. I, § 1 (App. 30a); *compare* U.S. Const. Art. III, § 1 (App. 31a). Moreover, "the rule is, that where the Legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so." *See Maxwell v. Moore*, 63 U.S. 185, 191 (1859). Accordingly, like the Constitution, § 1983 is the supreme

law of the land and the federal common law is inferior or subordinate to it. The federal judiciary can make no exception nor defense to § 1983 – like "qualified immunity" – because that would be legislating to do so.

"Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has the power to determine what must be proved to prevail on the merits." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 (2007). Therefore, the substantive pleading requirements for stating a § 1983 claim are established by Congress, not the federal judiciary; and the courts must look to the plain language of that statute – 42 U.S.C. § 1983 – to determine what allegations must be pled to state such a claim.

In *Gomez*, this Court explained that:

> "By the plain terms of § 1983, two – and only two – allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived [her] of a federal right. Second, [she] must allege that the person who has deprived [her] of that right acted under color of state or territorial law."

See Gomez v. Toledo, 446 U.S. 635, 640 (1980). Clearly, there are no exceptions contained in § 1983. *See* App. 34a. Moreover, the federal judiciary cannot create such an exception nor a defense – like "qualified immunity" – as that would be legislating from the bench. Yet, it has done so for years with impunity.

I. The Eleventh Circuit has decided an important question of federal law concerning the pleading requirements for a §1983 claimant based upon the "qualified immunity" defense that has not been, but should be, settled by this Court.

Quoting from *Ashcroft*, the Eleventh Circuit concluded that McGraw must plead facts showing "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *See Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))." Clearly, the Eleventh Circuit has changed the pleading requirements for a cause of action under § 1983 by adding prong (2) based upon *Ashcroft*, notwithstanding this Court's prior holding in *Gomez*. This presents a substantial question concerning the pleading requirements for civil rights litigants under § 1983; one that this Court should address.

Harlow and Ashcroft involved plaintiffs pleading *Bivens* claims, not a § 1983 claim as McGraw has pled in this instance. A *Bivens* claim is a judicially created implied cause of action "not provided for by the Constitution and not enacted by Congress." *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 411-12 (1971) (Chief Justice Burger, dissenting). So, it stands to reason that this Court would and could pronounce new pleading requirements for a *Bivens* claimant in *Ashcroft* – following its decision in *Harlow* – given that it created the *Bivens* claim in the first instance.

But, as previously indicated, a § 1983 claim is an express cause of action created by Congress. Indeed, § 1983 was

enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment. *Hafer v. Melo*, 502 U.S. 21, 28 (1991). Therefore, the pleading requirements for a § 1983 claim are established by Congress, and the courts must look to the language of that statute – 42 U.S.C. § 1983 – to determine what allegations must be pled to state such a claim as this Court did in *Gomez*. The Constitution vests all legislative powers in Congress, not the judiciary. *See* U.S. Const. Art. I, § 1; *compare* U.S. Const. Art. III, § 1. Thus, the panel opinion doesn't merely conflict with *Gomez*, it also reflects a usurpation of Congress' legislative power where it establishes new pleading requirements for a § 1983 claimant, though § 1983 is a statutory cause of action created by Congress. This overreach has been tacitly approved by the entire Eleventh Circuit, where no judge voted in support of McGraw's request for *en banc* review of the panel opinion.

Though this Court has historically treated § 1983 claims and *Bivens* claims similarly where "qualified immunity" is concerned, the Supremacy Clause characterizes a statutory § 1983 claim as superior to a judicially created implied *Bivens* claim because it was created by Congress, making it the Supreme Law of the land along with the Constitution. That is without exception. This is what makes America a nation of the people, for the people, and by the people. Therefore, a § 1983 claim is not subject to the federal common law defense of "qualified immunity", it reigns supreme. Accordingly, the federal judiciary cannot legislate an exception to § 1983 from the bench, though it has done so for years with the "qualified immunity" defense. It is time to correct that grave injustice, and this case provides the perfect opportunity for this Court to do just that.

II. The Eleventh Circuit has decided an important federal question concerning the "qualified immunity" defense and private actors not qualifying as "state actors" under §1983 in a way that conflicts with relevant decisions of this Court.

In *Harlow*, this Court cited *Gomez* with approval for the proposition that "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Though *Harlow* eliminated the subjective component of the qualified immunity defense where it held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"; it did not abrogate *Gomez*. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Therefore, *Gomez* is still controlling unless or until this Court overrules it.

In *Gomez*, this Court granted certiorari and reversed a First Circuit opinion affirming the dismissal of a § 1983 claim pursuant to a Rule 12(b)(6) motion to dismiss on "qualified immunity" grounds. *See Gomez v. Toledo*, 446 U.S. 635, 638 (1980). In so doing, this Court explained that it "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action;

instead we have described it as a defense available to the official in question." *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980). This Court further explained that "[s]ince qualified immunity is a defense, the burden of pleading it rests with the defendant." *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (citing Fed. R. Civ. P. 8(c) (defendant must plead any "matter constituting an avoidance or affirmative defense"); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1271 (1969)). Accordingly, the Eleventh Circuit's opinion affirming dismissal of McGraw's § 1983 claim pursuant to a Rule 12(b)(6) motion to dismiss on qualified immunity grounds is in direct conflict with this Court's opinion in *Gomez*. Just as this Court granted certiorari and reversed the First Circuit in *Gomez*, this Court should grant certiorari and reverse the Eleventh Circuit in this instance.

Next, the Eleventh Circuit's opinion conflicts with *United States v. Lanier* and *Hope v. Pelzer*. In *United States v. Lanier*, this Court "held that the defendant was entitled to 'fair warning' that his conduct deprived his victim of a constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was 'clearly established' in civil litigation under § 1983." *See Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002) (citing *United States v. Lanier*, 520 U.S. 259 (1997)). The Court went on to explain that we have "upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *See Hope v. Pelzer*, 536 U.S. 730, 740 (2002) (citing *United States v. Lanier*, 520 U.S. 259, 269

(1997)). Based on *Lanier*, this Court in *Hope* concluded that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In *Hope*, this Court further explained that although earlier cases involving "fundamentally similar" or "materially similar" facts provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. *Id.* Accordingly, the factual distinctions pointed out by the Eleventh Circuit between *Duncan v. Poythress* and McGraw's case are of no import where the fair warning standard may be used to satisfy McGraw's purported burden to show that DeSantis's conduct violated clearly established constitutional law. McGraw's complaint is premised upon the principle announced in *Duncan* that "[i]t is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment." *See* App. 37a. Therefore, pursuant to *United States v. Lanier* and *Hope v. Pelzer* DeSantis had fair warning, and McGraw met her purported obligation to show that DeSantis's conduct violated clearly established constitutional law. The Eleventh Circuit's opinion to the contrary is therefore in conflict with *Lanier* and *Hope*.

Finally, in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court recognized and reiterated that:

> "private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require the

> accused to be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."

See Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982) (quoting *United States v. Price*, 383 U.S., at 794.). In reaching that conclusion, this Court reasoned that "our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* This may be "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

In this case, the Eleventh Circuit's opinion conflicts with the foregoing reasoning of this Court in *Lugar* where, as here, McGraw's pleading specifically alleges how Banko and Childers worked together with and received significant aid from DeSantis in their effort to illegally remove McGraw from office. "In the American system of stare decisis, the result and the reasoning each independently have precedential force, and courts are therefore bound to follow both the result and the reasoning of a prior decision." *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n. 85 (2020).

III. The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power to restore *vertical stare decisis* in that court of appeals.

"[V]ertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.'" *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n. 84 (2020) (citing U.S. Const. Art. III, § 1). "In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court." *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n. 84 (2020) (citing *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). This includes the result and the reasoning independently as this Court explained in *Ramos*. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n. 85 (2020). The Eleventh Circuit did not do that in McGraw's case as previously explained.

"In the words of THE CHIEF JUSTICE, *stare decisis*' 'greatest purpose is to serve a constitutional ideal – the rule of law." *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (citing *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 378, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)). "Writing in Federalist 78, Alexander Hamilton emphasized the importance of *stare decisis*: To 'avoid an arbitrary discretion in the courts, it is indispensable' that federal judges 'should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (citing The Federalist No. 78, p. 529 (J. Cooke ed. 1961)). In that

regard, the Eleventh Circuit has failed to comply with its constitutional obligation where *vertical stare decisis* is concerned as previously explained.

Additionally, in *Singleton*, this Court reiterated that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Yet, in this case, the Eleventh Circuit took the unusual appellate step of deciding the "qualified immunity" and "state actor" issues though they were not considered by the district court in the first instance. Effectively, McGraw has been denied due process and her right of access to the courts because she never truly received trial court and subsequent appellate review of the "qualified immunity" and "state actor" issues where, as here, the Eleventh Circuit was the first court to address them.

Congress has granted this Court certain supervisory powers. *See* 28 U.S.C. § 2072 (App. 35a). Moreover, this Court also has inherent supervisory powers over the inferior federal courts. *See McNabb v. United States*, 318 U.S. 332, 340 (1943). It would be appropriate for this Court to exercise its supervisory powers over the Eleventh Circuit at this time to restore temperance, law, and order in that inferior court.

IV. The Decision Below Is Incorrect.

Petitioner recognizes that this Court is not in the business of correcting the erroneous decisions of the inferior federal courts. However, as previously explained, the Eleventh Circuit did not fulfill its constitutional obligation to *vertical stare decisis*. Thus, its opinion is not just incorrect, its unconstitutional.

This Court has the power to remedy this manifest injustice by granting McGraw's petition for a writ of certiorari. Moreover, this would prevent it from happening to others who may not be able to go the distance given that litigation is a costly marathon, not a sprint. Accordingly, this Court should grant this petition for a writ of certiorari and reverse the Eleventh Circuit's opinion in this case.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

March 13, 2024

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Table of Appendices

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 26, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12987

Non-Argument Calendar

DIYONNE L. MCGRAW,

Plaintiff-Appellant,

versus

KHANH-LIEN ROBERTS BANKO, SELDON J CHILDERS, CHILDERS LAW, LLC, RON DESANTIS, IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS GOVERNOR OF FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 1:21-cv-00163-AW-MAF

Before NEWSOM, GRANT, and BRASHER, Circuit Judges.

Appendix A

PER CURIAM:

We grant the petition for rehearing in part, withdraw our previous opinion, and replace it with the following.

Diyonne McGraw won an election for a school board seat for District Two in Alachua County, Florida. But McGraw had a problem: The local media discovered that she did not actually live in that district, even though a county official had told her otherwise. So McGraw's opponent in the primary election, Khanh-Lien Roberts Banko, hired an attorney, Seldon Childers, to file an emergency declaratory judgment action against McGraw in state court. Banko alleged that McGraw's seat was technically vacant under Florida law, which requires that public officials live in the districts they represent. The state court denied Banko's emergency motion for relief but suggested that Banko was likely to succeed on the merits. Childers forwarded that order to Governor DeSantis's office, and Banko also wrote to the Governor.

In response, Governor DeSantis issued Executive Order 21-147. The Executive Order explained that, because he concluded that McGraw failed to maintain residency in District Two, her seat was vacant as a matter of law. McGraw filed a petition for a writ of quo warranto against Governor DeSantis in state court, which the court denied. McGraw appealed that order.

McGraw then filed this action. In the operative complaint, McGraw alleges that Governor DeSantis, Banko, Childers, and Childers's law firm conspired to

infringe her "fundamental right" under the Due Process Clause of the Fourteenth Amendment to "vote and have her vote counted." She sought compensatory damages and injunctive relief. The defendants separately moved to dismiss the second amended complaint.

The district court dismissed each of McGraw's claims—some on justiciability grounds, the rest on the merits. Banko appealed.

After appealing, McGraw ran for election in a newly drawn District Two and won, which mooted the state court appeal of her petition for a writ of quo warranto. Likewise, McGraw concedes that her requests for injunctive relief in this case are moot because she currently serves on Alachua County's school board. So we consider only her claims for damages in this appeal.

We review *de novo* a district court's order granting a Rule 12(b)(6) motion to dismiss, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. A*m. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face," meaning it must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

McGraw contends that Governor DeSantis and by extension the other defendants[1] violated her substantive due process right "to vote and have her vote counted." By removing her from office, her theory goes, Governor DeSantis "disenfranchised her and her voters." As for McGraw's only remaining claim for damages, the Governor argues that he is protected by qualified immunity because his actions did not violate clearly established law. We agree.

The Due Process Clause of the Fourteenth Amendment "guarantee[s] some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 213 L. Ed. 2d 545 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)). Courts rarely recognize new substantive due process rights. *Collins v. City of Harker Heights*, 503

1. The other defendants argue that they are not state actors for the purposes of this constitutional claim. We agree. It is "[o]nly in rare circumstances" that a private party can be viewed as a state actor for purposes of Section 1983. *Harvey v. Harvey*, 949 F. 2d 1127, 1130 (11th Cir. 1992). A private person may be considered a state actor if they willfully participated in a joint act with the state or its agents. *Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980). We cannot say that Banko, Childers, and Childers's law firm engaged in that kind of joint act when they petitioned the Governor in light of the state court's ruling. *See, e.g., Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1251 (11th Cir. 1985)("One who has obtained a state court order or judgment is not engaged in state action merely because it used the state court legal process.").

U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."). A plaintiff may bring an action under Section 1983 for violations of substantive due process rights, *see Maddox v. Stephens*, 727 F.3d 1109, 1118 (11th Cir. 2013), but a plaintiff cannot prevail unless the Due Process Clause protects the right invoked.

For its part, qualified immunity shields state officials from liability for money damages in their individual capacity unless a plaintiff pleads facts showing "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, _ U.S. _, 583 U.S. 48, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L.Ed.2d 1149 (2011)) (internal quotation marks omitted).

McGraw cannot prove the existence of a clearly established substantive due process right on which she may base her claim. McGraw relies on a single, inapposite decision from the former Fifth Circuit. *See Duncan v. Poythress*, 657 F.2d 691, 703-04 (5th Cir. Unit B Sept. 1981).

There, the court held that public officials disenfranchise the electorate when they fill by appointment an office that state law mandates filling by election. This case has little in common with *Duncan*. There, state officials deprived voters of an election to fill a public office where state law required one. *Id.* Here, voters voted and elected McGraw. But Governor DeSantis determined the seat to which McGraw was "elected" was vacant under state law because he determined that she did not reside in the district. Put differently, voters exercised their right to vote. But they elected someone who another state official determined was ineligible to hold the position under state law. We cannot say that the Governor's actions violated a clearly established constitutional right such that he may be held liable for damages.

For these reasons, the district court is **AFFIRMED**. McGraw's motions for sanctions are **DENIED**.

APPENDIX B — DENIAL OF STAY OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 26, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12987

DIYONNE L. MCGRAW,

Plaintiff-Appellant,

versus

KHANH-LIEN ROBERTS BANKO, SELDON J CHILDERS, CHILDERS LAW, LLC, RON DESANTIS, IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS GOVERNOR OF FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 1:21-cv-00163-AW-MAF

ORDER:

The motion of Appellant to stay the issuance of the mandate pending a petition for writ of certiorari is DENIED as moot.

Appendix B

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION

APPENDIX C — VACATION OF REHEARING DENIAL OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 26, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12987

DIYONNE L. MCGRAW,

Plaintiff-Appellant,

versus

KHANH-LIEN ROBERTS BANKO, SELDON J CHILDERS, CHILDERS LAW, LLC, RON DESANTIS, IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS GOVERNOR OF FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 1:21-cv-00163-AW-MAF

ORDER:

The October 11, 2023 order denying the petition for rehearing is *sua sponte* VACATED.

Appendix C

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION

APPENDIX D — OPINION (WITHDRAWN) OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 18, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12987

Non-Argument Calendar

DIYONNE L. MCGRAW,

Plaintiff-Appellant,

versus

KHANH-LIEN ROBERTS BANKO, SELDON J CHILDERS, CHILDERS LAW, LLC, RON DESANTIS, IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS GOVERNOR OF FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 1:21-cv-00163-AW-MAF

Before NEWSOM, GRANT, and BRASHER, Circuit Judges.

Appendix D

PER CURIAM:

Diyonne McGraw won an election for a school board seat for District Two in Alachua County, Florida. But McGraw had a problem: The local media discovered that she did not actually live in that district, even though a county official had told her otherwise. So McGraw's opponent in the primary election, Khanh-Lien Roberts Banko, hired an attorney, Seldon Childers, to file an emergency declaratory judgment action against McGraw in state court. Banko alleged that McGraw's seat was technically vacant under Florida law, which requires that public officials live in the districts they represent. The state court denied Banko's emergency motion for relief but suggested that Banko was likely to succeed on the merits. Childers forwarded that order to Governor DeSantis's office, and Banko also wrote to the Governor.

In response, Governor DeSantis issued Executive Order 21-147. The Executive Order explained that, because he concluded that McGraw failed to maintain residency in District Two, her seat was vacant as a matter of law. McGraw filed a petition for a writ of quo warranto against Governor DeSantis in state court, which the court denied. McGraw appealed that order.

McGraw then filed this action. In the operative complaint, McGraw alleges that Governor DeSantis, Banko, Childers, and Childers's law firm conspired to infringe her "fundamental right" under the Due Process Clause of the Fourteenth Amendment to "vote and have her vote counted." She sought compensatory damages and injunctive relief. The defendants separately moved to dismiss the second amended complaint.

Appendix D

The district court dismissed each of McGraw's claims—some on justiciability grounds, the rest on the merits. Banko appealed.

After appealing, McGraw ran for election in a newly drawn District Two and won, which mooted the state court appeal of her petition for a writ of quo warranto. Likewise, McGraw concedes that her requests for injunctive relief in this case are moot because she currently serves on Alachua County's school board. So we consider only her claims for damages in this appeal.

We review *de novo* a district court's order granting a Rule 12(b)(6) motion to dismiss, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. A*m. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face," meaning it must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

McGraw contends that Governor DeSantis and by extension the other defendants[1] violated her substantive due process right "to vote and have her vote counted." By removing her from office, her theory goes, Governor

1. The other defendants argue that they are not state actors for the purposes of this constitutional claim. We will assume without deciding that they are.

DeSantis "disenfranchised her and her voters." As for McGraw's only remaining claim for damages, the Governor argues that he is protected by qualified immunity because his actions did not violate clearly established law. We agree.

The Due Process Clause of the Fourteenth Amendment "guarantee[s] some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 213 L. Ed. 2d 545 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)). Courts rarely recognize new substantive due process rights. *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."). A plaintiff may bring an action under Section 1983 for violations of substantive due process rights, *see Maddox v. Stephens*, 727 F.3d 1109, 1118 (11th Cir. 2013), but a plaintiff cannot prevail unless the Due Process Clause protects the right invoked.

For its part, qualified immunity shields state officials from liability for money damages in their individual capacity unless a plaintiff pleads facts showing "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)

(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, _ U.S. _, 583 U.S. 48, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L.Ed.2d 1149 (2011)) (internal quotation marks omitted).

McGraw cannot prove the existence of a clearly established substantive due process right on which she may base her claim. McGraw relies on a single, inapposite decision from the former Fifth Circuit. *See Duncan v. Poythress*, 657 F.2d 691, 703-04 (5th Cir. Unit B Sept. 1981). There, the court held that public officials disenfranchise the electorate when they fill by appointment an office that state law mandates filling by election. This case has little in common with *Duncan*. There, state officials deprived voters of an election to fill a public office where state law required one. *Id.* Here, voters voted and elected McGraw. But Governor DeSantis determined the seat to which McGraw was "elected" was vacant under state law because he determined that she did not reside in the district. Put differently, voters exercised their right to vote. But they elected someone who another state official determined was ineligible to hold the position under state law. We cannot say that the Governor's actions violated a clearly established constitutional right such that he (or the other defendants) may be held liable for damages.

For these reasons, the district court is **AFFIRMED**. McGraw's motions for sanctions are **DENIED**.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, FILED AUGUST 12, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA,
GAINESVILLE DIVISION

Case No. 1:21-cv-163-AW-MAF

DIYONNE L. MCGRAW,

Plaintiff,

v.

KHANH-LIEN ROBERTS BANKO, *et al.*,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS

Plaintiff Diyonne L. McGraw sued to contest her removal from the Alachua County School Board. The parties are familiar with the facts, which are also set out in my earlier order. ECF No. 40. The basic facts, though, are these: McGraw was elected to the Alachua County School Board. After she began serving in that office, the Governor issued an executive order removing her from office because she did not live in the district. At this stage, I accept those facts—and all well-pleaded facts—as true. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010).

McGraw's earlier complaint alleged a violation of her right of access to the courts. I dismissed that complaint

for lack of standing and failure to state a claim. That led to McGraw's Second Amended Complaint, which turns on a substantive due process claim. McGraw contends the Defendants violated her fundamental right "to vote and have her vote counted." ECF No. 42 (SAC). Defendants have again moved to dismiss. ECF Nos. 50-53.

I.

Defendants first challenge McGraw's standing, arguing primarily that she failed to allege a cognizable injury. *See* ECF No. 50 at 4-7; ECF No. 51-1 at 4-5; ECF No. 53 at 4-7; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (noting elements of standing: a cognizable injury, causation, and redressability).[1] They contend there is no harm to McGraw's right to vote because McGraw acknowledges she did, in fact, vote. But the crux of McGraw's claim is that she was disenfranchised when the Governor's executive order under § 114.01(2)—which she says the private-party Defendants procured, *see* ECF No. 54 at 14—ousted her from office. *See id.* at 4, 24 (arguing her vote was thereby "nullified"). That is her right-to-vote claim—not that she never got to vote in the first place.

1. McGraw alleges (and argues) violation of her supporters' rights too, *see* SAC ¶ 25; ECF No. 54 at 3-4, but she offers no justification for asserting "the legal rights or interests of third parties," *cf. Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Although McGraw suggests "she is the perfect Plaintiff for certifying a class under Rule 23," ECF No. 54 at 24, she did not plead a class complaint (or satisfaction of Rule 23's prerequisites).

Appendix E

In evaluating standing, I "must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Culverhouse v. Paulson & Co.*, 813 F.3d 991, 994 (11th Cir. 2016) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235, 355 U.S. App. D.C. 100 (D.C. Cir. 2003)). Assuming the merits of McGraw's claims, then, it becomes clear that she has alleged injury. She alleged not only removal from office, but also the resulting lost salary and benefits, plus emotional and reputational harm. *See* SAC ¶ 44. And she has alleged facts showing that Defendants caused that injury. Finally, McGraw seeks compensatory damages against each defendant, so there is no overarching redressability problem. Thus, I must reject Defendants' arguments that McGraw lacks standing altogether.

But there is a standing problem to the extent McGraw seeks injunctive relief. "Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party shows a real and immediate—as opposed to a merely conjectural or hypothetical—threat of *future* injury." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1329 (11th Cir. 2013) (citations and marks omitted). Here, McGraw seeks several forms of injunctive relief: (1) an injunction precluding the Governor "from engaging in any future conduct in furtherance of the enforcement of" the executive order, SAC ¶ 41; (2) an order directing the Governor, in his individual capacity, "to withdraw and or vacate" both the executive order removing McGraw from office and his order appointing McGraw's school-board replacement, *id.* ¶ 46; and (3)

injunctions precluding the private-party Defendants from "engaging in any future conduct that unconstitutionally disenfranchises Plaintiff McGraw," *id.* ¶¶ 64, 68, 73. The second—like McGraw's claims for compensatory relief—survives Defendants' standing challenge because the requested relief (an injunction vacating the order of removal) could redress the injury (removal).[2]

The first and third fail on standing grounds though. The executive order—and McGraw's removal from the school board—are in the past, and there is no allegation that the Governor is likely to do anything to enforce either in the future. Same for the private-party Defendants: McGraw hasn't alleged anything to suggest they are likely to take future action harming her. Thus, to the extent McGraw faces a real, immediate threat of future injury, that injury will not be *caused* by either the Governor's "future conduct" to enforce the executive order or by the private-party Defendants' "future conduct unconstitutionally disenfranchis[ing]" McGraw. Nor will it be redressed by enjoining either. So McGraw has not alleged facts to support standing as to these claims for injunctive relief—against the Governor in his official capacity, and against the private-party Defendants. Those claims must be dismissed for lack of standing. Were there standing, though, these claims would be dismissed on the merits for the reasons the next section explains.

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2. Again, this is assuming the merits of the claim—and assuming, for now, that the court has authority to order the Governor to perform an official action in his individual capacity.

Appendix E

II.

To state a § 1983 claim, McGraw must plausibly allege facts establishing the violation of a federal right. *See West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (citations omitted). Because she has not done so, her remaining claims are dismissed for failure to state a claim.

First, McGraw hasn't pointed to any authority suggesting she had a legally protected interest in continuing to hold public office—let alone an office for which she was not qualified.[3] The cases she cites are inapposite. *Duncan v. Poythress* stands for the proposition that public officials disenfranchise the entire electorate when they fill by appointment an office state law requires filling by election. *See* 657 F.2d 691, 703-04 (5th Cir. Unit B Sept. 1981). And *Reynolds v. Sims* was an equal-protection apportionment case. *See* 377 U.S. 533, 536-37, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Neither speaks to a substantive-due-process right of an official to remain in office after being elected.

McGraw's right to the office—if there is one—is not a federal right. *Cf. Snowden v. Hughes*, 321 U.S. 1, 7, 64 S. Ct. 397, 88 L. Ed. 497 (1944) ("[A]n unlawful denial by state action of a right to state political office is not a denial

3. McGraw has never alleged that she resided in the district, and there seems to be no real dispute about whether she could maintain the office as a nonresident. But the fact that she was ineligible for the office makes no difference to the outcome here. Even if the Governor's removal was unlawful under state law, that would not make his removal a federal constitutional violation, as discussed below.

of a right of property or of liberty secured by the due process clause." (citing *Taylor v. Beckham*, 178 U.S. 548, 20 S. Ct. 890, 44 L. Ed. 1187 (1900))); *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994) (en banc) ("Because employment rights are state-created rights and are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection."); *Taylor*, 178 U.S. at 577 ("[G]enerally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right."). It's also not a property interest the Florida Supreme Court recognizes. *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 662 (Fla. 2012) ("[E]lected officials have no property rights to the office to which they have been elected." (citation omitted)); *cf. also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .").

Separately, even if McGraw had a property interest in her office, she has not shown that removal from that office implicates the federal due-process right to vote, much less deprives her of it. By her logic, anytime someone is elected, he or she cannot be removed without violating the electors' right to vote. McGraw cites no authority supporting this position—which, taken to its logical conclusion, would invalidate numerous state-law provisions regarding, among other things, impeachment. *See, e.g.*, Fla. Const. art. III, § 17 (authorizing impeachment of governor,

cabinet members, and others); *id.* art. V, § 12 (authorizing removal of elected judges for misconduct).

McGraw also argues in passing that substantive due process "prohibits governmental action that 'shocks the conscience.'" ECF No. 54 at 21 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). But "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" *Lewis*, 523 U.S. at 846 (citation omitted), and "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level," *id.* at 849 (citation omitted)). The facts here simply don't rise to that level. Even if McGraw is right that the Governor should've followed different procedures in removing her from office,[4] I cannot say that his actions—or the other Defendants' actions in bringing McGraw's situation to the Governor's attention—were so arbitrary or egregious as to shock any reasonable person's conscience. So McGraw hasn't alleged a substantive due process violation on this basis either.

4. McGraw's argument goes like this: Applying *expressio unius*, since Florida Statute § 1001.38 only explicitly authorizes the Governor to *fill* school-board vacancies, *declaring* vacancies thereunder is unlawful. And, applying the principle of specific-over-general, the school-board-specific § 1001.38 supplants the moregeneral § 114.01 in the context of school-board vacancies. Because the Governor wasn't authorized to declare McGraw's seat vacant under either statute—or under the Florida Constitution, which also speaks only to *filling* vacancies, *see* Fla. Const. art. IV, § 1(f)—his executive order doing so was ultra vires. *See* ECF No. 54 at 4-12.

Finally, even though McGraw challenges the Governor's procedures for vacating her school-board seat, she does not allege a procedural due process violation here. Setting aside that McGraw hasn't shown a cognizable property interest in remaining in office, state-law violations are not actionable under § 1983. *See Burban v. City of Neptune Beach*, 920 F.3d 1274, 1278 (11th Cir. 2019) ("Section 1983 actions may be brought to enforce rights created by *federal* statutes as well as by the Constitution." (emphasis added) (citing *Maine v. Thiboutot*, 448 U.S. 1, 4-8, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980))). And to the extent federal due process might require procedures not followed here, McGraw hasn't alleged the lack of an adequate state remedy for the deprivation. *See McKinney*, 20 F.3d at 1557 ("[T]he state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise.").

In short, McGraw has not plausibly alleged a violation of a federal right, so she has not sufficiently pleaded a § 1983 claim. This failure also dooms her § 1983 conspiracy claim. *Cf. Grider v. City of Auburn*, 618 F.3d 1240, 1260 (11th Cir. 2010). And it moots any remaining issues, like whether the private defendants were state actors for § 1983 purposes or whether there was a proper request for relief. *See, e.g.*, ECF No. 51-1 at 7-11; ECF No. 53 at 7-9.

Appendix E

CONCLUSION

Defendants' motions to dismiss (ECF Nos. 50, 51, 52) are GRANTED, and the Second Amended Complaint (ECF No. 42) is DISMISSED. The clerk will enter judgment that says, "This case was resolved on motions to dismiss. Plaintiff's claims for injunctive relief against the Governor in his official capacity, and against Banko, Childers, and Childers Law, are dismissed without prejudice for lack of standing. All remaining claims are dismissed on the merits for failure to state a claim." Because McGraw had an opportunity to cure her pleading deficiencies and did not do so, her complaint is dismissed without leave to amend.

The clerk will close the file.

SO ORDERED on August 12, 2022.

/s/ *Allen Winsor*
United States District Judge

APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED DECEMBER 18, 2023

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 22-12987

DIYONNE L. MCGRAW,

Plaintiff-Appellant,

versus

KHANH-LIEN ROBERTS BANKO, SELDON J CHILDERS, CHILDERS LAW, LLC, RON DESANTIS, IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS GOVERNOR OF FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida D.C. Docket No. 1:21-cv-00163-AW-MAF

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before NEWSOM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

Appendix F

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

APPENDIX G — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 11, 2023

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 22-12987

DIYONNE L. MCGRAW,

Plaintiff-Appellant,

versus

KHANH-LIEN ROBERTS BANKO, SELDON J CHILDERS, CHILDERS LAW, LLC, RON DESANTIS, IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS GOVERNOR OF FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida D.C. Docket No. 1:21-cv-00163-AW-MAF

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before NEWSOM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

Appendix G

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

APPENDIX H — PROVISIONS INVOLVED

U.S. Const. Art. VI, cl. 2 reproduced at Appendix I -

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

Appendix H

U.S. Const. Art. I, § 1 reproduced at Appendix J -

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Appendix H

U.S. Const. Art. III, § 1 reproduced at Appendix K -

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Appendix H

U. S. Const. Amdt. XIV, § 1 reproduced at Appendix L -

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appendix H

U. S. Const. Amdt. XIV, § 5 reproduced at Appendix M -

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Appendix H

42 U.S.C. § 1983 reproduced at Appendix N -

§1983. Civil action for deprivation of rights

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix H

28 U.S.C. § 2072 reproduced at Appendix O -

§2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

**APPENDIX I — COMPLAINT,
FILED MAY 2, 2022**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

CASE NO: 1:21-cv-00163-AW-GRJ

DIYONNE MCGRAW,

Plaintiff,

v.

KHANH-LIEN ROBERTS BANKO, SELDON J. CHILDERS, CHILDERS LAW LLC, and RON DESANTIS, in his individual capacity and official capacity as Governor of Florida.

Defendants.

**PLAINTIFF'S SECOND AMENDED
CIVIL COMPLAINT**
(DEMAND FOR JURY TRIAL)

Appendix I

NATURE OF THE CASE

1. "It is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats [**41] of government through the power of appointment."[1] Such "action violates the due process guarantees of the fourteenth amendment."[2]

2. "Just as the equal protection clause of the fourteenth amendment prohibits state officials from improperly diluting the right to vote, the due process clause of the fourteenth amendment forbids state officials from unlawfully eliminating that fundamental right."[3]

3. The Constitution certainly protects the right to vote in state and federal elections.[4] The fundamental right to vote includes the right to cast your vote and have it counted.[5]

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1. *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. Unit B Sept. 28, 1981). In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

2. *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. Unit B Sept. 28, 1981).

3. Id.

4. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.").

5. *Id*. at 555.

4. Lady Diyonne McGraw (hereinafter "Plaintiff McGraw") takes this civil action pursuant to 42 U.S.C. § 1983 to vindicate her constitutional right to vote and have her vote counted under the substantive due process component of the fourteenth amendment to the U.S. Constitution.

5. This Court has original jurisdiction over this action because it involves a federal question.[6] Furthermore, this Court has original jurisdiction over this action because it seeks to: "redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States";[7] and or, "recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."[8]

6. Venue is proper in the Northern District of Florida because: the acts and or events complained of took place in Leon County, Florida and or Alachua County, Florida. Furthermore, at all times material hereto, the parties resided in Leon County, Florida and or Alachua County, Florida: Plaintiff McGraw resided and still does reside in Alachua, County, Florida; Defendant Banko resided

6. 28 U.S.C. § 1331.

7. 28 U.S.C. § 1343(a)(3).

8. 28 U.S.C. § 1343(a)(4).

in Alachua County, Florida; Seldon J. Childers resided in Alachua County, Florida; Defendant Childers Law LLC's principal place of business was located in Alachua County, Florida; and, Governor Ron DeSantis worked and resided in Leon County, Florida.[9]

GENERAL ALLEGATIONS

7. Plaintiff McGraw is and was at all times material hereto a citizen of the United States of America.

8. Plaintiff McGraw is and was at all times material hereto a citizen of the great state of Florida.

9. Plaintiff McGraw is and was at all times material hereto a graduate of Florida Agricultural & Mechanical University, a/k/a FAMU.

10. Plaintiff McGraw is a longtime member of Alpha Kappa Alpha Sorority, Incorporated; she is also a member of The Links, Incorporated.

11. Plaintiff McGraw is a registered Democrat.

12. Plaintiff McGraw is a resident of Alachua County, Florida.

13. At all times material hereto, upon information and belief, a majority of Alachua County's 192,839 active registered voters were Democrats: 94,125 were active

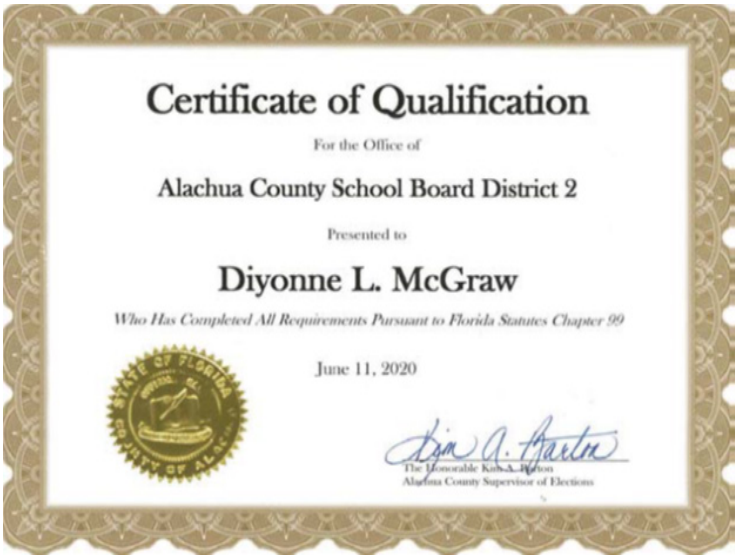
9. 28 U. S. C. § 1391(b).

registered Democrats; 51,041 were active registered Republicans; and, 47,673 were active registered others.

14. On or about September 25, 2019, Plaintiff McGraw met with Tim L. Williams, Assistant Supervisor of Elections for Alachua County, to secure professional guidance on determining the District in which she resided before seeking to qualify to campaign for a seat on Alachua County's School Board. During that meeting, Plaintiff McGraw provided Mr. Williams with her longtime residence address, 4331 NW 21st Terrace, Gainesville, FL 32605, and he advised that Plaintiff McGraw resided in District 2 for purposes of qualifying and campaigning for the District 2 seat on Alachua County's School Board.

15. On or around June 11, 2020, Plaintiff McGraw returned to the Alachua County Supervisor of Elections' office to confirm for a second time with Tim L. Williams that her longtime residence address, 4331 NW 21st Terrace, Gainesville, FL 32605, was in District 2 and to submit the necessary paperwork to qualify to run for the District 2 seat on Alachua County's School Board. Mr. Williams confirmed again that Plaintiff McGraw's longtime residence address was in District 2. Thereafter, Plaintiff McGraw submitted the necessary paperwork using said longtime residence address and was certified as qualified to run for the District 2 seat on Alachua County's School Board:

Appendix I



Certificate of Qualification

For the Office of

Alachua County School Board District 2

Presented to

Diyonne L. McGraw

Who Has Completed All Requirements Pursuant to Florida Statutes Chapter 99

June 11, 2020

The Honorable Kim A. Barton
Alachua County Supervisor of Elections

16. Plaintiff McGraw campaigned against Defendant Khanh-Lien Roberts Banko (hereinafter "Defendant Banko") for the District 2 seat on Alachua County's School Board.

17. A county-wide primary election was held on or around August 18, 2020.

18. Plaintiff McGraw cast a vote for herself to be counted in that county-wide primary election.

19. The election results were certified on August 24, 2020:

Appendix I

***** OFFICIAL *****
CERTIFICATE OF COUNTY
CANVASSING BOARD
ALACHUA COUNTY

We, the undersigned, SUSAN MILLER-JONES, County Judge, KIM A. BARTON, Supervisor of Elections, MARIHELEN WHEELER, County Commissioner, constituting the Board of County Canvassers in and for said County, do hereby certify that we met on the Twenty-Fourth day of August, 2020 A.D., and proceeded publicly to canvass the votes given for the several offices and persons herein specified at the Nonpartisan Election held on the Eighteenth day of August, 2020 A.D., as shown by the returns on file in the office of the Supervisor of Elections. We do hereby certify from said returns as follows:

For School Board, District 2, the whole number of votes cast was 57,828 of which

Khanh-Lien R. Banko	received 27,550 votes
Diyonne L. McGraw	received 30,278 votes

20. Plaintiff McGraw won the election by receiving a majority — 30,278 — of the total number of votes cast, 57,828.

21. In November 2020, Plaintiff McGraw was sworn in as the District 2 seat representative on Alachua County's

School Board. At all times material hereto, Plaintiff McGraw has remained at and is currently residing at the address [listed in paragraphs fourteen (14) and fifteen (15) of this complaint] she used to qualify for the election. She has never moved.

22. Thereafter, Alachua County's five (5) member school board consisted of three (3) black females and two (2) white males.

23. Moreover, after Plaintiff McGraw took office, several controversial school board decisions were made as a result of final three (3) to two (2) votes along those lines. For example, Plaintiff McGraw and the other two black females on the Alachua County School Board [which constituted a voting majority] pushed to immediately replace the then Superintendent, Karen Clarke, with a new person, Ms. Carlee Simon (a white female), in hopes that Ms. Simon would work to stamp out corruption throughout the school system and implement the School Board's policies that were ultimately designed to improve the educational experience for all of the public school students of Alachua County, especially those historically most vulnerable and lagging in performance (minorities).

24. Furthermore, Plaintiff McGraw and the other two black females on the Alachua County School Board [which constituted a voting majority] sought to readdress the Alachua County School Board's masking policies to bring them more in conformity with President Joe Biden's federal policies on masking to bolster protection for the health, safety and welfare of the staff, teachers, and students of Alachua County.

25. After being elected, sworn in, and actively serving on the board for more than seven (7) months, Plaintiff McGraw and 30,277 other Alachua County residents that voted for her were disenfranchised on or around June 17, 2021, by Governor Ron DeSantis' issuance of Executive Order 21-147 declaring a vacancy in the District 2 seat on Alachua County's School Board. Thereafter, Governor Ron DeSantis appointed a white female, Mildred Russell, to the District 2 seat.

COUNT I
PLAINTIFF MCGRAW'S SUBSTANTIVE DUE PROCESS CLAIM AGAINST DEFENDANT RON DESANTIS IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF FLORIDA

26. The allegations contained in paragraphs 1 thru 25 above are hereby realleged and incorporated by reference as if fully set forth herein.

27. Defendant DeSantis is and was at all times material hereto Florida's Governor; and as such, he is and was a state actor.[10]

28. Defendant DeSantis, acting as Florida's Governor, issued Executive Order 21-147 [disenfranchising Plaintiff McGraw and 30,277 other residents of Alachua County that voted for her] pursuant to Florida Statute § 114.01(1)(g) and (2); thereafter, Defendant DeSantis, acting as Governor of Florida, appointed Mildred Russell to the

10. *See*, Fla. Const. Art. IV, § 1(a) ("The governor shall be the chief administrative officer of the state....").

District 2 seat pursuant to that same statute. Accordingly, Defendant DeSantis is and was at all times material hereto acting under color of state law.

29. "A state official is subject to suit in his official capacity when his office imbues him with the responsibility to enforce the law or laws at issue in the suit."[11]

30. Defendant DeSantis did in fact deprive Plaintiff McGraw of her fundamental constitutional right to vote for herself and have her vote count as protected by the substantive component of the 14th Amendment's Due Process Clause. Defendant DeSantis did in fact deprive 30,277 others similarly situated of their fundamental constitutional right to vote for Plaintiff McGraw and have their votes count.

31. Under the circumstances, Defendant DeSantis' disenfranchisement of Plaintiff McGraw and the other Alachua County residents that voted for her was in direct violation of Florida's election laws.

32. Under Florida's election laws, a court could not inquire into Plaintiff McGraw's "qualifications" for the District 2 seat on Alachua County's School Board after she was elected.[12]

33. Under Florida's election laws, a claim concerning Plaintiff McGraw's "ineligibility" for the District 2 seat

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11. *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011).

12. *McPherson v. Flynn*, 397 So. 2d 665 (Fla. 1981); and, *Burns v. Tondreau*, 139 So. 3d 481 (Fla. 3d DCA 2014).

on Alachua County's School Board was time barred by Florida Statute § 102.168(2) which required that such a claim be filed with the court "within 10 days after midnight of the date the last board responsible for certifying the results officially certifies the results of the election being contested."

34. Under Florida's election laws, an "aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election."[13] Plaintiff McGraw's residence address was made known on the documents she submitted to qualify for the election; and her residence address remained the same before, during, and after the election. In fact, she never moved. Any concerns about her "ineligibility" for the District 2 seat based on residency requirements could have been complained about to the proper authorities before the election, the aggrieved parties are not allowed to wait until after the election to bring up a deficiency that could have been raised before the election.

35. Under Florida's election laws, the filing of a petition for writ of quo warranto was the only lawful manner by which Defendant DeSantis as Governor of Florida could potentially oust Plaintiff McGraw from her District 2 seat on the Alachua County School Board and that relief is discretionary.[14]

36. Florida Statute § 1001.38 governs when a vacancy occurs in the District 2 seat on Alachua County's School

13. *Pearson v. Taylor*, 32 So. 2d 826, 827 (Fla. 1947).

14. *See*, *State ex rel. Askew v. Thomas*, 293 So. 2d 40 (Fla. 1974).

Board and it does not authorize or permit Defendant DeSantis as Governor to declare a vacancy by executive order. Florida Statute § 1001.38 governs the issue not Florida Statute § 114.01(1)(g) and (2).

37. The lawsuit filed on or around June 9, 2021, [by Defendants, Seldon J. Childers and Childers Law LLC, on behalf of Defendant Khanh-Lien Roberts Banko] in Eighth Judicial Circuit Court case number 2021-CA-1594 was in violation of Florida's election laws as: it was time barred by Florida Statute § 102.168(2) to the extent that it raised Plaintiff McGraw's "ineligibility" for the District 2 seat on Alachua County's School Board as a basis for relief; the court did not have jurisdiction to entertain it to the extent that it sought relief on the grounds that Plaintiff McGraw was "unqualified" for the District 2 seat on Alachua County's School Board; and the court sitting in equity pursuant to Florida Statute § 86.011 did not have jurisdiction to entertain either a challenge to Plaintiff McGraw's "ineligibility" or a challenge to Plaintiff McGraw's "qualifications".

38. The non-final order in Eighth Judicial Circuit Court case number 2021-CA-1594 dated June 15, 2021, serving as a factual basis for Defendant DeSantis' issuance of Executive Order 21-147 is void because the court lacked jurisdiction to issue it.

39. The damage and or injury to Plaintiff McGraw's fundamental right to vote for herself for the District 2 seat on the Alachua County's School Board and to have her vote count is ongoing and continuous but can be remedied by prospective equitable relief.

40. The Eleventh Amendment does not bar Plaintiff McGraw's §1983 civil action for prospective equitable relief against Defendant DeSantis in his official capacity as Governor of Florida to end continuing violations of federal law.[15]

41. WHEREFORE, Plaintiff McGraw hereby demands a trial by jury on all issues so triable and further prays for the following relief: a) an order declaring Defendant DeSantis' issuance of Executive Order Number 21-147 unconstitutional under the substantive due process clause of the fourteenth amendment to the U.S. Constitution; b) an order enjoining the State of Florida and or Governor DeSantis, his agents, employees, and or those under his supervision or control from engaging in any future conduct in furtherance of the enforcement of Executive Order Number 21-147; c) an order declaring void as unconstitutional Executive Order Number 21-147; d) attorney's fees and expert fee costs pursuant 42 U.S.C. § 1988(b); e) a final judgment against Defendant DeSantis effectuating the foregoing requested relief.

COUNT II
PLAINTIFF MCGRAW'S SUBSTANTIVE DUE PROCESS CLAIM AGAINST DEFENDANT RON DESANTIS IN HIS INDIVIDUAL CAPACITY

42. The allegations contained in paragraphs 1-25, 28, 30, 31, and 32-38 above are hereby realleged and incorporated by reference as if fully set forth herein.

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15. *Ex parte Young*, 209 U.S. 123 (1908).

43. Defendant DeSantis's conduct is not shielded by qualified immunity because he was on notice of Plaintiff McGraw's fundamental right to vote for herself for the District 2 seat on the Alachua County School Board and to have her vote count.[16] Defendant DeSantis was also on notice that: "it is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats [**41] of government through the power of appointment.";[17] and such "action violates the due process guarantees of the *fourteenth amendment*."[18]

44. Plaintiff McGraw has suffered the following injuries as a direct and proximate result of being disenfranchised by Defendant DeSantis' issuance of Executive Order 21-147: a) violation of her fundamental right to vote for herself and have her vote count; b) attorney's fees and costs; b) inability to participate in and or vote as a member of the Alachua County School Board; c) termination of her salary and benefits as an Alachua County School Board member which she was due to

16. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.").

17. *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. Unit B Sept. 28, 1981). In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

18. *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. Unit B Sept. 28, 1981).

receive for 4 years while in office; and, d) emotional pain, suffering, public shame and humiliation.

45. Defendant DeSantis acted with malicious intent and or reckless disregard for Plaintiff McGraw's fundamental right to vote for herself and have that vote count because he was on notice of the election laws but willfully disregarded them while trampling on Plaintiff McGraw's fundamental right to vote for herself and have that vote count.

46. WHEREFORE, Plaintiff McGraw hereby demands a trial by jury on all issues so triable and further prays for the following relief: a) compensatory damages against Defendant DeSantis in his individual capacity; b) punitive damages against Defendant DeSantis in his individual capacity; c) attorney's fees and expert fee costs pursuant 42 U.S.C. § 1988(b) and (c) respectively against Defendant DeSantis in his individual capacity; d) an order declaring Defendant DeSantis' issuance of Executive Order Number 21-147 unconstitutional; e) an order enjoining Defendant DeSantis from engaging in any future conduct to enforce Executive Order Number 21-147 and or directing Defendant DeSantis to withdraw and or vacate Executive Order Number 21-147 and the order appointing Mildred Russell to the District 2 seat; and, f) a final judgment against Defendant DeSantis effectuating the foregoing requested relief.

Appendix I

COUNT III
PLAINTIFF MCGRAW'S AS-APPLIED CONSTITUTIONAL CHALLENGE TO FLORIDA STATUTE § 114.01(1)(G) AND (2) AGAINST DEFENDANT RON DESANTIS IN HIS OFFICIAL CAPACITY AS GOVERNOR

47. The allegations contained in paragraphs 1 thru 30 above are hereby realleged and incorporated by reference as if fully set forth herein.

48. Defendant DeSantis, acting as Florida's Governor, disenfranchised Plaintiff McGraw and 30,277 other residents of Alachua County that voted for her when he issued Executive Order Number 21-147 pursuant to Florida Statute § 114.01(1)(g) and (2).

49. Disenfranchisement is a heavy burden or injury to the right to vote which includes the right to have one's vote count. State statutes imposing such a heavy burden must survive strict scrutiny.

50. Under the circumstances of this case, the State has no compelling interest in disenfranchising voters more than 7 months after the election has been certified based on an elected official's "ineligibility" where the alleged grounds for said "ineligibility", failure to meet residency requirements, were a matter of public record and known to the State before the election. Plaintiff McGraw's address remained the same before, during and after the election. Action could have been taken before the election and or within 10 days after the election results were certified.

51. Moreover, the State has no legitimate reason or rational justification for the burden this statute imposes on the right to vote. Indeed, Florida's election contest statute, Florida Statute § 102.168, places a short time limit on when "ineligibility" can be raised to contest an election. There is a strong public interest in favor of not overturning the will of the electors after an election.

52. That strong public interest in not overturning the will of the electors is not only reflected in the election contest statute itself but also in the public policy expressed by the Florida Supreme Court in *Pearson v. Taylor*, 32 So. 2d 826, 827 (Fla. 1947).

53. On balance, the scale tips in favor of finding Florida Statute § 114.01(1)(g) and (2) unconstitutional as applied to Plaintiff McGraw under the circumstances.

54. WHEREFORE, Plaintiff McGraw hereby demands a trial by jury on all issues so triable and further prays for the following relief: a) an order declaring Florida Statute § 114.01(1)(g) and (2) unconstitutional as applied to Plaintiff McGraw under the U.S. Constitution; b) attorney's fees and expert fee costs pursuant 42 U.S.C. § 1988(b); and c) a final judgment against Defendant DeSantis in his official capacity effectuating the foregoing requested relief.

Appendix I

COUNT IV
PLAINTIFF MCGRAW'S SUBSTANTIVE DUE PROCESS CLAIM AGAINST DEFENDANT KHAHN-LIEN ROBERTS BANKO

55. The allegations contained in paragraphs 1-25, 28, 30, 31, and 32-38 above are hereby realleged and incorporated by reference as if fully set forth herein.

56. Defendant Banko lost the August 18, 2020 election to Plaintiff McGraw and the results were certified on August 24, 2020.

57. More than seven months after Plaintiff McGraw was sworn in as the District 2 representative on Alachua County's School Board, Defendant Banko went to Defendants, Seldon J. Childers, Esq. and Childers Law LLC., to figure out a way to quickly remove Plaintiff McGraw from her elected position on grounds that Plaintiff McGraw was "ineligible" and or "unqualified" for the District 2 seat based on residency requirements.

58. On or around June 9, 2021, Defendant Banko, by and thru Defendants, Childers and Childers Law LLC, filed a lawsuit. That lawsuit was served on Plaintiff McGraw June 16, 2021. In between filing the lawsuit and serving process on Plaintiff McGraw, Defendant Banko: emailed a letter on June 11, 2021, to Governor DeSantis requesting his help, aid, and or assistance in removing Mrs. McGraw from office to avoid protracted litigation; and moved ex-parte for an emergency temporary injunction to stop Mrs. McGraw from being on the School Board.

59. On or about June 15, 2021, the state court denied the ex-parte motion for an emergency temporary injunction and Defendant Banko, by and through Defendants, Childers and Childers Law, forwarded a copy of the non-final order denying the ex-parte motion for emergency temporary injunctive relief to Governor DeSantis requesting his help, aid and assistance in removing Plaintiff McGraw from public office based on some of the language in said non-final order.

60. Specifically, it was requested that Governor DeSantis issue an executive order declaring the District 2 seat vacate pursuant to Florida Statute § 114.01(1)(g) and (2).

61. On or about June 17, 2021, Governor DeSantis issued Executive Order Number 21-147 with a copy of the non-final order denying the ex-parte motion attached. Said Executive Order disenfranchised Plaintiff McGraw and 30,277 other Alachua County residents who voted for her.

62. Under the circumstances of this case, which cannot fully be known without some opportunity for discovery, Defendant Banko, though a private actor, could arguably be characterized as a state actor acting under color of state law based on a good faith extension of the Court's rationale and or holding in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) regarding the joint participation theory which required nothing more than a private actor "invoking the aid of state officials" to take advantage of unconstitutional state-created attachment procedures which effected a property interest. By analogy, in this case,

Defendant Banko invoked the aid of Governor DeSantis to take advantage of state-created procedures which unconstitutionally and impermissibly disenfranchised Plaintiff McGraw and 30,277 other electors who voted for Mrs. McGraw injuring their fundamental right to vote.

63. As a direct and proximate result, Plaintiff McGraw has suffered the following injuries: a) denial of her fundamental right to vote and have her vote counted by disenfranchisement; b) attorney's fees and costs; b) inability to participate and or vote as a member of the Alachua County School Board; c) termination of her salary and benefits as an Alachua County School Board member; and d) emotional pain, suffering, public shame and humiliation.

64. WHEREFORE, Plaintiff McGraw hereby demands a trial by jury on all issues so triable and further prays for the following relief: a) compensatory damages; b) punitive damages; c) attorney's fees and expert fee costs pursuant *42 U.S.C. § 1988(b) and (c)* respectively; d) an order declaring Defendant Banko's conduct unconstitutional; e) an order enjoining Defendant Banko from engaging in any future conduct that unconstitutionally disenfranchises Plaintiff McGraw and or her voting supporters; and, f) a final judgment against Defendant Banko effectuating the foregoing requested relief.

Appendix I

COUNT V
PLAINTIFF MCGRAW'S SUBSTANTIVE DUE PROCESS CLAIM AGAINST CHILDERS

65. The allegations contained in paragraphs 1-25, 28, 30, 31-38, 57-61 above are hereby realleged and incorporated by reference as if fully set forth herein.

66. Under the circumstances of this case, which cannot fully be known without some opportunity for discovery, Defendant Childers, though a private actor, could arguably be characterized as a state actor acting under color of state law based on a good faith extension of the Court's rationale and or holding in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) regarding the joint participation theory which required nothing more than a private actor "invoking the aid of state officials" to take advantage of unconstitutional state-created attachment procedures which effected a property interest. By analogy, in this case, Defendant Childers invoked the aid of Governor DeSantis to take advantage of state-created procedures which unconstitutionally and impermissibly disenfranchised Plaintiff McGraw and 30,277 other electors who voted for Mrs. McGraw injuring their fundamental right to vote.

67. As a direct and proximate result, Plaintiff McGraw has suffered the following injuries: a) denial of her fundamental right to vote and have her vote counted by disenfranchisement; b) attorney's fees and costs; b) inability to participate and or vote as a member of the Alachua County School Board; c) termination of her salary and benefits as an Alachua County School Board

member; and d) emotional pain, suffering, public shame and humiliation.

68. WHEREFORE, Plaintiff McGraw hereby demands a trial by jury on all issues so triable and further prays for the following relief: a) compensatory damages; b) punitive damages; c) attorney's fees and expert fee costs pursuant *42 U.S.C. § 1988(b) and (c)* respectively; d) an order declaring Defendant Childers' conduct unconstitutional; e) an order enjoining Defendant Childers from engaging in any future conduct that unconstitutionally disenfranchises Plaintiff McGraw and or her voting supporters; and, f) a final judgment against Defendant Childers effectuating the foregoing requested relief.

COUNT VI
PLAINTIFF MCGRAW'S SUBSTANTIVE DUE PROCESS CLAIM AGAINST CHILDERS LAW LLC

69. The allegations contained in paragraphs 1-25, 28, 30, 31-38, 57-61 above are hereby realleged and incorporated by reference as if fully set forth herein.

70. Childers Law LLC, though not an individual, is defined as a "person" under *42 U.S.C. § 1983*.

71. Under the circumstances of this case, which cannot fully be known without some opportunity for discovery, Defendant Childers Law LLC, though a private actor, could arguably be characterized as a state actor acting under color of state law based on a good faith extension

of the Court's rationale and or holding in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) regarding the joint participation theory which required nothing more than a private actor "invoking the aid of state officials" to take advantage of unconstitutional state-created attachment procedures which effected a property interest. By analogy, in this case, Defendant Childers Law LLC, acting through its Managing Member Seldon J. Childers, invoked the aid of Governor DeSantis to take advantage of state-created procedures which unconstitutionally and impermissibly disenfranchised Plaintiff McGraw and 30,277 other electors who voted for Mrs. McGraw injuring their fundamental right to vote.

72. As a direct and proximate result, Plaintiff McGraw has suffered the following injuries: a) denial of her fundamental right to vote and have her vote counted by disenfranchisement; b) attorney's fees and costs; b) inability to participate and or vote as a member of the Alachua County School Board; c) termination of her salary and benefits as an Alachua County School Board member; and d) emotional pain, suffering, public shame and humiliation.

73. WHEREFORE, Plaintiff McGraw hereby demands a trial by jury on all issues so triable and further prays for the following relief: a) compensatory damages; b) punitive damages; c) attorney's fees and expert fee costs pursuant *42 U.S.C. §1988(b) and (c)* respectively; d) an order declaring Defendant Childers Law LLC's conduct unconstitutional; e) an order enjoining Defendant Childers Law LLC from engaging in any future conduct that

unconstitutionally disenfranchises Plaintiff McGraw and or her voting supporters; and, f) a final judgment against Defendant Childers Law LLC effectuating the foregoing requested relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 2, 2022, 1 electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Filing.

Respectfully submitted,

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