No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

David Stanley,

Petitioner,

v.

Scott Morgan; Wayne Griffin; Thomas Glover; Monte Potier; City of Lafayette; Consolidated Government of Lafayette,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court's pronouncement in *Delaware State College v. Ricks,* 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980)—i.e., that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period"—applies in cases where the operative grievance, appellate, administrative, or other similar procedure constitutes a "direct review" of, or otherwise postpones the "finality" or "officiality" of, an employment action, as opposed to a "collateral review."

2. Whether the Supreme Court's holding in *Delaware State College v. Ricks,* 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) created a blanket rule to apply to all grievance procedures in all cases or, instead, was limited to the grievance procedure present in that case.

3. Whether the Supreme Court's holding in *Delaware State College v. Ricks,* 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 requires courts to conduct a fact-intensive analysis of the grievance, appellate, administrative, or other similar procedure at issue to determine whether it operates to postpone the "finality" or "officiality" of an employment action before concluding whether the pendency of said procedure tolls the running of the limitations period.

4. Whether a civil service employee's filing of a timely civil service appeal pursuant to La. R.S. § 33:2501 renders the appointing authority's decision preliminary, and the civil service board's decision "final," for purposes of ascertaining the accrual date of a civil service employee's federal causes of action.

RELATED CASES

Stanley v. Morgan, No. 24-30119, U.S. Fifth Circuit Court of Appeals, Judgment rendered October 28, 2024.

Stanley v. Morgan, No. 6:22-cv-1655, U.S. District Court for the Western District of Louisiana. Judgment entered February 1, 2024.

Stanley v. Morgan, No. 6:22-cv-1655, U.S. District Court for the Western District of Louisiana. Report and Recommendation entered January 19, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Stanley ("Stanley"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Fifth Circuit is located at 120 F.4th 467 (5th Cir. 2024), and it is reproduced in the Appendix (App.) at App. 1a-13a. The district court's slip opinion, which can be found at 2024 WL 396185 (W.D. La. Feb. 1, 2024), is reproduced at App. 14a-17a. The district court's slip opinion adopts the Magistrate Judge's Report and Recommendation, which can be found at 2023 WL 9502412 (W.D. La. Jan. 19, 2023) and is reprinted at App. 18a-39a.

JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on October 28, 2024. App. 14a-17a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

Government for a redress of grievances." U.S. Const. Amend. I.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. 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.

STATEMENT OF THE CASE

I. Stanley, an individual who has served as an employee of the Lafayette Police Department ("LPD") since 2009, filed this action against successive chiefs

of LPD, as well as the Lafayette Consolidated Government ("LCG"), following what he alleges to be an unlawful, unpaid suspension and demotion following his engagement in protected First Amendment speech.

On May 15, 2020, while off-duty and acting in his private capacity as president of PAL #905 ("PAL"), the local chapter of the Louisiana Union of Police Associations, Stanley posted a video to PAL's public Facebook page regarding the chapter's opposition to La. HB 577, a bill that proposed to enact statutory provisions regarding certification and appointment of officers in the municipal fire and police civil service in the cities of Broussard, Carencro, Scott, and Youngsville, Louisiana. On May 18, 2020, and while acting in the same, private capacity, Stanley posted a complimentary narrative of the LPD on the PAL public Facebook page following a traffic stop that had recently taken place.

On May 22, 2020—less than one (1) week after Stanley's first PAL post—Stanley received an internal memorandum informing him that he was being placed under investigation by LPD Internal Affairs ("IA") for violations of LPD's social media policies, public information and media relations policies, and public statements and relations policies. Stanley submits that this IA was launched in direct response to his PAL Facebook postings, which he submits is free speech protected by the First Amendment.

Stanley willfully participated in an IA interview, during which he was questioned

extensively about his May 15, 2020 and May 18, 2020 PAL Facebook postings.

On August 11, an LPD IA Commander informed Stanley that he was being disciplined by way of a 14-day (80-hour) suspension, which would commence on August 23, 2020. Stanley took an approved, medical leave of absence from August 17, 2020 through June 11, 2021, resulting in Stanley serving the 80-hour suspension from June 14, 2021 through June 27, 2021.

On August 20, 2020, and while on approved medical leave, Stanley filed a Civil Service Appeal with the Municipal Fire and Police Civil Service Board ("Board") pursuant to La. R.S. § 33:2501. That same day, Stanley filed a Petition for Temporary Restraining Order ("TRO") and Preliminary Injunction with the 15th Judicial District Court ("JDC") for the Parish of Lafayette, State of Louisiana, seeking a temporary restraining order against all named defendants to enjoin them from effectuating the 80-hour suspension. The facts plead in Stanley's August 20, 2020 pleading are identical to those plead in the federal complaint made subject of this appeal. The 15th JDC granted the TRO, and defendants appealed.

On September 18, 2020, Stanley received an Internal Memorandum removing him from his longstanding position as Patrol Division, Patrol Support, K-9 to a routine Uniform Patrol Officer. Stanley asserts that the Uniform Patrol Officer position is an objectively worse position, in terms of supervisory status, stature, and pay. While LPD

initially justified the transfer based on Stanley's mental health treatment purportedly creating a fitness-for-duty issue, LPD Chief, Scott Morgan, later admitted that he had transferred Stanley for "political reasons."

On October 21, 2020, the Louisiana Court of Appeals for the Third Circuit dismissed the TRO, noting that the TRO had, at that time, dissolved by operation of law. The 15th JDC requested that Stanley re-file his Motion for Preliminary Injunction in accordance with the Third Circuit decision, and Stanley complied with the directive by filing a Petition for Preliminary Injunction on November 20, 2020, seeking enjoinment of both Stanley's 80-hour suspension and demotion-transfer out of the elite, K-9 division. The facts plead in Stanley's November 20, 2020 pleading, like those in the August 20, 2020 pleading, are identical to those plead in the federal complaint made subject of this appeal.

The City filed an Exception of Lack of Subject Matter Jurisdiction and Exception of Prematurity, which the 15th JDC heard on April 16, 2021. The 15th JDC granted the exception of prematurity, holding that, because he is a permanent Civil Service employee, Stanley must first appeal his suspension and transfer-demotion to the Civil Service Board.

Stanley filed a Notice of Intent to File for Supervisory Writs and Request for Order Fixing Return Date on June 8, 2021. On June 9, 2021, the 15th JDC issued an Order setting the Return Date for Saturday, July 31, 2021. During the sanctioned briefing timeframe, Stanley's counsel contracted

COVID-19, leading Stanley to request an extension of the deadline on July 30, 2021. While the Court's signed Order, dated August 10, 2021, granted Stanley an extension, the Order never specified a Return Date.

The Board heard Stanley's August 20, 2020 Civil Service appeal on February 9, 2022. Following the presentation of evidence from all parties, the Board: 1) upheld Stanley's transfer-demotion; and 2) upheld the decision to suspend Stanley but reduced the suspension from fourteen (14) days to three (3). Both parties appealed the Board's decision to the 15th JDC, and the 15th JDC ultimately upheld the Board's decision. Neither party appealed further.

II. On June 14, 2022, Stanley filed the instant lawsuit, seeking damages pursuant to 42 U.S.C. § 1983 for the deprivation under color of law Stanley's First Amendment rights as secured by the United States Constitution. Stanley alleged facts virtually identical to those he alleged in his August 20, 2020 Petition for TRO and Preliminary Injunction and/or his November 20, 2020 Petition for Preliminary Injunction.

The City filed a Rule 12(b)(6) Motion to Dismiss or, alternatively, Rule 12(b)(1) Motion to Dismiss or Stay. Therein, Defendants argued: 1) Stanley's § 1983 claims had prescribed because Stanley had initiated suit more than one (1) year from the date that Stanley was notified of his suspension; 2) Stanley failed to state a cause of action for first amendment retaliation; and 3) the individual Defendants should be dismissed

in their individual capacities under the qualified immunity doctrine.

On January 19, 2023, the Magistrate Judge issued a Report and Recommendation, therein recommending that the district court grant Defendants' motion on limitations grounds and deny Defendants' motion on all other grounds. *Stanley v. Morgan*, 2023 WL 9502412 (W.D. La. Jan. 19, 2023). Stanley filed a timely Objection, arguing: 1) the Magistrate Judge erroneously found that August 11, 2020 and September 18, 2020, and/or June 11, 2021, as opposed to February 9, 2022, were the appropriate dates on which Stanley's § 1983 claims accrued and 2) even assuming that August 11, 2020 and September 18, 2020 were the correct accrual dates, the Magistrate Judge erred in finding that Stanley's state court petitions failed to interrupt the running of prescription.

On March 8, 2023 the district court entered a Memorandum Order staying the proceedings pending resolution of a certified question submitted to the Louisiana Supreme Court by the U.S. Fifth Circuit Court of Appeals in *Kling v. Hebert,* 60 F.4th 281 (5th Cir. 2023): "In Louisiana, under what circumstances, if any, does the commencement of a suit in a court of competent jurisdiction and venue interrupt prescription as to causes of action, understood as legal claims rather than the facts giving rise to them, not asserted in that suit?"

The Louisiana Supreme Court issued its *Kling* Opinion on January 26, 2024, answering the certified question as follows: "[P]rescription is interrupted

when notice is sufficient to fully apprise the defendant of the nature of the claim of the plaintiff, and what is demanded of the defendant." *Kling v. Hebert,* 2023-00257 (La. 1/26/24); 378 So. 3d 54.

After Defendants moved to reopen the mater, the district court issued a Judgment on February 1, 2024, adopting in full the Magistrate Judge's Report and Recommendation. *Stanley v. Morgan*, 2024 WL 396185 (W.D. La. Feb. 1, 2024). Though the Judgment does not specifically address Stanley's arguments regarding the appropriate accrual date for Stanley's § 1983 claims, the Judgment implicitly adopted the Magistrate's use of August 11, 2020 and September 18, 2020 and further found that, "because [Stanley]'s state court lawsuit sought solely injunctive relief, and because [Stanley] alleges a § 1983 claim and seeks monetary relief in the instant case, no interruption of prescription occurred. Consequently, [Stanley]'s § 1983 claims are prescribed." *Id.*

III. On appeal, Stanley challenged the district court's finding that his Section 1983 claims prescribed based on two (2) primary grounds. First, Stanley challenged the district court's finding that his 1983 claims accrued for prescriptive purposes on June 11, 2020 and September 18, 2020, as opposed to the Board's February 9, 2022 ruling on Stanley's timely filed Civil Service appeal. Second, and alternatively, Stanley challenged the district court's finding that, under the Louisiana Supreme Court's recent guidance in *Kling*, Stanley's state court pleadings failed to interrupt prescription as to Stanley's federal constitutional claims. The Fifth Circuit affirmed the

district court's ruling on October 28, 2024. *Stanley v. Morgan*, 120 F.4th 467 (5th Cir. 2024).

First, the Fifth Circuit flatly rejected Stanley's position that his §1983 claims accrued for prescriptive purposes when the challenged employment actions became "final actions"–i.e., when the Board upheld the transfer-demotion and upheld, in part, the unpaid suspension—on February 9, 2022. In rejecting Stanley's position, the Fifth Circuit likened Stanley's timely filed civil service appeal to other types "administrative appeals" or internal "grievance" proceedings to assert that "[d]ecades of Supreme Court precedent dictate" against finding that Stanley's claims accrued on February 9, 2022. *Id.* 470-71. The Fifth Circuit then held that it was constrained by this Court's precedent in *Delaware State College v. Ricks,* 449 U.S. 250, 101 S. Ct. 498, 66 Led.2d 431 (1980) and *Chardon v. Fernandez,* 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed. 2d 6 (1981)(per curiam), wherein in this Court, in the context of internal, non-statutory, university grievance procedures, found that the "pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." *Id.* at 471. The Fifth Circuit concluded its finding with the following:

> The clock starts ticking for an employment-based § 1983 claim when the employee receives notices of the adverse action, and an elective administrative appeal cannot stop or turn back the clock. Thus, Stanley's appeal to the Civil Service Board

> neither forestalled accrual nor tolled limitations.
>
> *Id.* at 472.

Second, and upon finding that "United States Supreme Court foreclose[d] [Stanley]'s first argument,"[1] the Fifth Circuit discussed and applied the Louisiana Supreme Court's *Kling II* analysis to determine that Stanley's state court petitions "failed to provide adequate notice of his § 1983 claims." *Id.* at 473. In so doing, the Fifth Circuit first cited *Kling II* to highlight the "essence of interruption" as "notice to the defendant of the legal proceedings based on the claim involved" and, where "two suits [are] instituted by the same obligee," and "deal[] with the underlying obligation and present[] the same demand, a prior suit may interrupt prescription." *Id.* at 472. Against this legal precept, the Fifth Circuit compared Stanley's state court petitions and federal complaint, finding that "[w]hile there is parity between the parties, the facts, and references to the Constitution, Stanley's state court petitions merely sought an injunction to prevent discipline." *Id.* at 473. The Fifth Circuit then found that Stanley's "state suit seeking to prevent LPD from implementing a suspension and transfer failed to provide LPD adequate notice of a potential tort suit for monetary damages," and, "because the statue court petitions failed 'to fully apprise the defendant of the nature of the claim of the plaintiff,' and especially what would be 'demanded of the defendant,' interruption does not apply." *Id.*

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[1] App. 8a-9a.

Based on these two (2) findings, the Fifth Circuit found that Stanley's "race against the clock for a timely § 1983 claim ended no later than June 11, 2022" and that, because Stanley did not institute his federal suit by that date, his federal claims had prescribed. *Id.*

SUMMARY OF THE ARGUMENT

The Fifth Circuit, without engaging in a fact-intensive inquiry to determine which actor's decision constituted the "final" or "official" decision of the City as it related to Stanley's suspension and transfer-demotion, summarily concluded that Stanley's civil service appeal amounted to a "collateral review" of the appointing authority's decision to discipline him. App. 6a-9a. In so doing, the Fifth Circuit likened Stanley's timely filed civil service appeal—which it referred to as "an elective administrative appeal"—to the "grievance process" analyzed in *Delaware State College v. Ricks*, 449 U.S. 250, 261, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980), despite their markedly distinguishable characteristics. Then, in an inexplicable deviation from its own precedent and that of other courts analyzing analogous facts, the Fifth Circuit failed to conduct a fact-specific inquiry of the "grievance" procedure before it, altogether disregarding the controlling Louisiana civil service which, under the facts of this case, conferred "final" decision-making authority to the civil service board upon a Stanley's timely filed appeal. Instead of looking to the particulars of the procedure to determine whom the procedure afforded final authority, the Court impermissibly relied on the "elective" nature of the civil service appellate process

to summarily hold that the civil service board appeal was a mere "collateral review" of the appointing authority's disciplinary decision.

In compounding error, the Fifth Circuit interpreted *Ricks* as creating a bright-line rule that *all* grievance processes are "by [] nature, [] a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." App. 8a. (citing *Ricks,* 449 U.S. at 261, 101 S. Ct. 498). This interpretation, however, overly and unduly broadens the intended reach of *Ricks*, which limited its analysis to the specific facts and grievance procedure at issue therein. *Ricks* does not create a bright-line rule, but, instead, holds that the pendency of processes which amount to "collateral review" of employment decisions do not toll the statutory period. *Ricks,* 449 U.S. at 261, 101 S. Ct. 506.

In the wake of *Ricks'* pronouncement that the statute of limitations is not tolled during the pendency of "collateral review" processes, courts across the country—appellate and district alike—have distinguished *Ricks* when they determine that the review process at issue—though it may be labeled or referred to as an "appeal" or "grievance" proceeding—actually postpones the "finality" of a defendant's decision. The Fifth Circuit's ruling lacks the necessary, predicate analysis of whether Stanley's timely filed civil service appeal, by way of either the express provisions of Louisiana law or by the terms of City policy, divested the appointing authority of "final" decision-making authority and, in turn, conferred such power on the Board. To the extent Louisiana law dictates that, upon a civil service

employee's timely filed civil service appeal, the Civil Service Board is vested with "final" decision-making authority over the challenged employment decision, the Fifth Circuit improperly classified Stanley's civil service appeal as "collateral review"—as opposed to the direct review it actually affected—and it improperly applied *Ricks* to prevent tolling of Stanley's claims during pendency of the same.

The Court should grant certiorari for purposes of establishing the degree of applicability, if any, of this Court's holdings in *Delaware State College v. Ricks,* 449 U.S. 250, 254, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980) and *Chardon v. Fernandez,* 454 U.S. 6, 102 S. Ct. 28, 70 L.Ed.2d 6 (1981) to administrative review processes that, by their express terms, constitute a direct review (i.e., postpone the "finality") of the challenged action. While *Ricks* plainly holds that "the pendency of grievance, or ***some other method of collateral review*** of an employment decision, does not toll the running of the limitations period," *Ricks* does not command—nor does it imply—that the accrual of an employee's federal claims should not and/or cannot be tolled during the pendency of a review process which affords him a ***direct*** review of the decision (i.e., "the opportunity to influence the decision" *before* it becomes final).

To the extent *Ricks* compels different treatment of processes deemed "direct" (i.e., to postpone the "finality" of an action) as opposed to "collateral (i.e., to remedy a previous, final action)," the Court should additionally grant certiorari for purposes of establishing, or otherwise clarifying, the obligation of lower courts to ascertain, under the specific facts of

any given case, whether the review process at issue—irrespective of the term used to refer to, describe, or characterize the same—shifts "final" decision-making authority and otherwise postpones the time at which a decision becomes "final, non-tentative, and official" for claim accrual purposes. Stanley submits that, by foregoing this necessary analysis in the instant case, the Fifth Circuit ignored express provisions of Louisiana law which rendered the decision of the Board, as opposed to the decision of the appointing authority, the "final" decision in the face of a civil service employee's timely filed civil service appeal.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Ruling Overly and Unduly Broadens the Intended Reach of *Ricks* Despite *Ricks's* Limiting Language to the Contrary

Although courts look to state law for the length of the limitations period, the time at which a § 1983 claim accrues "is a question of federal law," "conforming in general to common-law tort principles." *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007). That time is presumptively "when the plaintiff has 'a complete and present cause of action,' " *ibid.*, though the answer is not always so simple. *See, e.g., id.*, at 388–391, and n. 3, 127 S.Ct. 1091; *Dodd v. United States*, 545 U.S. 353, 360, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005).

In *Delaware State College v. Ricks*, this Court held that claims of unlawful employment

discrimination arising under Title VII and 42 U.S.C. § 1981 accrue when an employer "establishes its official position and communicates that position by giving notice to the affected employee." 449 U.S. 250, 257, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980)). Shortly thereafter, this Court extended *Ricks* to Section 1983 claims in *Chardon v. Fernandez,* holding that a Section 1983 claim accrues when an employee "[is] notified . . . that a final decision had been made" regarding the adverse employment action at issue. 454 U.S. 6, 8, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981).

In *Ricks,* the Court considered the timeliness of an Equal Employment Opportunity Commission ("EEOC") complaint filed by a college faculty member who was denied tenure and terminated one (1) year later as a natural consequence thereof. 449 U.S. at 258, 101 S. Ct. 498. The College Board of Trustees, which was vested with the ultimate authority over tenure decisions, formally voted to deny Ricks tenure on March 13, 1974. *Id.* at 251, 101 S. Ct. 501. Ricks immediately filed a grievance with the Board's Educational Policy Committee (the grievance committee), which the grievance committee took under submission in May 1974.

While Ricks's grievance remained pending, the college, commensurate with its policy, offered Ricks a "terminal" contract to teach for one additional year, expiration of which would terminate Ricks' employment relationship. *Id.* As of June 26, 1974 –the date on which the Board President notified Ricks that he would be offered a "terminal" contract for the 1974-

1975 school year—Ricks knew that, upon expiration of his terminal contract on June 30, 1975, he would be terminated. On September 12, 1974, the Board of Trustees notified Ricks that it had denied his March 1974 grievance. *Id.* at 253, 101 S.Ct. 502.

Against these facts, the Court found that the Ricks's claim for wrongful denial of tenure accrued—and the statute of limitations began to run—"when the tenure decision was made and Ricks was notified." *Id.* at 259, 101 S. Ct. 504. While the Court found that the district court "was justified in concluding that the College had established its official position—and made that position apparent to Ricks—no later than June 26, 1974," the Court indicated that, because Ricks' Title VII and § 1981 complaints were untimely running from the June 1974 date, the Court "need not decide whether the District Court correctly focused on the June 26 date, rather than the date the Board communicated to Ricks its unfavorable tenure decision made at the March 13, 1974 meeting." *Id.* n. 17. Instead, the Court treated the district court's determination of the June 26, 1974 as the date of tenure denial as a factual finding, which it found was not clearly erroneous. *Id.* at 265 n. 1 (J. Stevens, dissenting).

The EEOC filed an *amicus* brief in support of Ricks, arguing that the statute of limitations did not begin to run until the college notified Ricks that it denied his grievance on September 12, 1974. *Id.* at 260, 101 S. Ct. 498. The Court rejected this argument, however, drawing a critical distinction between collateral review and direct review of an adverse

employment action. Based upon the specific facts before it, the Court found that the College Board of Trustees "had made clear well before September 12 that it had formally rejected Ricks' tenure bid. The June 26 letter itself characterized that as the Board's 'official position.'" *Ibid.* For this reason, the Court found that the Board "entertaining [Ricks'] grievance complaining of the tenure does not suggest that the earlier decision was in any respect tentative." *Id.* at 505-06. Instead, the Court found that grievance procedure *at issue in Ricks* amounted to a collateral review of the Board of Trustees' previous, "official decision" and constituted "a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Id.* at 506.

The *Ricks* Court explicitly acknowledged a fundamental difference between review procedures that are collateral (i.e., those that *remedy* a prior decision) and those that are not (i.e., those that provide an opportunity to *influence* that decision before it is made). *Ricks,* 449 U.S. at 506, 101 S. Ct. 261. After highlighting this pivotal distinction, the Court looked to the particular grievance process before it—which it determined under the facts to constitute a "collateral review"— and held that "the pendency of a grievance, ***or some other method of collateral review*** of an employment decision, does not toll the running of the limitations periods." *Id.* (citing *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229, 97 S. Ct. 441, 50 L. Ed. 2d 427 (1976) (emphasis added).

Ricks certainly holds that, for those administrative processes that include a *collateral*

review of an employer's final employment decision, the pendency of those processes does not toll the statutory time period. *See id.* That being said, the *Ricks* Court limited its holding to the facts before it and cautioned future courts to carefully consider the facts of each case: "Complaints that employment termination resulted from discrimination can present widely varying circumstances . . . The application of the general principles discussed herein necessarily must be made on a case-by-case basis." 449 U.S. at 258, 101 S. Ct. 504 n. 9. The *Ricks* Court explained that the existence of the grievance procedure at issue "d[id] not suggest that the earlier decision [to deny Ricks tenure] was in any way tentative," given the "unbroken array of negative decisions" (the tenure committee's recommendation to deny tenure, the Senate vote to support the tenure committee's recommendation, and the Board of Trustee's formal vote to deny plaintiff tenure) which, in the Court's view, showed that the college "had established its official position—and made that position apparent to" Ricks before "the Board notified Ricks that his grievance had been denied. *Id.* at 260-262, 101 S. Ct. 498. The *Ricks* Court's analysis repeatedly emphasizes that the Board already had voted formally to deny tenure to Ricks before the grievance process commenced. *Id.* at 252, 101 S. Ct. at 501; *id.* at 261, 101 S.Ct. at 505; *id.* at 262, 101 S. Ct. at 506. In other words, *Ricks* involved a grievance procedure that challenged (i.e., constituted a "collateral review" of) the Board's final decision.

The Court's prolific underscore of the "collateral" nature of the grievance procedure at issue in *Ricks* corresponds with the Court's statement that,

"***The*** grievance procedure, by its nature, is a *remedy* for a prior decision …." *Ricks,* 449 U.S. at 261, 101 S.Ct. at 506 (emphasis added). Stanley submits that, if this Court meant to speak generally about grievance procedures, as opposed to specifically about the particular grievance procedure at issue, then this passage would have read, "Grievance procedures, by their very nature, are remedies for prior decisions…." *See Haeberle v. University of Louisville,* 90 F. App'x. 895, 905 n. 3 (6th Cir. 2004).

The Fifth Circuit's holding ignores the limiting language in *Ricks* and impermissibly interprets *Ricks* to create a blanket rule to apply to all grievance procedures in all cases. As noted *supra,* if the *Ricks* Court intended its holding to apply categorically to grievance procedures, as opposed to the particular grievance procedure at issue, it would have broadened its rule to state, "grievance procedures, by their very nature," as opposed to "the grievance procedure, by its very nature" language it employed.

While *Ricks* applies to "collateral review" processes, the rule espoused in *Ricks* does ***not*** apply to administrative/review processes—even processes referred to as "grievance procedures"—that amount to a "direct review" of the adverse action at issue (i.e., a review that influences the decision before it becomes "final"). A collateral challenge to an action necessarily implies the existence of a final decision, and numerous courts, including the Fifth Circuit itself, have distinguished *Ricks* when the statutes and/or policies governing the process at issue indicate that the process postpones the finality of an employer's employment decision. *See e.g., Harris v. Ladner,* 127

F.3d 1121, 449-450 (D.C. Cir. 1997) (finding that the "reconsideration process afforded Harris . . . although termed 'reconsideration,' does not appear to be like the collateral review procedure at issue in *Ricks*. Rather, under the University's procedures . . .the reconsideration provided Harris appears to occur only prior to the final tenure decision."); *Joseph v. New York City Bd. of Educ.,* 171 F.3d 87 (2d Cir. 1999) (holding that, where New York Law gave district superintendents full plenary power over tenure decisions, the employee's claim accrued on the date the superintendent denied the employee tenure); *Reid v. James Madison University*, 90 F.4th 311 (4th Cir. 2024) (finding the school's policy concerning the internal appeals process expressly stated that, if a student timey appeals a dean's decision to the appropriate vice president, the dean's decision is not "final," and holding that a "final" decision occurred when the vice president "denied [the student]'s appeal with a 'final,' non-appealable decision."); *Haeberle,* 90 F. App'x. 895 (analyzing the employer-university's handbook to determine whether an action of the school board, as opposed to an action of the school president, was deemed "final" for purposes of claim accrual); *Endres v. Ne. Oh. Med. Univ.,* 938 F.3d 281, 296 (6th Cir. 2019) (holding that the student's due process claims did not accrue until he learned of a "final, non-appealable decision recommending his dismissal.").

Ricks, when read in its entirety, cannot reasonably be interpreted to create a blanket rule that any and all grievance procedures are *per se* "collateral" and, thus, never toll limitations periods. By its express language, *Ricks* is limited to those

situations involving review procedures that amount to a collateral review of a final decision, as opposed to a direct review. This Court's guidance and clarification is necessary to ensure that courts undertake the proper analysis to determine whether a review process, irrespective of its label, is truly a "collateral" review of a final decision, or, conversely, a means of "direct" review that prolongs the "finality" of the decision for accrual purposes. This distinction, which has been markedly glossed over by courts engaging in accrual analyses post-*Ricks*, carries with it massive implications. Not only does a court's failure to properly distinguish between "direct" and "collateral" review deprive individuals of rights to proceed with an otherwise timely filed action, but—as evidenced in the case at bar—it renders superfluous the entire body of civil service law, which is designed, in part, to afford appropriate due process protections to employees within it and to adjudicate disputes outside of the judicial system.

II. The Fifth Circuit's Ruling is Irreconcilable with its Analysis and Holding in *Floyd v. Amite County School District*

Despite its unwillingness to do so in the instant case, the Fifth Circuit has previously distinguished the "grievance procedure" in *Ricks* to find a factually distinct appellate process sufficiently "direct" to toll the running of the limitations period. In *Floyd v. Amite County School Dist.,* the Fifth Circuit found that, under the specific facts of the case, the "appellate" process employed by the plaintiff did, in fact, affect the date on which the employer's adverse

employment decision was "final" for federal claim accrual purposes. 581 F.3d 244 (5th Cir. 2009). After being notified by his school superintendent that he was being terminated on November 15, 2002, Floyd, acting pursuant to Mississippi Code Annotated § 37-9-59, sought a due process hearing before the School Board, which was conducted over the course of several days in March and April 2003. On July 11, 2003, the School Board issued a unanimous opinion that Floyd's dismissal was proper. The parties then filed subsequent appeals to Amite County Chancery Court, Mississippi Court of Appeals, and the Mississippi Supreme Court, which ultimately denied Floyd's petition for writ of certiorari on August 3, 2006. During this time period, Floyd filed a federal lawsuit on February 6, 2004, alleging that his termination violated Title VII and 42 U.S.C. § 1981, among others.

While the district court concluded that the relevant employment decision was Floyd's termination by the superintendent on November 15, 2002, the Fifth Circuit reversed, noting that Floyd's case differed from *Ricks*—the case upon which the district court relied—in two material respects. Relevant to this petition is the second, in response to which the *Floyd* Court stated:

> In *Ricks,* the Board of Trustees, which was vested with the *ultimate authority* over tenure decisions, chose to deny the plaintiff tenure. *Id.* at 501 (emphasis added). Thus, even though a grievance process was available to the plaintiff that offered the possibility of relief, the Board of Trustee's decision represented

> the school's "official position." *Id.* at 505. In contrast, the Mississippi Supreme Court has clearly stated that in Mississippi the ultimate authority to terminate a school district employee resides with the school board, *not* the superintendent:
> . . .
>
> While a termination of an employee becomes final if it is not appealed, the decision is only preliminary if the employee requests a hearing before the school board. Thus, although Floyd was forced to cease working without pay upon receiving Russ's letter of termination on November 15, 2002, that decision did not represent the "official position" of the School District until it was approved by the School Board on July 11, 2003.

Floyd, 581 F.3d at 249 (internal citations omitted).

Rather than summarily deeming the appeal process at issue in *Floyd* a "collateral review," the *Floyd* Court looked to Mississippi state law, which it found "clearly" conferred "final" decision-making authority on the school board—not the superintendent—in the event an employee requested a hearing to contest his or her removal. *Id.* at 249; *see*

also Miss. Code Ann. § 37-9-59[2]; Miss. Code. Ann. § 37-9-113(1) ("Any employee aggrieved by a final decision of the school board is entitled to judicial review thereof, as hereinafter provided."). In finding that the school board's decision was the "final" decision that triggered accrual of Floyd's claims, the *Floyd* Court cited to Mississippi Supreme Court precedent, which held "[w]hile a termination of an employee becomes final if not appealed, the decision is only preliminary if the employee requests a hearing before the school board. *Id.* (citing *Spradlin v. Bd. of Trustees of Pascagoula Mun. Separate Sch. Dist.,* 515 So.3d 893, 897 (Miss. 1987)).

The Fifth Circuit's ruling in this case cannot be reconciled with the analysis it employed in *Floyd*. Identically to how Mississippi law confers "final" decision-making authority to the school board in the event an employee elects to pursue an appeal and requests a hearing, Louisiana law confers "final" decision-making authority on the civil service board in the event a civil service employee timely files an

[2] Mississippi Code Section 37-9-59 provides, in pertinent part: "For incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil or other good cause the superintendent of schools may dismiss or suspend any licensed employee in any school district. Before being so dismissed or suspended any licensed employee shall be notified of the charges against him and he shall be advised that he is entitled to a public hearing upon said charges . . .The school board, upon a request for a hearing by the person so suspended or removed shall set a date; time and place for such hearing. . . From the decision made at said hearing, any licensed employee shall be allowed an appeal to the chancery court in the same manner as appeals are authorized in Section 37-9-113. . . ."

appeal therewith. That is exactly what happened here.

Louisiana Revised Statute § 33:2501 provides that "any regular employee in the classified service who feels like he has been . . . subjected to any . . . disciplinary action without just cause may, within fifteen days after the action, demand, in writing, a hearing and investigation by the [Civil Service] board to determine the reasonableness of the action." La. R.S. § 33:2501(A). Upon receipt of an employee's appeal, Louisiana law mandates that the Board grant the employee a hearing and investigation. Following the investigation, the Board may, upon conclusive evidence, affirm the action of the appointing authority; however, if the Board finds that the action was not taken in good faith for cause, the board shall order immediate reinstatement or reemployment of such person from which he was removed, suspended, demoted, or discharged. *Id.* § (C)(1). The board may also modify the appointing authority's order of discipline by issuing lesser punitive action that may be appropriate under the circumstances. *Id.*

Imperatively:

> The decision of the board, together with its written finding of fact, if required, ***shall*** be certified in writing, to the appointing authority and shall be forthwith enforced by the appointing authority.

Id. § (C)(2)(emphasis added). Furthermore, it is only after the Civil Service Board acts on a timely filed

appeal that either party aggrieved thereby may seek redress from a court. *Id.* § (E)(1). Indeed, it was on this exact basis that the 15th JDC granted Defendants' Exception of Prematurity and disallowed Stanley from seeking redress in state court because the civil service had not yet "played out."

Section 33:2501, which is identical to Miss. Code Ann. § 37-9-59 in all material respects, provides a channel through which employees may seek direct review of an adverse personnel action. Section 33:2501, identically to Miss. Code Ann. § 37-9-59, provides a permissive right of appeal to a qualifying employee. Under both Miss. Code Ann. § 37-9-59 and La. R.S. § 33:2501, an adverse personnel action taken by the appointing authority/superintendent becomes final if not appealed; however, and as expressly recognized by the Mississippi Supreme Court under analogous facts, the decision of the appointing authority/superintendent is deprived of finality—and thus, is only preliminary—***if*** the employee appeals and requests a hearing before the civil service board. *See Spradlin,* 515 So.3d at 897 (emphasis added).

To the extent the Fifth Circuit relied on the "elective" nature of the civil service appeal process when categorizing the same as "collateral review," it did so in contravention of its own reasoning in *Floyd*. Had Stanley forgone his civil service appeal, the suspension and demotion decisions would have been "final" upon his receipt of written notice on June 11, 2021. Here, however, Stanley exercised his permissive right of appeal and invoked La. R.S. § 33:2501, which, by its express terms, divested the appointing authority's decision of finality—thereby making it

preliminary—and vested the Board with "final" authority as to the challenged actions. Because Louisiana state law—which is uniquely tailored to the State's civil service regime—dictates that "final" decision-making authority vests with the civil service board in the event of a timely filed appeal, the particular appellate process at issue is *not*, as the Fifth Circuit held, collateral. Upon Stanley's invocation of La. R.S. § 33:2501, the appointing authority's decision became preliminary, and the adverse employment decision(s) did not become the "final" or "official" decision(s) of the City until the Board ruled on February 9, 2022.

III. The Fifth Circuit's Ruling is at Odds with the Ninth Circuit's Ruling in *McCoy v. San Francisco, City & County* and Cases Addressing Claim Accrual in the Civil Service Context

The Fifth Circuit's ruling also runs afoul of numerous cases holding that, in the civil service context, it is the decision of the board—not the underlying chief or appointing authority—that is sufficiently "final" to trigger the statutory period.

For example, the Ninth Circuit addressed the "finality" of a decision affecting a civil service employee, for purposes of claim accrual, in *McCoy v. San Francisco, City & County*, 14 F.3d 28 (9th Cir. 1994). After the chief of police decided to suspend McCoy, a police homicide inspector, on or about May 17, 1988, McCoy appealed the suspension to the Police Commission, who heard his appeal in Summer 1990. At the conclusion of the three-day hearing on August

29, 1990, the Police Commission rendered an oral ruling, sustaining McCoy's suspension. *Id.* The Police Commission then issued a written decision, summarizing the hearing evidence and setting the dates for the suspension, on September 13, 1990. *Id.* McCoy filed a federal civil rights action on September 3, 1991, alleging a § 1983 claim, among others. *Id.* The City moved for dismissal, arguing, in relevant part, that McCoy's claims were time-barred. *Id.* Upon performing a *de novo* review, the U.S. Ninth Circuit Court of Appeals found that the date of the Commission's written decision—September 13, 1990—was "clearly the 'final decision' that triggered" the applicable statute of limitations. *Id.* at 30 (citing *Norco Const., Inc. v. King County,* 801 F.2d 1143, 1145-46 (9th Cir. 1986) (finding § 1983 action cause of action accrues upon an agency's final decision)).

Consistent with the Ninth Circuit, courts across the country, including courts within the Fifth Circuit, have found that a civil service employee's Section 1983 claims accrue on the date a civil service board acts on a timely filed appeal. *See, e.g., Harrison v City of Dallas,* 2000 WL 74315, * 1 (N.D. Tex. Jan. 25, 2000)(rejecting city's argument that that plaintiff-security officer's Section 1983 claim accrued on the date she was notified of her termination and finding that, because plaintiff exercised civil service appellate rights available to her, the termination decision became "final" for accrual purposes when the civil service board upheld the termination); *Thomas v. City of Houston*, 619 F. App'x. 291, 295-96 (5th Cir. 2015)(noting that the lower court had determined that the plaintiff's § 1983 claim accrued no later than "the date that the Civil Service Commission upheld

Thomas's termination from the city"); *Roberts v. Wood County Com'n*, 782 F. Supp. 45 (S.D.W.V. Jan. 30, 1992) (finding the statute of limitations of former deputy's § 1983 action challenging his discharge began to run on the date that county civil service commission entered its final order upholding his dismissal); *Arezzo v. City of Hoboken*, 719 F. App'x. 115, 117-18 (3d Cir. 2018) (finding plaintiff's claim accrued, at the latest, when the Commission issued its final administrative decision) (citing *Wallace*, 549 U.S. at 388); *Reid v. City of Flint*, 7 F. 2d 234 (6th Cir. 1993) (suggesting that the firefighter's discharge claim "did not actually accrue until he was notified by the Civil Service Commission that he would not be afforded a post-discharge hearing, under the Civil Service Commission Rules" but noting that he filed outside the statute of limitations even from the date he learned of the hearing denial); *Association for Los Angeles County Deputy Sheriffs v. County of Los Angeles*, 2012 WL 12995661 (C.D. Cal. Jun. 8, 2012) (finding plaintiff's claims accrued on the date the Civil Service Commission declined to hear plaintiff's case).

Additionally, in *Keeney v. United States,* 150 Ct. Cl. 53 (1960), the United States Court of Claims, much like the Fifth Circuit in *Floyd,* analyzed a statute analogous statute to La. R.S. 33:2501, finding:

> Section 14 of the Veterans' Preference Act, 5 U.S.C. § 863, provides that each veteran preference eligible "shall have the right to appeal to the Civil Service Commission from an adverse decision of *** [an] administrative officer ***, such appeal to be made in writing

within a reasonable length of time after the date of receipt of notice of such adverse decision." The section further provides that upon review the Commission could reverse the action of the administrative officer and "it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends." This Act, in effect, provides an additional forum within the executive branch of the Government in which the veteran may seek review of an adverse personnel action. As we pointed out in *Cuiffo v. United States*, supra, the wording of the section merely gives a right of appeal to the veteran, but where the veteran elects to exercise this right of appeal within time, the adverse action of the employing agency is thereby deprived of finality, since the Civil Service Commission may reverse or modify the decision of the agency. Since this is binding on the agency, the administrative action does not become final until the Civil Service Commission has acted. Until then an aggrieved employee cannot resort to the courts. An attempt to do so during the pendency of appeal to the Civil Service Commission would be premature. During that period, plaintiff's discharge is not final and there is nothing for the court to adjudicate.

> We must conclude, therefore, that when an appeal is taken to the Civil Service Commission by a veteran, the statute of limitations on actions in this court does not begin to run until the Civil Service Commission has acted.

Id. at *55-56. Almost identically to the Veterans' Preference Act quoted above, La. R.S. § 33:2501 provides that: 1) employees may appeal adverse employment actions to a civil service board; 2) upon receipt of a timely filed civil service appeal, the civil service board shall investigate and, upon review of the appointing authority's action, may approve, reverse, or alter the appointing authority's action; and 3) the civil service board's decision "shall be enforced" by the appointing authority. *See* La. R.S. 33:2501(A), (C). The appellate process at issue here, which confers "final" decision-making authority on the Board in the event of a civil service appeal, is a "direct" review of the action that prolongs the "finality of the decision " –by divesting the appointing authority's decision of finality—until the Board rules on the appeal.

In holding that it had "previously concluded that *Ricks* foreclosed delayed accrual and equitable tolling arguments based on an employee's decision to pursue an administrative appeal," the Fifth Circuit cited to its holdings in *Holmes v. Tex. A&M Univ.,* 145 F.3d 681, 685 (5th Cir. 1988) and *West v. Miss. Dep't of Pub. Safety,* 37 F. App'x. 712 (5th Cir. 2002) (per curiam). *Stanley,* 120 F.4th at 471. Neither of these cases are apposite, however, due to their

distinguishable facts. First, and while the *Holmes* Court did not engage in a fact-intensive analysis of the grievance procedure at issue, it did cite to various Texas authorities which held that the specific grievance procedure at issue constituted a "collateral review" and, accordingly, did not toll the limitations period. *Holmes,* 145 F.3d at 685 (citations omitted). The *West* Court, without engaging in any analysis of the alleged "state law" that "required" the plaintiff to "exhaust internal procedures before filing a complaint with the EEOC," merely cited to *Ricks* and *Holmes,* in turn summarily declaring the internal procedure as "collateral review" without any meaningful analysis. 37 F. App'x. at 712 (citations omitted). Neither case involved consideration of whether an employee's invocation of the civil service appellate process, or even the Louisiana Civil Service regime, shifts the "final" decision-making authority to the reviewing body dictated by the same.

The Fifth Circuit did not cite a single case wherein a court discussed the "finality" or "officiality" of decisions within the civil service framework to support its position that Stanley's civil service appeal was "collateral" and therefore insufficient to toll the statutory period. *Stanley,* 120 F.4th at 470-71. This is especially troubling, given the plethora of case law rendering a civil service appeal fundamentally different than the "collateral review" process at issue in *Ricks*. The Fifth Circuit's ruling in *Stanley*, in light of contradicting holdings across the country, will necessarily result in inconsistent rulings from future courts struggling with determining whether the

pendency of a particular review process does, as matter of law and fact, operate to toll the limitations period for an employee's federal employment claims.

This Court's guidance as to the relevance of State law and/or employer policy to a court's determination of the "finality" of a decision for accrual purposes will help resolve the inconsistencies displayed amongst courts and ensure that claim accrual is more accurately adjudicated from the date adverse actions are "final" and "official." This, in turn, will protect individuals in all realms of employment, not the least of which are those employees—such as police officers like Stanley—who are statutorily and constitutionally afforded due process protections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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January 27, 2025.

APPENDIX

TABLE OF APPENDICES

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 24-30119

David Stanley,

Plaintiff-Appellant,

v.

Scott Morgan; Wayne Griffin; Thomas Glover; Monte Potier; City of Lafayette; Consolidated Government of Lafayette,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:22-CV-1655

Argued September 4, 2024
Decided October 28, 2024

Before Jones, Willett, and Engelhardt, *Circuit Judges*.

Kurt D. Engelhardt, *Circuit Judge:*

The Lafayette Police Department suspended police officer David Stanley ("Stanley") and transferred him to another unit following an investigation into two of his Facebook posts. Over one year, one administrative appeal, and two state court petitions later, Stanley sued four police chiefs, the City of Lafayette, and the Consolidated Government of Lafayette LPD in federal court for alleged First Amendment violations under 42 U.S.C. § 1983. The district court dismissed the claims as prescribed.

Stanley appeals, hoping to rewind the prescription clock on two grounds. First, he insists that his § 1983 claims could not have accrued until an administrative appeal of the adverse actions concluded. Second, and alternatively, he contends that his state court petitions interrupted prescription under Louisiana law. Because United States Supreme Court precedent forecloses his first argument, and the Louisiana Supreme Court's recent opinion in *Kling v. Hebert* cuts against the second, we AFFIRM.

I. Factual and Procedural Background

Stanley posted on Facebook opposing a Louisiana bill and praising the LPD in connection with a traffic stop. On August 11, 2020, following notice of an investigation into the first post's potential violations of LPD policies, LPD informed Stanley that he would be suspended for fourteen days. Distressed by LPD decision, Stanley took sick leave for approximately one year before the suspension took effect.

The following week, while on leave, Stanley appealed his suspension to the Municipal Fire and Police Civil Service ("Civil Service Board") pursuant to La. R.S. 33:2501. On August 20, 2020, Stanley filed a Petition for Temporary Restraining Order ("TRO") and Preliminary Injunction in state court, seeking to enjoin LPD from imposing the suspension. The state district court granted the TRO, and LPD appealed. On September 18, 2020, also during his leave, LPD transferred Stanley from the K-9 division to the Uniform Patrol division.

Later that fall, the state appellate court dismissed LPD's TRO appeal, finding that the TRO had dissolved by operation of law. Stanley then re-filed his petition with the state district court on November 20, 2020, seeking an injunction regarding both the suspension and the transfer from the K-9 division. In the spring of 2021, the state district court held a hearing on the petition and ultimately granted LPD exception of prematurity, finding that Stanley was required to first finalize the appeal of his suspension and transfer with the Civil Service Board.

Stanley returned to work on June 11, 2021. That day, he received and signed formal written notice of the suspension. The suspension became effective on June 14, 2021.

On February 9, 2022, the Civil Service Board heard Stanley's appeal. The Civil Service Board upheld Stanley's transfer but reduced the suspension from fourteen to three days. Stanley then appealed to the state district court.

On June 14, 2022, Stanley filed suit in federal district court, seeking damages pursuant to § 1983 based on the alleged violations of his First Amendment rights and retaliation. LPD filed a Rule 12(b)(6) motion to dismiss, arguing that Stanley's claims were prescribed. The magistrate judge agreed. The magistrate judge found that the applicable one-year prescriptive period commenced when Stanley was notified of each disciplinary action, which occurred—at the latest—on the date he signed notice of the suspension, June 11, 2021. The claims were therefore prescribed when he filed suit on June 14, 2022. The magistrate judge also concluded that Stanley's state court petitions did not interrupt prescription because they failed to assert any federal claims or seek monetary damages. Stanley filed objections to the Report and Recommendation. He asserted for the first time in the objections that his § 1983 claims did not accrue until February 9, 2022, when the Civil Service Board adjudicated his appeal.

The district court stayed the proceedings pending resolution of this court's certified question to the Louisiana Supreme Court concerning interruption. *See Kling v. Hebert (Kling I*), 60 F.4th 281 (5th Cir. 2023). Following an answer from the Louisiana Supreme Court in *Kling v. Hebert (Kling II)*, 378 So. 3d 54 (La. 2024), the district court reopened Stanley's case and accepted supplemental briefing on *Kling II*'s application. The district court then adopted the Report and Recommendation, dismissing Stanley's claims as prescribed. Stanley timely appealed.

II. Standard of Review

We review orders on Rule 12(b)(6) motions to dismiss de novo. *Petrobras Am., Inc. v. Samsung Heavy Indus. Co.*, 9 F.4th 247, 253 (5th Cir. 2021). "Dismissal is appropriate if it is clear from the face of th complaint that the claims asserted are barred by the applicable statute of limitations." *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999); *see also Taylor v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014) motion to dismiss may be granted on a statute of limitations defense where it is evident from the pleadings that the action is time-barred, and the pleadings fail to raise some basis for tolling.").

III. Analysis

Section 1983 does not contain its own statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). Instead, § 1983 borrows its limitations period from state law. *Redburn v. City of Victoria*, 898 F.3d 486, 496 (5th Cir. 2018). In Louisiana, the limitations period is referred to as the "prescriptive period." *See Brown v. Pouncy*, 93 F.4th 331, 332 n.1 (5th Cir. 2024). The prescriptive period for personal injury actions is one year. LA. CIV. CODE art. 3492 ("Delictual actions are subject to a liberative prescription of one year.").[1]

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[1] Article 3492 was repealed and replaced by LA. CIV. CODE art. 3493.1, which took effect on July 1, 2024. Article 3493.1 extends the prescriptive period for delictual actions to two years. But because the extended period "shall be given prospective application only and shall apply to delictual acts arising after the effective date of this Act," the one-year prescriptive period applies here. Tort Action, 2024 La. Acts 423.

So Stanley had one year from the date his § 1983 claims accrued to file his complaint.

a. Stanley's § 1983 claims accrued upon notice of the adverse action.

"Federal law governs when a cause of action under § 1983 accrues." *Redburn,* 898 F.3d at 496. "Th limitations period for federal claims begins to run when plaintiff 'knows or has reason to know' of the injury, or in this case, when [Stanley] received notice of the alleged [unconstitutional] decision that is also the basis of his . . . claims." *McGregor v. La. State Univ. Bd. of Sup'rs*, 3 F.3d 850, 863 (5th Cir. 1993) (quoting *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989)). In other words, the accrual date "is judged not from the date the injury ceases, but from the earliest date a plaintiff was or should have been aware of his injury and its connection with the defendant." *Brossette v. City of Baton Rouge*, 29 F.3d 623 (5th Cir. 1994) (per curiam).

Stanley posits a different point for accrual. He contends that when an employee chooses to participate in an elective administrative appeal of the adverse employment decision, a § 1983 claim arising from that action cannot accrue until the appeal is complete. In his view, this is because the adverse action for which he seeks redress "does not become 'final' until he Civil Service Board has acted." He therefore could not have filed his § 1983 claims until February 9, 2022, when the Civil Service Board acted

on his administrative appeal.[2] Decades of Supreme Court precedent dictate otherwise.

It is a "settled rule" that "exhaustion of state remedies is not a prerequisite to an action under § 1983." *Knick v. Twp. of Scott*, 588 U.S. 180, 185 (2019) (citations omitted). Quite the opposite, § 1983 provides "individuals *immediate* access to the federal courts notwithstanding any provision of state law to the contrary." *Felder v. Casey*, 487 U.S. 131, 147 (1988) (emphasis added) (quoting Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 504 (1982)). It des not require individuals to "seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries." *Id.* Thus, exhaustion does not determine accrual.

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[2] Stanley raised this argument for the first time in his objections to the magistrate Report and Recommendation. As such, the argument is forfeited. Shambaugh & Son, L.P. v. Steadfast Ins. Co., 91 F.4th 364, 369 (5th Cir. 2024) (The court "considers arguments forfeited if they are not raised before a magistrate judge, even if they are subsequently raised before the reviewing district court in objections to the magistrate judge's report and recommendation."). Nevertheless, we have "considerable discretion in deciding whether to consider an issue that was not raised below" if the issue is "a purely legal matter and failure to consider the issue will result in a miscarriage of justice." *Rollins v. Home Depot USA,* 8 F.4th 393, 398 (5th Cir. 2021). The issue is purely a legal matter, but it is less clear that failure to consider it will result in a miscarriage of justice. Stanley provides no explanation for his failure to make this argument before the magistrate judgment, and there was ample opportunity to do so. *See Dellucci v. St. George Fire Prot. Dist.,* No-23-30810, 2024 WL 3688722, at *6 (5th Cir. Aug. 7, 2024). Still, out of an abundance of caution, we address his argument on appeal and determine that it fails on the merits.

If there were any doubt about the matter, the Supreme Court obviated it in *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980). In *Ricks*, the Supreme Court held that limitations periods for employment-based civil rights claims "commence when the employer's decision is made." 449 U.S. at 261 (addressing limitations in the Title VII context);[3] *see also Chardon v. Fernandez,* 454 U.S. 6, 7 8 (1981) (per curiam). The employer's decision is not made any less final—and accrual is not delayed—by the existence of a grievance process. Indeed, the process "by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Ricks,* 449 U.S. at 361. For this reason, the "pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." *Id.*

We previously concluded that *Ricks* foreclosed delayed accrual and equitable tolling arguments based on an employee's decision to pursue an administrative appeal. *See, e.g., Holmes v. Tex. A&M Univ.*, 145 F.3d 681, 685 (5th Cir. 1998) ("Holmes deserves no equitable tolling for the pendency of his university grievance procedures, a remedy which he

[3] Employment discrimination claims under §§ 1981 and 1983 are similar to those brought under Title VII. Indeed, § 1983 claims arising in the employment discrimination context "are analyzed under the evidentiary framework applicable to claims arising under Title VII of the Civil Rights Act of 1964." *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999). *Ricks* therefore applies to the § 1983 claims at issue in this employment case. *See id.; see also Velez-Velez v. P.R. Highway & Transp. Auth.*, 795 F.3d 230, 235 (1st Cir. 2015) (applying the *Ricks* limitations analysis to a § 1983 claim based on political discrimination in the employment context).

need not have pursued."); *West v. Miss. Dep't of Pub. Safety*, 37 F. App'x 712 (5th Cir. 2002) (per curiam) (Employee was not entitled to equitable tolling on the basis that "state law required her to exhaust internal grievance procedures before filing a complaint with the EEOC"). We see no basis to depart from this long-settled principle here, and Stanley provides none.[4]

In sum, a § 1983 claim, which seeks to vindicate violations of constitutional rights, exists separate and apart from any collateral review process. The clock starts ticking for an employment-based § 1983 claim when the employee receives notice of the adverse action, and an elective administrative appeal cannot stop or turn back the clock. Thus, Stanley's appeal to the Civil Service Board neither forestalled accrual nor tolled limitations. Because Stanley filed his § 1983 suit on June 14, 2022, over one year after receiving written notice of his suspension, time is not on Stanley's side. Unless the Louisiana doctrine of interruption revives it, the § 1983 claims are prescribed.

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[4] Stanley does not address *Felder* or *Ricks*. Instead, he largely relies on cases involving § 1983 due process claims based on alleged defects in the administrative appeals' procedures. *See, e.g., Thomas v. City of Houston*, 619 F. App'x 291, 295-96 (5th Cir. 2015) (per curiam); *Arezzo v. City of Hoboken*, 719 F. App'x 115, 117-18 (3d Cir. 2018); *Reid v. City of Flint*, 7 F.3d 234, 234 (6th Cir. 1993). Because Stanley does not assert a procedural due process claim or challenge the administrative appeals process itself, these cases are inapposite.

b. Stanley's state court petitions did not interrupt prescription.

Prescription may be interrupted "by the filing of suit in a court of competent jurisdiction and venue." *Cichirillo v. Avondale Indus., Inc.,* 917 So. 2d 424, 430 (La. 2005); see LA. CIV. CODE art. 3462. If the suit interrupts prescription, interruption "continues as long as the suit is pending." *Id.; see* LA. CIV. CODE art. 3463, 3466. Stanley contends that his August 20, 2020 and November 20, 2020 state court petitions interrupt prescription here.

The test for Interruption has not Is been clear to us. *See Kling I*, 60 F.4th at 283. In *Kling I*, an employee was terminated, allegedly for submitting written complaints about workplace and ethics violations. *Id.* at 282-83. He sued his employer for violating Louisiana's constitutional right to free expression but asserted no federal claims. *Id.* Eight years after his termination, he filed a § 1983 claim on the same facts, asserting that his state court suit—which did not bring First or Fourteenth Amendment claims—interrupted prescription. *Id.* at 283. He contended that the failure to assert the federal claims in his state court suit was of no moment because Louisiana takes a broader view of the phrase "cause of action," defining it to include "the operative facts at issue." *Id.* at 286.

Though we found no support for definition under Louisiana law, we noted cloudy authority on the question whether a previous suit could interrupt prescription on an unasserted claim. *Id.* Although virtually every federal district court to consider the

issue had held that "a pending state action does not interrupt prescription as to unasserted federal causes of action," Louisiana appellate courts were less uniform, and the Louisiana Supreme Court had yet to speak clearly on the issue. *Id.* at 286-87. We then certified a question to the Louisiana Supreme Court in *Kling I*, asking when a suit "interrupt[s] prescription as to causes of action, understood as legal claims rather than the facts giving rise to them, not asserted in that suit?" *Id.* at 288.

The Louisiana Supreme Court answered In *Kling II*, instructing that "[p]rescription is interrupted when notice is sufficient to fully apprise the defendant of the nature of the claim of the plaintiff, and what is demanded of the defendant." 378 So.3d at 55-56. The court explained that interruption is not so broad as to include "all causes arising out of the same operative facts identifying the same right/duty and the same violation of the legal theory pleaded irrespective of the source of the legal obligation." *Id.* at 56-57. Neither is it so narrow "such that the actions in the two suits must be the same to provide notice to a defendant." *Id.* at 57. Instead, the "essence of interruption" is "notice to the defendant of the legal proceedings based on the claim involved." *Id.* Where "two suits [are] instituted by the same obligee," and "deal[] with the same underlying obligation and present[] the same demand," a prior suit may interrupt prescription. *Id.* at 58 (citing *Thompson v. Town of Jonesboro,* 222 So.3d 770, 774 (La. App. 1st Cir. 2017)).

To illustrate this flexible concept, the Louisiana Supreme Court "[e]xamin[ed] the spectrum of

jurisprudence" on interruption. *Id.* The line of interruption cases considered the extent of the similarity between the two suits, including the parties, facts, claims asserted, the source of the defendant's obligation, and the demand made. *Id.* While none of the considerations alone appear to be determinative, the court placed particular emphasis on the source of the obligation and the demand. *See id.* at 57-59. For example, a workers' compensation tort suit for damages against an employer interrupted a later tort claim for damages against the liability insurer because the initial suit placed the insurer on notice of its legal and monetary obligations arising from the same underlying tort and facts. *Id.* at 58 (*citing Parker v. S. Am. Ins. Co.*, 590 So. 2d 55, 56 (La. 1991)). But a plaintiff's initial mandamus suit could not interrupt his subsequent claim for damages because a suit for mandamus relief failed to "put defendant on notice of a possible claim for monetary damages." *Id.* at 59 (citing *Thompson,* 222 So. 3d at 774).

A comparison of Stanley's state court petitions and his federal complaint demonstrate that the petitions failed to provide adequate notice of his § 1983 claims. While there is parity between the parties, the facts, and references to the Constitution, Stanley's state court petitions merely sought an injunction to prevent discipline.[5] His § 1983 suit is in

[5] Despite contending throughout briefing that he could *not* seek damages until he completed his administrative appeal, Stanley asserted or the first time at oral argument that his petitions *did* seek monetary damages. We discern none. And even if a singular request for "sick leave with pay in full, and . . . attorney's fees, expenses, and costs" in connection with an injunction could

another category entirely. A creature of tort liability, § 1983 permits recovery of compensatory damages, attorney's fees, and when appropriate, even punitive damages. *See Hale v. Fish*, 899 F.3d 390, 404 (5th Cir. 1990). Stanley's state suit seeking to prevent LPD from implementing a suspension and transfer failed to provide LPD adequate notice of a potential tort suit for money damages. *See Thompson*, 222 So. 3d at 774. Because the state court petitions failed "to fully apprise the defendant of the nature of the claim of the plaintiff," and especially what would be "demanded of the defendant," interruption does not apply. *Kling II*, 378 So. 3d at 55 56.

V. Conclusion

Stanley's race against the clock for a timely § 1983 claim ended no later than June 11, 2022. Because he filed suit three days later, the district court correctly dismissed the complaint as prescribed on its face. Accordingly, we AFFIRM.

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qualify as such, it is not a demand for damages of the sort available under § 1983.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

DAVID STANLEY	§	No. 6:22-cv-1655
	§	
VERSUS	§	JUDGE
	§	DAVID C. JOSEPH
SCOTT MORGAN, ET	§	
AL	§	MAGISTRATE
	§	JUDGE CAROL B.
	§	WHITEHURST

Judgment Issued: February 1, 2024

JUDGMENT

Before the court Before the Court is the REPORT AND RECOMMENDATION ("R&R") of the Magistrate Judge previously filed herein [Doc. 25] making recommendations as to the Motion to Dismiss or Motion to Stay under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) (the "Motion") [Doc. 9] filed by Defendants. The R&R recommends that the Motion should be granted on the grounds of liberative prescription and denied to the extent Defendants seek an award of attorneys' fees. [Doc. 25, p. 20].

Plaintiff filed a timely objection to the R&R on February 16, 2023 [Doc. 28] asserting that Plaintiff's

42 U.S.C. §1983 claim (the "§1983 claim") was timely filed because: (i) Plaintiff's cause of action did not accrue until February 9, 2022; and (ii) Plaintiff's state court pleadings interrupted prescription. [Doc. 28, pp. 15, 21-26]. Defendants Scott Morgan, Wayne Griffin, Thomas Glover, and Monte Potier, each in his individual capacity, as well as the City of Lafayette/Lafayette Consolidated Government (collectively, "Defendants") filed a Response to the Plaintiff's objections, arguing that the filing of Plaintiff's state court Petition did not interrupt prescription in the instant federal case, because the Plaintiff did not pursue a §1983 claim or seek monetary damages in the state court proceeding. [Doc. 29]. Furthermore, because: (i) Plaintiff's cause of action did not accrue until February 9, 2022; and (ii) Plaintiff's state court pleadings interrupted prescription. [Doc. 28, pp. 15, 21-26]. Defendants Scott Morgan, Wayne Griffin, Thomas Glover, and Monte Potier, each in his individual capacity, as well as the City of Lafayette/Lafayette Consolidated Government (collectively, "Defendants") filed a Response to the Plaintiff's objections, arguing that the filing of Plaintiff's state court Petition did not interrupt prescription in the instant federal case, because the Plaintiff did not pursue a §1983 claim or seek monetary damages in the state court proceeding. [Doc. 29]. Furthermore, Defendants argued that, even if this Court were to find that prescription was interrupted, prescription commenced running again on May 10, 2021. Defendants argue that because the Plaintiff did not file the instant lawsuit until June 14, 2022, Plaintiff's §1983 claims are prescribed.

On March 8, 2023, the Court STAYED this matter pending resolution of a certified question submitted to the Louisiana Supreme Court by the United States Fifth Circuit Court of Appeals in *Kling v. Hebert*, 60 F.4th 281 (5th Cir. 2023).[1] In *Kling*, the Fifth Circuit certified the following question: "In Louisiana, under what circumstances, if any, does the commencement of a suit in a court of competent jurisdiction and venue interrupt prescription as to causes of action, understood as legal claims rather than the facts giving rise to them, not asserted in that suit?" *Kling v. Hebert*, 60 F.4th 281, 288 (5th Cir. 2023). *See also* La.C.C. art. 3462.[2] On January 26, 2024, the Louisiana Supreme Court answered the question as follows: "[P]rescription is interrupted when notice is sufficient to fully apprise the defendant of the nature of the claim of the plaintiff, and what is demanded of the defendant." *Kling*, 2024 WL 301830, *1 (La. 1/26/24). The Court lifted the stay in the instant case on January 29, 2024. [Doc. 33].

On January 30, 2024, Defendants filed a Supplemental Response to Objection, arguing that the Louisiana Supreme Court's interpretation of interruption of prescription under Article 3462 comports with the magistrate judge's findings and conclusions in the R&R. The Court agrees, finding that because the Plaintiff's state court lawsuit sought solely injunctive relief, and because the Plaintiff

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[1] The Louisiana Supreme Court accepted the certified question on April 18, 2023. S*ee Kling v. Hebert*, 359 So.3d 499 (La. 2023).
[2] Article 3462 provides in relevant part that "[p]rescription is interrupted ... when the obligee commences action against the obligor, in a court of competent jurisdiction and venue." *Kling v. Hebert*, 2023-00257 (La. 1/26/24)

alleges a §1983 claim and seeks monetary relief in the instant case, no interruption of prescription occurred. Consequently, Plaintiff's §1983 claims are prescribed.

Thus, for the reasons assigned in the REPORT AND RECOMMENDATION of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, including the objections filed, and further considering the Louisiana Supreme Court's answer to the certified question posed by the Fifth Circuit in *Kling v. Hebert*, 2024 WL 301830, *1 (La. 1/26/24),

IT IS ORDERED that the Motion to Dismiss or Alternatively, Rule 12(b)(1) Motion to Dismiss or Stay filed by Defendants, Scott Morgan, Wayne Griffin, Thomas Glover, and Monte Potier, all individually, and the City of Lafayette/Lafayette Consolidated Government ("LCG") [Doc. 9] is GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED on grounds of prescription, and Plaintiff's claims are DENIED AND DISMISSED WITH PREJUDICE AS PRESCRIBED. The Motion is DENIED to the extent Defendants seek an award of attorneys' fees under §1988(b).

THUS DONE AND SIGNED at Lafayette, Louisiana, this the 1st day of February, 2024.

s/ DAVID C. JOSEPH
DAVID C. JOSEPH
UNITED STATES DISTRICT JUDG

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

DAVID STANLEY	§	No. 6:22-cv-1655
	§	
VERSUS	§	JUDGE
	§	DAVID C. JOSEPH
SCOTT MORGAN, ET	§	
AL	§	MAGISTRATE
	§	JUDGE CAROL B.
	§	WHITEHURST

Report and Recommendation Issued: January 19, 2023

REPORT AND RECOMMENDATION

Before the Court is the Motion to Dismiss or Alternatively, Rule 12(b)(1) Motion to Dismiss or Stay filed by Defendants, Scott Morgan, Wayne Griffin, Thomas Glover, and Monte Potier, all individually, and the City of Lafayette/Lafayette Consolidated Government ("LCG"). (Rec. Doc. 9). Plaintiff, David Stanley, opposed the Motion (Rec. Doc. 19), and Defendants replied (Rec. Doc. 24). The Motion was referred to the undersigned magistrate judge for review, report, and recommendation in accordance with the provisions of 28 U.S.C. §636 and the standing orders of this Court. Considering the evidence, the

law, and the arguments of the parties, and for the reasons explained below, the Court recommends that Defendants' Motion be granted in part.

Factual Background

Plaintiff, David Stanley, a Lafayette Police officer, filed this §1983 suit against successive chiefs of the Lafayette Police Department ("LPD") and LCG after Stanley was allegedly unfairly disciplined. Stanley alleged that he had been an LPD officer since 2009 without ever having faced an Internal Affairs ("IA") investigation or discipline until May 2020. (Rec. Doc. 1, ¶9). He alleged that while off duty and acting in his private capacity as president of PAL #905, the local chapter of the Louisiana Union of Police Associations, on May 15, 2020 he posted a video to PAL's public Facebook page regarding PAL's opposition to La. HB 577.1[1] (Rec. Doc.1, ¶10-13). On May 18, 2020, he alleged that while off duty and acting in his private capacity as the PAL president, he posted a complimentary narrative on the PAL public Facebook page regarding a traffic stop wherein LPD officers apprehended a felon and confiscated large quantities of cocaine and cash. (Rec. Doc. 1, ¶14).

Stanley alleged that within four days LPD launched an IA investigation for violations of LPD social media and other related policies due to his two Facebook posts. (Rec. Doc. 1, ¶15-21). As a result of the IA investigation, LPD imposed a 14-day

[1] La. HB 577 proposed to enact La. R.S. 33:2494(C)(5) and 2554(C)(3) regarding certification and appointment of officers in the municipal fire and police civil service in the cities of Broussard, Carencro, Scott, and Youngsville.

suspension, set to commence August 23, 2020; however, Stanley took medically approved sick leave from August 17, 2020 to June 11, 2021, such that the suspension was not served until June 14, 2021 through June 27, 2021. He alleged his sick leave was caused by the extreme emotional stress of LPD's actions. (Rec. Doc. 1, ¶22-23).

Stanley alleged that when he returned to work, in retaliation for his conduct, he was transferred from his elite position in LPD's specialized K9 division into Uniform patrol, where he lost the opportunity to accrue overtime hours. (Rec. Doc. 1, ¶24-25). According to the Complaint, LPD wrongfully justified the transfer based on his mental health treatment which created a fitness for duty issue as a K9 officer, but that Defendant then-chief Morgan later claimed Stanley was transferred for political reasons. (Rec. Doc. 1, ¶26-28). Upon Stanley's appeal, the Municipal Fire and Police Civil Service Board (MFPCS) upheld his transfer, declared his discipline for the first post regarding HB577 improper, and upheld his discipline for his second post regarding the LPD traffic stop, but found the discipline too harsh and reduced the suspension to three days. (Rec. Doc. 1, ¶29). Stanley appealed the MFPCS decision to the 15th Judicial District Court of Louisiana, which appeal remains pending. (Rec. Doc. 1, ¶30).

Stanley filed this suit in June 2022, alleging violations of his First Amendment right to free speech and retaliation based on LPD's imposed suspension and transfer from the K9 division to patrol. Defendants filed the instant motion to dismiss arguing Stanley's claims are prescribed and that he

otherwise failed to state claims against LCG, Morgan, Griffin, Glover, and Potier. Further, Defendants assert qualified immunity protects their actions and warrants dismissal. Alternatively, Defendants suggest the Court stay these proceedings pending the outcome of Stanley's appeal in state court.

Law and Analysis

I. Law applicable to Rule 12(b)(6) motions to dismiss and documents considered.

When considering a motion to dismiss for failure to state a claim under F.R.C.P. Rule 12(b)(6), the district court must limit itself to the contents of the pleadings, including any attachments thereto. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). The court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). However, conclusory allegations and unwarranted deductions of fact are not accepted as true, *Kaiser Aluminum & Chemical Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982); *Collins v. Morgan Stanley*, 224 F.3d at 498. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

To survive a Rule 12(b)(6) motion, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic*, 550 U.S. at 570.

The allegations must be sufficient "to raise a right to relief above the speculative level," and "the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* at 555 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). "While a complaint . . . does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citations, quotation marks, and brackets omitted; emphasis added). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the plaintiff fails to allege facts sufficient to "nudge[ ][his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Bell Atlantic v. Twombly*, 550 U.S. at 570.

A claim meets the test for facial plausibility "when the plaintiff pleads the 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. at 678. "[D]etermining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Therefore, "[t]he complaint (1) on its face (2) must contain enough factual matter (taken as true) (3) to raise a reasonable hope or expectation (4) that discovery will reveal relevant evidence of each element of a claim." *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 257 (5th Cir. 2009) (quoting *Bell Atlantic v. Twombly*, 127 U.S. at 556).

With these precepts, the Court shall consider the Complaint and its attached exhibits. (Rec. Doc. 1). The Court is also permitted to take judicial notice of public records as well as facts which are not subject to reasonable dispute in that they are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011). The Fifth Circuit has also sanctioned consideration of certain documents attached to the plaintiff's opposition, where no party questioned the authenticity of the documents and the documents are sufficiently referenced in the complaint. *Walch v. Adjutant Gen.'s Dep't of Texas*, 533 F.3d 289, 294 (5th Cir. 2008). Therefore, the Court shall also consider the documents attached to Plaintiff's Opposition as matters of public record and/or as uncontested documents.

II. Whether Plaintiff's § 1983 claims are prescribed.

Defendants first contend that Plaintiff's claims are prescribed. 42 U.S.C. §1983 does not contain a statute of limitations. Therefore, federal law looks to the applicable state law statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). Specifically, the court is to apply the state's statute of limitations applicable to personal injury actions. *Id.*, citing *Owens v. Okure*, 488 U.S. 235, 249–250 (1989), and *Wilson v. Garcia*, 471 U.S. 261, 279–280 (1985). In Louisiana, the prescriptive period for personal injury actions is one year. La. C.C. art. 3492. However, the accrual

date for a §1983 cause of action is governed by federal law, rather than state law. *Wallace*, 549 U.S. at 388. "[T]he limitations period begins to run when a plaintiff knows or has reason to know of the injury or, in this case, the alleged discriminatory decision that serves as the basis of his claim." *Brossette v. City of Baton Rouge*, 29 F.3d 623 (5th Cir. 1994), citing *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 863 (5th Cir.1993), *cert. denied*, 510 U.S. 1131, 114 S.Ct. 1103, 127 L.Ed.2d 415 (1994).

Plaintiff first contends that his claims accrued on June 14, 2021, when his suspension began; however, the jurisprudence outlined above definitively establishes that the one-year prescriptive period commenced when he was first notified of the disciplinary action. Plaintiff alleged in the Complaint that the LPD IA Commander informed him of his suspension on August 11, 2020 (Rec. Doc. 1, ¶22); although, the evidence shows he was formally notified of the suspension at the latest on June 11, 2021 (Rec. Doc. 1-13). The evidence shows he was notified of the transfer on September 18, 2020. (Rec. Doc. 1-14). The date of his knowledge, rather than the date(s) the suspension and transfer actually occurred, commenced the running of prescription. Thus, this suit, filed on June 14, 2022, is prescribed on its face. *See also Moreau v. St. Landry Par. Fire Dist. No. 3*, 413 F. Supp. 3d 550, 564 (W.D. La. 2019), *aff'd*, 808 F. App'x 225 (5th Cir. 2020) (Plaintiff's retaliation and due process claims accrued when he knew of his termination.)

Plaintiff nevertheless contends that prescription was interrupted on August 20, 2020

when he filed a Petition for Temporary Restraining Order and on November 20, 2020 when he filed Petition for Preliminary Injunction in state court based on the same allegations made the basis of this suit. Under Louisiana law, the one-year prescriptive period for such actions is interrupted by suit commenced against the obligor within the prescriptive period in a court of competent jurisdiction and venue. La. Civil Code art. 3462. "If prescription is interrupted ... [p]rescription commences to run anew from the last day of interruption." La. C.C. art. 3466.

Plaintiff filed a Petition for Temporary Restraining Order and Preliminary Injunction on August 20, 2020, and a Petition for Preliminary Injunction on November 20, 2020, in state court against LPD and acting Chief Morgan seeking an order restraining enforcement of his suspension. (Rec. Doc. 19-1). The factual allegations are identical to those asserted in this suit; however, Plaintiff did not seek monetary damages or assert any federal law claims. Indeed, at the state court hearing on Defendants' exceptions to the Petition for TRO, in response to the state court judge's comment regarding claims against the city for damages based on constitutional violations, Plaintiff's counsel stated:

> ...[W]e will be bringing a suit that will be coming for the damages that we've suffered. There are parts of this that are monetary in nature that we can recover. However, that being said, just because we can bring a suit later down the line for whatever is monetarily recoverable, are we precluded from

> filing an action to stop what is, on its face, a constitutional violation? And to that answer, it is no. We are absolutely allowed to bring the action to stop it from happening because there is no de minimis violation.

(Rec. Doc. 19-1, p. 136).

In *Ford v. Stone*, the Eastern District of Louisiana considered the position that the plaintiff's state court suit interrupted prescription for the filing of a later suit in federal court. The Court reasoned:

> In the present case, plaintiff contends that his filing of a lawsuit in state court arising out of the same basic facts as this suit interrupted prescription. The state court suit was filed in March of 1981. Although assertion of federal claims in the state action would clearly have constituted an interruption of prescription, neither the original nor the amended state court petitions allege any federal cause of action. No reference was made in either petition to federal statutory or constitutional rights.

Ford v. Stone, 599 F. Supp. 693, 695–96 (M.D. La. 1984), aff'd, 774 F.2d 1158 (5th Cir. 1985).

In *Ford*, plaintiff's counsel confirmed on the record in the state court proceedings that federal claims would be brought later and that the only issues

before the state court were grounded in state law. Id. at 696. *See also Joseph v. City of New Orleans*, 122 F.3d 1067 (5th Cir. 1997) (unpublished), citing *Ford v. Stone* ("[T]he filing of the suit in state court alleging only state law claims ... did not interrupt the prescriptive period with respect to the federal claims."); *Moreau*, 413 F. Supp. 3d at 565 (Plaintiff's federal due process claims filed more than one year after his termination were untimely, despite Plaintiff having asserted retaliation claims based on the same facts.) This Court likewise finds that Plaintiff's Petition for TRO in state court was insufficient to interrupt prescription for his federal law claims.

In any event, on April 26, 2021, the state court dismissed Plaintiff's petitions on Defendants' exceptions of prematurity. (Rec. Doc. 19-1, p. 130-48). Hence, by operation of La. C.C. art. 3466, even if the state court petitions interrupted prescription, the prescriptive period commenced anew on April 26, 2021, and this suit, filed on June 14, 2022, was still too late.

Plaintiff apparently attempts to distinguish his case from Ford v. Stone by suggesting that his state court petition referenced the constitutional violations made the basis of this suit; however, the mere reference of such allegations and the promise to file a future suit are insufficient to trigger the effects of interruption. The Court interprets the jurisprudence to require that the same claims/causes of actions be asserted or attempted to be asserted in both suits in order to trigger interruption. Accordingly, the Court finds that Plaintiff's § 1983 claims prescribed at the earliest on August 11, 2021 and at the latest on June

11, 2022 (extended to June 13, 2022 due to weekend expiration). His suit, filed June 14, 2022, was too late. The Court shall address Defendants' additional arguments for the sake of the District Court's review.

III. Whether Plaintiff has stated claims against LCG.

Defendants next seek to dismiss Plaintiff's claims against governmental entity LCG. Plaintiff broadly alleges that Defendants "established a prevalent, pervasive, and ongoing custom and policy of retaliatory and discriminatory conduct against Plaintiff for Plaintiff's exercise of his First Amendment freedom of speech." (Rec. Doc. 1, ¶65). Jurisprudence often refers to this as a Monell claim, as established by the Supreme Court in *Monell v. Dept. of Soc. Servs*., 436 U.S. 658, 691, (1978). "[A] municipality, may not be held liable under § 1983 on a basis of vicarious liability." *Hicks-Fields v. Harris Cty., Texas*, 860 F.3d 803, 808 (5th Cir. 2017), citing *Monell*, 436 U.S. at 691. Rather, a municipality may be liable where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*

"To establish municipal liability under §1983, a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (citing *Piotrowski v. City of Hous*., 237 F.3d 567, 578 (5th Cir. 2001)). The plaintiff must specifically identify each policy which

allegedly caused constitutional violations, so that the court can determine whether each one is facially constitutional or unconstitutional. *Piotrowski*, 237 F.3d at 579. "[I]solated unconstitutional actions by municipal employees will almost never trigger liability." *Id.* at 578. Indeed, "the touchstone for establishing customary policy is a persistent and widespread practice." *Id.* at 581.

With regard to the third element, *Monell* plaintiffs must overcome a high threshold of proof by establishing "both the causal link ('moving force') and the City's degree of culpability ('deliberate indifference' to federally protected rights)." *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir.1998), citing *Bryan County*, 520 U.S. at 410. "This requires showing either that the policy itself was unconstitutional or that it was adopted with deliberate indifference to the 'known or obvious fact that such constitutional violations would result.'" *Webb v. Town of Saint Joseph*, 925 F.3d 209, 219 (5th Cir. 2019) (citations omitted).

The Complaint falls far short of stating a claim for municipal liability against LCG. The Complaint is devoid of any specific factual allegations purporting to support a *Monell* claim. Plaintiff's single conclusory allegation that all Defendants generally established a policy of retaliation and discrimination is insufficient. Thus, Plaintiff's claims against LCG should be dismissed.

IV. Whether Plaintiff has stated claims against Griffin, Glover, and Potier.

"To pursue a claim under § 1983, a 'plaintiff[ ] must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.'" *Sw. Bell Tel., LP v. City of Houston*, 529 F.3d 257, 260 (5th Cir.2008), quoting *Resident Council of Allen Parkway Vill. v. HUD*, 980 F.2d 1043, 1050 (5th Cir.1993). Section 1983 claims include those against state actors in their individual and/or official capacities. In order to assert a valid claim against an official in his individual capacity, "[a] § 1983 claimant must 'establish that the defendant was either personally involved in a constitutional deprivation or that his wrongful actions were causally connected to the constitutional deprivation.' *"Jones v. Lowndes Cty., Miss.*, 678 F.3d 344, 349 (5th Cir.2012), quoting James v. Texas Collin County, 535 F.3d 365, 373 (5th Cir.2008). "Under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability." *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir.2001). "A supervisory official may be held liable ... only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir.2011), quoting *Gates v. Texas Department of Prot. & Reg. Servs.*, 537 F.3d 404, 435 (5th Cir.2008).

Plaintiff alleged Defendant Morgan served as chief from January 1 through December 31, 2020. (Rec. Doc. 1, ¶61). Defendants Glover, Griffin, and Potier appear as defendants in their alleged roles as successive chiefs of police: Glover – January 1 to October 1, 2021; Griffin – October 2 to December 31, 2021; Potier – January 1, 2022 through time of suit. (Rec. Doc. 1, ¶60-62). The factual allegations underlying Plaintiff's claims occurred during Morgan's tenure. Plaintiff alleges he was investigated and suspended in August 2020 (though the suspension was not carried out until June 2021) (Rec. Doc. 1, ¶22-23) and that Morgan transferred him in September 2020 (Rec. Doc. 1, ¶24; Rec. Doc. 1-14). Plaintiff's claims against the successive chiefs appear rooted in their alleged "continuation, renewal, and reinforcement" of his discipline. Absent more specific factual allegations regarding how Glover, Griffin, and Potier directly participated in the alleged First Amendment violations, the Court finds that Plaintiff has failed to state claims against these Defendants.

V. Whether Plaintiff stated a claim for First Amendment retaliation.

Defendants further urge the Court to dismiss Plaintiff's First Amendment retaliation claim. In order to state such a claim, the plaintiff must show that 1) he suffered an adverse employment decision; 2) his speech involved a matter of public concern; 3) his interest in commenting on matters of public concern outweigh the defendants' interest in promoting efficiency; and 4) the speech motivated the

defendants' action. *Breaux v. City of Garland*, 205 F.3d 150, 156 (5th Cir. 2000), citing *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir.1999).

Defendants challenge the first element, contending Stanley's suspension did not constitute an adverse employment action. The Fifth Circuit has clearly defined the scope of adverse employment actions:

> Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands. Transfers can constitute adverse employment actions if they are sufficiently punitive or if the new job is markedly less prestigious and less interesting than the old one. This court has declined to expand the list of actionable actions, noting that some things are not actionable even though they have the effect of chilling the exercise of free speech. The reason for not expanding the list of adverse employment actions is to ensure that § 1983 does not enmesh federal courts in relatively trivial matters. For example, in the education context, this court has held that decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures, while extremely important to the person who dedicated his or her life to teaching, do

> not rise to the level of a constitutional deprivation.
>
> Given the narrow view of what constitutes an adverse employment action, this court has held that the following are not adverse employment actions: (1) mere accusations or criticism; (2) investigations; (3) psychological testing; (4) false accusations; and (5) polygraph examinations that do not have adverse results for the plaintiff.
>
> *Breaux*, 205 F.3d at 157–58 (cleaned up).

Suspensions without pay have been deemed adverse employment actions in civil rights cases. See e.g., *LeMaire v. Louisiana Dep't of Transp. & Dev.*, 480 F.3d 383, 390 (5th Cir. 2007) (Two-day suspension without pay was sufficient adverse employment action in retaliation case). But see discussion in *Goodwin v. Acadian Ambulance Serv., Inc.*, No. 6:16-CV-0009, 2017 WL 6892994, at *10 (W.D. La. Dec. 5, 2017), report and recommendation adopted, No. CV 16-0009, 2018 WL 396193 (W.D. La. Jan. 11, 2018), wherein this Court examined relevant jurisprudence finding that one-day and comparable suspensions without pay were not sufficiently adverse employment actions. At this early stage of the proceedings and given the fact that Defendants do not challenge the sufficiency of Stanley's alleged transfer from K9 to patrol, the Court is unwilling to find Plaintiff failed to allege an adverse employment action for purposes of First Amendment retaliation. Accordingly, the Court declines to dismiss

Plaintiff's First Amendment retaliation claim on these grounds.

VI. Defendants' qualified immunity and request for stay.

Defendants maintain that regardless of whether Stanley sustained a constitutional injury, Defendants are protected by qualified immunity. The Fifth Circuit set forth the applicable law as follows:

> When a defendant invokes qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of the defense. To discharge this burden, "a plaintiff must satisfy a two-prong test." "First, he must claim that the defendants committed a constitutional violation under current law." "Second, he must claim that the defendants' actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of." "To be 'clearly established' for purposes of qualified immunity, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" "The central concept is that of 'fair warning': The law can be clearly established '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.'"

Club Retro, L.L.C. v. Hilton, 568 F.3d 181, 194–95 (5th Cir. 2009) (citations omitted).

The court need not consider whether a constitutional violation occurred under the first prong when the facts support a finding that the defendant's actions were objectively reasonable under the second prong. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Therefore, in this case, the Court need not consider whether Defendants violated the First Amendment when the facts support a finding of qualified immunity.

An official "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765, 134 S.Ct. 2012, 2023 (2014). Supreme Court precedent does not require a case directly on point for a right to be clearly established; existing precedent must have placed the statutory or constitutional question beyond debate. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), citing *White*, 137 S.Ct. 541, 551 (2017). "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.*

Defendants rely upon LPD's policies and the IA investigation to support then-Chief Morgan's decision to suspend Stanley. Notably, the Complaint does not

challenge LPD's policies as unconstitutional (see e.g. Rec. Doc. 1, ¶ 15; 21 and Rec. Doc. 1-6, 1-7, and 1-8), despite Plaintiff's opposition brief, which attacks the LPD policies with conclusory arguments. Rather, Plaintiff challenges Morgan's motive for the investigation and the results thereof—a finding that Plaintiff violated LPD policies regarding social media and public information and imposition of discipline. Plaintiff appealed the decision through the MFPCS and up to the state court of appeals, where the appeal remains pending. Absent a specific challenge to the underlying LPD policies, the Court is unwilling at this stage in the proceedings to bestow qualified immunity when the propriety of Defendants' actions has not been definitively sanctioned in the administrative procedural channels. Accordingly, if the case survives dismissal on prescriptive grounds, the Court concludes that a stay would be appropriate pending outcome of the state court appeal. Notably, Plaintiff states in opposition that he "litigated his constitutional claims before the Citizen Administrative Board as ordered by [the state court judge]." (Rec. Doc. 19, p. 15). Acceptance of Plaintiff's statement for these purposes warrants a stay.[2]

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[2] Plaintiff's statement presents a catch 22. Acceptance of this statement for the purpose that his state court petitions interrupted prescription (as Plaintiff intended in his brief) warrants additional consideration of the prescription issue. Since Plaintiff theoretically admits to litigating constitutional issues in state court, then prescription was arguably interrupted, but the Court's conclusion remains unchanged. As discussed above, the interruption ceased, and prescription commenced anew on April 26, 2021. The June 14, 2022 complaint in this Court was untimely regardless of how the state court petitions are analyzed.

In the event Defendants prevail on their motion, Plaintiff sought leave to amend in order to state claims. "District courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner which will avoid dismissal." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002). The court in its discretion may disallow amendment when the amendment would be futile. *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014). The Court finds that no amendment could cure the deficiencies rendering this suit untimely. Thus, Plaintiff's request to amend should be denied to the extent his claims are dismissed on the grounds of prescription.

VII. Defendants' request for attorneys' fees.

In the event of a dismissal pursuant to their Motion, Defendants last seek an award of attorneys' fees under §1988(b), which provides that the court, in its discretion, may allow the prevailing party in a §1983 action a reasonable attorney's fee as part of the costs. The language of the statute is permissive. The Court declines to recommend an award of attorneys' fees under §1988(b) at this time, where Defendants prevailed on a procedural issue. Prevailing party status should be reserved for those parties who "obtain judicially-sanctioned relief, such as a judgment on the merits or a consent decree (judicial imprimatur) ... [which] must materially alter the legal relationship between the parties [and] must modify

[the opposing party's] behavior in a way directly benefitting [the other party] at the time of the relief granted." *LULAC of Texas v. Texas Democratic Party*, 428 F. App'x 460, 463 (5th Cir. 2011), citing *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir.2008). In other words, absent a judicial decree that Defendants did not violate Plaintiff's First Amendment rights, the Court is unwilling to grant them prevailing party status.

Conclusion

For the reasons discussed herein, the Court recommends that Defendants' Motion to Dismiss (Rec. Doc. 9) be GRANTED IN PART AND DENIED IN PART. The Motion should be granted on the grounds of prescription, and Plaintiff's suit should be dismissed with prejudice as prescribed. The Motion should be denied to the extent Defendants seek an award of attorneys' fees under §1988(b).

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen days after being served with of a copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in the report and recommendation within fourteen days following the

date of its service, or within the time frame authorized by Fed. R. Civ. P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the district court, except upon grounds of plain error. See *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. §636(b)(1).

THUS DONE in Chambers, Lafayette, Louisiana on this 18th day of January, 2023.

s/ CAROL B. WHITEHURST
CAROL B. WHITEHURST
UNITED STATES MAGISTRATE JUDGE