No. ____

IN THE

Supreme Court of the United States

ROBERT WEISLER, III,
Petitioner,

v.

JEFFERSON PARISH SHERIFF'S OFFICE
ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Justice Ginsburg, recently noted that *Devenpeck* v. *Alford* has "set[] the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection," and it should be revisited. *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J. concurring). Under *Devenpeck*, a police officer's reason for a warrantless arrest is irrelevant to determining whether he acted reasonably by effectuating the arrest for the purposes of Fourth Amendment analysis under 42 U.S.C. § 1983. But qualified immunity already protects all officers but the malicious and incompetent, and *Heck* v. *Humphrey* already protects officers against claims for unlawful arrest when the arrestee was ultimately convicted of the crime for which he was arrested.

The question presented is whether *Devenpeck*, which *only* protects officers who either incompetently or maliciously arrest a person for a crime the arrestee did not commit, should be overruled.

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Robert Weisler, III, an individual. Petitioner was the plaintiff and appellant below.

The Respondents are the Jefferson Parish Sheriff's Office; Newell Normand, in his Individual and Official Capacity as Sheriff of Jefferson Parish; Travis Enclard, in his Individual and Official Capacity as a Jefferson Parish Sheriff's Office Deputy; Julio Alvarado, in his Individual and Official Capacity as a Jefferson Parish Sheriff's Office Sergeant; Mike Leyva, in his Individual and Official Capacity as a Jefferson Parish Sheriff's Office Deputy; Russell Varmal, in his Individual and Official Capacity as a Jefferson Parish Sheriff's Office Deputy; and Blake Hollifield, in his Individual and Official Capacity as a Jefferson Parish Sheriff's Office Deputy, who were defendants and appellees below.

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INTRODUCTION

This case presents a question of extreme importance as to whether a police officer's reasoning behind a warrantless arrest is relevant to determining if the officer had probable cause to act in civil cases filed under 42 U.S.C. § 1983. In *Devenpeck* v. *Alford*, 543 U.S. 146 (2004), this Court held that an officer's subjective reasoning for an arrest is irrelevant. But Justice Ginsburg indicated in her recent concurrence in *District of Columbia* v. *Wesby* that the issue should be reconsidered. 138 S. Ct. 577, 594 (2018).

As the law currently stands, "[s]ubjective intentions [of police officers] play no role in ordinary, probable-cause Fourth Amendment analysis" under the exclusionary rule. *Whren* v. *United States*, 517 U.S. 806, 813 (1996). In *Devenpeck*, the Court extended *Whren* to the Section 1983 context, holding that an arresting officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004). Since this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996), and various "follow-on" opinions, including *Devenpeck*, this Court's jurisprudence, according to Justice Ginsburg, has "set[] the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection," *Wesby*, 138 S. Ct. 577 at 594 (Ginsburg, J. concurring). And historically, tort suits have been the lynchpin for holding police accountable for abuse. *Collins* v. *Virginia*, 138 S. Ct. 1663, 1676 (2018) (Thomas, J. concurring). Yet the rule has validated arbitrary and ignorant action on the part of police officers.

Applying the rule created in *Whren* to tort suits is ill-founded. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law" from liability under Section 1983. *Wesby*, 138 S. Ct. at 589. Applying *Whren* to Section 1983 actions then protects those officers who maliciously or with plain incompetence effect an unlawful arrest. Thus, Under the current standard, an officer need only claim it looked like the arrestee was speeding, and all is absolved. *See*, *e.g.*, *United States* v. *Wilson*, No. 16-10911, 2016 WL 5539818 (11th Cir. Sept. 30, 2016).

Devenpeck should be overruled for several reasons. First, the rule at issue here is constitutional, therefore this Court has more flexibility in determining if stare decisis should apply than if it were a statutory issue. Second, this case has not engendered legitimate reliance, in that *Devenpeck* only protects the "plainly incompetent" and those who "knowingly" violate the arrestee's constitutional rights. Third, the circumstances surrounding qualified immunity have changed since *Devenpeck*. Constitutional questions are rarely reached anymore as a result of this Court's decision in *Pearson* v. *Callahan* in 2009. 555 U.S. 223, 235 (2009). Further, the Court has broadened "clearly established right" prong of the qualified immunity test over the last few years, including in *Reichle* v. *Howards*, 566 U.S. 658 (2012) and *White* v. *Pauly*, 137 S. Ct. 548 (2017). Fourth, *Devenpeck* was a poorly reasoned decision in that it is the progeny of a line of cases that misapplied a case from the 1970s, making *Devenpeck* the result of a game of judicial telephone. Sixth, the rule in *Devenpeck* has been consistently criticized by scholars, commentators, and even a Justice of this

court. And, finally, *Devenpeck* has led to the creation of a considerable amount of litigation as the lower courts have struggled for years to correctly apply its standard.

Qualified immunity protects "all but the plainly incompetent and those who knowingly violate the law." And a Section 1983 suit for unlawful arrest cannot survive unless the underlying criminal violation had a favorable outcome. *Heck v. Humphrey*, 512 U.S. 477, 489 (1994). Thus, *Devenpeck* protects *only* the plainly incompetent and those who knowingly violate the law to arrest someone *for a crime the arrestee did not commit*.

For these reasons and those that follow, the Court should grant the petition and reverse the judgment below.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Weisler respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is currently unreported but is reproduced at page 1a of the appendix to this petition ("App."). The opinion of the District Court for the Eastern District of Louisiana is unreported but is reproduced at page App. 9a.

JURISDICTION

The judgment of the Fifth Circuit was entered on June 18, 2018. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth in the appendix to this petition. App. 40a.

STATEMENT OF THE CASE

Factual Background. Plaintiff Robert Weisler, III, is a 55-year-old former police officer. App. 2a. In September 2015, Defendants Detective David Michel and Deputy Travis Enclard pulled Weisler over for driving with windows with too dark of a tint. App. 2a, 10a. Sergeant Alvarado joined the scene after Detective Michel had begun the traffic stop. ROA.300. After looking in his vehicle and seeing equipment that a law enforcement officer might possess, including a computer stand, emergency lights, and an emergency siren, Detective Michel asked Weisler if he was "a 26," which Weisler took to mean a police officer, based on his experience of serving as one. App. 2a. After Weisler answered affirmatively, Detective Michel asked for supporting documents, and Weisler produced two forms of identification from his time of service. App. 2a-3a. Weisler then explained to Sergeant Alvarado that he had retired and was no longer a police officer. App. 3a.

Sergeant Alvarado contacted the Hancock County Sheriff's Office to inquire about Weisler's employment. ROA.215. The chief deputy explained Weisler had been an officer but no longer worked at the department. *Id.* Detective Michel then arrested Weisler for falsely impersonating a police officer under Louisiana Revised Statutes § 14:112, which requires that the offender impersonate an officer with "the intent to injure or defraud or to obtain or secure any special privilege or advantage." *Id.* Weisler later testified he did not intend to injure, defraud, obtain

any special privilege, or ask to be let off. App. 18a; ROA.256:13-60:2. Deputy Enclard agreed, testifying: "[Weisler] didn't ask to be let off." ROA.346:11. Deputy Enclard also stated he had no reason to believe Weisler had attempted to gain some privilege during the interaction. ROA.346:5-8. He just did not realize that this intent was an element of the crime. ROA.348, 351.

After Detective Michel arrested and handcuffed Weisler, the detective "conducted a search incidental to arrest" and recovered a pill bottle containing prescription medicine "in his front pocket." App. 10a. With one exception, Weisler had left his valid prescriptions at home. ROA.244:7-10, 362. At the scene, Weisler told the officers he "could take them to the house and show them" the prescriptions. ROA.244:7-10. The officers nonetheless "further advised" him he was under arrest "for possession of controlled dangerous substances." ROA.216. In this litigation, the Defendants have identified the relevant criminal code section as Louisiana Revised Statutes § 40:967, ROA.106, but that provision only prohibits possession of regulated substances if not obtained "pursuant to a valid prescription." Defendants have not explained what evidence they had that Weisler violated the provision to support arguable probable cause.

The officers also cited Weisler for improper car window tint under Louisiana Revised Statutes § 36:361.1, which Deputy Enclard testified is "not an arrestable offense. It's a citation." ROA.358:8-9. Deputy Enclard could not recall ever arresting anyone for car window tint. ROA.358.

The officers transported Weisler to the Jefferson Parish Correctional Center where he was booked and remained confined for 36 hours. App. 3a. Weisler was eventually released from jail due to overcrowding. *Id.* The Assistant District Attorney dismissed all charges against him, and Weisler immediately paid his window tint ticket. *Id.*

Procedural Background. In September 2016, Weisler sued the defendants in the United States District Court for the Eastern District of Louisiana for violations of his civil rights under 42 U.S.C. § 1983, alleging violations of his Fourth, Fifth, Fourteenth, and Eighth Amendment rights. App. 3a. Weisler subsequently voluntarily dismissed Jefferson Parish and proceeded against the individual defendants. *Id.*

Defendants moved for summary judgment, arguing, among other things not relevant to this appeal, that Weisler could be arrested based on probable cause to believe he illegally possessed prescription medications. ROA.396-97, 387. Notably, the defendants did not argue that the arrest could be justified based on the actual reason for arrest—the purported impersonation of an officer.

The district court ruled that probable cause existed to arrest Weisler based on a ground not raised by the defendants until the reply brief. ROA.379, 398. In reply, Defendants for the first time argued that "even if Plaintiff was custodially arrested for the window tint charge, his arrest would not run afoul of Constitutional law." ROA.379. The court combined aspects of the defendants' two initial arguments to rule that Weisler admitted there was probable cause to believe his windows were illegally tinted, and therefore he could be arrested. ROA.398. Weisler was

not provided the opportunity to respond that probable cause to believe that the windows were overly tinted did not constitute probable cause to arrest him because the window-tint statute is a noncriminal regulatory violation. And the district court concluded, without analysis, that "a 'window tint' violation is certainly a 'very minor criminal offense.'" App. 29a-30a.

Weisler appealed the decision of the district court, arguing, among other things, the court should consider officers' stated reasons for making an arrest in the qualified immunity analysis. App. 7a. Weisler conceded that binding precedent from this Court foreclosed the argument. The Fifth Circuit rejected this argument, recognizing that it required the court to overrule Supreme Court decisions—a power the Fifth Circuit could not exercise.

REASONS FOR GRANTING THE WRIT

I. This Case Presents a Question of Exceptional Importance.

A. Justice Ginsburg Recently Expressed Concern That This Court's Jurisprudence Regarding Probable Cause, Which Ignores the Crime for Which an Arrest is Made, Unduly Favors Police Unaccountability.

In its recent decision in *District of Columbia* v. *Wesby*, 138 S. Ct. 577 (2018), this Court addressed whether police officers had probable cause to arrest the defendant individuals for a crime, absent affirmative proof of the required element of intent. As the law currently stands, "[s]ubjective intentions [of police officers] play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. In *Whren*, this Court utilized a "selective

characterization of [precedent]" to eschew a purportedly subjective standard for arrests for traffic infractions. Kathryn Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 Am. Crim. L. Rev. 1387, 1422 (2003). This rule has been upheld in other recent cases including *Devenpeck*, in which the Supreme Court held that an arresting officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004). In *Wesby*, however, this Court instead held that the "totality of the circumstances" demonstrated that it was reasonable for the officers involved to infer the intent required. *Wesby*, 138 S. Ct. at 586. In her concurrence, Justice Ginsburg noted that the Court's decision "leads [her] to question whether th[e] Court, in assessing probable cause, should continue to ignore why police in fact acted." *Id.* at 593. Justice Ginsburg stated that she "would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry." *Id.* at 594. Under this reasoning, the lower courts in this case erred in considering whether Defendants had probable cause to arrest Weisler for tinted windows, which was not the offense for which he *was* arrested, and was not an offense for which he *could* be arrested. App. 17a. Ultimately, the rule as espoused in *Whren* and *Devenpeck* is ill-founded; a defendant in a § 1983 unlawful arrest action should not be allowed to establish probable cause to arrest based on anything other than the crime or crimes for which the plaintiff was actually arrested.

B. The Court's Jurisprudence Protects Malicious and Incompetent Officers.

This Court has repeatedly stated that under the "demanding" qualified immunity standard, "all but the plainly incompetent or those who knowingly violate the law" are protected. *Wesby*, 137 S. Ct. at 589 (quoting *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986)). But a rule allowing defense counsel and district judges to scour the code book to find some arrestable offense not remotely contemplated by the arresting officers extends that protection to the malicious and plainly incompetent. As it currently stands, this Court's jurisprudence does not consider the crime for which an arrest is made, which validates and encourages arbitrary and pretextual behavior on the part of police officers. This Court's ruling in *Devenpeck* allows officers to conduct traffic stops and arrests for "the wrong reason," so long as some other offense can be identified, thus insulating "sham arrests" from judicial scrutiny. Elina Treyger, *Collateral Incentives to Arrest*, 63 Kan. L. Rev. 557, 611 (2015). Such a rule allows police officers wide latitude in conducting traffic stops and arrests, to the detriment of citizens who are targeted for their race or other immutable traits. The negative consequences of such a rule are easy to imagine, as *Devenpeck* and other "more recent cases . . . allow the police to make an arrest on trivial charges regardless of their underlying motivation, open[ing] the door to racial profiling, harassment, and other types of pretextual actions." Kit Kinports, *Criminal Procedure in Perspective*, 98 J. Crim. L & Criminology 71, 131 (2007).

One scholar has even characterized *Devenpeck* as the "rookie standard," because officers are allowed—

and even expected—to have only a rudimentary and basic understanding of the law. Brian Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 Md. L. Rev. 261, 318 (201). Indeed, "*Devenpeck* nixed any requirement that the police need to know the law." *Id.* at 319. This rule allows officers to act despite complete unfamiliarity with the law, provided that some criminal law can be found to apply after the fact. It is the height of inconsistency that, under qualified immunity analysis, the right at issue must not be determined at too high a level of generality for the victim, but must be defined at the highest level of generality as construed for the arresting officer.

While this Court, in both *Whren* and *Devenpeck*, raised the legitimate concern that a subjective standard could, in theory, become too variable and fact-based to achieve any sense of uniformity, *Devenpeck*, 543 U.S. at 155; *Whren*, 517 U.S. at 815, the standard advocated here is *not* a subjective one. It merely treats the stated reason for the arrest as one of the "given set of known facts" that is considered relevant to a determination of whether the officer's conduct was reasonable and asks whether a reasonable officer would have arrested for the same crime. Notably, this Court does not deem a standard to be subjective when it considers the reason for stopping someone in order to determine whether the length of the stop was objectively appropriate. *See, Rodriguez* v. *United States*, 135 S. Ct. 1609, 1616 (2015) ("[A] traffic stop 'prolonged beyond'" the "time reasonably required to complete [the stop's] mission" is "unlawful."). It is similarly appropriate to consider the arrest's mission.

Further, this Court's concern with respect to a subjective standard does not reasonably support defense counsel and lower courts' rifling through code books for post-hoc justifications of otherwise-unconstitutional arrests. And the current standard fails to sufficiently balance the competing interests of private citizens against police officers. For example, in *Devenpeck*, this Court stated that a subjective standard for probable cause would necessarily "mean[] that the constitutionality of an arrest under a given set of known facts will 'vary from place to place and from time to time.'" *Devenpeck*, 543 U.S. at 154 (quoting *Whren*, 517 U.S. at 815). But including the reason for arrest as a "known fact" does not vary the constitutionality of the arrest from place to place or time to time any more than does consideration of any other fact.

As Justice Ginsburg discussed in her *Wesby* concurrence, the law, as it currently stands, "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." *Wesby*, 138 S. Ct. at 594 (Ginsburg, J., concurring in the judgment in part). It is a completely reasonable proposition to expect police officers to be knowledgeable of the law. As the standard currently works in practice, however, incompetent and malicious officers who are lucky enough to be able to point to some sort of post-hoc justification are immunized from suit, as was the case with the Defendant officers here.

This case, even more so than *Devenpeck*, illustrates the extent to which the current state of the law validates the actions of ignorant officers after the fact. In *Devenpeck*, this Court rejected the notion that the probable cause inquiry is "confined to the known

facts bearing upon the offense actually invoked at the time of arrest," and further repudiated the idea that "the offense supported by these known facts must be 'closely related' to the offense that the officer invoked." *Devenpeck*, 543 U.S. at 152-53. In that case, the defendant officers originally suspected Alford, the respondent, of impersonating a police officer, as he, like Weisler, had police equipment in his vehicle. *Devenpeck*, 543 U.S. at 148-49. Alford also had a tape recorder in his vehicle, with which he recorded his conversation with the defendant officers. *Id.* at 149. Devenpeck, one of the responding officers, then arrested Alford "for a violation of the Washington Privacy Act," solely because Alford had recorded their interaction. *Id.* at 149-50. This Court found it crucial that Devenpeck subjectively believed that such an arrest was lawful, even though it was, in fact, not. *Id.* at 149-50. The arbitrary results of the current rule are starkly demonstrated by both *Devenpeck* and this case. Weisler was arrested for no more than a minor motor vehicle equipment violation, and yet the officer's interests are, under the current standard, weighed more heavily than those of people they arbitrarily arrest. This case therefore illustrates how the current law allows courts to validate the actions of officers who are ignorant of the law and have no valid justification for their arrest, but happen to be able to point to some other possible justification after the fact.

II. *Devenpeck* v. *Alford* Should Be Overruled.

This Court should overrule *Devenpeck*. A departure from *stare decisis* requires the existence of "some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). Relevant factors include whether the current rule (1) is constitutional or statutory; (2) has engendered reliance; (3) has been

undermined by changed circumstances; (4) was based on a decision that was "badly reasoned," *Arizona* v. *Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting) (collecting cases); (5) poses a "direct obstacle to the realization of important objectives embodied in other laws;" and (6) has suffered constant criticism because it is "inconsistent with the sense of injustice or with the social welfare," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-74 (1989), or "has defied consistent application by the lower courts." *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009).

1. *Constitutional rule*. It is "this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962) (plurality opinion); *see Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984) ("[A]dherence to precedent is not rigidly required in constitutional cases[.]"). Additionally, when the rule is "judge made," "[a]ny change should come from this Court, not Congress." *Pearson*, 555 U.S. at 233-34.

The rule in *Devenpeck* stems from a line of cases interpreting the probable cause requirement of the Fourth Amendment. *See Devenpeck*, 543 U.S. at 593-94 (quoting *Whren*, 517 U.S. 806, and *Scott* v. *United States*, 436 U.S. 128 (1978)). The Court's reversal of the Ninth Circuit's "closely related offense" approach to probable cause strengthened police officers' qualified immunity defense in § 1983 actions against them. This defense is a judge-made rule. *See Malley*, 475 U.S. at 342 ("[Section 1983] on its face does not provide for *any* immunities."); *see also, e.g.*, *Gray* v. *Baker*, 399 F.3d 1241, 1245 (10th Cir. 2005) ("Qualified immunity is a judicially-created defense."). Considering qualified immunity is judge

made and fails to effectuate congressional intent behind § 1983, "any change [to this doctrine] should come from this Court, not Congress." *Pearson*, 555 U.S. at 234.

2. *Legitimate reliance*. Cases involving property and contract rights favor *stare decisis* because they involve reliance interests, whereas "procedural or evidentiary rules . . . do not produce such reliance." *Pearson*, 555 U.S. at 233 (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)). Rules that "do[] not affect the way in which parties order their affairs," like the *Saucier* protocol overruled in *Pearson*, are likened to procedural and evidentiary rules that do not produce reliance interests. *Id.*

Here, the *Devenpeck* rule does not in any way affect the police officer's conduct. The officer's ability to justify the existence of probable cause for an arrest based on a criminal offense other than "his subjective reason for making the arrest," *Devenpeck*, 543 U.S. at 153, merely alters his qualified immunity defense in a § 1983 suit. Withdrawing from this rule would only limit the number of offenses the officer could rely on to justify probable cause in the suit. Moreover, the fact that *Devenpeck* effectively immunizes police officers from § 1983 claims because they can often point to a violation of *some* law is by no means a legitimate "settled expectation[]," *Pearson*, 555 U.S. at 233. In fact, it is because of the *illegitimacy* of this expectation that this Court should overrule *Devenpeck*. While police officers should have some leeway in the law to do their jobs, they should not be allowed to act with the expectation that the law affords them the power to execute a plainly incompetent arrest or one that knowingly violates the law.

3. *Changed circumstances*. Assuming the Court's 2004 decision in *Devenpeck* left plaintiffs some potential to prevail in a § 1983 suit, its qualified immunity cases since then have meant that this potential rarely materializes. In 2009, *Pearson* did away with *Saucier*'s mandatory two-step sequence of analyzing qualified immunity claims. 555 U.S. 223. Since then, the rate of reaching constitutional questions has decreased. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37 (2015) ("The overall rate of reaching constitutional questions accordingly has decreased after *Pearson*; it would be shocking if it were otherwise."). Judges are fueling police unaccountability by not addressing whether the officer violated plaintiff's constitutional rights in cases where the officer had no probable cause for the arresting offense. *See Wesby*, 138 S. Ct. at 591 ("Even assuming the officers lacked actual probable cause . . . the officers are entitled to qualified immunity [when] they 'reasonably but mistakenly conclude that probable cause was present'" (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987)).

Furthermore, this Court has considerably strengthened the "clearly established right" prong of the qualified immunity defense in recent years. In *Anderson*, the standard was that "[t]he contours of the right must be sufficiently clear that *a* reasonable official would understand that what he is doing violates that right." 483 U.S. at 640 (emphasis added). In 2012, the Court expanded this standard, declaring that "[t]o be clearly established, a right must be sufficiently clear 'that *every* 'reasonable official would [have understood] that what he is doing violates that right.'" *Reichle* v. *Howards*, 566 U.S.

658, 664 (2012) (quoting *Anderson*, 483 U.S. 640) (emphasis added). And just last year, this Court admonished lower courts for giving plaintiffs too much leeway in vindicating their constitutional rights and holding public officials accountable. *See White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) ("Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined at a high level of generality." (quotation marks omitted)). This Court's qualified immunity jurisprudence has tilted the "balance between the evils inevitable in any available alternative," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813 (1982), against police accountability and vindication of constitutional guarantees.

4. *Badly reasoned decision*. *Devenpeck* was badly reasoned because it stemmed from a line of Supreme Court decisions that misinterpreted, and then relied on, a single case: *United States* v. *Robinson*, 414 U.S. 218 (1973). Put differently, *Devenpeck* is the product of a bad game of telephone.

In *Robinson*, the issue in the case was whether the right to search incident to an arrest depended upon "the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." 414 U.S. at 235. This Court said no, holding that once an officer arrests an individual based on probable cause, "a search incident to the arrest requires no additional justification," whether on the basis of the officer's thoughts or the need to disarm the arrestee. *Id.* The Court held: "[I]t is the *fact* of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is . . . a 'reasonable' search under that Amendment." *Id.* (emphasis added). The Court further highlighted that

the officer's intent was irrelevant to the subsequent *search*: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed." *Id.* at 236. Thus, all the Court held in *Robinson* was that once the officer has probable cause to arrest, his *subsequent* state of mind is irrelevant.

The next link in this game of telephone is *Scott* v. *United States*, 436 U.S. 128 (1978), which relied exclusively on *Robinson* for its holding. In *Scott*, the Court held that the wiretapping agents' failure to make good-faith efforts to comply with the statutory requirement under 18 U.S.C. § 2518(5) (1976) that unauthorized wiretap interceptions be minimized had no bearing on whether their actions were reasonable under the Fourth Amendment. 436 U.S. at 137-38. Relying on *Robinson*, the Court stated: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Robinson* does not support such a broad proposition, as it stands only for the proposition that once the officer has probable cause to arrest, his subsequent state of mind is irrelevant. *See* 414 U.S. at 235. In *Scott*, unlike in *Robinson*, the officer's state of mind and his authority to act were concurrent in time; no subsequent act of the officer was at issue to which his intent could apply under *Robinson*. The Court, therefore, improperly stretched the meaning of *Robinson* in *Scott*.

The Court further misinterpreted *Robinson* in *Whren*, 517 U.S. 806. In *Whren*, where the officers

conducted a pretextual stop, the defendants put forth the following standard for assessing the "reasonableness" of police officers' actions: "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have [acted] for the reasons given." *Id.* at 814. This Court said that its precedents foreclosed such an approach, claiming: "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* (citing *Robinson*, 414 U.S. at 236). All the Court offered in support of its categorical rule was the following quotation from *Robinson*: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed." 414 U.S. at 236; *see* Wayne R. LaFave, 1 Search and Seizure, § 1.4(f), at 183 (5th ed. 2012). But the reasoning was flawed by assigning the reason for the arrest to the "subjective intent" part of that analysis, rather than the "circumstances" part. While the Fourth Amendment states an objective test, as established in the search context, the "mission" can be relevant. *Rodriguez*, 135 S. Ct. at 1616. The officer's subjective intent is not at issue when a court analyzes whether an officer

By relying on *Robinson*, the Court was "mixing apples and oranges." LaFave, *supra*, § 1.4(f), at 183. As noted, the question in *Robinson* was whether the officer's state of mind was relevant to his authority to search *after* he had arrested the individual upon probable cause. *See* 414 U.S. at 235. In *Whren*, this should have meant *at most* that once the officers had

reasonable suspicion to seize the defendants, the officers' intent became irrelevant to their following action—their discovery of the drugs—but *not* to the pretextual seizure. *See* LaFave, *supra*, § 1.4(f), at 184. Thus, like *Scott*, *Whren* impermissibly stretched *Robinson*.

Finally, the last link in this game of telephone: *Devenpeck*, which took this precedent from the criminal realm and moved it to the civil. The Court reversed the Ninth Circuit's holding that officers could not justify the plaintiff's arrest based on probable cause for offenses that were not "'closely related' to the offense invoked by the [officer] as he took [the plaintiff] into custody." *Id.* at 152. The Court held that "[the officer's] subjective reason for making the arrest need not be the *criminal offense* as to which the known facts provide probable cause." *Id.* at 153 (emphasis added). The Court reasoned: "As we have repeatedly explained, 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" *Id.* (quoting *Whren*, 517 U.S. at 813 (quoting *Scott*, 436 U.S. at 138)).

Devenpeck's holding collapses if none of the cases *Devenpeck* relied on—*Whren*, *Scott*, and by extension, *Robinson*—actually support its reasoning. The issue in *Robinson* was whether a police officer's state of mind was relevant to his authority to search the individual after making the arrest upon probable cause. 414 U.S. at 235. The issue in *Devenpeck*, however, was whether the officer's state of mind bore on whether any offenses not invoked by him justified the existence of probable cause for an arrest *in the*

first place. 543 U.S. at 153 (rejecting the Ninth Circuit's holding that the probable-cause inquiry is "confined to the known facts bearing upon the offense actually invoked at the time of arrest," and that this offense must be "closely related to the offense the officer invoked"). *Robinson* does not speak to this issue, as it does not even touch upon on whether the officer's state of mind is relevant to probable cause. 414 U.S. at 235 ("I]t is the *fact* of the lawful arrest which establishes the authority to search. (emphasis added)).

Neither does *Scott* help *Devenpeck*. *Scott* dealt with whether the officer's intent could invalidate an otherwise constitutional search *premised on the invoked authority. See id.* ("Subjective intent alone, the Government contends, does not make otherwise lawful conduct illegal or constitutional. We think the Government's position . . . embodies the proper approach *for evaluating compliance with the minimization requirement*" (emphasis added)); *see also* LaFave, *supra*, § 1.4(f), at 182 n.109 ("*Scott*, therefore, 'merely held that improper intent that is not acted upon does not render unconstitutional an otherwise constitutional search.'" (quoting John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. Rev. 70, 83-84 (1982))). *Scott* does not support *Devenpeck* because *Devenpeck* dealt with whether the officer's intent was relevant to *the premise* for a constitutional arrest to begin with. In short, *Scott* considers the officer's intent in connection with the invoked authority; *Devenpeck* considers his intent without a connection and thus takes *Scott* to the next level.

Nor does *Whren* save *Devenpeck*. *Whren* was about "whether a police officer, acting reasonably, would have made the stop for the reason given." 517

U.S. at 810. The case asked whether the officer's *arbitrariness* should be considered when assessing the reasonableness of the stop. *See id.* at 813-14. In other words, *Whren*, like *Scott*, analyzed the officer's intent in connection with the invoked authority, whereas *Devenpeck* went beyond that and held that no connection is required to establish probable cause. *Devenpeck* simply does not care which offense the officer invoked or what he was thinking at the time of the arrest, so long as the facts later marshal probable cause for *some* offense. *See* 534 U.S. at 153.

There is a reasonable question of whether *Whren* can survive the reasoning in *Rodriguez*, but the Court need not address that here. *Robinson*, *Scott*, and *Whren* fail to support *Devenpeck*. Accordingly, the Court's categorical statement in *Devenpeck* that "[o]ur cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause," *Devenpeck*, 534 U.S. at 153—is false when broadly applied to the stated reason for arrest. In any event, the application of the principles in *Whren* to the exclusionary rule does not require that the same be applied in the civil context.

5. *Obstacle to realization of objectives in other laws*. By ignoring the officer's state of mind during an arrest and relying on the officer's post-hoc justification for the arrest, *Devenpeck* frustrates the objective of Section 1983 claims, which is to deter denial of constitutional rights by state actors abusing their power. *See, e.g.*, *Harlow*, 457 U.S. at 814 ("In situations of abuse of office, a[] [§ 1983] action for damages may offer the only realistic avenue for vindication of constitutional guarantees."); *Smith* v. *Wade*, 461 U.S. 30, 54-56 (1983) (punitive damages

are appropriate in some § 1983 actions, as "society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others").

This Court has repeatedly stated that the "demanding" qualified immunity defense "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Wesby*, 138 S. Ct. at 589 (quoting *Malley*, 475 U.S. at 341). And the *Devenpeck* decision extended that protection to also save the incompetent and the malicious so long as the officer's lawyers can dream up an after-the-fact hypothetical justification for an arrest. The thicker the book of state criminal law statutes, the less the word "qualified" has any meaning: the defense effectively turns into absolute immunity. *See Kisela* v. *Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting) ("In holding [that the officer's lethal force against a nonthreatening plaintiff, who had committed no unlawful act and was suspected of no crime, did not violate 'clearly established law], the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield."). This Court should not afford officers absolute immunity either in fact or in effect; notably, the Court has flatly rejected a contrary suggestion. *Malley*, 475 U.S. at 342 ("Since [§ 1983] on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.").

The Court should tread lightly when it continues to move farther away from effectuating Congress's intent under § 1983. Abandoning *Devenpeck* as "a positive detriment to coherence and consistency in the law," *Patterson*, 491 U.S. at 173, would steer the

Court in the right direction by helping to achieve congressional objectives.

6. *Constant criticism*. This Court has previously held that one "factor[] that weigh[s] in favor of reconsideration" of a legal rule is whether the "decision has 'been questioned by Members of the Court in later decisions.'" *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 829-30 (1991)). This Court has also overturned a rule when the Circuits, along with scholars and commentators, have expressed criticism or disapproval of the rule. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.,* 485 U.S. 271, 286-87 (1988). *Devenpeck* has faced censure from several sources over the years, including legal scholars, commentators, and a Justice of this Court. Therefore, this Court's *Devenpeck* rule should be struck down in light of years of consistent criticism.

As discussed above, Justice Ginsburg herself has questioned the *Devenpeck* standard in her recent concurrence in *Wesby*. *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part). Justice Ginsburg expressed concern that "[t]he Court's jurisprudence . . . sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." *Id.* She also stated that she "would leave open[] for reexamination" this issue for a later case, much like this one. *Id.*

Devenpeck has been subjected to widespread criticism from scholars and commentators over the years. Some have argued that *Devenpeck* allows officers to arrest citizens, "for authoritarian reasons and in an authoritarian way, so long as there is some

other justification for the search or seizure." Eric Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 Ariz. St. L.J. 213, 238 (2012). *See also, e.g.,* Mary Beall, *Gutting the Fourth Amendment: Judicial Complicity in Racial Profiling and the Real-Life Implications*, 36 Law & Ineq. 145, 156 (2018) ("Combined, *Whren* and *Devenpeck* effectively shield law enforcement officers' racially-motivated, pretextual reasons for arrest from judicial scrutiny even if the underlying basis for the stop and search was improper."). This sentiment has been echoed by other commentators, who have argued that, under *Devenpeck*, prosecutors are "free to examine the criminal code to find some crime the arrestee might have committed, as long as the facts known to the officer (or, as a practical matter, which the officer later claims to have known at the time) would constitute probable cause for that crime." Richard McAdams, *Close Enough for Government Work? Heien's Less-Than-Reasonable Mistake of the Rule of Law*, 2015 Sup. Ct. Rev. 147, 173 (2015). Similarly, other scholars have argued that, aside from *Devenpeck's* implicit acceptance of arbitrary and pretextual behavior, "according to the Devenpeck Court, an officer's experience and training do not seem to matter." Foley, *supra*, at 318. Thus, the rule in Devenpeck amounts, largely, to a "rookie standard." *Id.* Other scholars have argued that *Devenpeck* has "considerably oversimplified the problem," by exclusively considering the facts surrounding the arrest and whether or not probable cause was reasonable based upon them. George Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 Miss. L.J. 373, 433 (2006).

An additional factor "weigh[ing] in favor of reconsideration" is if a decision has "defied consistent application by the lower courts." *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 829-30 (1991)). This Court has previously held that "efficiency in adjudication" can be achieved by overturning a rule when it "produce[s] litigation-spawning confusion in an area that should be easily susceptible of more workable solutions." *Morgane* v. *States Marine Lines*, 398 U.S. 375, 404-5 (1970); *see also Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) ("Eighteen years of essentially pointless litigation have persuaded us that [the rule at issue] is incapable of principled application."). The sheer volume of cases faced by the lower courts in an attempt to wrangle with *Devenpeck* demonstrates the extent to which this standard is unworkable.

The rule as espoused in *Devenpeck* has been haphazardly applied by the lower courts in myriad contexts. *See, e.g.*, *Rosenbaum* v. *Washoe Cty.*, 654 F.3d 1001, 1008 (9th Cir. 2011) ("It cannot be that probable cause for a warrantless arrest exists so long as the facts may arguably give rise to probable cause under *any* criminal statute on the books—even if the crime is buried deep in a dust-covered tomb and never charged or prosecuted. If it were so, officers could arrest without a warrant under virtually any set of facts and later search the legal archives for a statute that might arguably justify it."); *Daniels* v. *New York City*, 117 F. Supp. 3d 239, 242 (E.D.N.Y. 2015) (finding *Devenpeck*, "inapplicable and distinguishable factually" when "the arresting officer . . . preferred to remain ignorant and consciously avoided knowing the facts to which [the law] is specifically addressed"); *Merenda* v. *Tabor*, No. 5:10-CV-493, 2012 U.S. Dist.

LEXIS 63782, at *19-20, n.11 (M.D. Ga. May 7, 2012) ("[*Devenpeck*] offers little guidance on how related the offenses must be."); *United States* v. *Eglin*, No. CR409-216, 2010 U.S. Dist. LEXIS 12669 at *1 (S.D. Ga. Feb. 12, 2010) ("[T]he Court is dubious of the application of [*Devenpeck*] for the proposition that an 'officer's mistake of law was not fatal provided that the objective facts known to him furnished probable cause' in the context of a traffic stop."); *M.D.* v. *Smith*, 504 F. Supp. 2d 1238, 1245 (M.D. Ala. 2007) ("*Devenpeck* could be read to stand for the broad proposition that, as long as objective grounds exist to arrest a suspect, failure to do so actually is irrelevant."). The rule in *Devenpeck* has also been extended by some lower courts, and yet restricted in scope by others. *Compare, e.g.*, *United States* v. *Laville*, 480 F.3d 187, 194 (3d Cir. 2017) (extending *Devenpeck* to the context of investigative stops, in addition to arrests), *with Goddard* v. *Kelley*, 629 F. Supp. 2d 115, 127 (D. Mass. 2009) (declining to extend Devenpeck to a situation where officers "made a decision *not* to arrest plaintiff—and thus having foregone their opportunity to make a warrantless arrest"), *Farmer* v. *City of Spokane*, No. 2:15-CV-47-RMP, 2015 U.S. Dist. LEXIS 100622, at *9 (E.D. Wash. July 30, 2015) (declining to extend *Devenpeck* to a situation where officers alleged probable cause for an arrest based on an outstanding warrant of which they had no knowledge), *and McClellan* v. *Smith*, No. 1:02-CV-1141 2009 U.S. Dist. LEXIS 99222 at *20 (N.D.N.Y. Oct. 26, 2009) (declining to extend *Devenpeck* to malicious prosecution claims). The inability of the lower courts to adhere to the *Devenpeck* standard starkly demonstrates just how unworkable the rule has become.

With all of this noted confusion, *Devenpeck* has been cited over 2,300 times, even though it only protects officers who either incompetently or maliciously arrest a person for a crime the arrestee did not commit. *Devenpeck* undermining Section 1983 is an issue of extreme importance, and it should be revisited and overruled immediately.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
June 18, 2018
Lyle W. Cayce
Clerk

No. 17-30951
Summary Calendar

ROBERT WEISLER, III,

Plaintiff – Appellant

v.

JEFFERSON PARISH SHERIFF'S OFFICE; NEWELL NORMAND, Jefferson Parish Sheriff; DAVID MICHEL, Officer; TRAVIS ENCLARD, Officer; JULIO ALVARADO, Officer; MIKE LEYVA, Officer; RUSSELL VARMALL, Officer; BLAKE HOLLIFIELD, Officer,

Defendants – Appellees

Appeal from the United States District Court for the Eastern District of Louisiana
USDC No. 2:16-CV-14582

Before KING, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Robert Weisler, III, was pulled over and arrested while driving his white Ford Crown Victoria with darkly tinted windows. Although he was initially charged with impersonating a police officer and possession of a controlled substance, he ultimately pleaded guilty only to a violation of Louisiana's window-tint statute and paid a fine. He sued under 42 U.S.C. § 1983, alleging an unlawful arrest in violation of the Fourth Amendment. The district court ultimately granted summary judgment on the basis of qualified immunity after it determined that the officers had probable cause to arrest based on a violation of the window-tint statute. We AFFIRM.

I.

Robert Weisler, III, is a 55-year-old former police officer. In September 2015, two officers pulled him over for a traffic stop. Weisler was driving a white Ford Crown Victoria with windows tinted dark enough that the officers could not see inside. Once Weisler rolled down his window, the officers saw additional items that raised their suspicion that he was impersonating a police officer. The officers saw a computer stand, an emergency light on the front dashboard, an emergency siren in the front grill, and what appeared to be tactical equipment. They also noticed that Weisler was wearing a hat emblazoned with the word "S.W.A.T." The officers asked Weisler if he was "a 26"—that is, a law enforcement officer—and Weisler responded that he was and produced

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

identification for two different law enforcement agencies. Weisler later admitted that he was retired.

After verifying that Weisler had resigned from his last law enforcement job, the officers placed him under arrest. Weisler then spent roughly a day- and-a-half in jail; he was released due to overcrowding. He was charged with impersonating a police officer, La. R.S. § 14:112, possession of a controlled dangerous substance, La. R.S. § 40:967, and illegal window tint, La. R.S. § 32:361.1. The impersonation and controlled-substance charges were dropped. Weisler pleaded guilty to the window-tint charge and paid the attendant fine.

Weisler then sued under 42 U.S.C. § 1983 alleging violations of his Fourth, Fifth, Eighth,[1] and Fourteenth Amendment rights. He named as defendants the officers involved in his arrest, the officers who helped to prepare the police report, the officers at the parish jail, the sheriff of Jefferson Parish, the president of Jefferson Parish, and Jefferson Parish itself. He named all defendants in their personal and official capacities. The district court dismissed Jefferson Parish and its president as parties and ultimately granted summary judgment in favor of all other defendants.

II.

We review the district court's grant of summary judgment de novo. *Kariuki v. Tarango*, 709 F.3d 495, 501 (5th Cir. 2013). In doing so, we view the facts in the light most favorable to the nonmovant and draw

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[1] Weisler's complaint alleges that the defendants violated his Eighteenth Amendment rights, but the district court found that he intended to allege Eighth Amendment violations.

all reasonable inferences in that party's favor. Id. The ultimate question we ask is whether there exists any "genuine dispute as to any material fact" that warrants a trial. Fed. R. Civ. P. 56(a). If not, then "[t]he court shall grant summary judgment." Id.

The district court granted summary judgment on the basis of qualified immunity. Qualified immunity shields government officials from suits for damages unless a plaintiff shows "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). For a right to be clearly established, the relevant legal authorities must put the officer on notice that his or her particular conduct was unlawful. See *Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004) (en banc). This does not require that "the very action in question has previously been held unlawful," merelythat a reasonable officer would understand that his or her conduct was unlawful. Id. at 350 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). If reasonable officers could disagree on the lawfulness of the defendant's actions, then the officer is entitled to qualified immunity. *Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir. 2004). When a defendant pleads qualified immunity, the plaintiff bears the burden of negating it. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc).

III.

On appeal, Weisler raises three purely legal issues. We reject each of his claims of error.

A.

According to Weisler, it is clearly established that the Fourth Amendment prohibits arrests for noncriminal regulatory offenses.[2] Because the Louisiana window-tint statute is, in Weisler's view, a regulatory offense, any reasonable officer would have understood that the Fourth Amendment prohibited arresting Weisler for violating it.

Weisler is wrong on both fronts. As an initial matter, he fails to cite any cases from this circuit holding that an arrest for a noncriminal regulatory offense violates the Fourth Amendment. Moreover, as this court recently made clear, the Fourth Amendment does not limit arrests to criminal law violations.[3] *See City of El Cenizo v. Texas*, No. 17-50762, 2018 WL 2121427, at *13 (5th Cir. May 8, 2018) (published opinion). "Courts have upheld many statutes that allow seizures absent probable cause that a crime has been committed." *Id.* (collecting cases). Accordingly, it was by no means clearly established at the time of Weisler's arrest that the Fourth Amendment allows arrests only on probable cause of a criminal offense. *See id.* If anything, Supreme Court caselaw would have suggested to the

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[2] Weisler appeals the dismissal of only his Fourth Amendment false arrest claim. As a result, he has abandoned the remainder of his claims. *Cf. Crose v. Humana Ins. Co.*, 823 F.3d 344, 351 n.5 (5th Cir. 2016) ("We have consistently held that failure to brief an issue in the opening brief abandons that issue on appeal.").

[3] *City of El Cenizo* overruled the sole in-circuit district court case on which Weisler relies. See 2018 WL 2121427, at *13 n.22 ("disavow[ing]" *Mercado v. Dallas County*, 229 F. Supp. 3d 501 (N.D. Tex. 2017)).

officers that the Fourth Amendment did not stop them from arresting Weisler for a minor traffic offense, *see Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)—even if state law prohibited them from doing so, *see Virginia v. Moore*, 553 U.S. 164, 171-73, 176 (2008).

Even were that not so, the Supreme Court of Louisiana has described the window-tint statute as "regulating the tinting of car windows and providing criminal penalties and fines for infractions." *State v. White*, 1 So. 3d 439, 442 (La. 2009) (emphasis added) (citing La. R.S. 32:361.1); *see also State v. Wyatt*, 775 So. 2d 481, 483 (La. Ct. App. 2000) ("LSA–R.S. 32:361.1 provides restrictions on how darkly windows of a car may be tinted, and provides criminal penalties . . . ." (emphasis added)); *State v. Dillon*, 670 So. 2d 278, 282 (La. Ct. App. 1996) (describing a "violation of the tint law" as "a criminal offense"). Far from it being clear that a violation of the window-tint statute was a non-criminal, regulatory offense, if anything just the opposite was clear. Given that the state's courts have repeatedly characterized a violation of the window-tint statute as criminal, a reasonable officer could have believed that the Fourth Amendment did not prohibit him or her from arresting a person for violating it.

As such, it was not clearly established at the time of Weisler's arrest that the Louisiana window-tint statute was a non-criminal offense or that the Fourth Amendment prohibited arrests for such offenses. A reasonable officer who arrested a person under similar circumstances could have believed that he or she could legally do so.

B.

Weisler's two remaining arguments may be quickly rejected. He argues that courts should consider officers' actual reasons for making arrests in the qualified immunity analysis and that the qualified immunity doctrine is contrary to § 1983. Essentially, he is arguing that *Whren v. United States*, 517 U.S. 806 (1996), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), should be overruled. That we cannot do. The Supreme Court has reserved for itself "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989); *cf. State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (holding that court of appeals was correct to apply Supreme Court precedent despite its "infirmities, [and] its increasingly wobbly, moth-eaten foundations" (alteration in original)).

Moreover, neither argument is properly before this court on appeal. Weisler argued in the district court that the window-tint violation is not an arrestable offense and that he was therefore actually arrested for impersonation of a police officer. Yet, he never argued that the Supreme Court should overrule its objective reasonableness approach and take into account officers' subjective intent—indeed, he did not so much as cite Whren or a case following it. And nowhere in his district court briefing did he argue that the qualified immunity doctrine contravenes § 1983.

To preserve an argument for appeal, a party must "press" the argument, meaning that it must "clearly identify[] a theory as a proposed basis for deciding the case." *United States v. Scroggins*, 599 F.3d 433, 447 (5th Cir. 2010) (emphasis added) (quoting *Knatt v. Hosp. Serv. Dist. No. 1*, 327 F. App'x 472, 483 (5th Cir.

2009)). "[M]erely 'intimat[ing]' an argument is not" enough. Id. (alteration in original) (*quoting Knatt*, 327 F. App'x at 483). "Pressing" an argument also generally entails identifying "any relevant Fifth Circuit cases." *Id.* (quoting *Knatt*, 327 F. App'x at 483). Weisler—who was represented by counsel in the district court and still is on appeal—did not "press" any of these arguments below and thus cannot raise them for the very first time on appeal.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT WEISLER, III	CIVIL ACTION
VERSUS	CASE NO. 16-14582
JEFFERSON PARISH SHERIFF'S OFFICE, et al.	SECTION: "G"(4)

ORDER

Pending before the Court is "Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to F.R.C.P. 12(c) or, alternatively, for Summary Judgment Pursuant to F.R.C.P. 56 and to Dismiss as Frivolous Pursuant to 28 U.S.C. § 1915(e)."[1] Plaintiff, Robert Weisler, claims that he was falsely arrested on September 8, 2015, by Defendants David Michel[2] and Travis Enclard of the Jefferson Parish Sheriff's Office. Plaintiff also claims that he was then held in the Jefferson Parish Correctional Center for 36 hours without being allowed to take his medications, in violation of his Eighth Amendment rights. Plaintiff also names as defendants, in their individual and official capacities: Newell Normand, who served as Jefferson Parish Sheriff at all pertinent times; and Julio Alvarado, Mike Leyva, Russell Varmall, and Blake Hollifield, who each served as an officer for the Jefferson Parish Sheriff's Office at all pertinent times. Having reviewed the motion, the memoranda in

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[1] Rec. Doc. 24.

[2] With regret, the Court notes that Detective Michel was killed in an unrelated line-of-duty incident. Although named in Plaintiff's Complaint, he has not been served with the instant suit.

support and in opposition, the record, and the applicable law, the Court will grant Defendants' motion for summary judgment.

I. Background

According to the instant motion, Detective David Michel and Deputy Travis Enclard of the Jefferson Parish Sheriff's Office pulled Plaintiff over on September 8, 2015, as Plaintiff wasdriving his white Ford Crown Victoria.[3] Defendants state that Plaintiff was pulled over for operating his vehicle with "extremely dark window tint."[4] According to Defendants, Plaintiff was asked to roll down his rear passenger window, so Detective Michel could observe the vehicle.[5] Plaintiff alleges that he was asked whether he was a police officer, and he answered affirmatively.[6] Plaintiff avers that he then explained that he was retired, and he was placed under arrest for false personation under La. R.S. 14:112.[7] Upon arrest, Detective Michel conducted a search incidental to arrest of Weisler and recovered a bottle full of prescription medicine in Weisler's pocket.[8] Plaintiff alleges that he was held in the Jefferson Parish Correctional Center for 36 hours.[9] Plaintiff avers that he signed and paid for the citation regarding the

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[3] Rec. Doc. 24-1 at 3.

[4] *Id.*

[5] *Id.*

[6] Rec. Doc. 27 at 2.

[7] *Id.*

[8] Rec. Doc. 27 at 2.

[9] Rec. Doc. 1 at 4.

tinted windows, and all other charges were dismissed.[10]

Defendants filed the instant motion on August 29, 2017.[11]

II. Parties' Arguments

A. Defendants' Argument in Support of the Motion to Dismiss

a. There Was No False Arrest Because Plaintiff Pleaded Guilty to the Underlying Cause of the Stop

Defendants assert that Plaintiff brings this action pursuant to Section 1983, challenging the manner of his arrest and his alleged conviction.[12] Defendants aver that Plaintiff's claim "is not cognizable," since Plaintiff was "convicted in the underlying criminal prosecution."[13] Defendantsalso argue that Plaintiff's false arrest claim pursuant to Louisiana law is "barred for the same reason as Plaintiff's federal claim."[14] Defendants further state that Louisiana "does not allow state law claims to withstand summary judgment if the claims challenge the validity of the underlying criminal conviction."[15]

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[10] Rec. Doc. 27 at 2.

[11] Rec. Doc. 24.

[12] *Id.* at 8.

[13] *Id.* at 9. (citing *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994))

[14] *Id.* at 10.

[15] *Id.* (citing *Sheppard v. City of Alexandria*, No. 10-1396, 2012 WL 3961820, at *2 (W.D. La. Sept. 10, 2012)).

Defendants aver that "the cause for Plaintiff's initial stop was that his window tint was in violation of La. R.S. 32:361.1," and, according to Defendant, "Plaintiff pleaded guilty to this offense."[16] Thus, Defendants state, Plaintiff's claims under any theory of false arrest ought to be dismissed.

b. Plaintiff Admits Probable Cause Existed for His Arrest

Defendants state, "The existence of probable cause for an arrest is a bar to a § 1983 Fourth Amendment claim for unlawful arrest and false imprisonment."[17] Defendants argue that Plaintiff does not challenge that probable cause existed for the stop based on his window tint.[18] Instead, Defendants assert, Plaintiff argues that there was no probable cause for false personation, and Plaintiff would have been free to go if not for that charge.[19] Defendants argue that Plaintiff is incorrect that he necessarily would have been free to go.[20]

First, Defendants assert that, according to the United States Supreme Court, an officer may arrest a

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16 *Id.* at 11.

17 *Id.* (citing *Pfannstiel v. Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990)).

18 *Id.* The Court notes that Defendants state, "Plaintiff does challenge the probable cause that the Deputies had to make the traffic stop based on Plaintiff's illegal window tint in his Complaint and Amended Complaint, or in his xt of the sentence and the argument, it is clear that Defendants meant that Plaintiff does *not* challenge the probable cause regarding the window tint.

19 *Id.* at 12.

20 *Id.*

potential offender without violating the Fourth Amendment if the officer has probable cause to believe that the individual committed even a minor crime.[21] Thus, Defendants aver, thearrest did not violate a constitutional right, since Defendants had probable cause to believe that Plaintiff was driving with illegally tinted windows.[22]

Second, Defendants argue that there is no Fourth Amendment violation if the arresting officer has probable cause to arrest an individual for any crime.[23] Defendants assert that Plaintiff admits that he had illegally tinted windows, and that Plaintiff also admits that he had a single prescription bottle with multiple prescription medications without prescriptions for the medications.[24] Thus, Defendants argue, "[I]t is irrelevant whether probable cause existed to arrest Plaintiff for impersonation of a peace officer."[25]

Third, Defendants aver, it is irrelevant that charges were later dropped; the court evaluates the reasonableness of the officers' actions "in light of the cause that existed *at the time of arrest*."[26] Defendants state that probable cause may be evaluated by

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[21] *Id.* (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)).

[22] *Id.* at 13.

[23] *Id.* (citing *United States v. Bain*, 135 Fed.Appx 695, 697 (5th Cir. 2005)).

[24] *Id.*

[25] *Id.*

[26] *Id.* at 14 (citing *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000)).

"[p]ractical common sense."[27] Defendants then argue that "under the totality of the circumstances and the prescribed reasonableness test it is clear that the Defendants had probable cause to believe that Plaintiff was committing or had committed an offense."[28] Thus, Defendants contend that a false arrest or false imprisonment did not occur.

c. There is No Cognizable Cause of Action Under the Eighteenth Amendment

Defendants state that the Eighteenth Amendment, a violation of which was alleged in "Plaintiff's First Amended Complaint,"[29] became inoperative upon the ratification of the Twenty-First Amendment.[30] Thus, Defendants aver, Plaintiff's Eighteenth Amendment claimought to be dismissed.[31]

d. There is No Cause of Action Against Sheriff Normand in His Individual or Official Capacity

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[27] *Id.*

[28] *Id.*

[29] Rec. Doc. 3 at 9.

[30] Rec. Doc. 24-1 at 15. The Court notes that Plaintiff's argument is actually referring to the Eighth Amendment, as Plaintiff states, "The acts or omissions of Defendants, under color of state law, in denying the Plaintiff necessary medication with deliberate indifference to Plaintiff's medical needs and pre-existing medical conditions violated his Constitutional Rights as guaranteed by the Eighteenth Amendment of the U.S. Constitution, which grants Plaintiff *the right to be free from cruel and unusual punishment.*" Rec. Doc. 3 at 10 (emphasis added). Although Plaintiff indicated the Eighteenth Amendment, the Eighth Amendment grants the right to be free from cruel and unusual punishment.

[31] *Id.*

Defendants state that there is a heightened pleading standard to state a Section 1983 claim against Sheriff Normand in his individual capacity that requires alleging "specific conduct and actions giving rise to constitutional violations."[32] Quoting *Ashcroft v. Iqbal*, Defendants provide, "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions has violated the Constitution."[33] Moreover, Defendants assert, there is no underlying tort in the present case, so there is no cause of action for which Sheriff Normand could be liable.[34]

Defendants further contend that "[a] suit against a government official in his official capacity is treated as a suit against the entity."[35] Moreover, Defendants aver, "plaintiff has the burden of proving that there was a constitutional deprivation and that municipal policy was the driving force behind the constitutional deprivation."[36] However, Defendants state, if a Plaintiff fails to prove an underlying constitutional violation arising out of her arrest, then it is irrelevant whether there was a municipal policy that would have authorized such conduct.[37] Defendants argue that

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[32] *Id.* at 16 (citing *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2003)).

[33] *Id.* (*Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)).

[34] *Id.* at 17.

[35] *Id.* (citing *Lee v. Morial*, No. 99-2952, 2000 WL 726882, at *2 (E.D. La. June 2, 2000)).

[36] *Id.* (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)).

[37] *Id.* at 17-18 (citing *City of Los Angeles v. Heller*, 475 U.S. 797,

Plaintiff failed to allege or show an underlying constitutional violation arising out of his arrest, so Plaintiff's claims against Sheriff Normand in his official capacity ought to be dismissed.[38]

e. Plaintiff's Complaint Ought to Be Dismissed as Frivolous Pursuant to 28 U.S.C. § 1915(e)

Defendants state that a federal court may dismiss a claim if it determines that it is "frivolous or malicious."[39] "A complaint is frivolous 'if it lacks any arguable basis in law or fact.'"[40] Defendants assert that Plaintiff's complaint lacks an arguable basis in law because "Plaintiff had pleaded guilty to a charge for which he was cited prior to filing suit, [and] Plaintiff's claims for false arrest were barred as a matter of law at the time that he filed the instant action."[41] Moreover, Defendants argue, "Plaintiff's claims should be dismissed as factually frivolous because he admits that there existed probable cause," to the extent he admitted to having a single prescription pill bottle with multiple medications and having illegally tinted windows.[42]

B. Plaintiff's Arguments in Opposition to Defendants' Motion

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811 (1986)).

[38] *Id.* at 18.

[39] *Id.* at 19 (citing *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994)).

[40] *Id.* (citing *Moore*, 30 F.3d at 620).

[41] *Id.* at 20-21 (citing *Mahogany v. Muwwakkil*, 259 F. App'x 681, 682 (5th Cir. 2007)).

[42] *Id.* at 21.

a. 12(c) Does Not Allow Defendants to Reach Beyond the Pleadings

Plaintiff acknowledges that "12(c) allows a party to request an action be dismissed on the face of the pleadings." However, Plaintiff argues that "Defendants have simultaneously reached beyond the pleadings by submitting discovery, a deposition, and attaching myriad related exhibits to their motion."[43]

b. Plaintiff Claims He Was Arrested for False Personation Without Probable Cause, Which is a Genuine Issue of Material Fact

Plaintiff then states that his charges for false personation were dismissed, so his situation is not analogous to *Heck v. Humphrey*, which is cited by Defendants.[44] Plaintiff argues that false personation was the sole charge for which he was arrested, and it was dismissed.[45] Thus, Plaintiff asserts that Defendants are incorrect in that they "attempt to confuse Mr. Weisler's arrest for false personation with his citation for tinted windows."[46] Plaintiff provides a sample of Deputy Enclard's deposition where the Deputy states that window tint is "not an arrestable offense" in order to substantiate this argument.[47]

Moreover, Plaintiff argues that there is a genuine issue of material fact regarding whether Defendants had probable cause to arrest Plaintiff for false

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[43] Rec. Doc. 27 at 2-3.

[44] *Id.* at 3.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 4

personation.[48] Although Plaintiff concedes that probable cause for the window tint did exist, he argues that dismissing his claim of wrongful arrest for false personation because of the window tint "would create the absurd result that any traffic stop for tinted windows could then be turned into an arrest for any unrelated crime without the existence of probable cause."[49]

Plaintiff asserts that Defendants have failed to present evidence to show that Plaintiff's actions would meet any element of false personation.[50] Plaintiff argues that he stated that he was a retired police officer before the officers' decision to arrest him, and that there is no evidence that he sought any sort of advantage from being a retired police officer.[51]

Plaintiff also asserts that his medications are immaterial to whether probable cause existed for false personation because "[a]t the moment of arrest . . . the medications were not at issue."[52] Plaintiff avers that probable cause is determined at the moment of arrest, so the proper inquiry is whether there was probable cause for false personation.[53]

c. There Remains a Genuine Issue of Material Fact Regarding the Qualified Immunity Defense

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 5-6.

[52] *Id.* at 6.

[53] *Id.* at 6-7

Moreover, Plaintiff argues that "a fact issue exists as to whether the officers' arrest of Plaintiff was tortious."[54] Plaintiff argues that Defendants' assertion that Weisler has "failed to create a fact issue" regarding an underlying constitutional violation "is inapt to the facts and procedural posture of the case."[55] Plaintiff asserts that there is a genuine issue of material fact as to whether Sheriff Normand and JPSO's conduct meets the burden of the qualified immunity defense.[56] After stating the qualified immunity standard in *Harlow v. Fitzgerald*,[57] Plaintiff argues, "Seargeant Alvarado's testimony as to why the officers had probable cause to arrest Mr. Weisler for false personation demonstrates a profound misunderstanding of the statute."[58] Thus, Plaintiff asserts that there is a genuine issue of material fact "as to whether JPSO and Newell Normand sufficiently and effectively trained and supervised its officers."[59]

Finally, Plaintiff argues that "[t]he officers' own testimony and police report demonstrate the merit of Mr. Weisler's claims."[60] Thus, the standards for a

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[54] *Id.* at 7.

[55] *Id.*

[56] *Id.* at 7-8.

[57] 457 U.S. 800, 818 (1982).

[58] Rec. Doc. 27 at 8.

[59] *Id.*

[60] *Id.*

frivolous claim do not apply in the present case, according to Plaintiff.[61]

III. Legal Standard

A. Legal Standard for Federal Rules of Civil Procedure 12(c) and 56

Federal Rule of Civil Procedure 12(c) provides, "After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings."[62] Rule 12(d) further provides, "If on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."[63]

Pursuant to Rule 56, summary judgment is appropriate when the pleadings, the discovery, and any affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[64] When assessing whether a dispute as to any material fact exists, a court considers "all of the evidence in the record but refrains from making credibility determinations or weighing the evidence."[65] All reasonable inferences

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61 *Id.*

62 FED. R. CIV. P. 12(c).

63 FED. R. CIV. P. 12(d).

64 FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)*; Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

65 *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398–99 (5th Cir. 2008).

are drawn in favor of the nonmoving party, but "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment."[66] If the record, as a whole, could not lead a rational trier of fact to find for the non-moving party, then no genuine issue of fact exists, and the moving party is entitled to judgment as a matter of law.[67]

On a motion for summary judgment, the moving party bears the initial burden of identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact.[68] Where the non-moving party bears the burden of proof at trial, as here, the party moving for summary judgment may meet its burden by showing the Court that there is an absence of evidence to support the non-moving party's case.[69] Thereafter, if the moving party satisfies its initial burden, the burden shifts to the non-moving party to "identify specific evidence in the record, and articulate" precisely how that evidence supports his claims.[70] In doing so, the non- moving party may not rest upon mere allegations or denials in his pleadings, but rather must set forth "specific

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[66] *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985); *Little*, 37 F.3d at 1075.

[67] *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

[68] *Celotex,* 477 U.S. at 323.

[69] *Id.* at 325.

[70] *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994), *cert. denied*, 513 U.S. 871 (1994); *see also Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998).

facts showing the existence of a 'genuine' issue concerning every essential component of its case."[71] A party seeking to establish that a fact is genuinely disputed must support such an assertion by reference to "materials in the record, including depositions, documents . . . affidavits or declarations . . . admissions, interrogatory answers, or other materials."[72] The nonmovant's burden of demonstrating a genuine issue of material fact is not satisfied merely by creating "some metaphysical doubt as to the material facts," "by conclusory allegations," by "unsubstantiated assertions," or "by only a scintilla of evidence."[73] There is no genuine issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."[74]

B. Legal Standard for Qualified Immunity

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[75] Qualified immunity is an "immunity from suit rather than a

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[71] *Morris*, 144 F.3d at 380 (citing *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992)); *see also Bellard v. Gautreaux*, 675 F.3d 454, 460 (5th Cir. 2012).

[72] FED. R. CIV. P. (c)(1).

[73] *Little*, 37 F.3d at 1075.

[74] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)).

[75] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

mere defense to liability."[76] Once a defendant invokes the defense of qualified immunity, the plaintiff carries the burden of demonstrating its inapplicability.[77]

In Saucier v. Katz, the Supreme Court set forth a two-part framework for analyzing whether a defendant was entitled to qualified immunity.[78] Part one asks the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[79] Part two inquires whether the allegedly violated right is "clearly established" in that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[80] The Court does not have to address these two questions sequentially; it can proceed with either inquiry first.[81]

C. Applicable Law on Section 1983

"To state a claim under § 1983, a plaintiff must show: (1) he or she was deprived of a federal constitutional or statutory right or interest; (2) this deprivation occurred under the color of state law; and (3) the defendant was either personally involved in

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[76] *Pearson v. Callahan*, 555 U.S. 223, 237 (2009).

[77] *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009).

[78] 533 U.S. 194 (2001).

[79] *Id.* at 201.

[80] *Id.* at 202.

[81] *See Pearson*, 555 U.S. at 236 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory."); *see also Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462, 469 (5th Cir. 2014).

this deprivation or committed wrongful conduct that is causally connected to it."[82]

D. Probable Cause Pursuant to the 4th, 5th, and 14th Amendments

The Fourth Amendment establishes the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[83] Moreover, La. Const. Art. I, § 5 also prohibits unreasonable searches and seizures, and its "test of whether and when an intrusion on privacy rights occurs as a matter of the Louisiana Constitution is identical to the Fourth Amendment standard."[84] "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed."[85] Moreover, "[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."[86] However, an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."[87] "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth

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82 *Thomas v. Pohlmann*, 681 Fed.Appx. 401, 406 (5th Cir. 2017).

83 U.S. Const. amend. IV.

84 *State v. Moultrie*, 2015-2144 (La. 6/29/17); 224 So.3d 349, 352.

85 *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

86 *Id.* (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

87 *Id.*

Amendment, arrest the offender."[88] The Fifth Circuit has stated, "To ultimately prevail on [] section 1983 false arrest claims, [plaintiff] must show that [defendants] did not have probable cause to arrest [him]."[89]

The Fifth Amendment provides, "No person shall . . . be deprived of life, liberty or property, without due process of law."[90] The Fourteenth Amendment also provides that no State shall "deprive any person of life, liberty or property, without due process of law."[91] Similarly, Article 1, Section 2 of the Louisiana Constitution provides, "No person shall be deprived of life, liberty, or property, except by due process of law."[92]

E. Applicable Law of the Eighth Amendment

The Eighth Amendment protects the right to be free from cruel and unusual punishment.[93] "The Cruel and Unusual Punishment Clause allows an inmate to obtain relief after being denied medical care if he provides there was a 'deliberate indifference to his serious medical needs.'"[94] "Deliberate indifference is

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[88] *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

[89] *Johnson v. Norcross*, 565 Fed.Appx. 287, 289 (5th Cir. 2014) (citing *Haggerty v. Tex. S. Univ.*, 391 F.3d 653, 655 (5th Cir. 2004)).

[90] U.S. Const. Amend. V.

[91] U.S. Const. Amend XIV.

[92] La. Const. Art. I, § 2.

[93] U.S. Const. Amend. VIII.

[94] *Bias v. Woods*, 288 F. App'x 158, 162 (2008) (citing *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

an extremely high standard to meet."[95] "Deliberate indifference requires that the official have subjective knowledge of the risk of harm."[96] "To show subjective deliberate indifference, a plaintiff must present evidence: (i) that each defendant had subjective knowledge of facts from which an inference of substantial risk of serious harm could be drawn; (ii) that each defendant actually drew that inference; and (iii) that each defendant's response to the risk indicates that the defendant subjectively intended that harm to occur."[97]

IV. Analysis

A. Whether Plaintiff's Claims are Barred on the Face of the Complaint

Defendants first argue that Plaintiff's claims are barred on the face of the complaint because Plaintiff pleaded guilty to improperly tinted windows.[98] Thus, Defendants assert that they are entitled to judgment under Federal Rule of Civil Procedure 12(c).[99] Defendants quote *Heck v. Humphrey* in asserting,

> In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a

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95 *Blank v. Eavenson*, 530 F. App'x 364, 368 (5th Cir. 2013) (citing *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001)).

96 *Id.*

97 *Id.* (citing *Tamez v. Manthey*, 589 F.3d 764, 770 (5th Cir. 2009)).

98 Rec. Doc. 24-1 at 8.

99 *Id.*

> conviction *or sentence* invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. 2254.[100]

Defendants argue that Plaintiff's initial stop was for his excessively dark window tint, and he pleaded guilty to this offense.[101] Therefore, Defendants aver, "Plaintiff is procedurally foreclosed from suing under any theory of false arrest under federal or state law."[102]

In *Walter v. Horseshoe Entertainment*, the Fifth Circuit applied the Heck principle for a false arrest claim.[103] The Fifth Circuit stated that the principle applied, since "the plaintiffs were arrested for crimes of which they were ultimately convicted."[104] Here, unlike *Walter*, Plaintiff was arrested for a different crime than his ultimate conviction. Plaintiff was arrested for false personation under Louisiana Revised Statute 14:112,[105] but was convicted for unlawfully tinted windows.[106] Defendants present no

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[100] *Id.* at 9 (citing *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)).

[101] *Id.*

[102] *Id.* at 11.

[103] 483 F. App'x. 884, 887 (5th Cir. 2017).

[104] *Id.*

[105] *See* Rec. Doc. 27-4 at 20.

[106] Rec. Doc. 24-1 at 11.

authority, and the Court finds none, that suggests bootstrapping Plaintiff's conviction of illegally tinted windows to Plaintiff's arrest of false personation when applying *Heck* is permitted. Thus, Plaintiff's claims cannot be dismissed on the face of the complaint pursuant to Rule 12(c).

B. Whether Defendants are Entitled to Summary Judgment as a Matter of Law

Pursuant to Rule 56, summary judgment is appropriate when the pleadings, the discovery, and any affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[107]

Defendants argue that Plaintiff admits there was probable cause for the deputies to arrest him, since he admits that his windows were improperly tinted.[108] However, Plaintiff reiterates that he was arrested for false personation and only cited for tinted windows.[109] Plaintiff points to Deputy Enclard's deposition testimony, where he stated that improper window tinting is not probable cause for an arrest.[110] Thus, Plaintiff argues, "There exists a genuine issue of material fact as to whether Defendants had probable cause to arrest Mr. Weisler for false personation."[111]

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[107] FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)*; Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

[108] *Id.*

[109] *Id.* at 3.

[110] Rec. Doc. 27 at 4.

[111] *Id.* at 4.

As explained by the U.S. Supreme Court, an officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."[112] The Court reasoned that "[t]he Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[113] Thus, the fact that officers may not have had probable cause to arrest Plaintiff for false personation is immaterial if probable cause existed for another offense. In his opposition, Plaintiff "concedes that probable cause for the window tint certainly did exist, and he has taken full responsibility for this violation."[114]

Here, rather than disputing probable cause for improper window tint, Plaintiff asserts that a window tint violation is "not an offense for which an arrest may be conducted."[115] However, the Supreme Court has expressly rejected a distinction between "jailable" and "fine-only" offenses.[116] In *Atwater*, where the plaintiff had violated a Texas seatbelt requirement, the Supreme Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[117] Here, a "window

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112 *Devenpeck*, 543 U.S. at 153.

113 *Id.*

114 Rec. Doc. 27 at 4.

115 Rec. Doc. 3 at 5.

116 *Atwater*, 532 U.S. at 348.

117 *Id.* at 354.

tint" violation is certainly a "very minor criminal offense" similar to failing to wear a seatbelt.[118] Nevertheless, as recognized by the Supreme Court, it is within police officer authority to arrest an individual for such a violation.

Plaintiff argues that such a determination "would create the absurd result that any traffic stop for tinted windows could then be turned into an arrest for any unrelated crime without the existence of probable cause."[119] However, responding to a similar argument in Atwater, the Supreme Court stated that "just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests."[120]

Consequently, the arresting officers had probable cause to arrest Plaintiff for his window tint violation. As stated above, the Fifth Circuit has stated, "To ultimately prevail on [] section 1983 false arrest claims, [plaintiff] must show that [defendants] did not have probable cause to arrest [him]."[121] Thus, Plaintiff's Section 1983 false arrest claims, which include claims regarding the Fourth, Fifth, and Fourteenth Amendments, must be dismissed as a matter of law.

Additionally, Plaintiff's right to privacy claim based on Art. I, § 5 of the Louisiana Constitution must be dismissed, since the "test of whether and when an intrusion on privacy rights occurs as a matter of the

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118 *See id.*

119 Rec. Doc. 27 at 5.

120 *Atwater*, 532 U.S. at 353.

121 *Johnson*, 565 Fed.Appx. at 289 (citing *Haggerty*, 391 F.3d at 655).

Louisiana Constitution is identical to the Fourth Amendment standard."[122] Plaintiff's due process claim based on Art. I, § 2 of the Louisiana Constitution must also be dismissed, since its due process guarantee "does not vary from the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[123] Alternatively, Defendants assert the defense of qualified immunity.[124] Considering Defendants had probable cause to arrest Plaintiff, Defendants did not violate a constitutional right of Plaintiff, and Defendants were acting reasonably and entitled to qualified immunity.

In his amended complaint, Plaintiff also alleges a Section 1983 claim based on an alleged violation of the Eighth Amendment, asserting that Defendants denied Plaintiff necessary medical treatment.[125] As noted above, Plaintiff's amended complaint states that it is alleging a violation of the Eighteenth Amendment.[126] In its motion to dismiss, Defendants assert that there is no cause of action cognizable under the Eighteenth Amendment.[127] Despite Plaintiff's typographical error, the claim asserted is clearly an Eighth Amendment violation, as Plaintiff states that his claim is based on the amendment that "grants Plaintiff the right to be free from cruel and

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[122] *Moultrie*, 224 So.3d at 352.

[123] *Progressive Sec. Ins.,* 711 So.2d at 688.

[124] Rec. Doc. 7 at 2-3.

[125] Rec. Doc. 3 at 9–10.

[126] *Id.* at 9.

[127] Rec. Doc. 24-1 at 15.

unusual punishment."[128] Defendants do not address whether Plaintiff has a cause of action cognizable under the Eighth Amendment.

However, in Defendants' answer, they affirmatively plead qualified immunity to all of Plaintiff's claims.[129] As stated above, the doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[130] As defendants have invoked the defense of qualified immunity, Plaintiff carries the burden of demonstrating its inapplicability.[131]

Moreover, in *Saucier v. Katz*, the Supreme Court set forth a two-part framework for analyzing whether a defendant was entitled to qualified immunity.[132] Part one asks the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[133] Part two inquires whether the allegedly violated right is "clearly established" in that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[134] The Court does not have to address

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[128] *Id.* at 10.

[129] Rec. Doc. 7 at 2.

[130] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[131] *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009).

[132] 533 U.S. 194 (2001).

[133] *Id.* at 201.

[134] *Id.* at 202.

these two questions sequentially; it can proceed with either inquiry first.[135]

"The Cruel and Unusual Punishment Clause allows an inmate to obtain relief after being denied medical care if he provides there was a 'deliberate indifference to his serious medical needs.'"[136] "Deliberate indifference is an extremely high standard to meet."[137] "Deliberate indifference requires that the official have subjective knowledge of the risk of harm."[138] "To show subjective deliberate indifference, a plaintiff must present evidence: (i) that each defendant had subjective knowledge of facts from which an inference of substantial risk of serious harm could be drawn; (ii) that each defendant actually drew that inference; and (iii) that each defendant's response to the risk indicates that the defendant subjectively intended that harm to occur."[139]

In *Lawson v. Dallas County*, the Fifth Circuit held that the plaintiff alleged enough facts to determine that the defendants acted with deliberate indifference

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[135] *See Pearson*, 555 U.S. at 236 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory."); *see also Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462, 469 (5th Cir. 2014).

[136] *Bias v. Woods*, 288 F. App'x 158, 162 (2008) (citing *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

[137] *Blank v. Eavenson*, 530 F. App'x 364, 368 (5th Cir. 2013) (citing *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001)).

[138] *Id.*

[139] *Id.* (citing *Tamez v. Manthey*, 589 F.3d 764, 770 (5th Cir. 2009)).

to plaintiff's serious medical need.[140] The Fifth Circuit agreed with the district court's finding that "it is common medical knowledge that a paraplegic who is not properly cared for is at substantial risk of developing serious, even life-threatening, decubitus ulcers."[141] Moreover, stating that "each individual's subjective deliberate indifference must be examined separately,"[142] the Fifth Circuit held that the plaintiff proved that all the nurses who primarily treated the plaintiff "had actual knowledge of the risk posed by the development and worsening of [plaintiff's] ulcers."[143] The court reasoned that the nurses changed plaintiff's dressings on several occasions, so they observed the large holes developing in plaintiff's skin.[144] The court further reasoned that "the jail medical staff were aware of pressure sores on Lawson's back as early as November 6, 1993," and the jail received notice of its inadequate care each time the plaintiff had to be sent to the hospital.[145] Finally, the court held that plaintiff proved deliberate indifference by showing that the jail medical staff, who had actual knowledge as mentioned above,

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[140] *Lawson v. Dallas County*, 286 F.3d 257, 263 (5th Cir. 2002). The defendants were the Dallas County Sheriff in his official capacity and the Dallas County Chief Medical Officer in his official capacity.

[141] *Id.* at 262.

[142] *Id.* (citing *Stewart v. Murphy*, 174 F.3d 530, 537 (5th Cir. 1999)).

[143] *Id.*

[144] *Id.*

[145] *Id.*

disobeyed specific mandatory orders from doctors regarding plaintiff's care.[146]

In contrast with *Lawson*, the Fifth Circuit in *Oliver v. Kanan* determined that the plaintiff did "not state an Eighth Amendment deliberate-indifference claim."[147] Plaintiff alleged that the "medical staff improperly withheld medication for his eyes, that he had a reaction to an unspecified medication, that medical staff failed to provide him with soft sole shoes, and that Physician's Assistant . . . stated that he had no 'wonder drug' for [plaintiff]."[148] The Fifth Circuit determined that these allegations "fail[] to state the harm suffered and fail[] to show that medical staff knew of, and disregarded, a substantial risk of serious harm."[149] Plaintiff further alleged that doctors failed to treat his diarrhea and bloody stool, despite knowing his conditions. The court stated that plaintiff's statements "show[ed] no duration to his conditions and admit[ted] that doctors had performed tests to determine the cause (the results of which had not all been returned)," so the court held that plaintiff made "no showing of conscious disregard of a substantial risk of serious harm by the medical staff."[150] Finally,

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146 *Id.* at 263. The court stated, "Doctors at Tri-City and Parkland sent specific mandatory orders to the jail medical staff to turn Lawson every one or two hours, provide Lawson with a foam mattress, and conduct hydrotherapy. The jail nurses did not follow these instructions, despite their actual knowledge of the seriousness of Lawson's condition.

147 *Oliver v. Kanan*, 428 F. App'x 481, 482 (5th Cir. 2011).

148 *Id.*

149 *Id.*

150 *Id.*

plaintiff alleged that the "prison medical staff did not treat his complaint" for breast pain and a swollen right arm.[151] However, the court held that these allegations were not sufficient to state a medical-indifference claim, as plaintiff did not allege that the staff consciously disregarded a risk of serious harm.[152]

In the amended complaint, Plaintiff states that "officers refused to allow [him] to take his medications, causing him physical and mental discomfort."[153] Unlike in Lawson, where there was common medical knowledge about proper care of a paraplegic, Plaintiff alleges no facts in support nor does he submit any evidence that Defendants had a "subjective knowledge of facts from which an inference of substantial risk of serious harm could be drawn."[154] Moreover, Plaintiff does not examine the subjective deliberate indifference of each individual separately, per the Fifth Circuit's requirement in Lawson.[155] Plaintiff points to no evidence that Defendants actually drew any inference regarding a substantial risk of serious harm to Plaintiff.[156] Additionally, as stated in Oliver, failure to treat Plaintiff's medical complaint does not mandate the

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[151] *Id.*

[152] *Id.*

[153] Rec. Doc. 3 at 6.

[154] *Blank,* 530 F. App'x at 368 (citing *Tamez*, 589 F.3d at 770).

[155] *Lawson*, 286 F.3d at 263.

[156] *Id.* (stating that the defendants had actual knowledge, since, as stated above, "[t]he nurses changed [plaintiff's] dressings on several occasions and must have observed first-hand the large holes developing in [plaintiff's] skin.")

conclusion that Defendants intended any harm to occur.[157] As a result, Plaintiff fails to cite to, or provide any materials in the record that support the assertion that Defendants acted with deliberate indifference.

Plaintiff also does not submit any facts or authority as to whether his claim constitutes a "serious medical need." Plaintiff states generally that he suffered from mental and physical discomfort from not taking his medicine.[158] The Fifth Circuit has not provided a definition of what constitutes a "serious medical need," but the Court finds no authority where such a broad allegation is sufficient to plead "serious medical needs." In *Farinaro v. Coughlin*, a court in the Southern District of New York, stated that discomfort could constitute a serious medical need.[159] However, the court stated that a plaintiff has to allege a "specific showing of pain, discomfort, or risk to health."[160] Here, since Plaintiff has not alleged any facts regarding even discomfort, he has not made a "specific showing." Regardless, it is unnecessary to determine whether Plaintiff's discomfort constitutes a serious medical need, since Plaintiff has failed to support the claim that Defendants acted with deliberate indifference.

Moreover, qualified immunity requires that "it would be clear to a reasonable officer that his conduct

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157 *Oliver*, 428 F. App'x at 482.

158 Rec. Doc. 3 at 6.

159 *Farinaro v. Coughlin*, 642 F.Supp. 276, 279 (S.D.N.Y 1986).

160 *Id.*

was unlawful in the situation he confronted."[161] Neither Plaintiff nor Defendants have argued whether it was reasonable to deny Plaintiff his prescription medicine based on the circumstances of finding it. Although Defendants argue that "probable cause existed for Plaintiff's arrest for illegal possession of prescription narcotics," they do not assert that it was reasonable to deny Plaintiff his medication based on this probable cause. Regardless, since Plaintiff carries the burden of proving the inapplicability of qualified immunity, Plaintiff must prove that Defendants' actions were objectively unreasonable. As Plaintiff alleges no facts in support of nor submits any evidence that Defendants were unreasonable in denying Plaintiff's request for his medication, Plaintiff does not meet this burden. Nevertheless, as above, it is unnecessary to determine if Defendants' actions were objectively reasonable, since Plaintiff has failed to cite to, or provide, any materials in the record that support the claim that Defendants acted with deliberate indifference.

Although Plaintiff had a constitutional right to medical care, he fails to allege facts in support, nor does he submit any evidence, that the Defendants acted with deliberate indifference. Consequently, Plaintiff has failed to support the claim that there was a constitutional violation, and Defendants are entitled to qualified immunity.

Based on the foregoing, the Court finds that Defendants are entitled to summary judgment on Plaintiff's false arrest and cruel and unusual punishment claims. Since the Court has determined

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161 *Saucier,* 533 U.S. at 202.

that Defendants are entitled to summary judgment pursuant to Rule 56, it is unnecessary for the Court to evaluate whether Plaintiff's complaint ought to be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e).

Accordingly,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 is **GRANTED**.

NEW ORLEANS, LOUISIANA, this 9th day of November, 2017.

NANNETTE JOLIVETTE BROWN
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1983

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.