When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action

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It is virtually a tenet of modern federal jurisdiction that judges, at least when they are acting as judges, are inappropriate defendants in civil suits. Yet on rare but salient occasions, state judges might be the sole or primary party responsible for violating the constitutional rights of citizens, for instance by imposing excessive bail or by opening their courtrooms to oppressive private suits like those under Texas's Senate Bill 8 bounty regime. In such cases, injunctive relief against judicial officers may be the only or most effective remedy against constitutional violations, but federal courts from the trial level up to the Supreme Court treat state judges as if they are immune to suits seeking prospective relief.

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This practice is at odds with both the text of 42 U.S.C. § 1983 and the modern history that gave rise to it. Relying on archival investigation, extensive legislative history, and a broad canvass of federal court litigation, this Article seeks to clarify the circumstances in which state judges can be enjoined under Section 1983. In the 1984 case of Pulliam v. Allen*, the Supreme Court recognized a cause of action for prospective relief against judges, spurring Congress to eventually amend the text of Section 1983 itself. While numerous courts and commentators continue to suppose that Congress's amendment overruled* Pulliam*, we show that the amendment actually codified* Pulliam*'s core holding. By returning to the plain meaning of Section 1983's text, we argue that particularly vexing problems like bounty statutes and bail abuses can be directly restrained by prospective relief against state judges in appropriate cases.*

INTRODUCTION

It is virtually a tenet of modern federal jurisdiction that judges, at least when they are acting as judges, are inappropriate defendants for civil litigation. Yet on rare but salient occasions, state judges might be the sole or primary party responsible for violating the constitutional rights of citizens, for instance by imposing excessive bail or by opening their courtrooms to oppressive private suits like those under Texas's Senate Bill 8 (S.B. 8) bounty regime. In such cases, injunctive relief against judicial officers may be the only or most effective remedy against constitutional violations, but federal courts from the trial level on up to the Supreme Court treat state judges as if they are immune to suits seeking prospective relief. This practice is at odds with both the text of 42 U.S.C. § 1983 and the modern history that gave rise to it.

The main vehicle for suing state officials for civil rights violations in the United States today, 42 U.S.C. § 1983, ends with an intriguing line: "[I]n 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." The companion statute on attorney fee awards, 42 U.S.C. § 1988, pursues a similar aim with significantly different wording, prohibiting fee and cost awards against judges unless their actions were "in excess of such officer's jurisdiction." Key terms like the "unavailability of declaratory relief" are left undefined and are not used elsewhere in the U.S. Code. Yet an initial read of the text seems to make a couple of things clear. State judges can apparently be sued for injunctive relief, albeit in limited circumstances. Plaintiffs should apparently first seek, and federal courts should first award, declaratory relief before reaching for the more drastic remedy of an injunctive decree. That is, as a matter of text, Section 1983 seemingly permits suits against judges but sequences relief in preference for the less coercive remedy going first.

Since this text was codified in the 1996 Federal Courts Improvement Act (FCIA), however, many federal courts have reached the opposite conclusion. Section 1983, they have held, immunizes state judges from injunctive relief entirely. The "unavailability" of declaratory relief is, on these accounts, near meaningless and never operable. Despite the statute's explicit reference to "judicial capacity," most federal courts award relief against state judges only when those judges are acting in a nonjudicial capacity, for example, as courthouse administrators or local policy-makers.

The federal courts can find little support in the text of Section 1983 for the path they have taken. Instead, they rely on an inaccurate version of the legislative history. Federal courts today almost universally understand that Congress, in passing the FCIA, meant to overturn *Pulliam v. Allen*, a decision in which a 5–4 Supreme Court majority upheld the award of attorney fees against a local judge

enjoined from setting illegal bail in misdemeanor cases. To be sure, numerous members of Congress and those who testified before them gave some indication that *Pulliam* should be legislatively overruled.[1] But few courts have contended with the curious fact that, in attempting to overrule the decision, Congress codified it, leaving both injunctive relief and attorney fees available in the strictly limited and unusual cases in which the *Pulliam* Court indicated such relief would be appropriate. And this seemingly unexpected outcome was readily acknowledged in the legislative record.

Today it may be more important than ever to resolve this tension between text and constructed intent. Bounty statutes like Texas's S.B. 8 can chill the exercise of constitutional rights and yet be unchallengeable unless the state judges empowered to award the bounties can be enjoined. At the same time, many municipal judges continue to set bail in flagrantly unconstitutional ways, as did the magistrates in *Pulliam*, yet federal courts find it increasingly difficult to restrain these violations without enjoining the judges themselves. Under the text of Section 1983, these are not easy cases to remedy, but remedies are at least possible. Under the atextualist drift of the federal courts today, such cases are simply unreviewable, and state and local judiciaries remain unaccountable for their unconstitutional decisions.

This Article seeks to clarify the circumstances in which judges acting *as* judges can be sued under Section 1983. Part I surveys the doctrines and immunities that ordinarily shield judges from direct litigation and their decisions from collateral attack. Part II tells the story of the *Pulliam v. Allen* litigation, culminating with the Supreme Court's decision that Section 1983 empowers federal courts to directly restrain egregiously unconstitutional decision-making by state and local judges. Part III then relates the legislative history of the FCIA amendment to Section 1983. The legislative history explains how a divided Congress ended up codifying *Pulliam*'s holding even though the most vocal proponents of the amendment thought they were overturning *Pulliam*. Part IV surveys federal court case law applying the amendment and shows that many courts have privileged a misreading of Congress's intent over the plain text of Section 1983. Part V concludes that, by returning to Section 1983's text, particularly vexing problems like bounty statutes and bail abuses become more easily resolved.

I.
WHEN JUDGES MAY NOT BE SUED: JUDICIAL LIABILITY AND ITS LIMITS

It is—and in most cases ought to be—extremely difficult to sue a judge who is acting *as* a judge.[2] Even when a judge's decisions are egregiously contrary to

1. *See infra* Part III.A.

2. Courts more easily and more commonly find liability when judges are found to be acting in a non-judicial capacity, particularly when they act as administrators or law enforcers. *See, e.g.*, Forrester v. White, 484 U.S. 219, 230 (1988) (finding no judicial immunity when employing a probation adviser

law, those judgments must typically be challenged in an appeal to a higher court, and any system of appeal would swiftly break down if collateral attacks or direct suits against the judge in the first instance were freely permitted. Moreover, judges tend to be undercompensated members of the American bar for whom litigation costs in even a single suit could be catastrophic, particularly at the state and local levels. Numerous doctrines thus protect these judges from suit in their "judicial capacity," either by denying a cause of action to would-be plaintiffs or by eliminating remedies through various immunities.

But however rare it may be, the occasional case may arise in which a state or local judicial decision is so egregious, or the corrective effects of appeal are so infeasible or remote, that a direct and timely restraint on the first-instance judge may be required. Consider two examples, both historical but with recent resonance: private bounty regimes like Texas's S.B. 8 and municipal bail abuses like the ones at issue in the *Pulliam* case. First, we explain how bounty regimes and bail abuses work, and then we explain why a Section 1983 cause of action against state or local judges is the best candidate for effective redress.

First, so-called "bounty statutes." Texas's 2021 S.B. 8, or Heartbeat Act, attempts to shield the state's abortion law from federal court review by forbidding public enforcement of the law and incentivizing private enforcement through $10,000 bounties for each successfully prosecuted violation of the state law.[3] A private citizen can sue anyone believed to have aided and abetted an

in an administrative capacity); Supreme Ct. of Virginia v. Consumers Union of U.S., Inc., 446 U.S. 719, 737 (1980) (explaining there is no judicial immunity when investigating an attorney ethics breach in an enforcement capacity); LeClerc v. Webb, 419 F.3d 405, 414 (5th Cir. 2005) (finding no judicial immunity when implementing rules for admittance to the Louisiana bar in an enforcement capacity); Wolfe v. Strankman, 392 F.3d 358, 366 (9th Cir. 2004) (finding no judicial immunity when putting the plaintiff on the vexatious litigants list in an administrative capacity); Meek v. Cnty. of Riverside, 183 F.3d 962, 968 (9th Cir. 1999) ("Appellants' decision to fire a subordinate judicial employee is an administrative decision; the district court did not err in finding that appellants are not entitled to judicial immunity for such actions."); Kurowski v. Krajewski, 848 F.2d 767, 773 (7th Cir. 1988) (finding no immunity when firing two public defenders in an administrative capacity); Ratte v. Corrigan, 989 F. Supp. 2d 550, 559–60 (E.D. Mich. 2013) (finding no judicial immunity when pre-signing orders consenting to emergency treatment pending judicial hearing in an administrative capacity).

3. TEX. HEALTH & SAFETY CODE §§ 171.204(a), 171.205(a). The overturning of *Roe v. Wade*, 410 U.S. 113 (1973), has of course altered the landscape of abortion regulations and federal review. At the time S.B. 8 was enacted, abortion was regarded as a fundamental privacy right subjecting any regulatory action to strict scrutiny, but the Supreme Court has since upheld abortion regulations under rational basis review. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022). At the time of this writing, Texas's so-called Trigger Ban, H.B. 1280, 2021–2022 Leg., 87th Sess. § 3 (Tex. 2021); TEX. HEALTH & SAFETY CODE § 170A.001–170A.007, prohibits any abortion except those performed by a licensed physician to prevent the death or serious risk of substantial impairment of a major bodily function of the pregnant person. TEX. HEALTH & SAFETY CODE § 170A.002. Consequently, abortions reportedly are not being performed in Texas, and enforcement of the bounty statute is unlikely at this point. *See, e.g.*, *Texas Abortion Laws*, PLANNED PARENTHOOD CTR. FOR CHOICE, https://www.plannedparenthood.org/planned-parenthood-center-for-choice/texas-abortion-laws [https://perma.cc/N8PU-YQ7T]. S.B. 8 nevertheless provides a paradigmatic example of the chilling effects a bounty statute seeking to evade federal review can have and for that reason remains an attractive model for states to follow in other domains. *See infra* Part I.

abortion, and if the private citizen succeeds in showing that the law was violated, a $10,000 bounty is recoverable from the defendants. By placing enforcement in the hands of private parties and state judges, bounty regimes prevent defendants (in the case of S.B. 8, individuals that facilitated an abortion) from challenging the constitutionality of the bounty law in federal court until after a bounty is awarded—usually much later, when (and if) the Supreme Court takes up the case on review. In contrast, if a state officer were given authority to enforce a $10,000 penalty, prospective defendants could swiftly sue the state officer to challenge the law in federal court, even before the officer could bring an action to enforce the penalty.

Recently, California has mimicked Texas's statute with a bounty regime against gun manufacturers that similarly seeks to evade pre-enforcement federal review.[4] These regimes differ only slightly in their details from Minnesota Attorney General Edward T. Young's attempt to shield his state's railroad regulations from federal review in the case underlying the storied *Ex parte Young* decision from 1908.[5] Like S.B. 8, Young's statute did not provide for public enforcement but simply stated the penalties for charging rates in violation of the regulation.[6] Minnesota's regulations were then enforced by mandamus actions against the railroads, actions that, while usually prosecuted by attorneys general, could be pursued by any private citizen of the state injured by the railroads' noncompliance.[7] The Supreme Court nevertheless thought the Minnesota law could be restrained by enjoining Young from bringing a mandamus action as a state officer.[8] Last term, however, the Court reached the opposite conclusion with regard to Texas's attorney general, finding no enforcement powers under S.B. 8 it could enjoin.[9]

In theory, a bounty regime that unconstitutionally burdens a fundamental right will eventually be reviewable in federal court. Resort to state courts to recover a legal entitlement (in the case of S.B. 8, the $10,000 bounty) constitutes

4. *See* Shawn Hubler, *Newsom Raises His Profile with Hardball Tactics, Starting with a Gun Bill*, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/us/newsom-gun-bill-california.html **[**https://perma.cc/EB6T-HSDP]; S.B. 1327, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (signed July 22, 2022).

5. *See generally Ex parte* Young, 209 U.S. 123 (1908); Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURTS STORIES 247 (Vicki C. Jackson & Judith Resnik eds., 2010); David L. Shapiro, Ex parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011).

6. *See* H.F. 1190, 35th Leg., Reg. Sess. (Minn. 1907). On Young's personal involvement in crafting the legislation, see RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 144–45 (1993).

7. Young defended the law with reference to Supreme Court precedent that explained that "any person who will sustain personal injury" by a company's refusal to perform its public duty "may have a mandamus to compel its performance." Brief for Petitioner on Hearing of Rule to Show Cause, *In re* Young, 209 U.S. 123 (1907) (No. 10), 1907 WL 18905, at *60 (quoting Board of Liquidation v. McComb, 92 U.S. 531, 532 (1875)).

8. *See Ex parte Young*, 209 U.S. at 159.

9. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021).

state action under the Fourteenth Amendment, as the Court famously held in *Shelley v. Kraemer*.[10] And as it was in *Shelley*, the state court decision on the entitlement can be appealed in the ordinary course to the Supreme Court.[11] But as multiple commentators have pointed out, the trouble with particularly draconian bounty schemes like S.B. 8 or Edward Young's rate regulations is their chilling effect: despite even obvious unconstitutionality, no litigant may be willing to suffer the penalty of the bounty while challenging the law.[12] The availability of the state courts to hear the bounty claim causes the chilling effect and thus directly contributes to the injury. But unless a judge or the court system itself can be sued in a pre-enforcement action, resolution of the constitutional question may be indefinitely delayed.

Second, municipal bail abuses. Suppose a judge acts entirely beyond her jurisdiction to order arrest in cases in which state criminal law does not permit arrest and detention, such as citation-only misdemeanor or traffic offenses. Any subsequent demand for bail would be automatically excessive, and detention for failure to pay such a bail would violate fundamental precepts of due process.[13] Arrest and bail orders that exceed a judge's jurisdiction have been a recurring problem in American history. They were known to the Court under the chief justiceship of John Marshall, they underlay the *Pulliam* litigation in the 1980s, and they feature today in the Department of Justice's Ferguson Report and in follow-up impact litigation.[14]

In municipal bail abuse cases, a suit against an enforcement officer is at least theoretically possible—some sheriff or other ministerial officer, after all, actually closes the jail door on the aggrieved defendant in reliance upon the judge's order.[15] As far back as the treason trial of Aaron Burr, Chief Justice John Marshall opined that ministerial officers would be liable for damages in such cases even if they were ignorant of the fact that the orders they were enforcing were invalid.[16] But the rise of modern qualified immunity doctrine has made damages suits against enforcement officers unrealistic if not formally

10. Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (voiding racially restrictive covenants under the Fourteenth Amendment even when covenants are negotiated and enforced only by private parties).

11. *Id.*

12. *See, e.g.*, *Whole Woman's Health*, 142 S. Ct. at 544 (Roberts, C.J., concurring in part and dissenting in part) ("Given the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay."); *see generally* Whitney Arey, Klaira Lerma, Anitra Beasley, Lorie Harper, Ghazaleh Moayedi & Kari White, *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 NEW ENG. J. OF MED. PERSPECTIVES 388 (2022).

13. *See infra* Part II.A.

14. *See* DAVID ROBERTSON, TRIAL OF AARON BURR FOR TREASON 319–20 (1879) (discussing how attorneys argued before Chief Justice Marshall about an arrest order that exceeded a judge's jurisdiction); Pulliam v. Allen, 466 U.S. 522, 525–26 (1984); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 47–62 (2015).

15. *See, e.g.*, De Luna v. Hidalgo Cnty., 853 F. Supp. 2d 623, 641, 647–48 (S.D. Tex. 2012) (finding municipal liability based on a sheriff's policy of jailing those unable to pay a magistrate-ordered fine).

16. *See* ROBERTSON, *supra* note 14, at 392–93.

impossible.[17] Today, federal circuit courts are reluctant to order equitable relief against officers enforcing judicial orders that facially appear to be valid.[18]

Whether jailers can be sued as enforcement officers or not, bail abuses historically offer a paradigmatic case for direct actions against judges acting as judges. At the time of the Founding, courts commonly permitted tort actions for malicious prosecution or false imprisonment against judges or justices of the peace who set excessive bail or denied defendants their right to bail.[19] Some then limited this device as habeas actions—newly codified with rights to expeditious process—became the preferred route for attacking excessive bail orders.[20] But whether through direct or collateral attack, plaintiffs and petitioners have long maintained causes of action against judges who abuse their powers to arrest and set bail.

Identifying the proper cause of action. In pinpointing a source for a modern cause of action for enjoining egregious judicial behavior, several candidates stand out. Under the All Writs Act, plaintiffs might seek an extraordinary writ, like mandamus or prohibition, from a federal court to restrain an inferior judicial

17. *See, e.g.*, Woods v. City of Michigan City, 940 F.2d 275 (7th Cir. 1991) (granting qualified immunity to enforcement officers who indisputably violated state law by detaining a defendant and requiring the defendant to post bond for reckless driving due to the officers' subjective ignorance of the law).

18. *See* ODonnell v. Harris Cnty., 892 F.3d 147, 156 (5th Cir. 2018) (denying municipal liability when a "Sheriff is legally obliged to execute all lawful process and cannot release prisoners committed to jail by a magistrate's warrant"); Patterson v. Von Riesen, 999 F.2d 1235, 1240 (8th Cir. 1993) (explaining how sheriffs "should not be required to make the Hobson's choice between disobeying the court order or being haled into court to answer for damages"). To be sure, this modern reluctance is somewhat out of step with traditional practice, wherein equity courts often avoided directly restraining a court or its personnel by simply enjoining the parties who appeared before a court or the sheriff who enforced the target court's writs, no matter how facially valid those writs appeared. *See, e.g.*, John Harrison, Ex parte Young, 60 STAN. L. REV. 989, 998 (2008) (describing equitable "anti-suit" injunctions against parties as a way to avoid ordering relief against courts directly); Kellen Funk, *The Union of Law and Equity: The United States, 1800–1938*, *in* EQUITY AND LAW: FUSION AND FISSION 46, 49 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019) (noting the use of injunctions against sheriffs instead of courts in New York's notorious Erie Wars). We do not mean to necessarily endorse the modern approach. But if that practice is more solicitous of the innocent sheriff just following orders, then it is all the more important for relief to run against the judicial officer who renders the illegal order in the first place.

19. *See* R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 25–26 (1941); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 212–14 (3d ed. 1922–27) (documenting the origin of appeals in personal actions against judges); Yates v. Lansing, 9 Johns. 395, 432–46 (N.Y. 1811) (Opinion of Senator Clinton) (surveying case law establishing the common law rules that judges who act "out of character" may be sued for false imprisonment and other common torts, and that the availability of impeachment does not provide an adequate alternative to private suits). For a detailed survey of jurisdictions shifting from the old rules of judicial liability to more extensive programs of judicial immunity, see generally MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS (1892).

20. *See, e.g.*, Evans v. Foster, 1 N.H. 374, 377–78 (1819) (relying on 1815 N.H. Laws 15 § 11, which, like many Founding-era constitutions and statutes, codified the prohibition against excessive bail alongside the right to seek habeas corpus).

officer.[21] In practice, federal courts have not been accustomed to running prerogative writs (besides certiorari and habeas corpus) to state court judges, though Henry Hart believed there was nothing in the Constitution or federal statutes stopping them from doing so, and the Supreme Court has at times threatened state courts with a mandamus order.[22]

Another alternative might be the federal courts' inherent equitable powers to restrain violations of the Constitution.[23] But the Supreme Court recently ruled out this avenue in the S.B. 8 litigation, relying on *Ex parte Young*'s dicta that "an injunction against a state court" or its "machinery . . . would be a violation of the whole scheme of our Government."[24] This reliance on *Ex parte Young* was likely overwrought. *Ex parte Young* was a sprawling opinion filled with learned citations to federal court practice—except for the only paragraph cited last term by the Court.[25] Even during its own time, *Ex parte Young*'s pronouncement could not be taken at face value: it had been preceded by decades of removal statutes that expressly permitted federal courts to restrain state judges and their personnel from proceeding in state court upon cases that had been removed to federal court.[26] Although one should not be too quick to rule out a path through the All Writs Act or federal equity, federal mandamus is virtually never used, and, after the S.B. 8 litigation, federal equity against judicial officers appears to be foreclosed.

The final and most promising ground for a cause of action for enjoining judicial action, at least at the state level, is 42 U.S.C. § 1983, where Congress explicitly authorized "suit[s] in equity, or other proper proceeding" against those who act under color of state law.[27] Congress's open-ended authorization of all forms of relief and the modern fusion of law and equity should theoretically make available an injunctive decree against judicial officers who directly violate the Constitution—say by discriminatorily jailing a protected class, or denying

21. *See* 28 U.S.C. § 1651. Specific references to the historic prerogative writs have been omitted in the modern codification, but the Act continues to allow a federal court to "avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." United States v. N.Y. Tel. Co., 434 U.S. 159, 172–73 (1977).

22. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 516–17 (1954); *see, e.g.*, Deen v. Hickman, 358 U.S. 57, 58 (1958) (granting leave to file a mandamus petition against a state court, but delaying the issuance of the writ itself on the assumption the state court would henceforth comply with the Supreme Court's mandate); Gen. Atomic Co. v. Felter, 436 U.S. 493, 497–98 (1978) (same). Ann Woolhandler has unearthed a long tradition of federal courts employing state prerogative writ remedies when sitting in diversity jurisdiction. *See generally* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997).

23. *See* Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1315–17 (2023).

24. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021) (quoting *Ex parte* Young, 209 U.S. 123, 163 (1908)).

25. *See Ex parte Young*, 209 U.S. at 163.

26. *See* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 768–71 (1986).

27. 42 U.S.C. § 1983.

due process—or who commit traditionally proscribed injuries, like false imprisonment or malicious prosecution.

Precisely because the potential cause of action is so open-ended, judicial malfeasance as a ground of action could be conceivably unlimited and wreak havoc on an orderly process of trial and appeal. Accordingly, the Supreme Court has worked out a variety of doctrines to protect judges from frivolous litigation and channel most, if not all, grievances against judicial decision-making into a process of appeals. We survey these devices below.

A. Doctrines that Deprive Plaintiffs of a Cause of Action Against Judges

1. Rooker-Feldman

The *Rooker-Feldman* rule, a common law principle derived from two cases, establishes that a federal trial court cannot review state supreme court decisions.[28] Outside of the habeas context, federal trial courts are not courts of appeal for state adjudications. By statute, it is the U.S. Supreme Court that reviews state supreme court decisions on a proper writ of certiorari.[29] After curbing the lower courts' enthusiastic application of the bar in the mid-2000s, the Supreme Court has indicated that the doctrine does not have extensive application. Justice Stevens was notably fond of declaring the *Rooker-Feldman* doctrine "dead" and "interred."[30]

But when it comes to judicial suits, the rule is only mostly dead. The Court has cabined the application of the bar to suits (1) filed in a federal district court, (2) after a state court has come to final judgment, (3) claiming the judgment itself as the source of injury.[31] Few challenges under Section 1983 meet all three strictures, but suits against judges often can.[32] Usually when suing a judge in the judge's judicial capacity, plaintiffs are ultimately challenging an adjudication or judicial decree already rendered, and despite attempts to characterize it otherwise, the decree itself is often the only injury underlying the claim.

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28. *See* Rooker v. Fidelity Tr. Co., 263 U.S. 413, 415 (1923); Dist. of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Exxon Mobil Corp. v. Saudi Basic Indust. Corp., 544 U.S. 280, 284 (2005) (describing the doctrine as applying to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments").

29. *See* 28 U.S.C. § 1257; *Exxon Mobil Corp.*, 544 U.S. at 291–92 (emphasizing the doctrine's origins in the history of "§ 1257, [which] as long interpreted, vests authority to review a state court's judgment solely in this Court").

30. *See, e.g.*, Marshall v. Marshall, 547 U.S. 293, 318 (2006) (Stevens, J., concurring in the judgment); Lance v. Dennis, 546 U.S. 459, 468 (2006) (Stevens, J., dissenting); *see also* Samuel Bray, *Rooker Feldman (1923–2006)*, 9 GREEN BAG 2d 317 (2006) (satirical eulogy inspired by Justice Stevens's comments). *But see* Hadzi-Tanovic v. Johnson, 62 F.4th 394, 399–408 (7th Cir. 2023) (recognizing the continuing applicability of *Rooker-Feldman* to bar, e.g., federal suits challenging state divorce and custody decrees).

31. *Exxon Mobil Corp.*, 544 U.S. at 284.

32. *See infra* Part IV.B.

The Court's recent turn to a more formalist application of the rule means that the time of filing is all-important for the *Rooker-Feldman* bar. So long as suit is filed before judgment, the claim is not a forbidden substitute for a writ of certiorari or other means of appeal. Still, the bar is a useful reminder at the outset of this discussion: appeals are the ordinary way to challenge judicial faults; original actions are discouraged and reserved for extraordinary circumstances.

2. Article III Standing

Article III of the Constitution requires that any case before a federal court constitute a "case or controversy," that is, a live, actual dispute between adverse litigants.[33] While the Supreme Court has not directly weighed in on this point,[34] a couple of notable circuit court decisions have held that Article III bars suits against judicial defendants when what the plaintiffs really seek is to challenge state law.[35] Then-Judge Stephen Breyer made the case for the First Circuit in a suit against the Puerto Rico Supreme Court.[36] While a judge might be called upon to interpret and apply unconstitutional legislation, Breyer reasoned, the judge is simply a neutral arbitrator applying the law prescribed by the jurisdiction.[37] Even where the law applied by the judge is challenged as unconstitutional or otherwise arbitrary, the litigant's dispute is with the party enforcing the law; the judge has no interests one way or the other. For these reasons, suits against judges are ordinarily only cognizable as a constitutional matter when the judge is taking on a different role, such as acting as the enforcer or policy-maker.[38]

Though it might be a welcome dose of realism in isolation, Judge Breyer's reasoning has an awkward fit among the formalist doctrines that surround it. True enough, judges might not have much personal stake in the defense of a particular statute's legitimacy, but the same could often be said of attorneys general or beat cops who are the usual defendants in such litigation. It is not clear why the fictitious passageways through the Eleventh Amendment must lead only to so-called enforcement officers who, in most cases, are merely enforcing the decrees

33. *See* U.S. CONST. art. III, § 2; Lujan v. Defs. of Wildlife, 403 U.S. 555, 559–60 (1992) (describing standing as a core part of the case or controversy requirement of Article III).

34. *But see* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021) ("Private parties who seek to bring S. B. 8 suits in state court may be litigants adverse to the petitioners. But the state-court clerks who docket those disputes and the state-court judges who decide them *generally* are not.") (emphasis added). For the argument that Section 1983 renders bounty regimes like S.B. 8 an exception to this general rule, see *infra* Part V.

35. *See, e.g.*, Brandon E. *ex rel.* Listenbee v. Reynolds, 201 F.3d 194, 198–99 (3d Cir. 2000); Bauer v. Texas, 341 F.3d 352, 359 (5th Cir. 2003).

36. *In re* Justices of Sup. Ct. of P.R., 695 F.2d 17, 19 (1st Cir. 1982).

37. *Id.* at 21–22.

38. As another circuit court has explained, "The case or controversy requirement of Article III of the Constitution requires a plaintiff to show that he and the defendants have adverse legal interests. . . . The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity." *See Bauer*, 341 F.3d at 359.

of judicial officers. State action violative of federal rights is often the work of many hands and is almost always defended by the state government itself regardless of which officer is named as defendant. So long as officer suits remain the workaround to a realistic jurisprudence of suits against the sovereign, it is by no means clear that Article III requires that only certain officers and not others be treated as properly adverse defendants.

Where the Supreme Court has brought Article III to bear on judicial suits, it has found that the twin doctrines of ripeness and mootness make it difficult to bring claims for prospective relief. The leading cases of *O'Shea v. Littleton* and *City of Los Angeles v. Lyons* illustrate the catch-22.[39] In a suit challenging discriminatory bail and prosecution practices in Illinois, the *O'Shea* Court held that the class action plaintiffs did not allege a sufficiently "real and immediate" injury.[40] For those who had not yet experienced discrimination in the criminal system, the claim was unripe; it remained too speculative that they would be targeted.[41] For those who were already subject to discriminatory practices, the claim was moot.[42] There was no ongoing harm to enjoin, and the Court refused to assume that the same plaintiff would break the law and be subject to the same abuses again.[43] Similarly in *Lyons*, the Court denied standing for the plaintiff—who had been physically assaulted with a chokehold during a traffic stop—to seek equitable relief on the grounds that this past injury had ended and that the plaintiff had failed to show an immediate threat of future harm.[44] Lyons needed to demonstrate a "substantial" likelihood of being choked by the police again in the future, a nearly impossible standard to meet at the pleading stage.[45]

Even if the ripeness problem could be surmounted in a future case, the *O'Shea* Court advised that an equitable remedy would only raise further problems. Prospective relief necessarily raises the prospect of contempt for violating a federal court's decree. But in a class action directed against the discriminatory bail and prosecution practices of an entire municipality, the Court struggled to conceive of an injunctive decree that could be administered without turning each and every criminal case into an opportunity to run to federal court to check if the proceeding complied with the federal decree or made the state

39. O'Shea v. Littleton, 414 U.S. 488 (1974); City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

40. 414 U.S. at 496.

41. *Id.* at 497 ("Here we can only speculate whether respondents will be arrested, either again or for the first time, for violating a municipal ordinance or a state statute . . . .").

42. *Id.* at 495–96 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.").

43. *See id.* at 496–97.

44. 461 U.S. at 106–07.

45. *Id.* at 111 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)); *see generally* Peter C. Douglas, Note, City of Los Angeles v. Lyons*: How Supreme Court Jurisprudence of the Past Puts a Chokehold on Constitutional Rights in the Present*, 17 NW. J. L. & SOC. POL'Y 81 (2021).

officers liable for contempt. "This seems to us nothing less than an ongoing federal audit of state criminal proceedings," the Court warned.[46]

This dictum raising the specter of a federal audit has been invoked numerous times since *O'Shea*, but its features have never been precisely defined.[47] Still, we might draw several principles from the *O'Shea* line of cases. A plaintiff's injury must be no less imminent in judicial suits than in other cases, and past persecution is weak evidence that injury will imminently recur. Should injury be established, the prospective relief must be of a kind that is easily administrable and will not invite case-by-case inquiry into contempt liability. But perhaps the most important principle is what *O'Shea* did *not* say: in a suit naming judges as defendants, the Court never so much as hinted that the plaintiffs had chosen the wrong targets. Had the injuries and relief been better pleaded, nothing in *O'Shea* indicates that the suit could not have gone forward against judicial officers acting in a purely judicial capacity.

3. Abstention

Even where federal jurisdiction is properly obtained and standing is not a bar, federal courts may decline to exercise jurisdiction to award prospective relief under abstention doctrines. Judge-made abstention principles derive from concerns about federalism and comity, as well as the traditions of equitable restraint.[48] Where a matter is better suited for resolution in state court or where it is related to an ongoing state proceeding, federal courts will refrain from exercising their coercive authority, including in actions seeking only declaratory relief.[49] While abstention doctrines encompass a variety of claims,[50] two lines of abstention are most salient for suits against judicial officers: abstention under *Pullman v. Texas Railway Commission* and abstention under *Younger v. Harris*.

Rarely invoked today, *Pullman* abstention advises federal courts to abstain from awarding equitable relief when federal constitutional questions can be avoided by first clarifying antecedent questions of state law.[51] The practice of certifying unresolved questions to state supreme courts has largely superseded the application of *Pullman* abstention today.[52] Still, the *Pullman* abstention principle could pose a barrier to judicial suits since questions of whether a judge

46. *O'Shea*, 414 U.S. at 500.

47. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 760–61 (1984); Daves v. Dallas Cnty., 64 F.4th 616, 628, 631 (5th Cir. 2023) (en banc); Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 611 (8th Cir. 2018).

48. *See* Fred O. Smith, Jr., *Abstaining Equitably*, 97 NOTRE DAME L. REV. 2095, 2096–97 (2022); Amy C. Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 824–26 (2008).

49. *See* Samuels v. Mackell, 401 U.S. 66, 73–74 (1971).

50. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 547–52 (1985).

51. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984).

52. *See generally* Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847 (2007).

was acting egregiously beyond her jurisdiction might turn on unresolved interpretations of state law. Recently, a number of suits challenging local responses to COVID-19 (whether filed against judicial defendants or not) ran aground on *Pullman* abstention.[53]

Like *Rooker-Feldman*, the *Pullman* bar is rigidly formalist and applied strictly. The ambiguity of the state law must be, well, unequivocal. And a possible resolution to the state law question must necessarily avoid the application of federal constitutional (not statutory) law. While *Pullman* offers functional guidance that state courts are better positioned to interpret state law, and perhaps to discipline in-state judicial behavior, it is the rare case that meets the formal factors for *Pullman* abstention.

Much more commonly applied in the lower courts today is the abstention doctrine first articulated in the Court's 1971 decision *Younger v. Harris*. In *Younger*, the Court held that federal courts cannot enjoin pending state criminal prosecutions absent extraordinary circumstances constituting great and immediate irreparable harm.[54] *Younger*'s famous reliance on notions of "Our Federalism" and the proper balance between concurrent judicial systems has long been contested.[55] The Court's most recent—and unanimous—opinion on the matter recognized that *Younger* is in strong tension with the "virtually unflagging" obligation of federal courts to hear and decide cases properly within their jurisdiction.[56] The Court has instructed that *Younger* abstention is strictly reserved to criminal and criminal-like proceedings that should not be interrupted when the federal claim can properly be raised in those proceedings or on appeal afterward.[57] On this basis, the Court has also—unanimously—refused to apply *Younger* to Section 1983 suits challenging illegal bail and pretrial detention regimes.[58] Criminal prosecutions, after all, can proceed uninterrupted regardless of how a court seeks to remedy pretrial process.[59] It is an open question whether bounty regimes are sufficiently criminal-like to come under *Younger*'s sway.[60]

Numerous lower courts, however, have failed to heed the Supreme Court's guidance that *Younger* strictly applies only to criminal-like proceedings that can

53. *See, e.g.*, Russell v. Harris Cnty., 454 F.Supp.3d 624, 639–41 (S.D. Tex. 2020). More often, the Prison Litigation Reform Act (PLRA), enacted shortly before the FCIA, posed a barrier to relief from pandemic conditions in prisons. *See also* Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117, 144–46 (2022). Since the statute restricts prospective relief in "any civil action with respect to prison conditions," it too may preclude prospective relief against judicial officers in certain prisoner suits. 42 U.S.C. § 1997e.

54. 401 U.S. 37, 45–46 (1971).

55. *See generally* Fred O. Smith, *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018); Aviam Soifer & H. C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977).

56. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013).

57. *Id.*

58. Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975).

59. *Id.*

60. *See* Note, *Private Attorneys General and the Defendant Class Action*, 135 HARV. L. REV. 1419, 1436–37 (2022) (arguing that *Younger* likely does apply to S.B. 8-like bounty regimes).

adequately accommodate adjudication of the federal issue. Some, like the Second Circuit, apply *Younger* abstention broadly to preclude review of any facet of state administration of a criminal justice system.[61] Recently, the Fifth Circuit has treated the Court's *Younger* holdings as mere dicta and has commanded district courts to apply *Younger* more sweepingly.[62] It is unclear where these trends will end, so for our purposes, we assume that *Younger* abstention is what the U.S. Supreme Court says it is: a doctrine of rare application that leaves *ongoing criminal prosecutions* undisturbed in favor of appellate process in those cases.[63] Like the other doctrines surveyed here, *Younger* is in line with a broad principle favoring appellate review over direct actions against state judicial misconduct. But because of its particular application, the doctrine hardly covers the universe of potential misconduct and leaves sufficient room for extraordinary remedies to apply to extraordinary cases.

4. Preiser-Heck

One last barrier to relief that, like *Younger*, is unique to the criminal setting is the choice-of-action *Preiser-Heck* doctrine, which forecloses a Section 1983 action where the relief sought would necessarily invalidate a plaintiff's detention.[64] Like *Rooker-Feldman*, the *Preiser-Heck* doctrine is more rooted in a conflict of federal statutes than in the nature of Article III or federal jurisdiction. Just as Congress has chosen to route state supreme court appeals directly to the U.S. Supreme Court (as *Rooker-Feldman* surmises), Congress has chosen to channel challenges to state detention into the increasingly restrictive statutory regime of post-conviction habeas proceedings known as the Antiterrorism and Effective Death Penalty Act—AEDPA for short.[65]

By their plain terms, both AEDPA and Section 1983 provide for suits challenging state detentions that violate federal rights. If the election of remedies were left to plaintiffs, however, almost no one would choose the highly restrictive regime of post-conviction habeas—with its short statute of limitations, sweeping exhaustion requirements, and mandated deference to the state courts—over Section 1983, which has none of those limitations.[66] Through a series of cases since the early 1970s, the Supreme Court has reasoned that if Congress

61. Wallace v. Kern, 520 F.2d 400, 408–09 (2d Cir. 1975).

62. Daves v. Dallas Cnty., 64 F.4th 616, 623–33 (5th Cir. 2023) (en banc). Elsewhere in this issue, John Giammatteo argues these decisions are forming a trend towards a new "Comity Abstention" doctrine. *See generally* John Harland Giammatteo, *The New Comity Abstention*, 111 CALIF. L. REV. 1705 (2023).

63. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78, 81–82 (2013).

64. *See* Preiser v. Rodriguez, 411 U.S. 475, 488–90 (1973); Heck v. Humphrey, 512 U.S. 477, 486–87 (1994).

65. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. I, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2241–66).

66. *Cf.* Monroe v. Pape, 365 U.S. 167, 183 (1961). The only slight advantage a habeas action has over Section 1983 is that state judgments are not preclusive in habeas courts but may be in subsequent Section 1983 actions. *See* Allen v. McCurry, 449 U.S. 90, 105 (1980).

intends its restrictions in the habeas statutes to have any effect, habeas must be the exclusive remedy for challenging illegal detention.[67]

Like the other doctrines surveyed here, the *Preiser-Heck* bar is sweeping in principle but narrow in application. Formally, the necessary invalidity of the detention is what counts. For that reason, damages actions can run into the *Preiser* bar if recovery of damages requires showing the illegality of the underlying detention (as in tort actions for false imprisonment).[68] In such cases, the cause of action for the tort damages does not accrue until a habeas action has first invalidated the detention.[69] But so long as the validity of detention isn't *necessarily* called into question, Section 1983 remains an appropriate vehicle for both retroactive and prospective relief. A one-off suit for the restoration of good time credits illegally withheld by probation falls under the bar.[70] In contrast, a class action seeking an across-the-board procedural inquiry that will likely, but not necessarily, result in the restoration of good time credits does not fall under the bar.[71]

In a sense, habeas suits are a common way of "suing judges" in that they directly challenge judicial decision-making without using the ordinary appellate process. Indeed, AEDPA is the standard vehicle by which state judicial action is challenged in federal trial courts today. But formally, habeas suits are conceived of as running against custodial, not judicial, defendants, and judges can usually play no role in the defense of their decision to detain.[72] The limited nature of habeas relief—the release or remand of usually one single petitioner—leaves much to be desired in cases mounting systemic claims. *Preiser-Heck* accordingly poses one last barrier to more ambitious suits against judicial malfeasance since it threatens to sweep Section 1983 claims (against any defendants) into the narrow confines of post-conviction review.

B. Doctrines of Judicial Immunity

In addition to doctrines that restrict, restrain, or eliminate a cause of action against judges and their courts, doctrines of immunity bar recovery even when a

67. *See Preiser*, 411 U.S. at 475; *Heck*, 512 U.S. at 477. The *Preiser-Heck* doctrine continues to raise troubling questions of timing and sequencing for the Court. *See generally* Nance v. Ward, 142 S. Ct. 2214 (2022); Thompson v. Clark, 142 S. Ct. 1332 (2022); McDonough v. Smith, 139 S. Ct. 2149 (2019).

68. *Heck*, 512 U.S. at 477.

69. The circuits are split on their reading of *Preiser*. Some treat the bar as though an action for damages does not accrue until invalidation. *See* Smith v. Veterans Admin., 636 F.3d 1306, 1312 (10th Cir. 2011). Others hold that an action accrues upon injury, but *Preiser* imposes an exhaustion requirement before the Section 1983 court acquires jurisdiction. *See* Mejia v. Harrington, 541 F. App'x 709, 710 (7th Cir. 2013). The Supreme Court declined to address the division of authority when given the opportunity. *See* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1724 n.2 (2020).

70. Wolff v. McDonnell, 418 U.S. 539, 554 (1974).

71. Wilkinson v. Dotson, 544 U.S. 74, 82 (2005).

72. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 478 (2004); Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484, 494–95 (1973).

valid cause of action might be stated. As noted above, certain traditional causes of action like false imprisonment were properly asserted against judicial officers.[73] Over time, however, American courts followed an increasingly rigid English practice of insulating judges from suits for damages.[74] Such immunity is often described as "absolute," meaning that no showing of bad faith or malice pierces the immunity.[75] Any suit barred by absolute immunity can and thus should be dismissed immediately at the outset because no set of facts developed in the litigation could possibly change the outcome.[76] The value of absolute immunity, therefore, is twofold: officers are protected not only from liability, but they are also freed from the burden of litigation and of mounting even the barest defense.[77]

All this decisional law has been rendered with reference to *damages* actions against judicial officers. The traditional modes of judicial discipline, namely trespass actions for false imprisonment and the like, awarded only damages remedies, so immunity doctrines grew out of a damages context.[78] For most of American history, the question of prospective relief against judicial officers seems not to have been a question of immunity but of a duly authorized cause of action. Judges have always been effectively subject to coercive relief in habeas actions—that, after all, is the point of habeas actions—but state judges have not always been subject to federal habeas until Congress so decreed as a Reconstruction measure.[79] By statute, Congress has forbidden federal injunctions against state court proceedings,[80] but also by statute, Congress has allowed for such injunctions to enforce removal actions,[81] to protect the jurisdiction of federal habeas courts,[82] and to vindicate civil rights in Section 1983 actions.[83]

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73. *See supra* note 19.

74. *See generally* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879 (1980).

75. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 870–71 (1994).

76. *See id.* at 871; Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

77. *See Digital Equip. Corp.*, 511 U.S. at 871.

78. *See* Jay Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201, 210, 232, 245 (1980).

79. Habeas Corpus Act of 1867, 14 Stat. 385; WILLIAM DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 189–99 (1980).

80. *See* 28 U.S.C. § 2283.

81. 28 U.S.C. § 1446(d); French v. Hay, 89 U.S. (22 Wall.) 250, 253 (1874).

82. 28 U.S.C. § 2251; *Ex parte* Royall, 117 U.S. 241, 248–49 (1886). While Section 2251 is a modern codification, the power of federal habeas courts to stay or declare void the ongoing proceedings of state courts was expressly conferred by Congress in the Habeas Corpus Act of 1867, 14 Stat. 385, 386.

83. Mitchum v. Foster, 407 U.S. 225, 242–43 (1972). As the *Mitchum* Court recognized, numerous other twentieth-century statutes have empowered federal courts to stay or annul state proceedings by injunctive decrees, including the Interpleader Act of 1926, 44 Stat. 416, the Frazier-Lemke Farm Mortgage Act, 49 Stat. 944 (1934), and the Emergency Price Control Act of 1942, 56 Stat. 33. *See Mitchum*, 407 U.S. at 234–35 nn.14–17.

By common law tradition, judges receive absolute immunity from damages actions only when they are acting *as* judges. A judge driving negligently on vacation is liable for the harms he inflicts the same as anyone else. Over time, the Supreme Court has made pretty fine distinctions in the functional test to determine when judges act as judges. A judge making a horrendous decision in chambers to sterilize a girl without her parents' knowledge is acting as a judge.[84] A judge who sexually harasses a probation officer in chambers acts only as an administrator.[85] A state court that promulgates attorney ethics rules acts as a legislature (and thus enjoys legislative immunity).[86] When that same court adjudicates an ethics violation, it is protected by judicial immunity.[87] But when state judges *investigate* an ethical breach, they act as enforcement officers and lose their absolute immunities.[88]

Arguing that judges are not acting *as* judges is often the best strategy for plaintiffs seeking to impose liability, whether prospective or retroactive.[89] But that path is not our concern here. In our two examples, bounty statutes and bail abuses, we take for granted that judges in these cases are acting indisputably as judges, presiding over courts from a bench and rendering judicial decisions.[90] It may be surprising that the question of judicial liability for prospective relief did not arise at the Supreme Court until the mid-1980s, but the function-specific structure of immunity doctrine helped to keep the question from being squarely presented. The doctrines we have surveyed here leave only the narrowest opening for suing a judge in these circumstances: the claim cannot be for damages, cannot seek immediate release from detention, cannot improperly circumvent the appellate process, and cannot unduly interfere with an ongoing criminal proceeding. If such a case could be found, could a judge then be enjoined? *Pulliam v. Allen* offered an initial affirmative answer.

II.
WHEN JUDGES WERE SUED: THE STORY OF *PULLIAM V. ALLEN*

On January 10, 1980, Richmond Allen was arrested in the small town of Culpeper in central Virginia for "the use of abusive language."[91] The charge, a

84. Stump v. Sparkman, 435 U.S. 349, 362 (1978).
85. Forrester v. White, 484 U.S. 219, 229 (1988).
86. Sup. Ct. of Va. v. Consumers Union, 446 U.S. 719, 734 (1980).
87. *Id*. at 723–24.
88. *Id*. at 736.
89. *See supra* note 2.
90. *See* Stump v. Sparkman, 435 U.S. 349, 362 (1978) ("The relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.").
91. [Defendant Pulliam's] Memorandum of Law [Supporting Dismissal] at 1, Allen v. Burke, Civ. No. 81-40 (E.D. Va. Feb. 11, 1981) (on file with the National Archives Philadelphia Records Division [hereinafter NAPRD]); Plaintiff's Brief in Response to Defendant's Memorandum of Law at

Class 3 misdemeanor under Virginia law, carried no prison time and could be punished, at most, with a $500 fine.[92] Because the charge was not punishable with imprisonment, Allen should have received a citation or, at most, a summons to court.[93] Instead, the arresting officer brought Allen before a local magistrate, Gladys Pulliam, who set bail at $250.[94] Unable to come up with that sum, Allen was incarcerated under Magistrate Pulliam's order.[95] He remained detained for fourteen days before his first hearing, where he was summarily convicted on only hearsay testimony and sentenced to time served.[96] At no point during his incarceration or trial did Allen have legal counsel. Perversely, he was not entitled to a lawyer since his charged offense did not formally carry a penalty of imprisonment.[97]

Shortly after his release, Allen reached out to a small criminal defense firm in Charlottesville. The senior partner of the two-lawyer firm, Steven Rosenfield, swiftly got Allen's conviction reheard and dismissed for lack of evidence.[98] But

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1, *Allen*, Civ. No. 81-40 (E.D. Va. Feb. 24, 1981) (on file with NAPRD) (citing VA. CODE § 18.2-416 (1980) (current version at VA. CODE ANN. § 18.2-416 (2022)).

92. *See* VA. CODE ANN. § 18.2-211 (1980) (repealed by ch. 955, 2004).

93. *See id.* At the time, one additional provision of the Virginia Code allowed magistrates to set bail in lieu of issuing a mere summons if "probable cause exist[ed] that [the accused wa]s likely to disregard a summons." VA. CODE ANN. § 19.2-74 (1980) (as amended by VA. CODE ANN. § 19.2-74 (2022)). After Allen's sentence but before the civil suit, the Virginia legislature amended Section 19.2-74 to eliminate any allowance for imprisonment or bail for non-arrest offenses. *See* VA. CODE ANN. § 19.2-74.1 (repealed 1981). It was undisputed during the civil suit that Pulliam made no requisite finding regarding the likelihood a summons would be obeyed, either in Allen's case or those of the class members. *See, e.g.*, Plaintiff's Exhibit Arrest Warrants and Orders of Magistrate Gladys Pulliam, *Allen*, Civ. No. 81-40 (E.D. Va. May 21, 1981) (on file with NAPRD) (showing Pulliam's orders evidencing no finding of probable cause the arrestee was likely to disobey a summons); Plaintiff's Brief in Response to Defendant's Memorandum of Law at 3, *Allen*, Civ. No. 81-40 (E.D. Va.) (on file with NAPRD) (demonstrating from discovered materials that Pulliam held dozens of defendants to bail in the months both before and after the amendment of VA. CODE ANN. § 19.2-74). Moreover, as Allen's counsel pointed out, Virginia law allowed for the trial of misdemeanants in absentia, so failure to obey a summons would not materially affect the progress of a prosecution in any event. *See* Plaintiffs' Brief in Support of Summary Judgment at 6, *Allen*, Civ. No. 81-40 (E.D. Va. May 19, 1981) (on file with NAPRD); VA. CODE ANN. § 19.495 (1975) (current version at VA. CODE ANN. § 19.2-258).

94. Affidavit [of Sheriff Melvin Richard Dwyer] at 1, *Allen*, Civ. No. 81-40 (E.D. Va. Jan. 16, 1981) (on file with NAPRD).

95. *See id.* at 1–2; Complaint at 3, *Allen*, Civ. No. 81-40 (E.D. Va. Jan. 16, 1981) (on file with NAPRD).

96. *See* Complaint, *supra* note 95, at 3.

97. *See id.* A decade earlier, the Supreme Court had ruled that misdemeanor defendants were entitled to counsel when facing "the prospect of imprisonment, for however short a time." Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970)). The Court had a clear expectation that "every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." *Id.* at 40. Yet Virginia's counsel apparently interpreted the rule to mean that no counsel need be appointed if the law did not formally provide for imprisonment as a sentence. *See* [Defendant Burke's] Memorandum in Support of Motion to Dismiss Under Rule 12(b) at 5, *Allen*, Civ. No. 81-40 (E.D. Va. Feb. 17, 1981) (on file with NAPRD).

98. *See* Motion to Set Aside Conviction at 1–2, Virginia v. Allen, Crim. No. 80-52 (Culpeper Cnty. Dist. Ct. Feb. 1, 1980); Letter from Roger L. Morton, Clerk, Culpeper Cnty. Dist. Ct., to Steven D. Rosenfield (Feb. 5, 1980) (on file with NAPRD in the record files of *Allen v. Burke*).

Rosenfield's junior partner Deborah C. Wyatt, a budding civil rights lawyer admitted to the bar only a couple years earlier, sensed there might be something more to the case. An initial suit against Culpeper's sheriff was swiftly abandoned when it became clear the affirmative relief—an injunction against enforcing facially valid judicial orders—would force sheriffs acting in good faith to choose between contempt by a state judge or contempt by a federal one.[99] The only "natural defendant" to an injunctive action, Wyatt concluded, was the magistrate herself.[100] So on January 16, 1981, Wyatt sued a judge.[101]

The small-town character of the proceedings lasted all through the case that became the landmark Supreme Court case of *Pulliam v. Allen*.[102] Wyatt argued Allen's side at all stages, including before the U.S. Supreme Court.[103] Indeed, the ACLU and NAACP[104] were apparently unaware of the case until after the Supreme Court granted certiorari.[105] Meanwhile, the Commonwealth's defense counsel, clearly unaccustomed to the complexities of Section 1983 litigation, forfeited almost every conceivable argument, including the argument that Pulliam should be judicially immune to equitable relief.[106] Still, a slim majority of the U.S. Supreme Court was set to award Pulliam immunity when Justice Thurgood Marshall switched his vote, turning Justice Harry Blackmun's dissent into a majority opinion holding that, in egregious cases like Allen's, a judge could indeed be held liable to prospective relief (and the attorney fee award that followed).[107]

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99. *See* Allen v. Peters, Civ. No. 80-81 (E.D. Va. 1980).

100. Transcript of Oral Argument at 47, Pulliam v. Allen, 466 U.S. 522 (1984) (No. 82-1432).

101. Docket Sheet, Allen v. Burke, Civ. No. 81-40 (E.D. Va.) (on file with NAPRD).

102. Allen originally named as defendants both Gladys Pulliam, the magistrate who had jailed him for his inability to pay bail, and Basil C. Burke, Jr., the county district judge who allegedly delayed calling Allen's case and who convicted him without evidence. Allen's conviction was expunged before the civil case was filed. *See supra* note 99. In federal district court, Burke was dismissed from the suit at summary judgment, as the court found that Burke's "involvement in the unconstitutional laws or practices is minimal or non-existent." Memorandum Opinion at 8, *Allen*, Civ. No. 81-40 (E.D. Va. June 4, 1981) (on file with NAPRD). The case remained captioned *Allen v. Burke* until the Supreme Court granted certiorari under the caption *Pulliam v. Allen*.

103. *Pulliam* was the first of only two arguments Wyatt presented to the Supreme Court. A month after arguing *Pulliam*, she also argued *Hudson v. Palmer*, 468 U.S. 517 (1984), a prisoner suit in which the Court ruled against Wyatt's client and fortified its recent holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), that minor destruction of a prisoner's property does not give rise to a cause of action under Section 1983 for violating federal due process.

104. Allen was African American. According to the opening complaint, a White man, George E. Cambill, was arrested at the same time and on the same charge of using abusive language (likely in an altercation with Allen), and though he too was held to an illegal bail, Cambill's case was called, and Cambill was released three days earlier than Allen. Complaint, *supra* note 95, at 3.

105. Because the case became a pitched battle over attorney fees, the archive contains a fairly detailed breakdown of Wyatt's day-to-day activities. She first recorded a call to the ACLU on March 14, 1983, two weeks after Pulliam filed for certiorari. Affidavit of Deborah C. Wyatt at 9, *Allen*, Civ. No. 81-40 (E.D. Va. June 15, 1984) (on file with NAPRD). The first recorded contact with the NAACP was on April 28, 1984. *Id*.

106. *See infra* Part II.A and accompanying text.

107. *See infra* Part II.C and accompanying text.

The Sections that follow tell the story of *Pulliam v. Allen* and relate how the Supreme Court ultimately concluded that judges, even when acting in a judicial capacity, could be sued in appropriate cases seeking prospective relief. Because of the unusual posture of the case, the Court had a rare opportunity to answer the question of judicial liability in the abstract, shorn of complicated equitable doctrines of abstention and exhaustion. Squarely facing the question, the Court could hardly avoid the long common law tradition of coercive relief against judicial officers.

A. Building the Appropriate Case: Pulliam *in the District Court*

Although Richmond Allen's suit certainly benefited from the poor pleading of Virginia's counsel, his success was not simply at the default of his opponent. Despite her few years of experience, Deborah Wyatt's handling of the Section 1983 claim was procedurally skillful, well calculated to navigate the treacherous waters of federal equity. Where Wyatt might have fallen short on substantive law to support Allen's claims, the district court stepped in to find a straightforward path to relief.

At first, the pleadings did not present a promising case. Allen's opening complaint sought to certify a class of incarcerated Class 3 and 4 misdemeanor defendants in Culpeper County.[108] The complaint rested on three principal counts: incarceration of defendants on non-arrest charges violated federal due process, inflicted cruel and unusual punishment, and denied the right to counsel.[109] At the time, none of the claims were particularly promising as a matter of substantive law. Since it was Virginia law and not federal law that made the charges non-arrest crimes, each count in the end called for a federal court to compel state officers to comply with state law, a practice the Supreme Court would soon declare beyond the bounds of the Eleventh Amendment in the *Pennhurst* doctrine.[110]

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108. Complaint, *supra* note 95, at 2–3. When it turned out that very few arrestees were charged like Allen with the use of abusive language (Burke stated under oath that Allen's case was "unique and singular," Affidavit of Basil C. Burke, Jr. at 3, *Allen*, Civ. No. 81-40 (E.D. Va. Feb. 17, 1981) (on file with NAPRD)), Wyatt moved the intervention of Jesse W. Nicholson, an indigent man who had been arrested and held to an unaffordable bail four separate times for public intoxication. Motion to Intervene at 1–2, *Allen*, Civ. No. 81-40 (E.D. Va. Apr. 28, 1981) (on file with NAPRD). Similar to the abusive language statute, the Virginia Code did not provide for arrest, bail, or imprisonment for Class 4 public intoxication charges. *See* VA. CODE ANN. § 18.2-388 (1979).

109. Complaint, *supra* note 95, at 4–7.

110. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (holding that Eleventh Amendment immunity is not stripped from officers or agencies of the state when those officers or agents merely violate state but not federal law). For a deep history and trenchant critique of the *Pennhurst* rule, see Karen Tani, *The Pennhurst Doctrines and the Lost Disability History of the "New Federalism,"* 110 CALIF. L. REV. 1157, 1163–97 (2022). Where state law gives mandatory (as opposed to discretionary) duties to state officers, the violation of that duty may deprive a plaintiff of a state-created liberty or property interest in violation of federal due process, giving rise to a cause of action under Section 1983. Federal judges have inconclusively debated whether state-mandated rights to pretrial release count as federally protected interests. *Compare* Woods v. City of Michigan City, 940 F.2d 275, 282–86 (7th Cir.

The strongest claim for federal relief did not appear until the district court ruled later in the summer. Chief Judge Albert Vickers Bryan, Jr., granted summary judgment for Allen primarily on an equal protection theory.[111] While detention on a non-arrest charge might offend state law, Bryan reasoned, the plaintiff class was detained "solely because of inability to pay a money bond."[112] In the preceding decade, the Supreme Court had twice condemned state practices of converting unpaid fines into prison sentences as unconstitutional discrimination against the indigent.[113] Noting that these decisions dealt with incarceration after conviction, Bryan emphasized "the principle applies with even greater force to pretrial detainees who are presumed innocent and who suffer before any trial a punishment unauthorized even after a determination of guilt"—unauthorized not just by state law, but by the Supreme Court's recent equal protection decisions as well.[114] On the merits, Magistrate Pulliam's practice of detaining misdemeanor defendants on unaffordable bail was held to clearly violate the Constitution.[115]

Wyatt's careful pleading ensured that the district court could reach the merits. Allen's sentence had been served and his conviction overturned, so *Preiser* and *Younger* presented no bar. But that only raised the problem of equitable standing as recently reinvigorated by the Supreme Court.[116] Allen's past harm did not confer standing for prospective relief, and a class of imminently harmed plaintiffs complaining about a magistrate's bail decisions might raise *O'Shea*'s specter of a "federal audit" and sweep in claimants for

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1991) (Will, J., concurring), *with* ODonnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1142–47 (S.D. Tex. 2017), *aff'd in part & rev'd in part*, 892 F.3d 147, 158–60 (5th Cir. 2018). Wyatt incorporated a state-created liberty interest theory in her briefing on procedural due process. *See* Plaintiff's Memorandum of Law Opposing Dismissal at 8, *Allen*, Civ. No. 81-40 (E.D. Va. Feb. 24, 1981).

111. Bryan was the son of Albert Vickers Bryan, who presided over the U.S. District Court for the Eastern District of Virginia from 1947 to 1961 and oversaw the enforcement of *Brown v. Board of Education* in Prince Edward County. The courthouse for the Eastern District of Virginia is now named in honor of Albert Vickers Bryan.

112. Memorandum Opinion, *supra* note 102, at 4.

113. *See* Tate v. Short, 401 U.S. 395, 399–401 (1971); Williams v. Illinois, 399 U.S. 235, 244–45 (1970).

114. Memorandum Opinion, *supra* note 102, at 5. Several federal courts have recently agreed on the principle that *Williams* and *Tate* apply "with special force in the bail context, where . . . arrestees are presumed innocent." Buffin v. City & Cnty. of San Francisco, No. 15-CV-04959-YGR, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018). *See also ODonnell*, 892 F.3d at 147, 162 n.6 ("[T]he distinction between post-conviction detention targeting indigents and pretrial detention targeting indigents is one without a difference.").

115. In addition to the equal protection ruling, the court appears to have rested its holding in part on a substantive due process analysis, finding that imprisonment "solely for failure to make bond on an offense for which no incarceration is authorized by the state . . . offends basic notions of fairness" and that "[t]he liberty interest at stake here is an important one." Memorandum Opinion, *supra* note 102, at 4. On the interrelated challenges to municipal bail systems on due process, substantive due process, and equal protection grounds, see generally Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098 (2019); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019).

116. *See* O'Shea v. Littleton, 414 U.S. 488, 496, 500 (1974).

whom *Younger* and *Preiser* might again bar relief.[117] To avoid these problems, Wyatt phrased her prayer for relief carefully. She asked the court to "[e]njoin defendant Pulliam from ever in the future having an accused incarcerated awaiting trial for a [non-arrest] offense."[118] The requested injunction neither sought nor would have secured release for any defendant currently in custody, satisfying *Preiser*.[119] It would not suspend or delay criminal prosecutions themselves, avoiding *Younger*.[120] And it created an easily administrable, across-the-board rule that would not require a federal court to scrutinize any particular bail amount, thus obviating the need for an *O'Shea*-like federal audit.[121]

Most of Wyatt's strategy navigating these precedents was not spelled out until much later, since her opposing counsel did not raise *Preiser*, *Younger*, or *O'Shea*.[122] Instead, defense counsel faulted Allen for not seeking a bond reduction on his own while imprisoned without the assistance of counsel.[123] Citing decisional law on judicial immunity to damages, Pulliam's counsel argued there was "a real question as to whether [an injunction against a judicial officer] is appropriate or even permissible," but cited no authority in support.[124] Defense counsel even stipulated that Pulliam "on many occasions requires a cash bond" in contravention of Virginia law.[125] Perhaps the characterization did not appear worth contesting. Pretrial discovery showed that in the four months before the suit was filed, forty-nine misdemeanor arrestees were illegally held to bail, thirty-four of which remained detained throughout the entirety of their pretrial proceedings.[126]

Finding the defendants' briefing "quite frankly[] anemic," Chief Judge Bryan ruled for Allen in a short opinion emphasizing the equal protection violation of Magistrate Pulliam's bail scheme.[127] The final judgment included an unequivocal injunction against local judges: "In particular, any such conduct or practice [confining defendants prior to trial solely because they cannot meet

117. *See supra* notes 39–47 and accompanying text.

118. Complaint, *supra* note 95, at 7.

119. *See supra* note 72 and accompanying text.

120. *See supra* note 47 and accompanying text.

121. *See supra* notes 59–60 and accompanying text.

122. Brief for Respondent at 37–39, Pulliam v. Allen, 466 U.S. 522 (1984) (No. 82-1432) (arguing that, as in *Gerstein v. Pugh*, 420 U.S. 103 (1975), since the criminal proceedings themselves were not challenged or obstructed and since the uncounseled detention was of such short duration, *Younger* was inapplicable and no feasible alternatives through state appeals or prerogative writs were available).

123. Memorandum in Support of Motion to Dismiss Under Rule 12(b), *supra* note 97, at 2–3.

124. [Defendant Pulliam's] Memorandum of Law [Supporting Dismissal], *supra* note 91, at 3.

125. [Joint] Stipulation of Facts at 3, Allen v. Burke, Civ. No. 81-40 (E.D. Va. May 21, 1981) (on file with NAPRD).

126. [Plaintiff's] Motion for Summary Judgment at 3, *Allen*, Civ. No. 81-40 (E.D. Va. May 19, 1981) (on file with NAPRD).

127. Memorandum Opinion, *supra* note 102, at 3.

bond] by defendant Gladys Pulliam, magistrate, is declared unconstitutional, and she, and those carrying out such practices, are enjoined from such practices."[128]

Chief Judge Bryan's opinion ended with a bit of boilerplate that would eventually land the case in the Supreme Court: "Plaintiffs, having substantially prevailed, are entitled to costs, including reasonable attorney fees, in accordance with 42 U.S.C. § 1988."[129] After arguing that Wyatt's fee of $7,308 was unreasonable—and losing yet again before Chief Judge Bryan—the Commonwealth's counsel chose to appeal only the award of attorney fees while leaving the injunction order undisturbed.[130]

B. A Matter of Precedent: Pulliam *in the Fourth Circuit*

The Fourth Circuit made short work of Pulliam's appeal, since recent circuit and Supreme Court precedent seemed to make the outcome clear. As a matter of circuit precedent, the court had already established the rule that judges could be enjoined even when acting in a judicial capacity.[131] In *Timmerman v. Brown*, a prisoner suit, plaintiffs alleged that state lawyers with the South Carolina Attorney General's Office were hampering prisoners' efforts to press criminal charges against correctional officers who brutally assaulted them.[132] Among the multiple remedies sought from various defendants, the plaintiffs included a request for mandamus against a state magistrate judge to reinstate indictments dismissed at the assistant attorney general's urging.[133] The district court had dismissed the case entirely on immunity grounds, but the Fourth Circuit panel reversed, reinstating all claims for prospective relief.[134] The court based much of its brief reasoning on a slew of Supreme Court cases dismissing actions against judges on grounds *other* than immunity to conclude that Section 1983 must necessarily support an equitable cause of action against judicial

128. Order at 2, *Allen*, Civ. No. 81-40 (E.D. Va. June 4, 1981) (on file with NAPRD).

129. *Id.*

130. *See* [Defendant Pulliam's] Objections to Plaintiff's Request for Attorney's Fees at 1, *Allen*, Civ. No. 81-40 (E.D. Va. June 26, 1981) (on file with NAPRD); Memorandum Opinion at 1–4, *Allen*, Civ. No. 81-40 (E.D. Va. July 6, 1981) (on file with NAPRD); Notice of Appeal at 1, *Allen*, Civ. No. 81-40 (E.D. Va. July 27, 1981) (on file with NAPRD). The reasons for not appealing the propriety of the injunction are unclear or, where offered, unconvincing. Ultimately, state's counsel argued before the Supreme Court that the change to Virginia's Code absolutely ruling out detention for Class 3 or 4 misdemeanor arrestees mooted any challenge to the injunction. Transcript of Oral Argument, *supra* note 100, at 5. But the injunction had issued after the statutory change and continued in effect against Magistrate Pulliam—were she to order a class member held to bail, she could have been held in contempt by the federal court under the terms of the injunction at any time. As discussed below, Fourth Circuit precedent allowing injunctions against judicial officers was well established, and the defendants may not have thought the case an appropriate vehicle for challenging the rule before the Supreme Court until their hand was forced that direction.

131. *See* Timmerman v. Brown, 528 F.2d 811, 814 (4th Cir. 1975), *rev'd on other grounds sub nom.* Leeke v. Timmerman, 454 U.S. 83 (1981) (reversing for want of plaintiffs' standing).

132. *Timmerman*, 528 F.2d at 812–13.

133. *Id.* at 813.

134. *Id.* at 812–13.

officers.[135] The court reserved the question of whether an injunction was interchangeable with mandamus for purposes of Section 1983, but it assumed that on either ground the district court would have power to compel the magistrate to reinstate the indictments against the corrections officers if the magistrate did not voluntarily comply.[136]

With the rule of *Timmerman* that judges could be sued for prospective relief, Allen's attorney fee award followed almost automatically since the Supreme Court had classified attorney fees as prospective relief in 1978's *Hutto v. Finney*.[137] Although the case provoked a sharp dissent arguing that attorney fees were functionally indistinguishable from damages forbidden by Eleventh Amendment immunity (money is money, after all),[138] the *Hutto* majority reasoned that fees were more like contempt fines or court costs that had always been awarded against states regardless of sovereign immunity.[139] Indeed, always *had* to be awarded—what good would the rule of *Ex parte Young* be, the majority reasoned, if injunctions against state agents could not be enforced with contempt fines?[140]

Taking *Timmerman* and *Hutto* together, for Allen's award to issue, the Fourth Circuit only had to confirm the fee award was consistent with Congress's statute. Noting that the House report underlying Section 1988's passage expressly extolled the value of awarding fees against officers who were otherwise immune to damages awards, the panel did not find it a close call to sustain Allen's award.[141]

C. Accidents and Traditions: Pulliam *at the Supreme Court*

After the Supreme Court granted certiorari in April 1983, Allen's case finally gained a national profile. Amicus briefs poured in, most aligning in predictable ways. The ACLU and the National Association of Criminal Defense Lawyers (NACDL) supported affirming judicial liability, both as to prospective relief as well as to attorney fees.[142] The Conference of Chief Justices and the

135. *Id.* at 814.

136. The panel gave the magistrate the benefit of the doubt by "suppos[ing] that . . . , freed from interference from the Solicitor's office, [he] would issue any warrants sought by plaintiffs." *Id.* at 816. On the interchangeability of equitable and prerogative writ relief, the panel had only a decades-old student note to look to for authority. *See id.* (citing Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedural Manipulation*, 38 COLUM. L. REV. 903 (1938)). On the progressive merger of equitable and prerogative remedies in the federal courts, see generally James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 STAN. L. REV. 1269 (2020); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

137. 437 U.S. 678 (1978).

138. *Id.* at 707–08 (Powell, J., dissenting); *id.* at 715–17 (Rehnquist, J., dissenting).

139. *Id.* at 694–95 (majority opinion).

140. *See id.* at 690–91.

141. Allen v. Burke, 690 F.2d 376, 379 (4th Cir. 1982) (quoting H.R. REP. NO. 1558 (1976)).

142. *See* Brief of the American Civil Liberties Union, ACLU of Virginia, and National Legal Aid and Defender Association, Amici Curiae in Support of Respondents, Pulliam v. Allen, 466 U.S. 522

administrative heads of New York and Pennsylvania's judiciaries argued that judges always had enjoyed and always should enjoy absolute judicial immunity as to both attorney fee awards and to prospective relief itself.[143] The American Bar Association and the State of Minnesota took something of a middle path, focusing their arguments against the award of attorney fees while urging the Court to extend judicial immunity to prospective relief under Section 1983 as well.[144]

All of the briefing expected that the Supreme Court would address the liability of judges to prospective relief, even though Pulliam had not appealed the injunction ordered against her.[145] Some advised the Court to leave the question for another day, perhaps by finding that Pulliam was not acting in a judicial capacity but as a law enforcement officer when she ordered defendants detained for want of bail.[146] The offers were unavailing. Court Rule 21.1 provided that "every subsidiary question fairly included" within the question presented for certiorari was properly before the Court, and ultimately the Court decided that the question of judicial liability to prospective relief was indeed "fairly included" in the question of liability for attorney fees under Section 1988.[147]

Collectively, Pulliam and her allies supporting the expansion of judicial immunity made three principal arguments. First, Pulliam and her amici pointed to a recent Supreme Court decision holding that legislators, including state-level legislators, were absolutely immune from liability both as to damages and prospective relief, and they argued the same policy should extend to the judicial branch of government.[148] The Court had reasoned that legislative immunity "insure[d] that the legislative function may be performed independently, without fear of outside interference."[149] And outside interference could come in the form of an equitable action just as surely as it could a damages action. Either kind of

(1984) (No. 82-1432); Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae, *Pulliam*, 466 U.S. 522 (No. 82-1432).

143. *See* Brief of the Conference of Chief Justices as Amicus Curiae in Support of Petitioner, *Pulliam*, 466 U.S. 522 (No. 82-1432); Brief Amicus Curiae of the Honorable Lawrence H. Cooke, Chief Judge of the State of New York, *Pulliam*, 466 U.S. 522 (No. 82-1432); Brief Amicus Curiae of the Honorable Abraham J. Gafni, Court Administrator of Pennsylvania, in Support of the Position of Gladys Pulliam, Magistrate for the County of Culpepper, Virginia, *Pulliam*, 466 U.S. 522 (No. 82-1432).

144. *See* Brief of the State of Minnesota and the Minnesota Supreme Court, as Amici Curiae, in Support of the Petition for Writ of Certiorari, *Pulliam*, 466 U.S. 522 (No. 82-1432); Brief Amicus Curiae of the American Bar Association, *Pulliam*, 466 U.S. 522 (No. 82-1432).

145. *See supra* note 130.

146. *See* Brief of the American Civil Liberties Union, *supra* note 142, at 31–32; Brief of the National Association of Criminal Defense Lawyers, *supra* note 143, at 8–13.

147. Pulliam v. Allen, 466 U.S. 522, 528 n.5 (1984) (quoting SUP. CT. R. 21.1(a) (1980) (amended 1989)).

148. *See* Brief on Behalf of Petitioner at 28–30, *Pulliam*, 466 U.S. 522 (No. 82-1432) (citing Sup. Ct. of Virginia v. Consumers Union, 446 U.S. 719 (1980)); Brief of the Conference of Chief Justices, *supra* note 143, at 10–12; Brief of the State of Minnesota, *supra* note 144, at 10–12.

149. *Consumers Union*, 446 U.S. at 731.

litigation "creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation."[150] No less could be said for judges, Pulliam argued.[151]

Second, the judicial parties argued that liability for prospective relief was both unnecessary and unwarranted given the many alternatives states provided for challenging judicial conduct and the numerous Supreme Court precedents routinely forcing parties into those alternative channels.[152] Aggrieved parties could usually appeal a judge's offensive decision or bring post-conviction collateral attacks through state or federal habeas proceedings.[153] Judges were subject to the political process, including impeachment from office or removal through election.[154] In extreme cases, "extraordinary writs" like mandamus or prohibition (but apparently not injunctions) could keep judges within their jurisdiction, and state bars or disciplinary panels could intervene in a variety of formal and informal ways.[155] Although Section 1983 had no exhaustion requirement as a matter of black letter law,[156] the judicial parties could point to precedents denying equitable remedies under Section 1983 until plaintiffs submitted to state process or sought writs of habeas corpus.[157]

Finally, Pulliam and her allies argued that judicial liability was inconsistent with the traditions of English common law and American federalism. "Most" of the early decisions on judicial immunity, they pointed out, did not specifically reference damages actions but spoke generally of "civil suits."[158] Citing early twentieth-century cases, the Conference of Chief Justices argued that even in Section 1983 cases, "this Court has always been mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"[159] Thus, for reasons based on dual sovereignty, alternative political remedies, and the policies underlying legislative immunity,

150. *Id.* at 733 (alteration in original).

151. Brief of Petitioner, *supra* note 148, *supra* at 28–30.

152. *See, e.g.*, Brief of the Conference of Chief Justices, *supra* note 143, at 12–16.

153. *See* Brief of Petitioner, *supra* note 148, at 25–26; Brief of the Conference of Chief Justices, *supra* note 143, at 13; Brief of the Honorable Abraham J. Gafni, *supra* note 143, at 12; Brief of the State of Minnesota, *supra* note 144, at 15–16.

154. *See* Brief of Petitioner, *supra* note 148, at 25–26; Brief of the Conference of Chief Justices, *supra* note 143, at 13; Brief of the Honorable Abraham J. Gafni, *supra* note 143, at 10; Brief of the State of Minnesota, *supra* note 144, at 16.

155. *See* Brief of the Conference of Chief Justices, *supra* note 143, at 13–14; Brief of the Honorable Lawrence H. Cooke, *supra* note 143, at 7; Brief of the State of Minnesota, *supra* note 144, at 15–16.

156. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961); Patsy v. Bd. of Regents of the State of Fla., 457 U.S. 496, 507 (1982).

157. *See* Brief of the Conference of Chief Justices, *supra* note 143, at 15 (citing Allen v. McCurry, 449 U.S. 90, 104 & n.24 (1980); Huffman v. Pursue, Ltd., 420 U.S. 592, 608–09 (1975)).

158. *See id.* at 6–7 (citing Bradley v. Fisher, 80 U.S. 335, 347 (1871); Randall v. Brigham, 74 U.S. 523, 535 (1869); Ross v. Rittenhouse, 2 Dall. 160, 164 (Pa. 1792)); *see also* Brief of the State of Minnesota, *supra* note 144, at 3–5; Brief of Petitioner, *supra* note 148, at 12–20.

159. Brief of the Conference of Chief Justices, *supra* note 143, at 15 (quoting Stefanelli v. Minard, 342 U.S. 117, 120 (1951)).

the judicial parties and their amici urged the extension of judicial immunity to prospective relief as well.

Allen's counsel was quick to point out the inherent tensions in the judicial parties' arguments. If it was true that judges could be challenged in a variety of ways, formal and informal, legal and political, then judicial independence clearly could be sustained alongside robust mechanisms for correcting judicial misfeasance.[160] And if the Supreme Court had often steered parties into alternative channels of proceeding against judges, immunity from prospective relief must not have been that well established in the common law, else the Court would have made it a leading rationale in its cases foreclosing equitable remedies.[161] Beyond showing that the judicial parties' arguments tended to refute one another, Wyatt and her amici answered the proponents of judicial immunity point by point.

As to the disparity between judges and legislators that judicial liability would produce, Wyatt argued there was good reason for the disparate treatment. Unlike judicial immunity, legislative immunity was protected in the Constitution through the Speech and Debate Clause.[162] And legislators, acting purely in a legislative capacity, could not directly act upon citizens to their detriment. Legislation was routinely subjected to pre-enforcement review, while the coercive decrees of judges, including bodily confinement, were carried out immediately and could last for weeks or months while challenges were pending.[163]

The many alternative paths to challenge judicial action became a further reason *supporting* judicial liability in Wyatt's account. Practically, she contended, a judge was neither more preoccupied nor had her independence threatened to a greater extent by an injunctive suit than by a routine appeal—the state attorney general's office defended the judge either way and covered her costs, as had indeed happened in Pulliam's case.[164] And Allen's injuries offered a clearcut example of the alternatives breaking down. Only the Conference of Chief Justices had been so bold as to suggest that Allen, confined without a lawyer and with no effective contact with courts, should have lodged an appeal or sought federal habeas during his two-week imprisonment.[165] Were that the rule, Wyatt responded, judges would effectively be unaccountable, not just to Allen, but to the dozens of indigent Virginians who had been routinely and illegally detained without counsel by Culpeper County's magistrates.[166]

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160. Brief of Respondent, *supra* note 122, at 47–57.

161. *Id.* at 22–28.

162. U.S. CONST. art. I, § 6; Brief for Respondent, *supra* note 122, at 58–59.

163. *See* Brief for Respondent, *supra* note 122, at 60–61.

164. Transcript of Oral Argument, *supra* note 83, at 14–15 (Counsel for Pulliam: "It is not reflected in the record as such, but the magistrate in this case sought a special appropriation from the Executive Secretary of the Supreme Court of Virginia's office, and it was paid.").

165. Brief for the Conference of Chief Justices, *supra* note 143, at 14–15.

166. *See* Brief for Respondent, *supra* note 122, at 33–37.

As to tradition, Pulliam's long string of cited judicial immunity cases indisputably involved only damages claims.[167] And Wyatt repeatedly tried to remind the Court of its civil rights precedents grounding its interpretation of Section 1983 in the memory of Reconstruction. As the Court had reasoned a decade earlier in *Mitchum v. Foster*, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights."[168] At oral argument, Wyatt contended that the lessons the Court had drawn from Reconstruction in modern civil rights litigation would be "thrown out in the twilight zone" if state judges could egregiously violate the Constitution while federal courts could not "retain the ability to stop them."[169]

After oral argument, described by one law clerk as "painful,"[170] the justices' conference ended in a stalemate. If the question of judicial immunity to prospective relief could not be avoided in answering the question presented about attorney fees, Justice O'Connor advised her colleagues to dismiss the writ of certiorari as improvidently granted (a "DIG" in Court parlance).[171] Her offer declined, O'Connor changed her vote from cautious affirmance to "tentative" reversal on the basis of absolute judicial immunity to prospective relief.[172] That produced a potential majority favoring across-the-board immunity consisting of Justices Powell, O'Connor, Marshall, and Rehnquist along with Chief Justice Burger.[173] Powell set to work to secure O'Connor's vote.[174]

In a lengthy correspondence between the chambers, Powell and O'Connor negotiated over how best to reverse the trial court. O'Connor was reluctant to shut the door entirely on prospective relief, but she emphasized her conviction that the Court should "take most such suits out of the federal courts and return them, where I believe they belong, to the state courts."[175] If no procedural rule

167. *See, e.g.*, Randall v. Brigham, 74 U.S. (7 Wall.) 523, 523 (1869); Bradley v. Fisher, 80 U.S. 335, 345 (1871); Pierson v. Ray, 386 U.S. 547, 550 (1967); Stump v. Sparkman, 435 U.S. 349, 351 (1978).

168. Brief of Respondent, *supra* note 122, at 43–44 (quoting Mitchum v. Foster, 407 U.S. 225, 242 (1972)).

169. Transcript of Oral Argument, *supra* note 83, at 46–47. On the Court's selective use of Reconstruction history in reviewing claims for equitable relief, see Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2080–90 (2022).

170. [Memorandum to Justice Blackmun] Re: Pulliam v. Allen, No. 82-1432 Post-Argument Thoughts (Nov. 2, 1983), *in* PAPERS OF HARRY A. BLACKMUN, LIBRARY OF CONGRESS, SUPREME COURT FILES, 1970–1994, boxes 400–01 [hereinafter BLACKMUN PAPERS].

171. *See* Undated Conference Notes re: Pulliam v. Allen, *in* BLACKMUN PAPERS.

172. Justice Sandra Day O'Connor, Memorandum to the Conference (Nov. 10, 1983), *in* BLACKMUN PAPERS.

173. *See* Conference Notes of Justice Harry Blackmun (handwritten on Chief Justice Warren E. Burger, Memorandum to the Conference) (Nov. 11, 1983), *in* BLACKMUN PAPERS.

174. *See* Letter from Justice Lewis Powell to Justice Sandra Day O'Connor (Nov. 4, 1983), *in* PAPERS OF LEWIS F. POWELL JR., WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, box 610, folders 7–16 [hereinafter POWELL PAPERS].

175. Letter from Justice Sandra Day O'Connor to Justice Lewis Powell 3 (Dec. 1, 1983), *in* POWELL PAPERS.

offered itself, O'Connor was willing to revisit or reinterpret the Court's precedents on due process and equal protection to find that Allen had not actually been wronged under the federal Constitution.[176] For his part, Powell worried that "affirmance would . . . invite many suits against judges."[177] So long as some alternative remedy existed under state law, Powell was comfortable shutting the door to the federal court.[178] Believing his procedural approach could satisfy O'Connor's concerns, Powell wrote a preliminary draft on December 21 that he shared only with O'Connor, emphasizing again her critical vote to hold the majority.[179] After the Christmas holiday, O'Connor wrote back that she was "relieved to see a solution to this difficult case" and confirmed her vote for the draft.[180]

When Powell's draft opinion circulated to the full Court in early January 1984, Justice Blackmun began work on a caustic dissent.[181] Declaring "unlimited judicial immunity" to be "undesirable as a matter of judicial policy [and] contrary to the clearly expressed intent of Congress," Blackmun's draft dissent charged the Court with being "vastly and unnecessarily overprotective of those who sit on the judicial benches of this country."[182] When the usual memos confirming each justice's position on the two opinions circulated, a surprise appeared: Justice Marshall signed on with Blackmun's dissent.[183] Recognizing a

176. *See id.* at 1–3.

177. Letter from Justice Lewis Powell to Justice Sandra Day O'Connor 1 (Nov. 4, 1983), *in* POWELL PAPERS.

178. *See* Justice Lewis Powell, Memorandum 1 (Dec. 16, 1983), *in* POWELL PAPERS.

179. Letter from Justice Lewis Powell to Justice Sandra Day O'Connor 1–3 (Dec. 21, 1983), *in* POWELL PAPERS.

180. Letter from Justice Sandra Day O'Connor to Justice Lewis Powell (Jan. 3, 1984), *in* POWELL PAPERS.

181. Undated First Draft Dissent at 1, *in* BLACKMUN PAPERS.

182. *Id.* Justice Powell's draft opinion was even more far-reaching than his published dissent. *See infra* notes 195–200 and accompanying text (discussing the published dissent). Recognizing that state and local judges might occasionally create "legitimate individual grievances," Powell thought leaving these grievances unremedied was an "acceptable" expense of maintaining "an independent judiciary and an orderly appellate procedure." First Draft Majority Opinion at 12 (Jan. 6, 1984), *in* BLACKMUN PAPERS. Powell further wrote that Virginia appellate or habeas processes were adequate alternatives in Allen's case, even going so far as to distinguish his own unanimous opinion in *Gerstein v. Pugh* that had indicated that periods of detention so short as to be effectively unchallengeable made the Court's equitable abstention doctrines inapplicable to class actions challenging systemically insufficient pretrial procedure. 420 U.S. 103, 110 n.11 (1975); First Draft Majority Opinion at 14. Indeed, Powell's draft did not reckon with the systemic features of Allen's allegations or class certification at all.

183. Letter from Justice Thurgood Marshall to Justice Harry A. Blackmun (Feb. 14, 1983), *in* BLACKMUN PAPERS. Upon receiving Powell's January 6 draft, *see supra* note 182, Justice Marshall's law clerk Howell E. Jackson wrote a short memo advising Marshall to "withhold your join in anticipation of further writings." Re: Pulliam v. Allen, No. 82-1432, of Howell E. Jackson to Justice Thurgood Marshall, *in* PAPERS OF THURGOOD MARSHALL, LIBRARY OF CONGRESS, SUPREME COURT FILE, box 344 [hereinafter MARSHALL PAPERS]. The clerk objected to Powell's "infus[ing] into judicial immunity doctrine equitable notions of comity" and seems to have understood Marshall's initial vote at conference to favor a ruling only that attorney fees were functionally damage awards and should be barred on that basis without any effect on the availability of prospective relief. *Id.* The clerk suggested that "[p]erhaps [Blackmun] can convince you that the attorney's fee award was appropriate in this case."

few days later that "Harry's dissent has a court," Chief Justice Burger requested Blackmun redraft his opinion as the majority.[184] Absolute judicial immunity therefore turned on a rare eleventh-hour change of judicial heart.[185]

The final opinions that emerged barely addressed the question presented and instead joined issue over contending visions of judicial history and tradition. The Blackmun majority treated the interpretation of Section 1988 as an easy one already decided by the Court's precedents.[186] The only question, then, was whether injunctive relief could be ordered against a judge acting in her judicial capacity. Technically, Blackmun admitted, the English common law tradition did not allow for an *injunction* against judges, as "[i]njunctive relief was an equitable remedy that could be awarded by the Chancellor only against the parties in proceedings before other courts."[187] But chancery's peculiar private law niche within the English legal system was treated by the majority as an inconsequential accident of history.[188] If the question concerned not the technical "injunction" of chancery but the availability of "prospective relief" generally, Blackmun found solid support in the common law tradition in the form of "the King's prerogative writs."[189]

Citing a wide range of English legal historians, Blackmun's majority opinion demonstrated that the Court of King's Bench had long controlled inferior judicial officers through the writs of mandamus (ordering an officer to fulfill a usually nondiscretionary public duty) and prohibition (restraining an officer from action beyond his jurisdiction).[190] The difference between an equitable injunction and a legal writ of prohibition, Blackmun indicated, was a matter of mere semantics and the now obsolete quirks of English legal institutions.[191] Writs of prohibition were customarily ordered both when direct review was available and when it was not, and in ecclesiastical cases in particular, English courts had expanded the definition of "jurisdiction" to order the writ of

Id. No other correspondence survives, but we can surmise Marshall ultimately adopted his clerk's suggestions.

184. Chief Justice Warren E. Burger, Memorandum to the Conference (Feb. 23, 1984), *in* MARSHALL PAPERS.

185. One review of Supreme Court studies found that "voting switches that shift a case's outcome after conference are rare—only 1% of cases." Josh Gupta-Kagan, Stanley v. Illinois*'s Untold Story*, 24 WILL. & MARY BILL OF RIGHTS J. 773, 814 (2016).

186. *See* Pulliam v. Allen, 466 U.S. 522, 543–44 (1984) (citing Pierson v. Ray, 386 U.S. 547, 554 (1967), Hutto v. Finney, 437 U.S. 678, 694 (1978), and Sup. Ct. of Virginia v. Consumers Union, 446 U.S. 719, 738–39 (1980) to demonstrate that Congress "made clear in § 1988 its intent that attorney's fees be available in any action to enforce a provision of § 1983").

187. *Id.* at 529.

188. *See id.*

189. *Id.*

190. *See id.* at 530–36. For a detailed overview of the writs of mandamus and prohibition in Anglo-American practice, *see* Pfander & Wentzel, *supra* note 136, at 1292–99, 1315–18.

191. *See Pulliam*, 466 U.S. at 533 ("Examples are numerous in which a judge of the King's Bench, by issuing a writ of prohibition at the request of a party before an inferior or rival court, enjoined that court from proceeding with a trial or from committing a perceived error during the course of that trial.").

prohibition in cases of substantive error as well.[192] True, the federal court did not sit over state courts in the same way the King's Bench presided over the other English courts, but at least Pulliam's theory of absolute judicial immunity was disproven by the longstanding tradition of highly effective—and coercive—prerogative writs ordered in appropriate cases.[193] For Blackmun, that was enough. As judicial immunity to *prospective relief* in general was not part of the common law tradition, immunity could not be asserted against modern equitable remedies in the federal courts.

Justice Powell's dissent did not address the interpretation of Section 1988 at all.[194] To be sure, the dissent groused that "[t]he holding of the Court today subordinates realities to labels" since "a judgment poses the same threat to independent judicial decisionmaking whether it be labeled 'damages' . . . or 'attorney's fees.'"[195] But the problem for Justice Powell was not the Court's reading of Section 1988; it was its allowance for judicial liability in the first place. Powell contended the majority had misread the common law tradition. He agreed that equity historically did not run injunctions against judicial officers.[196] But where the majority had found equity-like prospective relief in the prerogative writs, Powell contended that the writs "were intended only to control the proper exercise of jurisdiction" and therefore "posed no threat to judicial independence and implicated none of the policies of judicial immunity."[197] As Powell read the record, "[t]here is no allegation in this case that petitioner exceeded her jurisdiction."[198] Pulliam was a magistrate judge with jurisdiction over misdemeanor offenses. Her "erroneous construction and application of law" occurred within, not beyond, that jurisdiction.[199] For the dissent, that left nothing for the prerogative writs to do, and Pulliam's immunity from suit should have remained intact.[200]

192. *See id.* at 534–35.
193. *See id.* at 536.
194. *See id.* at 544–57 (Powell, J., dissenting).
195. *Id.* at 544–45.
196. *See id.* at 549.
197. *Id.* at 549-50.
198. *Id.* at 550.
199. *Id.*
200. The prerogative writ tradition posed a problem for Powell all throughout the case. In a cover letter to O'Connor, Powell explained that "mandamus will issue to command performance of a clear legal duty and is directed only to one specific act; an injunction demands continuous conduct over a period of time and often involves an extended period of judicial oversight and supervision." Letter from Justice Lewis Powell to Justice Sandra Day O'Connor (Dec. 21, 1983), *in* POWELL PAPERS. But Powell cited no authority for this distinction, nor did he explain why Allen's deprivation should not have been redressed through a targeted mandamus order. In draft notes to a law clerk, Powell noted that "particularly [the] treatment of the prerogative writs" showed "why drafting the dissent was so much more trouble than doing what we hoped would be a Court opinion." [Draft] Memorandum (Apr. 8, 1984), *in* POWELL PAPERS. The notes indicate that most of the material addressing prerogative writs was cut from the manuscript draft (now lost) before a typed copy was even circulated. *Id*.

The dissent's jurisdictional logic was hardly unimpeachable. Virginia law gave Magistrate Pulliam jurisdiction over certain initial appearances in misdemeanor cases, but it also expressly forbade her from issuing orders of arrest or detention in those cases. What the dissent described as Pulliam's "erroneous construction" of law could just as easily have been redescribed as flagrantly exceeding her jurisdiction. As the majority noted, the English common law had long understood that the line between jurisdiction and substantive decision-making was murky at best, and grave errors of substance had often been treated as defects of jurisdiction appropriately remedied by the prerogative writs.[201] Powell was dismissive of this evidence. "It was the rivalry between the English temporal and spiritual courts," he contended, "that induced the King's Bench to adopt the myth that misapplication of substantive common law affects the court's jurisdiction."[202]

The majority and dissent thus squarely disagreed on what was central to the common law tradition and what was a mere accident of history. To the majority, the power to correct and, if need be, coerce inferior judges lay at the bedrock of common law administration. That these coercive decrees were called writs of prohibition rather than equitable injunctions was a historical accident contingent on the vagaries of English legal institutions. To the dissent, the independence of judges, secured by absolute immunity from any kind of suit, was the only solid principle. That English courts had sometimes honored this rule in the breach was the accident of history.

The accident in Pulliam's case was that she had not appealed the injunctive decree against her. Over and again, the majority "reaffirm[ed] the validity of those principles" that restricted federal equitable relief based on the standing of the parties and the comity owed to state courts.[203] On a full record, the majority may have reversed Chief Judge Bryan on those grounds.[204] But without the ability to reweigh the equities of Allen's case, the majority decided it had to answer the question of judicial immunity in the abstract, and it was ultimately unwilling to say judges could not be sued in *any* circumstance.[205] The majority

201. *See supra* notes 191–193 and accompanying text. A similar dynamic has often been observed in the context of administrative agencies. *See, e.g.*, RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 356 (7th ed. 2015) ("Whenever an agency's action violates its governing statute, it seems possible to characterize the agency either as having exceeded its jurisdiction or as having erred substantively. As a result, any effort to distinguish those categories will be elusive." (citing examples)).

202. Pulliam v. Allen, 466 U.S. 522, 550–51 (1984) (Powell, J., dissenting).

203. *Id.* at 539 (majority opinion).

204. Blackmun's law clerk suggested that, consistent with Deborah Wyatt's initial instinct, proper relief could have been addressed to the sheriff so as to protect indigent misdemeanor defendants without directly enjoining a judge. [Memorandum] Re: Petr's Reply Brief in Pulliam v. Allen (Oct. 28, 1983), *in* BLACKMUN PAPERS.

205. *See Pulliam*, 466 U.S. at 541–43 ("We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity. In so concluding, we express no opinion as to the propriety of the injunctive relief awarded in this case.").

emphasized that federal courts "should not sit in constant supervision of the actions of state judicial officers" and that injunctive relief should be limited to "really extraordinary causes."[206] But in the end, there had to be a way through.

Even before the decision came down, the *ABA Journal* had characterized *Pulliam* as a "Firestorm over Attorney Fee Awards."[207] Almost immediately, judges and bar associations began petitioning Congress to overturn the decision, while academics lamented the "twilight of judicial independence."[208] One study of judicial malpractice insurance (which became a hot commodity in the second half of 1984) figured these responses were "overreactions."[209] A flood of litigation against judges sued in their judicial capacity for injunctions and attorney fees failed to materialize. Indeed, the only major fee award to follow *Pulliam* was that against Pulliam herself. Having triumphed in the litigation over her initial $7,308 fee, Wyatt moved the district court to award her $86,880 for the appeal.[210] After yet another round of briefing, Pulliam and the Commonwealth of Virginia settled with Wyatt for an undisclosed amount.[211]

Given the subsequent history in Congress, it is important to reiterate what *Pulliam* said and what it did not say. In the end, the Court majority held only that state judges *could* be liable to prospective relief under Section 1983. The majority opinion hinted that Allen's was the kind of egregious case meriting prospective relief. But it did not have to examine the facts or weigh the equities of the particular injunction awarded because Pulliam had not appealed it. All the abstention, standing, and exhaustion jurisprudence recently laid out by the Court remained intact, ready to thwart would-be plaintiffs. By all indications, the Court understood injunctions to be rarely awarded and almost never awardable against judicial officers except in the most extreme of circumstances.

III.
CONGRESS'S RESPONSE: "OVERRULING" *PULLIAM* BY CODIFYING ITS HOLDING AND SEQUENCING RELIEF

Following *Pulliam*, state judges fearful of lawsuits and liability for attorney fees petitioned Congress to legislatively overturn the decision and codify absolute judicial immunity. In response to these concerns as well as the broader

206. *Id.* at 538–39 (quoting *Ex parte* Fahey, 332 U.S. 258, 260 (1947)).

207. Robert A. Diamond, *The Firestorm over Attorney Fee Awards*, 69 ABA J. 1420, 1420 (1983).

208. *See* Joseph R. Weisberger, *The Twilight of Judicial Independence*—Pulliam v. Allen, 19 SUFFOLK U. L. REV. 537, 537 (1985); Irene Merker Rosenberg, *Whatever Happened to Absolute Judicial Immunity?*, 21 HOUS. L. REV. 875, 879 (1984).

209. David R. Cohen, *Judicial Malpractice Insurance—The Judiciary Responds to the Loss of Absolute Judicial Immunity*, 41 CASE W. RES. L. REV. 267, 281 n.103 (1990).

210. [Plaintiffs'] Motion to Grant Costs and Attorney's Fees, Allen v. Burke, Civ. No. 81-40 (E.D. Va. June 25, 1984) (on file with NAPRD).

211. Order, *Allen*, Civ. No. 81-40 (E.D. Va. Oct. 3, 1984) (on file with NAPRD).

political movements for litigation reform in the 1980s and 1990s,[212] the Senate Judiciary Committee drafted an amendment to Section 1983 as part of the Federal Courts Improvement Act (FCIA). Senators described this amendment as "restor[ing] the full scope of judicial immunity lost in *Pulliam*,"[213] and courts have subsequently summarized it as "overrul[ing] *Pulliam*."[214] The text Congress adopted, however, cannot be so construed. The amendment instead codifies *Pulliam* and judges' amenability to suit, offering only a sequencing limitation that prioritizes declaratory before injunctive relief. The dominant narrative about Congress overturning *Pulliam* is thus incomplete. Indeed, Congress's own acknowledgment of the text's implications supports a plain reading of the statute.

Part III.A provides an overview of the history of the amendment. Part III.B describes the rhetorical opposition to *Pulliam* from key congressional players and its incongruence with the factual reality and the text of the amendment that resulted. Part III.C reconciles the enacted text with what we think is the best reading of the legislative history.

A. Enactment History

The adoption of the FCIA in October 1996 was the culmination of nine years of congressional consideration and debate. On July 21, 1987, three years after *Pulliam*, Senators Heflin and Hatch introduced the first version of the amendment to the Senate Judiciary Committee.[215] The following year, the Subcommittee on Courts and Administrative Practice held its first hearing about "the problems raised by *Pulliam*," where legislators heard from fellow senators, state court judges, DOJ representatives, bar associations, and civil rights organizations.[216] The American Bar Association was particularly active, working on drafting that year's iteration of the amendment with Senator Heflin.[217] Despite several years of dormancy during its life as a bill, the FCIA and Section 1983

212. *See generally* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 983 (2003) (discussing the "litigation explosion" and the various legislative and judicial responses to it, including changes to the Federal Rules of Civil Procedure, the Supreme Court summary judgment "trilogy," the Civil Justice Reform Act of 1990, the Common Sense Product Liability Legal Reform Act of 1996, the Private Securities Litigation Reform Act of 1995, and changes to tort and class action law in the early 2000s).

213. S. REP. NO. 104-366, at 37 (1996).

214. *See infra* Part IV.A and accompanying text.

215. *See* S. 1515, 100th Cong. (1987); 133 CONG. REC. 20519 (1987).

216. *See Bill to Prohibit Injunctive Relief, or an Award of Damages Against, a Judicial Officer for Acts Taken in an Official Capacity: Hearing on S. 1482, 1512, 1515 Before the S. Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary*, 100th Cong. 49 (1988) [hereinafter *1988 Hearing*] (statement of Sen. Heflin). This hearing discussed three similar bills. S. 1515 was the closest to the language finally adopted in 1996. *See 1988 Hearing* at 3–49.

217. *See* Norma L. Shapiro, *The Restoration of Judicial Immunity*, 35 JUDGES J. 2, 2 (1996).

amendment were the subject of two additional extensive hearings and three detailed Senate reports.[218]

The actual text of the amendment did not change markedly over the decade preceding its enactment. The original version proposed amending Section 1983 to add: "except that in any action brought against a judicial officer for an act committed in such officer's official capacity . . . injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."[219] In 1988, a freestanding fourth section was added, establishing exhaustion-of-remedies and imminent harm requirements that paraphrased the standard for a preliminary injunction:

> Notwithstanding any other provision of law, no federal court shall issue an injunctive or declaratory order against a judicial officer of a state for an act or omission committed in such officer's judicial capacity, unless it is determined that there is not an adequate remedy in state court and there is imminent danger of irreparable harm to the petitioner.[220]

This version was never considered by the full Senate, and the subsequent version, presented in October 1989, dropped section four.[221]

The 1989 version also contained the only significant change in wording during the amendment's drafting history: the words "or omission" were added after "for an act," and "official capacity" was changed to "judicial capacity."[222] The latter change responded to DOJ's testimony the prior year urging Congress to clarify the meaning of "official capacity."[223] The amendment thus unambiguously pertains to acts taken by judges in traditional judicial (mainly, adjudicative) roles. Judges acting outside of their adjudicatory roles are left to the normal operations of Section 1983.

The text of the amendment otherwise retained its current form, save for the stylistic switch from "committed" to "taken" in 1995.[224] The current form,

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218. *See* S. REP. NO. 101-465 (1990) [hereinafter 1990 S. REP.]; S. REP. NO. 102-224 (1991) [hereinafter 1991 S. REP.]; S. REP. NO. 104-366 (1996) [hereinafter 1996 S. REP.]. The legislative history discussed relies mainly on these reports and transcripts from the hearings.

The bill was also regularly introduced on the congressional floor throughout the years. *See, e.g.*, 133 CONG. REC. 20519, 20560-62 (1987); 137 CONG. REC. S3191 (daily ed. Mar. 31, 1991) (statement of Sen. Howell Thomas Heflin); 138 CONG. REC. 2084 (1992); S. 1115, 141 CONG. REC. 21836, S11324 (1995); S. 1887, 142 CONG. REC. S6517-03, S12379, S27306 (1996); 142 CONG. REC. H12277, H27352 (1996).

219. S. 1515, 100th Cong. (1987).

220. S. 1515, 100th Cong. (1988).

221. *See* S. 590, 101st Cong. (1989); 1990 S. REP., *supra* note 218, at 3–4 (explaining the history of this proposed additional section).

222. *See* S. 590, *supra* note 221 ("[E]xcept that in any action brought against a judicial officer for an act or omission committed in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

223. *See id.*; *1988 Hearing*, *supra* note 216, at 53 (statement of Deputy Assistant Att'y Gen. Jones).

224. *See* S. 1115, 104th Cong. (1995) (including the language "taken in such officer's judicial capacity").

adopted via unanimous consent in October 1996,[225] reads: "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."[226]

B. Predominant Themes Motivating Congress and the Shortcomings of This Traditional Narrative

Vocal supporters of the Section 1983 amendment—its sponsoring legislators and the state judges who appeared at multiple hearings—communicated four concerns in the aftermath of *Pulliam*. *Pulliam*, in their view, allowed for unprecedented (1) vexation and harassment of the judiciary, (2) judicial liability for attorney fee awards (in addition to the cost of their own attorneys), (3) diminished judicial independence, and (4) distorted notions of federalism and judicial comity. As the legislators and judges described it, the possibility of judges being subject to litigation would wreak havoc on the efficiency, impartiality, and dignity of state courts, and put judges at personal financial risk.

Section 1983 was purportedly amended to legislatively overturn *Pulliam*, restore judicial immunity, and foreclose federal court suits against state judges, or so the story was told.[227] The Senate report published a month before the final version was adopted states that the amendment "restores the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's decision in *Pulliam*" and goes far "in eliminating frivolous and harassing lawsuits which threaten the independence . . . [of] the judicial process."[228] But curiously, the text neither restored judicial immunity nor eliminated suits against state judges, and the four concerns driving the amendment effort were addressed only obliquely by the resulting statute. This dominant narrative of "restoring judicial immunity" thus does little to explain the meaning of the language Congress adopted. This Section reviews these principal themes of the legislative history and their incongruence with the text of the amendment.

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225. *See* 142 CONG. REC. S12379, 12386 (daily ed. Oct. 3, 1996) (statement of Sen. Charles E. Grassley); 142 CONG. REC. H12277 (Oct. 4, 1996).

226. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3853 (1996) (codified at 42 U.S.C. § 1983).

227. It was described as "[l]egislation to help restore the *status quo ante* . . . " 1990 S. REP., *supra* note 218, at 8; *Judicial Immunity Legislation: Hearing on H.R. 3206 and H.R. 671 Before the Subcomm. on Intell. Prop. and Jud. Admin. of the H. Comm. on the Judiciary*, 102nd Cong. 49 (1991) [hereinafter *1991 Hearing*] (statement of Assistant Att'y Gen. Gerson) ("If either of these bills is enacted, the doctrine of absolute immunity for a judge's performance of his or her official acts, a mainstay of our common law heritage for several centuries, will be properly restored."); *see also, e.g.*, 1996 S. REP., *supra* note 218, at 37 ("Section 311 restores the full scope of judicial immunity lost in *Pulliam* . . . ."); *1988 Hearing*, *supra* note 216, at 52–54 (statement of Deputy Assistant Att'y Gen. Jones,); *id.* at 253 (statement of Justice Weisberger) ("Its objective is to restore judicial immunity as it existed prior to *Pulliam v. Allen*.").

228. 1996 S. REP., *supra* note 218, at 36–37.

1. The Dominant Narrative

Following *Pulliam*, state judges feared that they would be subject to suit by bitter litigants who had lost their cases, fueled by vengeance and lured by the prospect of recovering attorney fees. They envisioned these suits as unmeritorious burdens on the legal system, clogging federal dockets and exhausting state judges' time and resources.[229] Such fears had particular political salience in the context of what commentators called the "litigation explosion," referring to perceived increases in frivolous litigation and the rising costs and burdens of civil suits.[230] Even if these cases were dismissed at the early stages, they would require judges to respond and mount a defense.[231] And the idea of a judge being haled into court, to stand before a peer and defend the exercise of their official duties, was described as undignified and degrading.[232] The 1990

229. *See, e.g.*, *1988 Hearing*, *supra* note 216, at 82 (statement of Justice Danielson); *id.* at 112 (statement of Chief Justice Peterson) (describing, in addition to the detriment to the state system, the burden on the federal system forced to adjudicate these suits); *id.* at 126 (panelist responses to questions posed by Senator Thurmond) (describing "[t]he ever present threat of burdensome litigation"); *id.* at 250 (statement of Justice Weisberger); *1991 Hearing*, *supra* note 227, at 11–12 (statement of Chief Justice Carrico, Supreme Court of Virginia); *id.* at 69 (statement of Judge Bradford, Superior Court of Maine). One judge also described the "emotional rigors of aggressive discovery tactics" while discussing the burdens of defending a suit. *See id.* at 59 (statement of Judge Bradford, Superior Court of Maine).

230. *See generally* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985) (discussing the increase in litigation and burden on federal courts). Professor Miller explains that the "outcry in this country over the social costs of civil litigation" in the 1990s was "unprecedented in its decibel level and sense of urgency, bringing together a coalition of politicians, lawmakers, business people, and scholars . . ." across ideologies. Miller, *supra* note 212, at 986. "Along with the perception of increased litigation and a concomitant rise in associated time and expense," he writes, "much of the increase [was] attributed to frivolous cases." *Id.* at 987.

Whether the perceived "litigation explosion" at the end of the twentieth century had any basis in empirical reality has been doubted. *See* Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1178 (noting that "[f]rom 1960 to 1986, annual civil case filings in U.S. district courts grew 398% [and that] [t]his fourfold increase helped to cultivate a widely-held belief in a 'litigation explosion'" but contending that rates of litigation have largely stagnated since then). *But see* Miller, *supra* note 212, at 992 (noting the "contrary evidence indicating that the claims of the alleged 'litigation explosion' are exaggerated"); Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199, 216 (1991) (review of OLSON, THE LITIGATION EXPLOSION, *supra*) ("As this freight train of 'reform' rumbles toward what may now be its inevitable destination, I am reminded of a scribe's words . . . : 'There is more fear in this country than the facts warrant.'" (quoting A.H. Sulzberger, Speech Upon Receiving Columbia College Distinguished Service Award, 1952, *reprinted in* J. BARTLETT, FAMILIAR QUOTATIONS 1020 (14th ed. 1968))); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717, 722 (1998) (describing the sentiment in the 1990s in response to the perceived "litigation explosion" as a "jaundiced view of American civil justice" and criticizing it as largely unfounded—"its key assertions are at best exaggerated and in many cases entirely mistaken").

231. *See 1988 Hearing*, *supra* note 216, at 49 (statement of Sen. Charles E. Grassley); *id.* at 214–15 (statement of Judge Roth) ("The real fact . . . is . . . that you become a personal litigant, that you become subject to suit, to discovery, to appearance in court or at least through all the depositions that can be imposed in that type of situation.").

232. *See Judicial Immunity: Hearing on S. 590 Before the Subcomm. on Cts. & Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 187 (1989) [hereinafter *1989 Hearing*] (statement of Justice Weisberger) (adamantly disagreeing with the suggestion that the subject-to-suit provision in

Senate Report described one of the amendment's two aims as "discourag[ing] frivolous or harassing lawsuits that threaten the ordered and objective decisionmaking essential to the judicial process."[233]

If the parade of horribles continued to an adverse judgment on the merits, the judge might face a significant financial burden. The judge could be held liable for the plaintiff's attorney fees. The state judges present at the hearings were particularly concerned about covering fees out of pocket. Justices Peterson and Carrico, of Oregon and Virginia, respectively, pointed out that half of the states had no formal indemnification scheme or insurance coverage for judges to cover acts taken in their judicial capacity.[234] The 1990 Senate Report echoed their concern: "judicial officials in at least 30 States could be found personally liable for fee awards," it forewarned, "unless their legislatures acted to protect them."[235] Attorney fee awards also had political salience at the time and were an important target in the broader litigation reform movement.[236]

The issue of attorney fees was ultimately addressed in the FCIA's amendment to Section 1988, which made attorney fee awards available in cases against judges in a judicial capacity only where the judge's action was "clearly in excess of such officer's jurisdiction."[237] The amendments to Sections 1983

Section 1983, as opposed to the attorney fees provision in Section 1988, is not crucial to judicial independence—thus intimating that the issue is the vexation of the suits themselves). Justice Carrico also described it as degrading—"I don't know how I can describe how belittling . . . , how humiliating it is"—to have to defend himself in court for his judicial decisions. *1991 Hearing*, *supra* note 227, at 35 (statement of Justice Carrico).

233. 1990 S. REP., *supra* note 218, at 2; *infra* note 245 and accompanying text; *see also 1988 Hearing*, *supra* note 216, at 49 (statement of Sen. Charles E. Grassley) ("*Pulliam* has spawned a substantial amount of litigation against judges, most of it meritless, by the way."); *1991 Hearing*, *supra* note 227, at 23 (statement of Chief Judge Robinson, Jr., District Court for the District of Columbia) (describing a key purpose of judicial immunity as protecting "judges from harassing and vexatious litigation based upon their judicial acts").

234. *See 1988 Hearing*, *supra* note 216, at 98–100 (statement of Edwin Peterson, Chief Justice of the Oregon Supreme Court) (acknowledging that some states had other provisions to help mitigate costs, although they were not well known); *1989 Hearing*, *supra* note 232, at 23 (statement of Chief Justice Carrico).

235. 1990 S. REP., *supra* note 218, at 9. The report cited *Kentucky v. Graham*, 473 U.S. 159 (1985), which held that fees could not be recovered from the government in a personal capacity suit.

236. The "American Rule" of having each party pay their own attorney fees was thought to encourage frivolous litigation—litigants did not have to fear paying others' fees as much—and contribute to the "litigation explosion." *See, e.g.*, Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 721 (1995) ("Proposals which would require losing parties to pay their opponents' legal fees are grounded on the above concerns, such as the litigation explosion, litigation abuse, and manufacturers' substantial exposure in products liability cases, as well as arguable concerns involving fairness and increased litigation expenses."); *see also* Miller, *supra* note 212, at 1000 (noting proposed legislation in the 1990s that called for changes in attorney fees schemes); 42 U.S.C. § 1997e(d) (establishing the "150% cap" in the PLRA, which was adopted during this period).

237. *See* 42 U.S.C. § 1988; Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(b), 101 Stat. 3847. Unlike the amendment to Section 1983, the amendment to Section 1988 at least appears to overrule *Pulliam* by changing the applicable standard of liability. Even so, it is not clear that *Pulliam* itself would have come out differently under Section 1988 as amended, considering the Fourth Circuit and Supreme Court's conviction that Pulliam's behavior made her an appropriate defendant in a

and 1988 and their respective purposes, however, were not disaggregated in the early years. Discussions of attorney fees were a prominent part of the larger effort to restore judicial immunity by amending Section 1983. The availability of attorney fee awards not only increased the chances of being sued—by enticing prospective plaintiffs[238]—but also heightened the stakes, placing a greater burden on judges to defend vigorously and avoid suit by sacrificing neutrality in the first place.[239]

Even in the absence of a judicial award, there was still concern about other monetary costs. Litigation alone imposed financial burdens: judges might have to pay for their own representation[240] or expend funds managing the litigation and complying with discovery requests. If they obtained insurance, this too would impose a cost, either on the judges or on taxpayers.[241]

Regardless of whether it ever actualized, the fear of being sued would diminish judicial independence and impartiality, the judges argued. Their decisions would be tainted by the fear that a disgruntled litigant would sue out of vengeance—or at least the public would have this perception, which would "undermine [its] faith" in the system.[242] Judges' jurisprudence would not only be shaped by political elections but also by the prospect of litigants invoking their own referendum via federal oversight.[243] The Senate reports emphasized this problem, describing preservation of judicial neutrality as the second central purpose of the legislation, and cited cases exemplifying the legitimate threat to

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prohibition-like suit, a prerogative writ intended to restrain gross violations of jurisdiction. *See supra* notes 136, 190–193 and accompanying text.

238. *See* 1990 S. REP., *supra* note 218, at 7 (describing one of the main problems arising from *Pulliam* as making "judges personally liable for court costs and large attorney fee awards that are tantamount to direct money damages and thereby encourage harassing litigation"); *1988 Hearing*, *supra* note 216, at 49 (statement of Sen. Charles E. Grassley) ("What drives these cases to be filed? The lure of attorneys' fees, the 'Holy Grail' for all those lawyers in America who yearn to make a profitable career out of suing the Government."); *1989 Hearing*, *supra* note 232, at 267 (describing how plaintiffs will be lured by the prospect of recovering attorney fees).

239. *See infra* Part III.B and accompanying text.

240. *See 1989 Hearing*, *supra* note 232, at 145 (statement of Judge Roth).

241. *See id.* at 202 (statement of Justice Weisberger).

242. *1989 Hearing*, *supra* note 232, at 127 (statement of Judge Roth, Fourth Judicial District of Portland, Oregon) ("The silent presence of potential liability impugns the impartiality of our judges and can only undermine the faith of our people in the fairness of our courts."); *1988 Hearing*, *supra* note 216, at 84 (statement of Judge Peterson) ("[M]y independence ha[s] been substantially fettered."); *id.* at 1–2 (statement of Sen. Heflin); *see also id.* at 51 (statement of Associate Justice Murray, Rhode Island Supreme Court) (noting fears about impairment to judicial independence after *Pulliam*).

243. *Cf. 1988 Hearing*, *supra* note 216, at 70 (statement of Associate Justice Danielson, California Court of Appeals) ("In the absence of judicial immunity, a judge who is called upon to make a decision on what may be a highly unpopular cause has some compunction about going out too far, of being so far in the lead that he's lost all of his support.").

Although seven states use no elections for state judges (including California, Rhode Island, and Virginia, homes to the outspoken Justices Danielson, Weisberger, and Carrico), the rest have some kind of popular election selection method that already infuses political bias into the judicial system. *See Judicial Election Methods by State*, BALLOTPEDIA, https://ballotpedia.org/Judicial_election_methods_by_state [https://perma.cc/3BVF-CXX2].

independence.[244] As the 1996 Senate Report explained, despite the relative rarity of a meritorious suit and the frequency of early dismissal,

> the very process of defending against those [thousands of Federal cases . . . filed against judges and magistrates] is vexatious. . . . [T]he risk to judges of burdensome litigation creates a chilling effect that threatens judicial independence and may impair the day-to-day decisions of the judiciary in close or controversial cases.[245]

In addition to fears about the burdens of suit, fears about liability for attorney fee awards were also seen as a threat to independence.[246] The 1991 Senate Report stated that because of the availability of attorney fees, any suit against a judge for injunctive relief "places an open-ended financial threat against the judge for making an honest judicial decision for which a governmental unit may not be liable."[247] Senator Heflin's introduction to the 1988 and 1989 hearings also invoked judicial independence, quoting a British case from 1868 on the importance of judges acting "without favor, without fear," and proceeded to depict *Pulliam* as a threat to this central value.[248]

Finally, state judges viewed *Pulliam* as a threat to values of federalism and judicial comity. The prospect of federal courts issuing coercive orders to state judges, effectively telling state courts what to do, invoked the specter of the federal audit and an aggressive regime of oversight harkening back to Reconstruction.[249] Judges and legislators feared it would disrupt "Our

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244. *See* 1990 S. REP., *supra* note 218, at 7 (describing one of the two key purposes of the legislation as restoring the doctrine of judicial immunity to fulfill the "historic function of protecting independence of the judiciary," key to the rule of law); *id.* at 1–2 ("S. 590 . . . would . . . preclude the direct threat now posed to the independence of both the State and Federal judicial systems.").

The other purpose cited, *see supra* note 233, was preventing vexatious and harassing suits.

245. 1996 S. REP., *supra* note 218, at 37; *see also 1988 Hearing*, *supra* note 216, at 84 (statement of Judge Peterson) ("It's just the threat of being sued, the threat, to say nothing of the threat of attorneys' fees—does substantially impair the exercise of independence by judges.").

246. *See* 1990 S. REP., *supra* note 218, at 9 ("Representatives of the judiciary testifying at the hearings on S. 590 . . . were unanimous in the view that fee awards against judges are as destructive to judicial independence as direct damages."); *id.* (citing Consumers Union of the United States v. Am. Bar Ass'n, 505 F. Supp. 822 (E.D. Va. 1981), as a case where attorney fees were awarded against the Supreme Court of Virginia); 1991 S. REP., *supra* note 218, at 7–9 (same).

The Deputy Assistant Attorney General also echoed this concern, highlighting liability for damages and attorney fees as the principal threat to a fair and independent judiciary. *See 1988 Hearing*, *supra* note 216, at 52 (statement of Deputy Assistant Attorney General Jones); *id.*, at 52–65 (agreeing with judges' estimations that *Pulliam* portended the end of judicial independence). The ABA concurred in this fear about judicial independence in its amicus brief to *Pulliam*, which was included in the 1989 hearing materials. *See id.* at 147–69.

247. 1990 S. REP., *supra* note 218, at 9.

248. *1988 Hearing*, *supra* note 216, at 1; *1989 Hearing*, *supra* note 232, at 1 (quoting Scott v. Stansfield, 3 LR Exch. 220, 223 (1868); Bradley v. Fisher, 80 U.S. 335, 349 n.16 (1871)).

249. *See 1988 Hearing*, *supra* note 216, at 105 (statement of Chief Justice Peterson) ("Surely we can now agree that state courts should no longer be compared to some courts of the turbulent Reconstruction Era whose transgressions were among those by state officials that led Congress to enact restraints on state action violating federally protected rights."); *id.* at 212 (statement of Justice Weisberger, speaking on behalf of a panel including Judge Roth and representative of the ABA Thomas Barnett) ("[I]njunctive relief against a judge, either State or Federal, is inherently wrong.").

Federalism" (explicitly invoked as such), creating a system where federal district courts displaced state courts of appeals.[250] The 1990 and 1991 Senate Reports thus described "preserv[ing the] long history of judicial federalism" as one of the two key "need[s] for the legislation" and explained that the amendment would "enhance established concepts of comity and federalism in accordance with the principles of equitable relief essential to the integrity of State judicial proceedings under our dual system."[251]

The addition of section four, though subsequently removed, reflected this concern with federal comity. Many voiced support for this express assurance that federal relief was only a last resort reserved for when judges' violations could not be remedied in state systems.[252] Despite the ultimate omission of section four, this sentiment persisted throughout the debates.[253]

2. What the Data Said

These concerns, although frequently repeated in the hearings and Senate reports, do little to explain why Congress adopted the amendment that it did. This Section demonstrates why these concerns were overblown in light of the data that was available. It also explains how the less vocal majority in Congress

250. *See* 1990 S. REP., *supra* note 218, at 7 (explaining that the amendment corrects the problem created by *Pulliam* that encouraged litigants to challenge state decisions by collateral attacks in federal courts rather than the remedies available in the state system); *1988 Hearing*, *supra* note 216, at 126 (panelist responses to questions posed by Senator Thurmond) ("[I]nsofar as *Pulliam* 'allows for a federal cause of action to be brought against a state court judge for injunctive relief, I do strongly believe that '*Pulliam* gives the federal courts unnecessary authority over state judicial officers.' The decision is contrary to what has been entitled 'Our Federalism.'"); *id.* at 113 (statement of Chief Justice Peterson) ("[Modern state courts] should not be viewed as inferior tribunals requiring daily oversight by individual judges on the federal bench."); *1989 Hearing*, *supra* note 232, at 252 (questions submitted by Sen. Herb Kohl) ("[S]hort circuiting of the appellate process by bringing suit [in federal court] against a Judge with whom one disagrees only tends to subvert and degrade the Judicial process."); *1991 Hearing*, *supra* note 227, at 14 (statement of Chief Justice Carrico) (describing the same concern of using federal cases as collateral attacks on state proceedings and the threat to comity and integrity of the state judicial process).

251. 1990 S. REP., *supra* note 218, at 2, 7; *see also* 1991 S. REP., *supra* note 218, at 7 (same).

252. Justice Danielson and Chief Justice Peterson pushed for the state exhaustion requirement. *See 1988 Hearing*, *supra* note 216, at 82 (statement of Judge Danielson) ("I suggest that there be an additional amendment to provide that injunctive or declaratory relief shall not be granted against a state judge or judicial officer where a plain, speedy and efficient remedy may be had in the courts of such state."); *id.* at 91 (statement of Chief Justice Peterson) ("In short, we do not believe there is need for a federal judge to enjoin a state judge in a federal civil rights action absent a showing of an inadequate remedy at law within the state court system and a serious risk of irreparable harm . . . .").

253. Senator Heflin opened the 1989 debate by describing the "encroachment on the doctrine of federalism [that] destroys comity between the two separate but equal judicial systems." *1989 Hearing*, *supra* note 232, at 2. *See also, e.g.*, *id.* at 14 (statement of Chief Justice Peterson) ("[W]e continue to prefer language, such as Sec. 4, S. 1515 as reported by the Judiciary Committee in the last Congress, which would require that all issues be resolved in state courts, whenever possible, before federal courts could intervene."); *1991 Hearing*, *supra* note 227, at 11 (statement of Chief Justice Carrico); *id.* at 25-26 (statement of Judge Robinson); *id.* at 125 (statement of Sen. Hughes) ("[I]t involve[s] fundamental questions about the independence of the judiciary . . . and the whole concept of comity between Federal and State judicial remedies. . . . We hope that we can fashion something that will in fact reserve [*sic*] the concept of federalism . . . .").

responded to this reality by only modestly reforming the availability of prospective relief against judges. The amendment ultimately adopted after the decade of debate merely sequenced litigation; it did not immunize judges from suit.

Throughout the decade that Congress debated *Pulliam*, the expected flood of cases against judges failed to materialize. A task force on the impact of *Pulliam* tallied suits against judges in the years before and after the decision was handed down, reporting its findings in the 1988 and 1989 hearing materials.[254] The statistics suggested that most suits filed against state judges were likely frivolous, or at least difficult to win—only 2 to 3 percent were decided favorably to plaintiffs[255]—but there was no dramatic increase in the frequency of suits following *Pulliam* in 1984. There were 957 total cases from 1982 to 1985. The 1988 Senate Report concluded that cases were increasing over this period, as more suits were brought by disgruntled litigants seeking redress for unfavorable outcomes in their cases.[256] The task force's report the subsequent year, however, presented a less determinate picture of the upward trend, undermining any causal conclusions. "Between 1984 and 1985, the number of reported lawsuits decreased from 433 to 281, a 35% reduction. Filings increased again between 1985 and 1986 by 49% (281 to 418) but decreased again by 14.3% between 1986 and 1987 (418 to 358)."[257] Although a few cases captured legislators' attention in the aftermath of *Pulliam*,[258] suits against judges generally waxed and waned with no clear connection to the *Pulliam* decision. And the absolute number of

254. *See 1988 Hearing*, *supra* note 216, at 161–83; *1989 Hearing*, *supra* note 232, at 76–97.

255. Only 3 percent of cases in this data set were resolved favorably to plaintiffs (by judgment or settlement)—and only six of those were for judicial acts (as opposed to administrative acts in an enforcement capacity). *See 1988 Hearing*, *supra* note 216, at 169, 183. These cases involved successful challenges to the statutes or procedures on which the judges based their decisions. *See id.* at 169. The statistics are not fully telling, however, because many suits were still pending, and many states did not release data. *See id.* at 161. The data in the 1989 hearing is similar. Only 2.4 percent of suits were decided favorably to plaintiffs, and 47 percent of the total decisions were about acts judicial in nature. *See 1989 Hearing*, *supra* note 232, at 83.

256. *See 1988 Hearing*, *supra* note 216, at 161–64, 183.

257. *See 1989 Hearing*, *supra* note 232, at 76.

258. *See, e.g.*, *infra* Part III.B. Beyond those discussed explicitly in the hearings, there may have been other suits against judges for injunctive relief against actions in their judicial capacities of which legislators—or vocal political advocates—were made aware. *See, e.g.*, *Lofton v. U.S. Dist. Ct. for E.D. Ark.*, 882 F.2d 300, 301 (8th Cir. 1989) (allowing a civil rights class action lawsuit for injunctive relief regarding jail conditions to proceed against a state circuit judge who had issued contempt orders when a jail refused to accept additional inmates—due to overcrowding—which contravened a federal consent decree, noting that "[the judge] does not enjoy immunity from prospective injunctive relief"); Larry Ault, *Judge Kept as Defendant in Jail Suit*, ARK. DEMOCRAT, Aug. 10, 1989, at 48 (reporting on the *Lofton* suit); Rapp v. Disciplinary Bd. of Haw. Sup. Ct., 916 F. Supp. 1525, 1538 (D. Haw. 1996) (enjoining defendants, including state supreme court justices, from applying an unconstitutional judicial rule, although not discussing official immunities or clarifying whether this was in a judicial capacity).

lawsuits—in the range of 200 to 500 a year across the country—remained relatively low.[259]

Concerns about liability for attorney fees likewise seem to have been unfounded, or at least exaggerated, despite the dire warnings sounded by certain state judges.[260] Requests for attorney fees under Section 1988 did not increase after *Pulliam*.[261] Given the paucity of meritorious cases against state judges and the even smaller percentage of cases where attorney fees are awarded,[262] combined with states' indemnification schemes, the congressional reports showed few, if any, cases where judges had to pay plaintiffs' attorney fees out of pocket.[263]

In most cases, judges did not have to pay fees for their own representation either. A study cited in the 1988 hearing concluded that "almost all of the states have representation provided by the Attorney General (or other public legal office)," vitiating any need for personal spending.[264] The fear of attorney fees articulated in the legislative history was thus disproportionate to the reality,[265] and perhaps reflected the outsized influence of one unlucky judge from Oregon who was held liable for $35,000 in attorney fees, although the award was ultimately covered by the state.[266]

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259. *See 1989 Hearing*, *supra* note 232, at 76–79. Nevertheless, the report concluded, somewhat misleadingly, that "the number of . . . 1983 actions filed against state court judges increased in 1986 and remains at a level today that causes great concern to the judiciary." *Id.* at 95.

260. *See supra* notes 234–241 and accompanying text.

261. *See 1989 Hearing*, *supra* note 232, at 91.

262. The study published in the 1989 hearing estimated that plaintiffs received attorney fees in about 39 percent of cases where they prevailed, which was only 2.4 percent of cases filed. *See id.* at 95, 83.

263. The senators who opposed the amendment to Section 1983 noted, "In the rare cases in which a plaintiff has succeeded, there is not one reported instance of a judge having paid attorney's fees out of his or her pocket." *See* 1990 S. REP., *supra* note 218, at 14 (minority views). This may be true notwithstanding the shortcomings in existing indemnification schemes noted by state judges and in the Senate reports. *See supra* notes 234–241 and accompanying text; *see also 1988 Hearing*, *supra* note 216, at 79 (statement of Justice Danielson) (admitting that in the cases he cited for attorney fee awards, the awards "were ultimately paid by a governmental unit and not the judge in his or her individual capacity"). The NAACP's Legal Defense and Educational Fund representative concurred: "[I]n virtually all cases where fees are awarded against any state or local official, including judges, those fees will be paid out of government funds. . . . Indeed, in our long experience of handling civil rights cases against hundreds of . . . government officials and agencies, we are aware of no instance in which any defendant named in his or her official capacity has had to pay a penny of fees or costs out of his or her own pocket." *Id.* at 262.

264. *1988 Hearing*, *supra* note 216, at 99 (statement of Chief Justice Peterson).

265. As the senators who opposed the bill explained, "The rationale for the ban on attorney's fees . . . springs largely from concern that . . . *Pulliam* would unleash a flood of civil rights litigation against State court judges who would be personally liable for attorney's fees incurred by successful plaintiffs in such cases. This fear has not been borne out . . . ." 1990 S. REP., *supra* note 218, at 14 (minority views).

266. This judge was Chief Justice of the Oregon Supreme Court Edwin Peterson, who was an outspoken participant in the 1988 and 1989 hearings. *See generally 1988 Hearing*, *supra* note 216; *1989 Hearing*, *supra* note 232. After *Pulliam*, he was subject to an adverse judgment by the District Court of Oregon, which enjoined judicial enforcement of a recoupment statute ("authoriz[ing] courts to assess

Fears of a federal audit and assaults on federalism largely proved baseless in practice as well. Federal judges hardly issued any injunctive orders,[267] and lawmakers could point to no sign of overly aggressive federal judges.[268] As the director of the ACLU explained,

> The fact is that Federal judges do not likely enjoin State judges. We have not had a single case that's been reported, that anybody's testified to . . . where that has . . . occurred. . . . [Federal judges] will only enjoin them in extraordinary situations where that relief is, as Justice Blackmun said, constitutionally required and necessary to prevent irreparable harm.[269]

Whether or not *Pulliam* encouraged a return to Reconstruction-era federal judicial oversight of state judges,[270] federal courts in the late 1980s and early 1990s showed no appetite to take up the challenge.[271]

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the cost of court-appointed counsel against indigent defendants if the court determines there is ability to repay") as a violation of the Sixth Amendment. *See* Fitch v. Belshaw, 581 F. Supp. 273, 275 (D. Or. 1984); *1988 Hearing*, *supra* note 216, at 79 (statement of Justice Danielson) (noting the attorney fees against Chief Justice Peterson); *see also id.* at 84–85 (statement of Chief Justice Peterson) (explaining how this case had shaded his and his colleagues' thinking about criminal defendants in subsequent cases and how the threat of liability is felt deeply even if the actual awards are rare); *id.* at 109 ("Hardly a week goes by without a judge of the courts of Oregon receiving threats of suits by disgruntled litigants. Some judges, in face of the threat of a substantial attorney fee award say, 'It's not worth it,' and yield.").

267. *See infra* Part III.B.2. The data published in the 1989 hearing reveals only forty-seven of 1974 cases against state judges filed over five years ended favorably to plaintiffs, including settlements. *1989 Hearing*, *supra* note 232, at 85.

268. *Accord* 1990 S. REP., *supra* note 218, at 13 (minority views) ("Perhaps this intrusion upon the capacity of Federal courts to remedy constitutional violations might be justified if it could be shown that Federal courts were continually overstepping their bounds and fashioning broad injunctions that interfered with the operation of the State judiciary. Yet no such showing has been made.").

269. *1988 Hearing*, *supra* note 216, at 265–66 (statement of Director Halperin); *see also 1991 Hearing*, *supra* note 227, at 101 (statement of Michael Cooper, N.Y. State Bar Ass'n) (concluding "[w]e know of no case in which a Federal judge in New York has enjoined a New York State judge in a section 1983 action"). Cooper contested one case others had cited as an example of an injunction issued against a state judge, *Johnson Newspaper Corp. v. Morton*, 862 F.2d 25 (2d Cir. 1988), noting it had involved only a declaratory decree. *Id.*

In the suit against Chief Justice Peterson, *see supra* note 266, the district court awarded summary judgment to the plaintiff, essentially declaring a state statute unconstitutional. *See Fitch*, 581 F. Supp. at 278. But the summary judgment order did not include a decree, injunction, or any prohibitory language whatsoever against the judicial parties.

270. *See supra* note 250.

271. Some judges explicitly declined to issue relief on federalism or federal comity grounds. *See, e.g.*, Holeman v. Elliott, 732 F. Supp. 726, 727 (S.D. Tex. 1990) (holding that despite *Pulliam*'s abrogation of judicial immunity against injunctive relief, such relief was not available where the cause of action was "'enmeshed' in the underlying domestic relations controversy, which is a state—not federal—concern"); Belill v. Hummel, No. 86-1937, 1987 WL 24114, at *4–5 (6th Cir. Dec. 1, 1987) (understanding *Pulliam* as holding that "although the doctrine of judicial immunity does not prevent a federal court from granting prospective injunctive relief against a state court judge, the principles of federalism may require that a federal court abstain from granting such relief if it unduly interferes with the independence of the state court" and declining to issue relief on such grounds in this case); Smith v. Wood, 649 F. Supp. 901, 910 (E.D. Pa. 1986) (explaining that it would have declined to resolve the case based on *Pullman* abstention but holding that it did not need to reach that question because there was no real case or controversy against the judge).

Even if these concerns about frivolous lawsuits, attorney fees liability, threats to independence and federalism had more foundation in the data, the biggest problem for the dominant narrative is that the amendment to Section 1983 did nothing to mitigate them. The most natural reading of the amendment—precluding injunctive relief "unless a declaratory decree was violated or declaratory relief was unavailable"—is that a plaintiff can try to get declaratory relief against a judge first and then move to injunctive relief if necessary.[272] Yet allowing judges to be subject to suits for declaratory relief poses the same threats to judicial independence, the same burdens of litigation, a similar risk of attorney fees (amended in but not eliminated from Section 1988), and at least similar comity concerns as those raised by an action for injunctive relief.[273]

The question thus remains: if the purpose of the amendment was to restore judicial immunity, why provide for declaratory liability? The amendment seemingly has the incongruous effect of codifying a right of action against a judge under Section 1983 for declaratory relief, cementing concerns about vexatious suits, judicial independence, and federalism into the future implementation of Section 1983, precisely contrary to the stated goals of *Pulliam*'s critics and parts of the Senate Report.

C. Reconciling the Text and Legislative History

The final Senate report's bold proclamation that "Section 311 restores the full scope of judicial immunity lost in *Pulliam*"[274] has rhetorical flourish. But it is belied by the actual text of the amendment, which expressly permits injunctive relief against judges, while in some cases withholding that relief until a declaratory decree has been awarded and violated. Two readings of the amendment seem possible. One emphasizes the intent of the most outspoken proponents of the amendment, which we will refer to as the "full judicial immunity" reading. The second emphasizes the plain meaning of the text Congress actually enacted—the plain meaning approach. This Section explores these two readings and explains why the plain meaning approach is preferable.

On the full judicial immunity reading, Section 1983 as amended turns the Powell dissent in *Pulliam* into law, shielding judges from prospective relief whenever they act in a judicial capacity. This reading necessarily must render

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Some judges also specifically declined to issue relief based on the concerns about judicial independence and harassment. *See, e.g.*, Adams v. McIlhany, 593 F. Supp. 1025, 1033 (N.D. Tex. 1984) ("Under these circumstances, the requested equitable relief would require a vague and open-ended prohibition of the judge's acting to violate a contemnor's rights in the future under the threat of being held in contempt of this Court. To do so would greatly increase the potential for harassing litigation and the corresponding intimidation of the judge in performance of his judicial duties in the future, and therefore, is inappropriate at this time.").

272. 42 U.S.C. § 1983.

273. *See generally* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091 (2014).

274. 1996 S. REP., *supra* note 218, at 37; *see also supra* notes 227-228.

the recognition of declaratory relief an empty gesture. At most, it allows a future Congress to provide for a declaratory cause of action against judges, but until that time, no relief is available. Under the plain meaning approach, the amendment means what it naturally appears to say: judges can be sued for prospective relief, though in most cases plaintiffs must sequence their claims for relief to seek a declaratory decree first before a more coercive injunction can be ordered.[275]

While we think the plain meaning approach makes the most sense textually, purposively, and prudentially, the full immunity reading is not completely groundless. Under the decades-old *Skelly* test for declaratory relief, declaratory jurisdiction requires that there be a hypothetical nondeclaratory action available that concerns the same issue, between the same parties, within the federal court's subject matter jurisdiction.[276] Because judges are absolutely immune to damages actions (at least, brought against them in their judicial capacity) and the amendment deprives plaintiffs of an injunctive action in the first instance, the Declaratory Judgment Act does not seem to offer a ground of action against judges.[277] Without the Declaratory Judgment Act as a source of action, no ground for declaratory relief appears available unless the amendment text itself confers one. Admittedly, it seems odd to read a text reputed to "restore[] the full scope of judicial immunity" as in fact *creating* a new cause of action for declaratory relief against judicial officers.[278]

The full judicial immunity reading of the amendment nevertheless runs into serious difficulties. The allowance for injunctive suits when declaratory relief is "unavailable" is chief among them. If Section 1983 does not create a cause of action for declaratory relief and if the Declaratory Judgment Act does not otherwise authorize one against judges, then declaratory relief is, technically, unavailable in every case. Thus, either the "unless a declaratory decree was

275. While widely rejected by the federal courts, see Part IV *infra*, the natural reading has featured in many recent student notes and essays. *See generally* Stephen N. Scaife, Comment, *The Imperfect but Necessary Lawsuit: Why Suing State Judges Is Necessary to Ensure that Statutes Creating a Private Cause of Action Are Constitutional*, 52 U. RICH. L. REV. 495 (2017) (reading Section 1983 as providing a cause of action against state judges); Samuel K. Benham, Note, *Judicial Purgatory: Strategies for Lawyers*, 58 DRAKE L. REV. 585 (2010) (noting that Section 1983 could allow for suits against judges similar to an extraordinary writ); Case Note, *Fifth Circuit Holds that Section 1983 Does Not Apply to Local Judges*, 135 HARV. L. REV. 1472, 1477–78 (2022) ("If an official-capacity suit could never be brought against a judicial officer, this provision of § 1983 would be superfluous. The Senate Report confirms this reading, as it emphasizes that the amendment 'does not provide absolute immunity for judicial officers.'").

276. *See* Skelly Oil v. Phillips Petrol. Co., 339 U.S. 667 (1950).

277. The Declaratory Judgment Act does not create a new cause of action where none otherwise exists. *See, e.g.*, City of Reno v. Netflix, Inc., 52 F.4th 874, 878 (9th Cir. 2022) (per curiam) ("The Declaratory Judgment Act does not provide a cause of action when a party . . . lacks a cause of action under a separate statute and seeks to use the Act to obtain affirmative relief. The availability of relief under the Declaratory Judgment Act "presupposes the existence of a judicially remediable right.")

278. 1996 S. REP., *supra* note 218, at 37; *see also supra* notes 227, 228, 233, and accompanying text.

violated or declaratory relief was unavailable" clause—the "unless" clause—is inexplicable surplusage, or it overturns the whole point of the amendment by straightforwardly authorizing injunctive suits against judges, potentially in many *more* cases than even *Pulliam* envisioned.

The full judicial immunity reading also fails to capture the nuances of Congress's expressed purpose. The very same Senate report that declared the restoration of judicial immunity one sentence earlier states that "litigants may still seek declaratory relief, and may obtain injunctive relief if a declaratory decree is violated or is otherwise unavailable."[279] A finer reading of the legislative history suggests that members of Congress understood and accepted what this meant. More commensurate with the tempered reality behind their concerns, the legislators meant to restrict, but not entirely eliminate, prospective relief against state judges and simply sequence the specific form of relief sought. This pragmatic approach was likely paired with the loftier rhetoric to serve political aims, as litigation reform efforts were broadly popular in the mid-1990s—the PLRA and AEDPA are just two examples of major congressional reforms targeted at reducing federal litigation adopted in the very same year (and like the FCIA, neither the PLRA or AEDPA shut the door to relief entirely; indeed, the "most radical injunction issued by a court in our Nation's history" was authorized by the PLRA).[280] The senators won a rhetorical victory while actually doing something more subtle.

Though not trumpeted in the Senate report's introduction, the more nuanced purpose was made clear in the hearings. Several speakers and legislators acknowledged that declaratory relief remained available under the amendment,[281] and this was crucial to striking the right balance between

279. 1996 S. REP., *supra* note 218, at 37.

280. *See* Prison Litigation Reform Act, Pub. L. No. 104–134, 110 Stat. 1321 (1996) (codified at 42 U.S.C. § 1997e); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214; Brown v. Plata, 563 U.S. 493, 549 (2011) (Scalia, J., dissenting). For an examination of the purpose and impact of the PLRA, see generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1565 (2003) (citing comments from the legislative history such as, "This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation" (quoting 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch))). For a discussion of the purpose and impact of AEDPA, see generally Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1227 (2012) (describing the desire for a more efficient system of habeas review in capital cases as motivating the statute's passage).

This rhetoric was also likely reflective of the political dynamics of federalism at the time. Reagan politics of the 1980s heralded a resurgence of states' rights and a shift away from the ideals of Reconstruction and the civil rights era, and these conservative, small-government aims were reflected in decisions of the Rehnquist Court in the following decade. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 500–03 (1995) (discussing the Supreme Court's use of federalism as a limit on first federal judicial and then federal legislative power and the overlay of Reagan's "new federalism").

281. *See, e.g.*, *1988 Hearing*, *supra* note 216, at 226 (statement of Justice Weisberger) ("You will note that S. 1515 would not disturb the remedy of declaratory relief from federal courts."); *id.* at 64

immunity for judges and relief for aggrieved plaintiffs. In the hearings, Congress heard from liberal civil rights organizations like the NAACP's Legal Defense and Educational Fund and the ACLU that urged the importance of providing plaintiffs some recourse in the federal courts for egregious abuses at the hands of state judges.[282] Legislators indeed expressed concern about cutting off all pathways for relief to meritorious civil rights plaintiffs.[283] The 1990 Senate Report accordingly praised the amendment as achieving its goals "without denying any citizen his or her day in court."[284]

Although the contours of "unavailability" were never defined, at least some legislators attached importance to this remaining path to immediate injunctive relief. Several speakers concerned about the amendment drew attention to the injustice in Allen's case against Pulliam and to instances where immediate relief might be necessary, such as in the bail context or in an emergency.[285] Since there is no such remedy as a preliminary declaratory decree,[286] the "unless" clause seems intended to allow plaintiffs to seek temporary restraining orders and preliminary injunctive relief in the time-sensitive situations for which those types of remedies are commonly sought.[287]

(statement of Deputy Assistant Attorney General) ("This approach would not preclude the award of injunctive relief against state judicial officers, which *Pulliam v. Allen* held to be proper, but would instead adopt the prudential policy of having courts rendering decisions in cases under 42 U.S.C. § 1983 forbear from entering such intrusive relief. . . ."); *infra* notes 282-284 and accompanying text.

282. *See 1988 Hearing*, *supra* note 216, at 261–91; *1989 Hearing*, *supra* note 232, at 279–83; *1991 Hearing*, *supra* note 227, at 131–33.

283. Senator Grassley, for instance, questioned a panel of state judges about the risk of immunizing judges altogether and making them unaccountable. They responded by emphasizing other forums for resolution, which the legislators may have viewed as insufficient. *See 1988 Hearing*, *supra* note 216, at 120–22.

This was also a major concern of those who opposed the amendment, who emphasized the necessity for redress of constitutional rights violations. *See, e.g.*, 1990 S. REP., *supra* note 218, at 13 (minority views) ("[C]urrent law strikes an appropriate balance between assuring judicial independence, respecting the principle of comity and federalism, and protecting the right of citizens to obtain relief form [*sic*] violations of their civil rights. S. 590 would upset this balance and unduly restrict the availability of equitable relief.").

284. 1990 S. REP., *supra* note 218, at 2.

285. *See 1989 Hearing*, *supra* note 232, at 281 (statement of Executive Director Aron, Alliance for Justice) ("[T]he *Pulliam* case is an excellent example where injunctive relief was necessary to protect the plaintiffs' constitutional rights."); 1990 S. REP., *supra* note 218, at 12 (minority views) ("As the Supreme Court recognized in the *Pulliam* case, however, there are occasions when injunctive and declaratory relief are necessary to protect constitutional rights."); *id*. at 13–14 (explaining how "the nature and short duration of the pretrial detention imposed [in *Pulliam*] may [have made it] impossible" to get redress through state courts, necessitating the injunctive relief issued); 1991 S. REP., *supra* note 218, at 13 (same).

286. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("[P]rior to final judgment there is no established declaratory remedy comparable to a preliminary injunction."). Not all courts have taken the Supreme Court's pronouncement on this point as the final word. *See* Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 276 (7th Cir. 1992) (Posner, J.) (surveying disagreement among the lower courts on the availability of preliminary declaratory relief).

287. *See* 1990 S. REP., *supra* note 218, at 13 (minority views) (explaining the necessity for injunctive relief in these cases but fearing that plaintiffs would have to go "through the cumbersome process of obtaining declaratory relief" first); *1991 Hearing*, *supra* note 227, at 101 (statement of

The plain meaning approach better advances these modest versions of Congress's articulated goals. The legislative history suggests that Congress saw a declaratory judgment as a milder, less coercive remedy, one less injurious to federalism and less threatening to judges, safeguarding the independence and dignity of the state judiciary as a result.[288] The coercive aspect of a federal injunction running against a state jurist is mitigated in the declaratory context. Comments by state judges and other organizations in the hearings suggest that the two forms of relief were understood to impose different burdens, particularly with the repercussions in case of violation. Some judges greatly feared being held in contempt by a federal court.[289] The "warning" of declaratory relief was less threatening and seen as sufficient to achieve compliance.[290]

And aside from Congress's purpose, the plain meaning approach also makes more sense textually. It gives effect to the clause providing for injunctive relief when declaratory relief is unavailable and avoids rendering the entire statutory sentence a nullity. This interpretation can thus satisfy jurists of all statutory interpretation persuasions: formalist textualists who believe any contextual understanding must be limited to the surrounding words and grammar, more flexible textualists who take into account some amount of social and policy context, and purposivists willing to engage with the legislative history.[291]

Cooper) ("*Pulliam* is an illustration of a case in which a Federal injunctive remedy should be available. One of the plaintiffs there was jailed for 14 days for failing to post bail for a nonjailable offense, to wit, using abusive and insulting language.").

288. Professor Samuel Bray forcefully argues that the notion that a declaratory judgment is milder than an injunction is a "myth." He concedes that the declaratory remedy "lacks a command, a sanction, or full issue-preclusive effect," and these "rationales" for the "mildness thesis" "are not wholly baseless." Bray, *supra* note 273, at 1102, 1105, 1122. For at least the outspoken supporters of the amendment, these rationales carried the day, and the myth of the milder declaratory remedy was one the statute apparently embraced.

289. Chief Justice Peterson quoted Justice Powell's dissent in *Pulliam* and echoed his concern about being held in contempt. *1988 Hearing*, *supra* note 216, at 104–05 ("The threat of contempt—with the possibility of a fine or even imprisonment—could well deter even the most courageous judge from exercising [judicial] discretion independently and free from intimidation.") (quoting Pulliam v. Allen, 466 U.S. 522, 555 (1984) (Powell, J., dissenting)); *see also id.* at 217, 223 (statement of Justice Weisberger, Judge Roth, and Thomas Harnett on behalf of the ABA) (also quoting Powell's dissent and raising the "specter of contempt proceedings").

290. Because it was assumed no state judge would dare defy a federal court declaratory decree, declaratory relief was thought to largely eliminate the need for injunctive relief: "Should a state remedy not be available a declaratory order, as provided for in S. 590, is all that is necessary. There is no reason to believe that a state court would defy the order of a federal court. But should this ever occur injunctive relief then would be available under S. 590." *1989 Hearing*, *supra* note 232, at 124 (statement of Chief Justice Carrico).

291. *See generally* Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033 (2023) (challenging the conventional history of the "plain meaning school" and describing the divisions in modern textualism); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 307 (2020) ("Scholars have long engaged with the battle between textualism and purposivism. Although this debate is important, it has overshadowed another important division: that between formalistic and flexible textualism."); *see also* Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309, 350 (2014)

In short, the language of the FCIA's amendment to Section 1983 appears, at first blush, to contradict Congress's aim, articulated in the 1996 Senate Report, of restoring judicial immunity and overturning *Pulliam v. Allen*. But it would be brazen to disregard the "unless" clause altogether. Instead, textualist, purposivist, and prudentialist aims can all be satisfied by an approach that uses the clause as a modest sequencing of relief in favor of less coercive initial awards. And the predominant narrative can be understood as a product of the strong political push for litigation reform at that time. Congress was aware of the limits of the text that it adopted, as a sequencing regime rather than a bar, and chose to partly repeal, partly codify *Pulliam*. This allows for declaratory relief against a judge in their judicial capacity for the small class of cases that avoid Article III, justiciability, and abstention concerns.

IV.
PULLIAM AND THE FCIA IN THE LOWER COURTS: SECTION 1983 SINCE 1996

Since the 1996 amendment, federal courts have scarcely granted declaratory or injunctive relief against state judges in practice, but very few have offered a reasoned rejection of such suits under Section 1983's plain text.[292] Indeed, nowhere has court practice reflected any serious grappling with the interpretation of the text and its history. Few courts have even noticed the tension between the text and their practices. The circuits that have concluded that prospective relief against a judge for judicial activities is incognizable have done so largely relying upon a pre-*Pulliam* analysis.[293] A slight majority of circuits, however, have read Section 1983 as leaving open a path to declaratory and injunctive relief, though they most often find the path foreclosed by justiciability or abstention barriers.[294]

This Part first surveys the lower courts' use of Section 1983 to foreclose relief against state judges. Few courts have articulated a justification of their practices that squares with the text of Section 1983. Judicial decisions quickly

(theorizing that "the labels Textualism and Purposivism have come to swallow many finer distinctions" and that the divisions within textualism are more indicative of particular approaches).

This Article does not attempt to predict how particular jurists would interpret Section 1983 or canvass all of the potential approaches under different theories of statutory interpretation. It rather aims to provide broad analyses of purpose and text that jurists can take into account according to their personal interpretative proclivities. *Cf.* Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 568–89 (2017) (emphasizing that "purposivism" and "textualism" oversimplify the interpretive process and explaining that the selection of text and context ab initio is key). We nonetheless promote the reading we find most persuasive, as it is consistent with both our textual and purposivist analyses.

292. This Part's analysis is based on a review of around 100 cases considering Section 1983 claims against judges for prospective relief. While many are cited below, many others contained no notable commentary on the FCIA.

293. This includes the First, Third, and Sixth Circuits, as well as potentially the Fifth and D.C. Circuits. *See infra* Part IV.A.

294. This includes the Seventh, Eighth, Tenth, and Eleventh Circuits, as well as likely the Fourth Circuit. It is difficult to determine which camp constitutes a "majority view," as the stances of the Second, Fourth, Fifth, Ninth, and D.C. Circuits are unclear. *See infra* Part IV.B.

devolve into incoherence when explaining the availability of injunctive relief where declaratory remedies are "unavailable." We then turn to the courts and opinions that have more persuasively recognized the availability of declaratory relief against state judges and applied the text of Section 1983 in a straightforward way.

A. Foreclosure of Declaratory and Injunctive Relief in Error

Several circuit courts either ignore or misread the "unless" clause or adopt an approach that renders it a nullity. The First, Third, Fifth, and Sixth Circuits have held that one cannot sue a judge for actions taken in a judicial capacity.[295] These courts have adopted a doctrine—derived from *Rooker-Feldman* and Article III's "case-or-controversy" requirement, which tends to preclude suits against judges acting as neutral arbiters—that only permits relief for acts done in an enforcement or administrative capacity.[296] While perhaps defensible as a synopsis of abstention and standing doctrine, the flat denial of judicial liability runs roughshod over Congress's statute.

This approach was first articulated in *In re Justices of the Supreme Court of Puerto Rico*, a First Circuit opinion written by then-Judge Breyer prior to *Pulliam*.[297] The court there explained that Section 1983 does not provide relief "against judges acting purely in their adjudicative capacity, any more than, say, a typical state's libel law imposes liability on a postal carrier or telephone company for simply conveying a libelous message."[298]

Despite the *Pulliam* decision and amendment to Section 1983, the First Circuit continues to apply this analysis in Section 1983 actions,[299] and it has been adopted by the Third and Sixth Circuits, which regard it as an Article III test for ensuring that a case or controversy exists.[300] The Fifth Circuit has also previously

295. *See infra* Part IV.A and accompanying text.

296. *See infra* Part IV.A and accompanying text.

297. *In re* Justices of the Sup. Ct. of P.R., 695 F.2d 17 (1st Cir. 1982).

298. *Id.* at 23.

299. *See, e.g.*, Zenon v. Guzman, 924 F.3d 611, 618 (1st Cir. 2019) (holding that declaratory relief was foreclosed because the challenged action was in the judge's judicial capacity and therefore the judge was immune under Section 1983).

300. *See, e.g.*, Brandon *ex rel.* Listenbee v. Reynolds, 201 F.3d 194, 197–99 (3d Cir. 2000); Malhan v. Katz, 830 F. App'x 369, 369 (3d Cir. 2020) (holding that declaratory relief is only available if the act is not in a judge's judicial capacity); Allen v. Debello, 861 F.3d 433, 444 (3d Cir. 2017) (clarifying that the Declaratory Judgment Act provides no cause of action for declaratory relief against judges); Argen v. Kessler, No. 18-963 (KM)(JBC), 2019 WL 2067639, at *4 (D.N.J. May 10, 2019) (explaining that Section 1983 provides the underlying right of action for relief but that it is limited to instances where judges act as enforcers or administrators of statutes); Boguslavsky v. Conway, No. 3:12CV2026, 2012 WL 5197966, at *3 (M.D. Pa. Oct. 19, 2012) (holding that declaratory relief against a judge based on a prior decision made in his capacity as a neutral arbiter is not cognizable).

The Sixth Circuit adopted this test in the years following the *Tesmer* case, *see supra* note 341, which had awarded declaratory relief, and after other cases that seemed to affirm declaratory relief's availability, *see, e.g.*, Ward v. City of Norwalk, 640 F. App'x 462, 467–68 (6th Cir. 2016); Cooper v. Rapp, 702 F. App'x 328, 333 (6th Cir. 2017) (citing to *Listenbee* and *In re Justices*, concluding that the

cited the *In re Justices* analysis,[301] and the D.C. Circuit has invoked similar reasoning on at least one occasion.[302] Although the above-mentioned circuit courts maintain that declaratory relief against judicial officers *is* available under Section 1983, it is not available when they are acting in their judicial roles—which is akin to saying it is not available under the circumstances Congress's text explicitly says it is.[303]

The Third Circuit tried to reconcile the text and purpose of the statute to give effect to the *In re Justices* analysis after FCIA, but its analysis is unpersuasive. "A review of the legislative history confirms this reading of the amendment," it claimed.[304] "The Senate Report accompanying the amendment suggests that the amendment's purpose was to overrule the Supreme Court's decision in *Pulliam*[,] . . . not to alter the landscape of declaratory relief. *See* S. Rep. No. 104–366."[305] The availability of declaratory relief, then, should turn on whether judges are proper defendants under Section 1983 in the first place, and to assess this, the court looked to *In re Justices*.[306] Because there is no controversy when a judge is merely applying a statute in her adjudicative

"request for a declaratory judgment is barred by Article III's case-or-controversy requirement, which 'operates to ensure that declaratory relief is available only when a live controversy continues to exist'").

301. *See* Bauer v. Texas, 341 F.3d 352, 358–61 (5th Cir. 2003) ("The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity."). This is the only Fifth Circuit opinion to cite to *In re Justices*. *Cf. infra* notes 322–325 and accompanying text (describing a different approach taken by the Fifth Circuit, contrary to *In re Justices*).

In a more recent opinion, however, the Fifth Circuit has signaled hostility toward Section 1983 liability writ large, expressing wariness of declaratory decrees against state judges for federalism reasons. It granted a stay of a declaratory decree issued by a district court in light of the irreparable harm to the federal system, i.e., to avoid "tread[ing] on important federalism principles." Freedom from Religion Found., Inc. v. Mack, 4 F.4th 306, 315 (5th Cir. 2021) (also granting the stay because the district court erred in issuing relief against a county officer in his official capacity, which was equivalent to a suit against the state, thus violating *Will*'s holding on sovereign immunity). It cited to the FCIA and Congress's general federalism concerns, despite Congress's express provision for declaratory relief in Section 1983. For a critique of this opinion's interpretation of Section 1983 with respect to state judges, see generally Case Note, *supra* note 275.

302. *See* Roth v. King, 449 F.3d 1272, 1286–87 (D.C. Cir. 2006) (finding that District of Columbia Superior Court judges, who established a system for appointing attorneys eligible to receive compensation under Criminal Justice Act in juvenile delinquency matters, were immune from Section 1983 suit for injunctive relief related to those acts). "[B]ecause a number of the Superior Court appellants acted in a 'judicial capacity' in selecting attorneys for inclusion on the panels, those appellants are immune from suits for injunctive relief under § 1983," the court explained. *Id.*

303. The First Circuit approach may, however, allow for declaratory relief against quasi-judicial officers, like parole board commissioners, who act in "quasi-adjudicative" capacities. For district court opinions entertaining, but not granting, requests for declaratory relief against such officers, see, e.g., Bartlett v. Mass. Parole Bd., No. 13–11479–WGY, 2013 WL 3766747, at *9–11 (D. Mass. July 15, 2013); Crotty v. Mass. Parole Bd., No. 10–40245–FDS, 2012 WL 3628904, at *5 (D. Mass. Feb. 23, 2012); Phillips v. Conrad, No. 10–40085–FDS, 2011 WL 309677, at *7–10 (D. Mass. Jan. 28, 2011); Pelletier v. Rhode Island, No. 07–186S, 2008 WL 5062162 (D.R.I. Nov. 26, 2008).

304. Brandon *ex rel.* Listenbee v. Reynolds, 201 F.3d 194, 198 (3d Cir. 2000).

305. *Id.*

306. *Id.*

capacity, the court determined, judges are not proper defendants.[307] Put differently, the Third Circuit held that the amendment does not provide for declaratory relief; it only implicitly recognizes that there may be some circumstances where it is available, and it is not available where a judge is acting in a judicial capacity. But as explained, this is a flawed reading of both the text and the legislative history. The text specifically refers to "judicial capacity," and if there was no prospective relief cognizable against judges for judicial actions in the first place, a statutory response to *Pulliam* would not have been needed. Congress would not have recognized a right to relief in the plain text.

In re Justices and the cases adopting its reasoning suggest that there may be a *constitutional* problem with suing judges in their adjudicative capacity.[308] Perhaps even if Congress wanted to create a cause of action against judges, it could not. But this argument has never been fully explored nor adequately supported. The First Circuit in *In re Justices* explicitly declined to answer that question, alluding to constitutional avoidance, and the Supreme Court ruled to the contrary in *Pulliam*.[309]

In contrast to the First, Third, and Sixth Circuits, the Second Circuit has not conclusively adopted the judicial capacity test,[310] but its interpretation has

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307. *See id.* The court also condemned the threat to judicial integrity and neutrality posed by judicial amenability to suit. "To require the Justices unnecessarily to assume the role of advocates . . . would tend to undermine their role as judges. To encourage or even force them to participate as defendants in a federal suit attacking Commonwealth laws would be to require them to abandon their neutrality and defend as constitutional the very laws that the plaintiffs insist are unconstitutional—laws as to which their judicial responsibilities place them in a neutral posture." *In re* Justices of the Sup. Ct. of P.R., 695 F.2d 17, 25 (1st Cir. 1982).

308. *See supra* notes 298–302 and accompanying text.

309. In declining to resolve the question, *In re Justices* indicated that there may be cases where—to provide complete relief to the plaintiffs—a judge may be a cognizable and necessary defendant.

> In still other suits, it is arguably necessary to enjoin a judge to ensure full relief to the parties. Cf. WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir.1981) (plaintiff obtains injunction against state court enforcement of prior court suppression order). Such cases are unusual, for . . . it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion. . . . [But] [w]e recognize the existence of cases . . . in which courts have entertained suits against judges that attack statutes related to the judicial process or statutes previously enforced by the particular judge against the plaintiff.

695 F.2d at 23. The court subsequently returned to this discussion to note that "at times such harms [to institutional neutrality] may have to be tolerated in order to afford proper relief to a party." *Id.* at 25. It held that the present facts did not fit that scenario. *See id.* at 24–25.

But if this rationale were presented more squarely to the court in an appropriate case, it would provide a clean solution to the text and purpose puzzle. It would allow for a cause of action under Section 1983 to sue a judge to challenge a statute like S.B. 8, whereby state judges have been conscripted into the roles of prosecutors and attorney generals, and thus made the appropriate targets for plaintiffs' relief. This paragraph, which importantly acknowledges a potential path to relief for adjudicative actions, has not been further expanded upon by any court.

310. One Southern District of New York opinion seems to mimic the *In re Justices* test, but it does not cite to it, nor is it clear that it is endorsed by the Second Circuit. *See* Nieves v. Ward, No. 1:22-CV-1382 (LTS), 2022 WL 623896, at *2 (S.D.N.Y. Mar. 3, 2022) (considering a claim for injunctive relief and concluding that "[t]here are only two sets of circumstances in which judicial immunity does

nonetheless rendered the "unless" clause meaningless. In almost all cases in the Second Circuit involving a request for injunctive relief against judges, courts pay lip service to the sequencing requirement: such cases are dismissed because the plaintiff failed to show "that a declaratory decree was violated or that declaratory relief was unavailable."[311] But instead of allowing plaintiffs to amend their complaint to request declaratory relief, courts perfunctorily dismiss these cases with prejudice, using boilerplate language from the statute. This suggests, without engaging in any of the interpretative struggles, that declaratory relief would not be available even if the plaintiff had requested it. And as a result, in practice it isn't. Various other courts, though less uniformly, have taken up this practice of perfunctory dismissals as well.[312]

A few Second Circuit cases have offered cursory explanations as to why declaratory relief would not be available. One per curiam summary order reads,

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not apply: (1) when a judge takes action that is outside the judge's judicial capacity, or (2) when a judge takes action, that, although judicial in nature, is in the absence of all jurisdiction. *Mireles* [*v. Waco*], 502 U.S. [9,] . . . 11-12").

311. McKeown v. N.Y. State Comm'n on Jud. Conduct, 377 F. App'x 121, 124 (2d Cir. 2010) ("To the extent that Appellant seeks injunctive relief against Judge Scarpino, . . . Appellant does not allege that a declaratory decree was violated or that declaratory relief was unavailable, and so § 1983 relief is not available."); *see also, e.g.*, Montero v. Travis, 171 F.3d 757, 761 (2d Cir. 1999) ("Montero, however, alleges neither the violation of a declaratory decree, nor the unavailability of declaratory relief. Montero's claim for injunctive relief is therefore barred . . . ."); Davis v. Campbell, No. 3:13-CV-0693 LEK/ATB, 2014 WL 234722, at *9 (N.D.N.Y. Jan. 22, 2014) ("In this case, plaintiff does not allege that any declaratory relief was unavailable in state court, and generally, declaratory relief against a judge for actions taken within his or her judicial capacity is ordinarily available by appealing the judge's order. LeDuc v. Tilley, No. 05–CV–157, 2005 WL 1475334, at *7 (D. Conn. June 22, 2005) (citing cases)."); Sanchez v. Doyle, 254 F. Supp. 2d 266, 273 (D. Conn. 2003) ("As Sanchez alleges no violation of a declaratory decree and no unavailability of declaratory relief, any claim he might assert for injunctive relief against Stine is barred."); L.B. v. Town of Chester, 232 F. Supp. 2d 227, 238 (S.D.N.Y. 2002) ("As Plaintiff does not allege that there is any violation of a declaratory decree or that such relief would be unavailable, the claims against Magistrate Masella for injunctive relief are also dismissed."); Ackermann v. Doyle, 43 F. Supp. 2d 265, 275 (E.D.N.Y. 1999) (in light of plaintiff's failure to plead declaratory relief, declining "to sua sponte afford the plaintiff leave to amend on the ground of futility[;] [i]n the Court's view, granting leave to amend would be unproductive"); Kampfer v. Scullin, 989 F. Supp. 194, 202 (N.D.N.Y. 1997) ("Because the Kampfers could have sought declaratory relief but failed to do so, the court finds that the doctrine of absolute judicial immunity bars their present suit against Judge Scullin and dismiss all remaining claims on those grounds.").

312. *See, e.g.*, Catanzaro v. Cottone, 228 F. App'x 164, 167 (3d Cir. 2007) ("Catanzaro's Complaint is devoid of any allegation that declaratory relief is unavailable or that a declaratory decree has been denied, and, thus, his claim for injunctive relief is barred."); Correa v. Hall, No. C 10–0885 RS (PR), 2010 WL 3323843, at *1 (N.D. Cal. Aug. 23, 2010) (dismissing a pro se plaintiff's complaint with prejudice because plaintiff failed to request declaratory relief); Steinberg v. Sup. Ct. of Pa., No. CIV.A. 09-86, 2009 WL 1684663, at *22 (W.D. Pa. June 10, 2009), *aff'd sub nom.* Steinberg v. Sup. Ct. of Pa., 419 F. App'x 198 (3d Cir. 2011) ("Steinberg does not allege that a declaratory decree was violated, or that declaratory relief was unavailable to him. . . . It necessarily follows that the judicial immunity available to the individual Justices under the FCIA bars Steinberg's request for injunctive relief.").

In one case, a federal judge harshly issued sanctions after the plaintiff requested injunctive relief where there was no reason to think that declaratory relief would be unavailable. *See* Kircher v. City of Ypsilanti, 458 F. Supp. 2d 439, 453–54 (E.D. Mich. 2006) (also issuing sanctions on account of plaintiff's frivolous insistence on a lack of judicial immunity despite the 1996 amendment to Section 1983).

"We also reject plaintiff's contention that he is entitled to declaratory relief based on *Pulliam*[,] . . . given that the *Pulliam* holding with respect to such relief has been effectively overruled by Congress."[313] But it does not address the fact that the FCIA explicitly references declaratory relief, and this holding has not been elaborated upon in other opinions.

Still, by regularly repeating the statutory text, the Second Circuit—and other courts with a similar practice—suggests that if a Section 1983 plaintiff showed that declaratory relief *was* unavailable, injunctive relief could be obtained. And therefore, much like the FCIA itself, by referencing declaratory relief, the court inadvertently reinforces the potential pathway to prospective relief against judges. The Second Circuit, then, provides no support for an alternative reading of Section 1983 that immunizes judges and fully abrogates *Pulliam*.

B. Recognition of Availability of Declaratory Relief

At least five circuits have more fully embraced the statutory text and the plain meaning approach advanced in Part III, explicitly acknowledging that declaratory relief against a judge for an act in his judicial capacity is cognizable and available under Section 1983. Actual awards of relief are extremely rare, however, and analyses of the statute are often limited to dicta or footnotes in unpublished opinions. As a result, they offer limited insight into the proper way to reconcile text, purpose, and practice. But they nonetheless reflect twenty-five years of judicial practice in which, despite plaintiffs' lack of recovery, the path to prospective relief for judicial acts described in the statutory text has been theoretically preserved. We first summarize these circuits' approaches, then note the shortcomings in their explications of the statute, and, finally, distill the takeaways for interpreting Section 1983 going forward.

The Eleventh Circuit has been home to one of the more robust dialogues between the courts concerning the statutory text and ultimately has found declaratory relief available. In *Esensoy v. McMillan*, a circuit panel wrote that "§ 1983 does not explicitly bar . . . declarative relief," thus neither endorsing nor foreclosing the availability of a declaratory action.[314] A subsequent opinion in the Northern District of Alabama surmised that Congress may have found it unnecessary to explicitly bar claims for declaratory relief because "no such exemption from judicial immunity had ever previously been recognized."[315] But other post-*Esensoy* cases suggest the circuit has coalesced around the

313. Guerin v. Higgins, 8 F. App'x 31, 32 (2d Cir. 2001).

314. Esensoy v. McMillan, No. 06-12580, 2007 WL 257342, at *1 n.5 (11th Cir. Jan. 31, 2007) (per curiam) ("[J]udicial immunity protects the Defendants only from Appellant's request for injunctive relief. But § 1983 does not explicitly bar Appellant's request for declarative relief."). Note, however, that this analysis is dicta.

315. Ray v. Jud. Corr. Servs., Inc., No. 2:12-CV-02819-RDP, 2014 WL 5090723, at *4–5 (N.D. Ala. Oct. 9, 2014).

understanding that Section 1983 permits a declaratory cause of action against state judges.[316] An Eleventh Circuit panel recently affirmed a district court opinion using the continued availability of declaratory relief as a basis for not dismissing a claim against a judge.[317] And a more recent Northern District of Alabama case summarized the circuit's approach, concluding that "prospective declaratory relief *is* an exception to judicial immunity in cases brought against municipal court judges pursuant to . . . § 1983."[318]

The Seventh, Eighth, and Tenth Circuits have written less effusively about the availability of declaratory relief but have expressed agreement with the Eleventh Circuit's view. One Seventh Circuit disposition, albeit in a footnote and in dicta, observes that "Section 1983 still leaves room for claims for declaratory relief."[319] The Eighth Circuit has noted approvingly in a published opinion that "most courts hold that the amendment to § 1983 does not bar declaratory relief against judges."[320] A judge from the Tenth Circuit has written, "Generally speaking, the only type of relief available to a plaintiff who sues a judicial officer is declaratory relief," citing to the statute and thus indicating that declaratory relief remains available.[321]

The Fifth Circuit has at times articulated a similar approach.[322] One opinion by the Eastern District of Louisiana and affirmed by the Fifth Circuit recognized declaratory relief after careful consideration of the FCIA's text.[323] The court

316. *See, e.g.*, Crisp v. Georgia, No. 21-14190, 2022 WL 3589673, at *6 (11th Cir. Aug. 23, 2022) ("As for Crisp's requested injunctive and declaratory relief, Crisp does not argue that (1) a declaratory decree was violated or (2) declaratory relief was unavailable."); McCone v. Thorpe, 828 F. App'x 697, 698 (11th Cir. 2020) ("McCone alleged no facts entitling him to an injunction because, in the words of the district court, he did not allege that 'Judge Thorpe . . . violated a declaratory degree [*sic*] [ ]or . . . that declaratory relief is unavailable to him."); Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000) (suggesting that declaratory relief against a federal judge is cognizable under the FCIA).

317. Wells v. Miller, No. 15-CV-80412, 2015 WL 12953099, at *2 (S.D. Fla. June 30, 2015), *report and recommendation adopted*, No. 15-80412-CIV, 2015 WL 12953100 (S.D. Fla. Nov. 13, 2015), *aff'd*, 652 F. App'x 874 (11th Cir. 2016).

318. Snow v. King, No. 4:17-CV-1048-VEH, 2018 WL 656032, at *4 n.2, *6 (N.D. Ala. Feb. 1, 2018) (explicitly finding that the challenged action was conducted in a judicial capacity).

319. Haas v. Wisconsin, 109 F. App'x 107, 114 n.8 (7th Cir. 2004); *see also* Johnson v. McCuskey, 72 F. App'x 475, 477 (7th Cir. 2003) ("[T]he amendment to § 1983 limits the type of relief available to plaintiffs who sue judges to declaratory relief.").

320. Just. Network, Inc. v. Craighead Cnty., 931 F.3d 753, 763 (8th Cir. 2019) (affirming the district court's denial of injunctive and declaratory relief against a judge for constitutional violations in sentencing, an act in the judge's judicial capacity, because the declaratory relief requested was ultimately retrospective in nature).

321. Chavez v. Schwartz, 457 F. App'x 752, 754 (10th Cir. 2012); Lawrence v. Kuhenhold, 271 F. App'x 763, 766 (10th Cir. 2008) (referring specifically to when a plaintiff is suing for a judicial action or omission). Neither case found that plaintiffs stated a viable claim, however, on other grounds.

322. *But see supra* notes 301–303 (describing how the Fifth Circuit has applied in the *In re Justices* rule).

323. Leclerc v. Webb, 270 F. Supp. 2d 779, 793 (E.D. La. 2003), *aff'd*, 419 F.3d 405 (5th Cir. 2005). The Fifth Circuit affirmed, however, on the ground that the judges had acted in an enforcement capacity, so the court did not directly review the question of the availability of declaratory relief against judges in their judicial capacity. *See* 419 F.3d at 414.

reasoned that declaratory relief was available against judges prior to 1996, and the 1996 amendment's express reference to such relief constituted an endorsement, making it a prerequisite to injunctive relief.[324] Other Fifth Circuit dispositions have also found that the statute leaves open the possibility of declaratory relief.[325] Though the Fourth Circuit has not issued a decisive opinion on the matter, a few district court orders within the circuit reflect similar conclusions.[326]

These references do not provide unassailable support for this reading of the statute. They are mostly nonbinding, with commentary in dicta, footnotes, or unpublished dispositions.[327] In practice, despite a potential reading of Section 1983 that provides for declaratory relief, courts hardly ever issue a prospective remedy against state judges. They instead find claims barred for the same reasons that—in the view of some—declaratory relief against a judge for an action in a judicial capacity is inconceivable. Often the relief requested from judges is not truly prospective,[328] and plaintiffs can alternatively seek relief in the state court

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324. *See id.* ("Defendants can make no colorable argument that the FCIA did anything to alter the landscape with respect to declaratory relief. Declaratory relief against judges acting in their judicial capacities was well-established before the FCIA. The FCIA amendments continue to contemplate declaratory relief by making express reference to it as a first step before injunctive relief is permissible."). The opinion was ultimately decided on the basis that the judges were sued in their enforcement capacity, making it technically dicta, but its analysis of the amendment is nonetheless significant.

325. *See, e.g.*, Hoppenstein v. Ruckel, No. 4:14–cv–467, 2015 WL 294295, at *2–3 (E.D. Tex. Jan. 22, 2015) (declining to dismiss plaintiff's request for declaratory relief under the amendment to Section 1983, though not discussing whether judge was sued in a judicial capacity); Severin v. Parish of Jefferson, 357 F. App'x 601, 605 (5th Cir. 2009) (per curiam) ("[J]udicial immunity does not bar declaratory relief . . . ."). *But see, e.g.*, Dickerson v. Bickham, No. 22-1157, 2022 WL 2382321, at *3 (E.D. La. June 2, 2022) ("The FCIA therefore statutorily overruled Pulliam's holding regarding the availability of injunctive relief against a state judge in his official capacity. Thus, neither injunctive relief nor damages are available in this Section 1983 action against a state judicial officer." (citations omitted)).

326. *See* Miller v. Purpura, No. JKB-21-3206, 2022 WL 3083440, at *2 (D. Md. Aug. 3, 2022) (noting that "judicial immunity does not apply to claims for equitable relief" (quoting Foster v. Fisher, 694 F. App'x 887, 889 (4th Cir. 2017)) but denying the declaratory relief requested because it was retrospective in nature); Lowe v. Arbouw, No. 3:20-cv-005322020, 2020 WL 6580392, at *2 (E.D. Va. Oct. 13, 2020) (explaining that "Judge Gill did not violate a declaratory decree, and the Court has no evidence that 'declaratory relief was unavailable' to Lowe[, so] Lowe cannot receive an injunction against Judge Gill," and declining to award declaratory relief in its discretion); Murphy v. Ross, No. 3:14CV870, 2015 WL 1787351, at *2 (E.D. Va. Apr. 15, 2015) (implying that if a proper declaratory decree had been violated, injunctive relief would remain available).

327. *See, e.g.*, *supra* notes 314–326.

328. *See, e.g.*, Just. Network, Inc. v. Craighead Cnty., 931 F.3d 753, 764 (8th Cir. 2019) ("[D]eclaratory relief is limited to prospective declaratory relief. . . . [W]e conclude that TJN's request for declaratory relief is retrospective; as a result, TJN is not entitled to such relief under § 1983."); Lawrence v. Kuhenhold, 271 F. App'x 763, 766 (10th Cir. 2008) (holding that declaratory relief was not available because it would not address plaintiffs' harm, requiring retrospective relief); Johnson v. McCuskey, 72 F. App'x 475, 477 (7th Cir. 2003); Green-Bey v. Atlantic Cnty., No. 21-20143 (KMW) (AMD), 2022 WL 2532665, at *2 (D.N.J. July 7, 2022); Klayman v. Rao, No. 21-cv-02473 (CRC), 2021 WL 4948025, at *3 (D.D.C. Oct. 25, 2021); Block v. Snohomish Cnty., No. C18-1048-RAJ, 2019 WL 954809, at *10 (W.D. Wash. Feb. 27, 2019); Snow v. King, No. 4:17-CV-1048-VEH, 2018 WL 656032, at *6 (N.D. Ala. Feb. 1, 2018); Boguslavsky v. Conway, No. 3:12CV2026, 2012 WL 5197966, at *3 (M.D. Pa. Oct. 19, 2012).

system, such as through appeals[329] or writs.[330] Plaintiffs also run into the *Rooker-Feldman* bar[331] and the *Preiser- Heck* bar,[332] or face justiciability and abstention issues.[333] In other cases, declaratory relief is denied as a matter of judicial or equitable discretion, perhaps to effectuate the perceived policy of the FCIA.[334]

329. *See, e.g.*, *Snow*, 2018 WL 656032, at *9 ("Plaintiff had an adequate remedy at law, an appeal . . . , and used it, and the case against him was dismissed with prejudice. [T]he Plaintiff can seek . . . expungement. . . . The availability of these remedies prevent him from receiving declaratory relief in this case." (emphasis omitted)); McNeil v. Harvey, No. CV 17-1720 (RC), 2018 WL 4623571, at *6 (D.D.C. Sept. 26, 2018) ("When a court entertains an independent action for relief from the final order of another court, it interferes with and usurps the power of the rendering court."); Yellen v. Hara, No. 15–00300 JMS–KSC, 2015 WL 4877805, at *6 (D. Haw. Aug. 13, 2015) (explaining that plaintiffs are not entitled to equitable relief because they "have a right of appeal" and therefore do not lack an adequate remedy at law, among other reasons); Wells v. Miller, No. 15-CV-80412, 2015 WL 12953099, at *2 (S.D. Fla. June 30, 2015), *aff'd*, 652 F. App'x 874 (11th Cir. 2016) ("The Plaintiff is not eligible for declaratory relief because he had an adequate remedy at law, namely, the right to appeal to the state appellate courts and petition for certiorari."); Jenkins v. Kerry, 928 F. Supp. 2d 122, 135 (D.D.C. 2013) ("[D]eclaratory relief against a judge for final actions taken within his or her judicial capacity is . . . available by way of a direct appeal of the judge's order."); Clarry v. Hatch, No. 04-CV-4167-JPG, 2005 WL 3234394, at *3 (S.D. Ill. Nov. 28, 2005) (assuming, in light of plaintiff's pro se status, that declaratory relief is unavailable and injunctive relief an option but concluding, based on "considerations of comity and federalism that strongly counsel against the requested intervention," that "[p]laintiff's concerns [could be] addressed at the state level").

330. *Cf.* Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000) (concluding that declaratory relief against a *federal* judge is cognizable under the 1996 amendment but foreclosed because there is an adequate remedy at law—a writ*);* McCone v. Thorpe, 828 F. App'x 697, 698 (11th Cir. 2020).

331. *Rooker-Feldman* is considered by some to be a dead letter, *see supra* note 30 and accompanying text, but it provides a frequent basis for dismissal of suit in this context, *see, e.g.*, Parrish v. Bennett, 989 F.3d 452, 456 (6th Cir. 2021); Bukovinsky v. Pennsylvania, 455 F. App'x 163, 166 (3d Cir. 2011); Adames v. Fagundo, 198 F. App'x 20, 22 (1st Cir. 2006); Haas v. Wisconsin, 109 F. App'x 107, 113 (7th Cir. 2004); Leiser L. Firm, PLLC v. Sup. Ct. of Va., No. 1:14-CV-407, 2015 WL 1936356, at *5 (E.D. Va. Apr. 28, 2015) ("Plaintiff 'may not escape the jurisdictional bar of *Rooker–Feldman* by merely refashioning its attack on the state court judgments as a § 1983 claim.'"), *aff'd*, 632 F. App'x 127 (4th Cir. 2016); Mikhail v. Khan, 991 F. Supp. 2d 596, 613–14 (E.D. Pa. 2014) (although ultimately dismissing under *Younger* abstention); Cassel v. Cnty of Ramsey, No. 10–4981 (JRT/TNL), 2011 WL 7561261, at *9 (D. Minn. Nov. 2, 2011) (dismissing based on *Rooker* and *Younger*); Steinberg v. Sup. Ct. of Pa., No. 09-86, 2009 WL 1684663, at *15 (W.D. Pa. June 10, 2009); Willner v. Frey, 421 F. Supp. 2d 913, 923 (E.D. Va. 2006).

332. *See, e.g.*, Tyrrell v. Cotton, No. 8:19CV386, 2019 WL 5422988, at *3 (D. Neb. Oct. 23, 2019); Sheffer v. Centre Cnty, No. 4:18-CV-2080, 2019 WL 2621836, at *16 (M.D. Pa. May 23, 2019); Severin v. Par. of Jefferson, 357 F. App'x 601, 605 (5th Cir. 2009) (per curiam); Esensoy v. McMillan, No. 06-12580, 2007 WL 257342, at *1 n.5 (11th Cir. Jan. 31, 2007) (per curiam).

333. *See, e.g.*, Serafine v. Crump, 800 F. App'x 234, 238 (5th Cir. 2020) (suggesting the claim suffers from a mootness or ripeness problem: "plaintiff must demonstrate a substantial likelihood she will encounter the same judge, in sufficiently similar circumstances, and with sufficiently similar results to establish an immediate, rather than speculative, threat of repeated injury"); Mikhail v. Khan, 991 F. Supp. 2d 596, 613–14 (E.D. Pa. 2014) (dismissing under *Younger* abstention); Cassel v. Cnty. of Ramsey, No. 10–4981 (JRT/TNL), 2011 WL 7561261, at *9 (D. Minn. Nov. 2, 2011) (dismissing under *Younger*); Tesmer v. Granholm, 295 F.3d 536, 539 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 307 F.3d 459 (6th Cir. 2002), *rev'd en banc*, 333 F.3d 683 (6th Cir. 2003) (reversing on *Younger*).

334. *See, e.g.*, Waris v. Frick, No. 06-5189, 2007 WL 954108, at *9 (E.D. Pa. Mar. 28, 2007). The court did not believe that "adjudicating Plaintiff's request for a declaratory judgment . . . would serve well the public interest or the interests in practicality and wise judicial administration. . . . Besides, the purposes of judicial immunity and the limitations on injunctive relief in 42 U.S.C. § 1983 would be

Moreover, no court has advanced a complete and satisfactory theory of Section 1983's meaning and operation. When plaintiffs request injunctive relief, courts often dismiss on the ground that the plaintiff has not shown declaratory relief is unavailable;[335] however, no common law understanding of unavailability has developed.[336] It is clear, at least, that unavailability does not simply mean that a court has found declaratory relief to be improper as a matter of discretion or abstention, nor that a state court denied relief.[337] But none of the opinions reviewed here provide an example of what would constitute unavailability to justify injunctive relief. Most courts maintain this incongruence between the theoretical availability of relief and its practical nonexistence without deeper inquiry into the text, history, or the source of the right of action.[338]

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ill-served if judges routinely were forced to defend against declaratory judgment actions like this one, where their immunity obviously shields them from liability for money damages." *Id.*; *see also* Lowe v. Arbouw, No. 3:20-cv-005322020, 2020 WL 6580392, at *2–3 (E.D. Va. Oct. 13, 2020) (suggesting that it would be improper for the court to exercise its discretion to grant declaratory relief because such relief would not settle the legal issue and would bypass state court appellate review)

335. *See infra* Part IV.B and accompanying text.

336. *See, e.g.*, Landrith v. Gariglietti, 505 F. App'x 701 (10th Cir. 2012) (leaving unavailability largely undefined and merely stating that "[f]ederal courts are not authorized to grant injunctive relief against judicial officers taking actions in their judicial capacity, absent limited circumstances not present here"); Roth v. King, 449 F.3d 1272, 1286 (D.C. Cir. 2006) (summarily concluding that "[n]either statutory limitation appears to apply in this case, and appellees' complaint says nothing to the contrary").

Some courts have held that a plaintiff's request for declaratory relief is an indication that it is *not* unavailable. *See, e.g.*, Ray v. Jud. Corr. Servs., Inc., No. 2:12–CV–02819–RDP, 2014 WL5090723, at *4 (N.D. Ala. Oct. 9, 2014); Parent v. New York, 786 F. Supp. 2d 516, 531 (N.D.N.Y. 2011); Kuhn v. Thompson, 304 F. Supp. 2d 1313, 1332 n.11 (M.D. Ala. 2004) ("Plaintiffs seem to acknowledge the availability of declaratory relief by seeking it in this very action."); Nollet v. Justs. of Trial Ct. of Mass., 83 F. Supp. 2d 204, 210 (D. Mass. 2000); Jones v. Newman, No. 98 Civ. 7460 (MBM), 1999 WL 493429, at *7 (S.D.N.Y. June 30, 1999).

337. *See, e.g.*, Narumanchi v. Souza, No. CIV. 13-00401 LEK, 2013 WL 4501412, at *4 (D. Haw. Aug. 21, 2013), *aff'd* No. 13-16700 (9th Cir. Oct. 25, 2013) (explaining that if declaratory relief is improper—as evidenced by the fact that the court decides not to award it—it remains "available" under the statute and injunctive relief therefore is foreclosed); *see also* Hoai v. Superior Ct. of D.C., 539 F. Supp. 2d 432, 435 (D.D.C. 2008) ("Unfortunately for the plaintiffs, a failure to get one's desired decisions in our local courts does not constitute such 'unavailability' and the suit must therefore be dismissed."), *aff'd sub nom.* Thanh Vong Hoai v. Superior Ct. for D.C., 344 F. App'x 620 (D.C. Cir. 2009); Klayman v. Blackburne-Rigsby, No. 21-0409 (ABJ), 2021 WL 2652335, at *3 (D.D.C. June 28, 2021) (same); Lask v. Meloni, No. 15-7606 (NLH/JS), 2016 WL 7042067, at *2–3 (D.N.J. Dec. 1, 2016) (holding that the plaintiff did not show declaratory relief was unavailable despite the court's decision not to award declaratory relief); Hupp v. Petersen, No. EDCV151247VAPSP, 2015 WL 9664962, at *3 (C.D. Cal. Dec. 2, 2015) (suggesting that "declaratory relief" cannot be considered unavailable just because the declaratory relief claims were not "viable" in this case); *Cassel*, 2011 WL 7561261 at *8 (holding that the plaintiff had not demonstrated declaratory relief was unavailable despite injunctive relief being barred by *Rooker-Feldman* and *Younger*).

338. *But see* Argen v. Kessler, No. 18-963 (KM)(JBC), 2019 WL 2067639, at *4 (D.N.J. May 10, 2019) (suggesting that there is a right of action under Section 1983 for declaratory relief but ultimately foreclosing relief for actions in a judicial capacity). "By 'claim for declaratory relief,' I necessarily meant '§ 1983 claim for declaratory relief'; there is no such thing as a claim for declaratory relief untethered to some underlying cause of action." *Id.* The case proceeded against the judge in his capacity as an enforcer of a gag order.

But these circuits' adoption of a reading that allows for relief is nonetheless significant and provides an opening for further development of doctrine that aligns with both the text and Congress's modest intent. And there is at least one lower court case demonstrating how the statute could provide relief. In 2000, the Eastern District of Michigan provided declaratory relief to a plaintiff whose Sixth Amendment right to counsel was violated by a state judge.[339] The opinion explained that the amendment to Section 1983 made declaratory relief available and that declaratory relief was available in this case whether the particular act was characterized as a judicial or administrative one.[340] The court deemed relief proper so long as it was sequenced to begin with a declaration and only followed by injunctive relief if that declaration was violated.[341] Although the decision was ultimately reversed on appeal on *Younger* abstention grounds,[342] it at least provides a roadmap for courts navigating the Section 1983 cause of action against state judicial misfeasance.

* * *

In sum, the lower federal courts have not persuasively resolved any of the perplexing questions about the FCIA's purpose and text or about the availability of a cause of action for suing state judges. But our review of over a hundred cases summarized here has made a few points clear. First, contrary to assertions that the FCIA "abrogated *Pulliam*," or the generally accepted principle that one cannot sue a judge, treatment of judges under Section 1983 is still very much an open question. No court has explicitly stated that declaratory relief is never available against a judge. At least half, or a slight majority, of the circuits have indicated that there is a cognizable path to relief from actions undertaken in a judicial capacity,[343] and some continue to grapple with the question.[344] As recently as 2021, the Ninth Circuit explicitly declined to answer whether declaratory relief is available against judges under Section 1983, leaving lower courts to excavate the history and practice as we have done here.[345] Despite

339. *See* Tesmer v. Granholm, 114 F. Supp. 2d 603, 622 (E.D. Mich. 2000) (holding that judges were proper defendants and declaratory relief was available).

340. *See id.* at 616–18.

341. Tesmer v. Kowalski, 114 F. Supp. 2d 622, 628 (E.D. Mich. 2000) ("In the present case, Plaintiffs obtained a declaratory decree, and its terms were violated by Judge Kolenda. As such, it appears that Plaintiffs are entitled to an injunction against him.").

342. *See* Tesmer v. Granholm, 295 F.3d 536, 543 (6th Cir. 2002), *aff'd in part and rev'd in part en banc*, 333 F.3d 683 (6th Cir. 2003). The Supreme Court considered and rejected plaintiffs' claim based on third-party standing. Kowalski v. Tesmer, 543 U.S. 125, 134 (2004).

343. *See supra* Part IV.A.

344. The D.C. Circuit and Fourth Circuit have had little to say on the issue, *see supra* notes 326 and 302, and the Second Circuit seems to have fallen short of definitively resolving it. *See supra* notes 310–313 and accompanying text.

345. *See* Lund v. Cowan, 5 F.4th 964, 970 n.2 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 900 (2022) ("Our court has not yet explicitly answered whether the [FCIA's amendment to Section 1983] bars declaratory relief, so Lund urges us to hold that it does not. But we leave that question for another day."); *see also* LaTulippe v. Harder, No. 3:21-CV-00090-HZ, 2021 WL 5530945, at *884 (D. Or. Nov. 23, 2021) ("The text of § 1983 does not explicitly bar claims for declaratory relief. The Ninth Circuit has

twenty-five years of virtually no prospective relief being issued, the "unless" clause has not been affirmatively renounced or read out of existence.

Second, the courts that have foreclosed all prospective relief against judges for actions taken in their judicial capacity run into two contradictions: one textual and one purposive. The FCIA's language about the availability of declaratory and injunctive relief against "a judicial officer for" acts taken in a "judicial capacity" makes no sense if such relief is not cognizable to begin with. No court has explicitly stated that the text should be repudiated; in fact, many continue to use the "unless" clause to perfunctorily dismiss cases.[346] If the problem is fundamentally constitutional,[347] no court has made that analysis explicit and instructed plaintiffs on how to read the statute. Considering the purpose of the FCIA, it also would not make sense to foreclose relief for actions taken by judges in their judicial capacities. If such suits are barred notwithstanding *Pulliam*, Congress need not have legislated at all. But then courts that consider the FCIA to overrule *Pulliam* must grapple with a statutory text that basically codifies *Pulliam*'s core holding. At one step of their reasoning or another, courts must accept the feasibility of some prospective relief for judicial actions.

Lastly, many courts have explicitly—and convincingly—noted that prospective relief is available against judges. Several courts have gone beyond a mere citation to further explain or rely on this principle.[348] The one case that undertook the more detailed inquiry of the pre-*Pulliam* common law, the impact of the decision, and the intent of the amendment came to this conclusion.[349] Judicial interpretation on a whole, then, is consistent with recognition of a residual class of cases for which prospective relief is cognizable and can run against state judges, first in the form of a declaration and then followed by an injunction.

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yet to decide whether claims for declaratory relief may be brought under § 1983."); Shalaby v. Jud. Officers of State of Cal., 138 F. App'x 897, 898 (9th Cir. 2005) (offering the cryptic conclusion in an unpublished memorandum that "[w]e agree with [the] decisions holding that judges adjudicating cases pursuant to state statutes may not be sued under § 1983 in a suit challenging the state law" without further explanation); Wolfe v. Strankman, 392 F.3d 358, 366 (9th Cir. 2004) (not fully resolving whether declaratory relief is ever available against a judge for acts in a judicial capacity, as the action here was in the judge's enforcement capacity, but citing to the First Circuit's *In re Justices* standard).

For lower courts' conclusions, compare Marn v. McCully, No. 12–00684 DKW/BMK, 2013 WL 6894987, at *2 (D. Haw. Dec. 31, 2013) (concluding that declaratory relief is not cognizable on account of the doctrine of judicial immunity), with Correa v. Hall, No. C 10–0885 RS (PR), 2010 WL 3323843, at *1 (N.D. Cal. Aug. 23, 2010) ("[T]he doctrine of judicial immunity does not bar claims for injunctive relief in § 1983 actions, see *Pulliam*[,] . . . [yet] Plaintiff has not alleged . . . that a declaratory decree was violated, or that declaratory relief was unavailable.").

346. *See supra* notes 311–312 and accompanying text.

347. *See supra* notes 308–309 and accompanying text.

348. *See supra* notes 321, 326, and accompanying text.

349. *See supra* notes 323–324.

V.
WHERE TO GO FROM HERE: APPLYING THE TEXT AS WRITTEN

Ordinarily, a defendant challenging an unlawful statute or government action would sue the relevant enforcement official: the attorney general, the sheriff, or the government agency. But we have seen at least two circumstances—bounty statutes and abusive municipal bail regimes—where the only plausible defendant against which effective injunctive relief could run is a state or local judge. These schemes are legislatively designed to avoid involving enforcement officers, at least until long after a citizen's rights have been unconstitutionally deprived. Deprivations instead occur during or at the outset of classic judicial activities, such as hearing disputes, awarding civil judgments, or setting or denying bail.

What would it look like to apply the plain meaning of Section 1983 to bail abuses or bounty regime cases today? At the outset, it should be noted that it would likely *not* look like a flood of litigation. Doctrines of standing, abstention, and exhaustion were all re-affirmed by *Pulliam* and remain fully operative today. In the typical case, no Article III controversy exists between a judge and a plaintiff merely seeking to review the constitutionality of a state statute. Plaintiffs cannot seek and courts cannot grant release outside of the habeas context, and plaintiffs cannot have their criminal or criminal-like adjudications suspended outside the narrow exceptions of *Younger*.

But in extraordinary cases—cases in which no other state enforcement officer can be enjoined until long after an unconstitutional harm has occurred and its chilling effects have been felt—there ought to be a way to vindicate fundamental constitutional rights when they are violated solely or primarily by state judges acting in an adjudicative capacity. Section 1983, plainly read, provides that way through: it calls for a suit for injunctive relief in an emergency and otherwise a suit for a declaration.

Thus far, we have merely restated what Section 1983 says and what *Pulliam* squarely held. The remainder of this Part briefly addresses how a federal court could responsibly apply legislative text and Supreme Court precedent to the key difficult cases we have referenced, bail abuses and bounty regimes.

The first main point courts will have to get clear is the availability of declaratory relief. Too often, courts have treated both varieties of prospective relief possibly available under Section 1983 as rising or falling together. Courts reluctant to find liability for injunctive relief tend to hold—usually without explanation—that declaratory liability is also off the table (or that plaintiffs have not met some undefined pleading burden to establish declaratory liability).[350] These courts then have to disregard—occasionally with an awkward acknowledgement[351]—Section 1983's plain statement that the *unavailability* of

350. *See supra* notes 311–312 and accompanying text.
351. *See supra* notes 335–338 and accompanying text.

declaratory relief makes *injunctive relief* immediately available. There is no sensible way to read the text that lets courts have it both ways like this. If injunctive relief is unavailable, it must be because Congress required an initial grant of declaratory relief. If declaratory relief is unavailable, Congress has expressly provided an immediate pathway to injunctive relief.[352]

It may be that on the merits, or in the exercise of equitable discretion, the court should not issue relief. But if that is the case, the court should say so rather than treat the text of Section 1983 itself as some kind of jurisdictional bar.[353] Congress made declaratory relief available against judges acting in a judicial capacity. Courts should accordingly treat Section 1983 as affirmatively creating a declaratory cause of action against judges reserved for cases involving gross overstepping of jurisdiction (e.g., abusive bail regimes), or cases evading or indefinitely delaying federal review because the only state action is judicial cognizance of an otherwise private action (e.g., bounty regimes). In the bail context, a declaratory suit acts as a direct descendent of false imprisonment or malicious prosecution claims: cases that traditionally were brought against judges, not wardens or enforcement officers. The declaratory cause of action against bounty regimes is trickier to pinpoint. But whether it descends from the prerogative writ tradition, as *Pulliam* indicated, or flows from federal equity when all other avenues of legal relief have proven inadequate, the declaratory cause of action essentially restricts states from using their own courts' remedial apparatus to enforce clearly unconstitutional laws, like the racially restrictive covenants struck down in *Shelley v. Kraemer*.[354]

In the S.B. 8 case, the Supreme Court blithely ignored *Shelley* because the case "did not even involve a pre-enforcement challenge."[355] But that should hardly matter. True, in *Shelley*, the Supreme Court restrained privately negotiated racially restrictive covenants when the state courts' cognizance of

352. Even if Section 1983 does not itself create a declaratory cause of action, the dilemma remains how to apply the text without rendering it incoherent on the one hand or surplusage on the other. Suppose Congress meant only that judges could be sued for declaratory relief in whatever circumstances allowed by the Declaratory Judgment Act, 28 U.S.C. § 2201. Under the test applied in *Skelly Oil v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950), and clarified in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19–20 (1983), plaintiffs seeking injunctive relief are either thrown into a recursive loop (the injunction isn't authorized by Section 1983 until declaratory relief is sought, but declaratory relief depends on a hypothetical injunctive degree that isn't authorized by Section 1983 until declaratory relief is sought . . .) or else bootstrap their way to relief every time (no declaratory relief available under *Skelly Oil* now means injunctive relief is available under Section 1983's plain terms, and now a hypothetical case for injunctive relief satisfies the *Skelly Oil* test and makes declaratory relief available). *See supra* notes 276–278.

353. *Cf.* Mass. State Grange v. Benton, 272 U.S. 525, 528 (1926) (Holmes, J.) ("Courts sometimes say that there is no jurisdiction in equity when they mean only that equity ought not to give the relief asked. In a strict sense the Court in this case had jurisdiction. It had power to grant an injunction, and if it had granted one its decree, although wrong, would not have been void").

354. 334 U.S. 1 (1948).

355. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 534 (2021).

those covenants ultimately came under review through 28 U.S.C. § 1257.[356] Theoretically, bounty regimes and bail abuses could be reviewed the same way (supposing potential appellants are willing to violate unconstitutional laws in order to challenge them). But *every* declaratory action involves a potentially coercive enforcement action that could someday be litigated, appealed, and finally resolved on the merits. The whole point of declaratory actions is to accelerate the determination of important legal questions, especially in cases in which arguably legal activities will be chilled due to their uncertain legal status.[357] Whether a *Shelley*-like action can be brought pre-enforcement, that is, whether declaratory relief should be available or not, is ultimately a policy question for Congress. Ultimately, Congress has made that determination in Section 1983 and has not welcomed the courts to second-guess it.

One significant consequence of reading Section 1983 to confer a declaratory cause of action is that, unlike ordinary practice under the Declaratory Judgment Act, declaratory jurisdiction under Section 1983 is not declinable or discretionary. Section 1983 does not include the permissive "may" that the Declaratory Judgment Act does; indeed, by its terms, the statute fast-tracks injunctive relief where declaratory jurisdiction is unavailable. The various multi-factor tests circuit courts have erected to guide lower courts when deciding whether to decline declaratory jurisdiction are simply inapplicable in actions against judicial defendants.[358]

Having satisfied itself that a case before it belongs to the narrow category of actions in which no other enforcement officer defendant is available and a plaintiff is being harmed or threatened by state judicial action, a federal trial court may then apply the bevy of jurisdiction-restricting doctrines like the *Preiser*, *Younger*, and *Rooker-Feldman* doctrines, in addition to more run-of-the-mill bars like preclusion[359] and time limitations.[360] In all cases that survive that gauntlet, courts should proceed to assess the declaratory action on its merits without fear of or regard for the usual concerns arising from immunity doctrines. Congress, as we have seen, has already weighed the policy arguments that

356. 334 U.S. at 3, 4.

357. *See* FALLON ET AL., *supra* note 201, at 837–43; *see generally* Robert T. Sherwin, *Shoot First, Litigate Later: Declaratory Judgment Actions, Procedural Fencing, and Itchy Trigger Fingers*, 70 OKLA. L. REV. 793 (2018); Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529 (1989).

358. *See, e.g.*, St. Paul Ins. Co. v. Trejo, 39 F.3d 585, 590–91 (5th Cir. 1994); Rarick v. Federated Servs. Ins., 852 F.3d 223, 227–30 (3d Cir. 2017); W. World Ins. Co. v. Hoey, 773 F.3d 755, 759–61 (6th Cir. 2014). Because Congress has conferred expressly this specific remedy only for actions taken by judges acting in a judicial capacity, we expect the normal rules of the Declaratory Judgment Act would still apply in all other Section 1983 actions, including the many actions against judges who are found *not* to be acting in a judicial capacity when engaging in the challenged conduct. *See supra* note 2.

359. *See* Allen v. McCurry, 449 U.S. 90, 100–01 (1980).

360. Section 1983 actions "borrow" their statute of limitations from state tort law provisions. *See* Wilson v. Garcia, 471 U.S. 261, 276 (1985).

liability may freeze officers from performing their duties or incentivize runaway litigation.[361] Congress has nevertheless chosen to leave the door of liability open, and courts should honor that choice. Nor should federal trial courts be especially solicitous of judicial defendants, any more than they are of wardens in habeas cases or attorneys general in *Ex parte Young* actions. Judicial defendants are, as the legislative record disclosed in the debate over the FCIA, routinely defended by the relevant state's attorneys and indemnified by state legislatures.[362] Suits against judicial officers simply exemplify the longstanding rule that while sovereign states cannot be sued directly, their officers who violate the federal Constitution can be. There is no reason in doctrine, policy, or the realities of litigation to distinguish a judicial defendant from beat cops, prison guards, or state attorneys on this score.

Finally, courts should note that the procedures laid out above assume that litigants can wait for vindication of a declaratory action. If the plaintiff cannot, Congress has instructed courts to immediately resort to a coercive decree, which may take the form of a temporary restraining order or preliminary order of injunction. The very sparse commentary on the "unavailability" of declaratory relief in the FCIA amendment to Section 1983 confirms that at the very least, Congress meant for *Pulliam* to stand as the paradigm case requiring immediate federal court intervention.[363] Minority reports on the amendment emphasized that the nature and short duration of pretrial detention often necessitates immediate injunctive relief and concluded that "*Pulliam* itself provides a compelling example."[364] Accordingly, the minority would not have required resort to declaratory relief at all but would have maintained access to injunctive relief against judges in all cases.[365] That view did not win out, but we can infer that the unavailability clause was meant to at least keep the path clear for cases like *Pulliam* in which lawyerless defendants were unlawfully detained for weeks on unaffordable bail.[366] In essence, in all cases in which a preliminary injunction would be appropriate against an enforcement officer but no such officer is available as a defendant, courts should deem a similar decree available against judicial officers.

CONCLUSION

Despite justiciability and abstention issues rendering it difficult, the ability to sue judges is essential to providing plaintiffs with a remedy in extraordinary cases. The Supreme Court has acknowledged as much. In *Pulliam v. Allen*, it

361. *See supra* Part III.B.

362. *See supra* note 264 and accompanying text.

363. *See supra* notes 285–287 and accompanying text.

364. 1990 S. REP., *supra* note 218, at 12 (minority views); 1991 S. REP., *supra* note 218, at 13 (minority views).

365. *See id*.

366. *See supra* notes 93–98 and accompanying text.

held that there is no common law judicial immunity to prospective relief, and it recognized state judges as proper defendants under Section 1983. While the FCIA in 1996 appeared to make a significant amendment to the statute, it merely varied the sequence of relief and did not overturn *Pulliam*'s fundamental holding.

In response to state judges' pleas, Congress spent a decade weighing the risks to judicial independence and federalism against the need to provide plaintiffs with relief. Although the stated purpose of the amendment to Section 1983 was to restore judicial immunity, the clear text of the statute only imposed a sequencing regime: injunctive relief against judges for actions taken in a judicial capacity is available *once* the judicial defendant violates a declaratory decree. In doing so, the statute impliedly creates the necessary right of action for that declaratory decree. A careful reading of the legislative history affirms Congress's purpose in making this modest textual change.

Courts have largely failed to provide a coherent reading of the statute that reflects its text and purpose, but they have not entirely foreclosed a path to prospective relief from judicial action. Disregarding plain statutory text is at odds with interpretive norms, and for this reason, judges have mainly resorted to various procedural devices to resolve these disputes. Federal judges, much like scholars and litigants, have presumed that their decrees simply cannot run against judges, without grappling with the clear text of Section 1983 and the legacy of *Pulliam* that show they can. This lack of inquiry in no way proves the futility of the statutory remedies, however.

Reading the current version of Section 1983 to permit declaratory relief against judges (followed by injunctive relief as necessary) makes the most sense considering the textual, purposive, and prudential aims of Congress's amendment to Section 1983. By allowing plaintiffs to sue judges for declaratory relief, courts would do justice to the text of the FCIA, protect plaintiffs from civil rights abuses, and hold judicial officers accountable for unconstitutional conduct. By resurfacing the history and text of Section 1983, litigants can demonstrate that schemes to evade federal court review of unconstitutional actions and legislation are not, in fact, ironclad. Judges may be temporarily spared from the coercive grip of a federal injunction but they, like the rest of us, are not immune from being called to account.