42 U.S.C. § 1983 — JUDICIAL IMMUNITY — FIFTH CIRCUIT HOLDS THAT SECTION 1983 DOES NOT APPLY TO LOCAL JUDGES. — *Freedom from Religion Foundation, Inc. v. Mack*, 4 F.4th 306 (5th Cir. 2021).

In response to a post–Civil War South where "judges, having ears to hear, hear[d] not,"[1] Congress enacted several statutes to force state officials to comply with the new Fourteenth Amendment.[2] One of those statutes was the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, which provides a cause of action against any person who deprives another of their constitutional rights under color of law.[3] As articulated by the Supreme Court: "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[4] Recently, in *Freedom from Religion Foundation, Inc. v. Mack*,[5] the Fifth Circuit issued a stay pending appeal to allow a justice of the peace, Judge Mack, to continue opening court sessions with prayer.[6] In its reasoning, the court concluded that Judge Mack could not be sued in his official capacity for prospective relief under 42 U.S.C. § 1983.[7] Regardless of the court's analysis on the merits of the Establishment Clause claim, the Fifth Circuit's determination that Judge Mack could not be sued in this way ignored the statute's text, history, and surrounding jurisprudence.

In 2014, Judge Mack, a justice of the peace in Montgomery County, Texas, created a chaplaincy program to assist him in his duties as county coroner.[8] As a corollary to the program, Judge Mack regularly invites the volunteer chaplains to participate in "opening ceremonies" in his courtroom before the first case is called.[9] In these ceremonies, chaplains

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[1] CONG. GLOBE, 42d Cong., 1st Sess. app. at 78 (1871) (statement of Rep. Perry).

[2] *See, e.g.*, Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *upheld in Ex parte* Virginia, 100 U.S. 339 (1880), *invalidated in part by* The Civil Rights Cases, 109 U.S. 3, 25 (1883); Enforcement Act of 1870, ch. 114, 16 Stat. 140 (current version at 18 U.S.C. § 241).

[3] 42 U.S.C. § 1983.

[4] Wyatt v. Cole, 504 U.S. 158, 161 (1992).

[5] 4 F.4th 306 (5th Cir. 2021).

[6] *Id.* at 308.

[7] *Id.* at 311.

[8] Freedom from Religion Found., Inc. v. Mack, 540 F. Supp. 3d 707, 709 (S.D. Tex. 2021). Between November 2017 and October 2020, "approximately 90 percent of the volunteer chaplains represented surrounding Protestant Christian congregations." *Id.* Initially, the program's handbook contained an image of a badge with a cross on it and stated that "[t]he role of the JCC Chaplain is to be a representative of God[,] bearing witness to His hope, forgiving and redeeming power"; however, the current version omits the image of the cross and instead states that "[t]he role of the JCC Chaplain is to be a representative of hope, forgiveness, and compassion." *Id.* (alterations in original).

[9] *Mack*, 4 F.4th at 308.

offer prayers or "encouraging words."[10] Those with business before the court are not required to stay in the room and are told that their involvement will not be considered by the court in its decisionmaking.[11]

Between August 2015 and July 2017, attorney John Roe appeared before Judge Mack on ten occasions, and each time "a Christian chaplain delivered a Christian prayer" during the opening ceremonies.[12] Consequently, in July 2017, feeling that his refusal to participate would prejudice his clients, Roe stopped representing clients whose cases had been assigned to Judge Mack.[13] On May 29, 2019, Roe and the nonprofit organization Freedom from Religion Foundation (FFRF) filed suit against Judge Mack in his individual and official capacities, alleging that Judge Mack's opening ceremonies violate the Establishment Clause of the U.S. Constitution.[14]

Both parties filed motions for summary judgment.[15] The District Court for the Southern District of Texas granted the plaintiffs' motion and denied the defendant's,[16] finding that the opening ceremonies violate the Establishment Clause.[17] While the defendant argued that *Marsh v. Chambers*[18] and *Town of Greece v. Galloway*[19] controlled, Senior District Judge Hoyt distinguished these cases because both concerned prayer in a legislative, rather than judicial, setting.[20] Moreover, the court found that the ceremonies have "both a religious purpose and a primary effect of advancing or endorsing religion,"[21] highlighting the defendant's statement that his chaplaincy program was something "that God wanted in place, for His larger purpose."[22] Thus, the court concluded that the ceremonies were unconstitutional and the plaintiffs were entitled to summary judgment, issuing a declaratory decree and warning

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[10] *Id.*

[11] *Id.* at 309.

[12] *Mack*, 540 F. Supp. 3d at 711.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 708.

[16] *Id.*

[17] *Id.* at 713 (citing Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947)).

[18] 463 U.S. 783 (1983) (upholding the Nebraska legislature's practice of opening each legislative day with a prayer).

[19] 572 U.S. 565 (2014) (upholding the practice of opening monthly town board meetings with prayer).

[20] *Mack*, 540 F. Supp. 3d at 713–14. This distinction was relevant because (a) there was no equivalent historical tradition of routine prayer before the commencement of court proceedings, *id.* at 714, (b) the prayer was directed at the parties with business in the courtroom instead of the government body's own members, *id.* at 713–14, and (c) Judge Mack's ceremonies "[e]vince[] [c]oercion," *id.* at 714, because "in contrast to a town board meeting or legislative session, a litigant's, or her attorney's, attendance is not voluntary in any real sense," *id.* at 715.

[21] *Id.* at 716 (citing Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 278–79 (5th Cir. 1996); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

[22] *Id.* (quoting a 2015 letter from Judge Mack to his supporters).

that if the defendant violated the decree, the court would issue an injunction[23] pursuant to 42 U.S.C. § 1983.[24] The defendant filed a request for a stay pending appeal in the Fifth Circuit.[25]

The Fifth Circuit granted the stay. Writing for the panel, Judge Oldham[26] determined that Judge Mack's appeal was likely to succeed,[27] that he would face irreparable harm without a stay,[28] that "any injury to FFRF [was] outweighed by Judge Mack's strong likelihood of success on the merits,"[29] and that the public interest in correctly applying the First Amendment warranted a stay.[30] The court reasoned that Judge Mack was likely to succeed on appeal because he could not be sued in his official capacity under § 1983,[31] and FFRF was unlikely to succeed on its individual-capacity claim due to the "abundant history and tradition of courtroom prayer"[32] and the fact that Judge Mack "invite[s] the public to leave the [c]ourt before invoking God,"[33] making his opening ceremonies less coercive than other historical examples of courtroom prayer.[34] The court concluded that Judge Mack would be irreparably harmed without the stay because (a) the district court's intervention into Judge Mack's courtroom violated federalism principles[35] and (b) the Texas State Commission on Judicial Conduct continued to investigate Judge Mack.[36]

In determining that Judge Mack could not be sued in his official capacity under 42 U.S.C. § 1983, the court first stated that "[o]bviously,

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[23] *Id.*

[24] In suits against judges, "injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

[25] *Mack*, 4 F.4th at 311.

[26] Judges Higginbotham and Smith joined Judge Oldham's opinion.

[27] *Mack*, 4 F.4th at 311.

[28] *Id.* at 315.

[29] *Id.* at 316.

[30] *Id.* at 317.

[31] *Id.* at 311.

[32] *Id.* at 313–14 (noting the Supreme Court's traditional call to order ("God save this Honorable Court"), the practice of three Founding-era Justices of "authoriz[ing] clergymen to open court sessions with prayer" when they rode circuit, and then–Chief Justice Jay's description of the practice as "the custom," *id.* at 314).

[33] *Id.* at 314.

[34] *Id.* For example, the Fifth Circuit cited a 1791 prayer for mercy on the soul of a defendant sentenced to death and a 1792 charge to a grand jury that perjury was an "abominable Insult . . . to the divine Being." *Id.* (omission in original) (first citing State v. Washington, 1 S.C.L. (1 Bay) 120, 158 (1791); and then quoting John Jay's Charge to the Grand Jury of the Circuit Court for the District of Vermont (June 25, 1792), *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 282, 284 (Maeva Marcus et al. eds., 1988)).

[35] *Id.* at 315–16 (citing Texas v. EPA, 829 F.3d 405, 434 (5th Cir. 2016) (recognizing that violations of federalism principles constitute irreparable injury); *accord* Valentine v. Collier, 956 F.3d 797, 803–04 (5th Cir. 2020) (per curiam) (recognizing irreparable injury where a court enjoined a state from effectuating legislation in the context of COVID-19 response)).

[36] *Mack*, 4 F.4th at 316.

'[s]uits against state officials in their official capacity . . . should be treated as suits against the State,'"[37] which must ordinarily be dismissed on the basis of Eleventh Amendment sovereign immunity.[38] Next, the court cited *Will v. Michigan Department of State Police*[39] for the proposition that "[s]uits against the State under 42 U.S.C. § 1983 are doubly dismissible because the State is not a 'person' under that statute."[40] Instead, according to the Fifth Circuit, "the only way to bring an official-capacity claim against an officer of the State"[41] is under *Ex parte Young*,[42] which could not apply here as Judge Mack is a county officer and the complaint did not ask for relief under *Ex parte Young*.[43]

The Fifth Circuit's analysis of judicial immunity under § 1983 ignored the statute's text, history, and surrounding jurisprudence. First, § 1983 does generally provide a cause of action against state officials for prospective relief. A plain reading of § 1983 indicates that it applies to state officials, as state officials are "person[s],"[44] and Supreme Court precedent confirms this reading in official-capacity suits for prospective relief. Second, § 1983 applies to state judges specifically, with some limitations. The drafters of § 1983 specifically contemplated suits against judges, and courts have consistently entertained such suits. Though § 1983 was amended in 1996, the amendment merely prescribed a particular path to sue for prospective relief against state judges, and the plaintiffs in *Mack* adhered to that path.

On its face, the text of § 1983 applies to all state officials. Invoking broad authority, the statute applies to "[e]very person who, under color of [law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[45] As a state official is a "person," the statute applies to state officials.[46]

Supreme Court precedent also supports the application of § 1983 to state officials. Although the Fifth Circuit cited *Will* to support its proposition that "[s]uits against the State under § 1983 are doubly dismissible

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[37] *Id.* at 311 (alteration in original) (omission in original) (quoting Hafer v. Melo, 502 U.S. 21, 25 (1991)).

[38] *Id.*

[39] 491 U.S. 58 (1989).

[40] *Mack*, 4 F.4th at 311 (citing *Will*, 491 U.S. 58).

[41] *Id.*

[42] 209 U.S. 123 (1908). Under *Ex parte Young*, official-capacity actions for prospective relief are not treated as actions against the State. *See id.* at 159–60.

[43] *Mack*, 4 F.4th at 312.

[44] 42 U.S.C. § 1983.

[45] *Id.*

[46] Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) ("To most, 'every person' would mean *every person*, not every person *except* judges."). Though the Court has narrowed this reading in official-capacity damages suits, this definition still provides a useful starting point.

because the State is not a 'person' under that statute,"[47] the opinion ignored a crucial caveat made in that very opinion. Writing as though this limitation was so obvious that it hardly needed to be stated, the *Will* Court added in a footnote that "[o]f course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983."[48] The Court reached this seemingly obvious conclusion by looking to existing Supreme Court precedent, specifically *Kentucky v. Graham*,[49] which made clear that, in the sovereign immunity context, "official-capacity actions for prospective relief are not treated as actions against the State."[50] The Court explained that the distinction between actions for damages and actions for prospective relief is a "commonplace" feature of sovereign immunity doctrine,[51] which would have been familiar to the enacting Congress.[52] Since *Will* was decided in 1989, other circuit courts have consistently looked to this distinction in their analysis of sovereign immunity to allow § 1983 suits against individual defendants in their official capacity for prospective relief.[53] Thus, it is not true that "the only way to bring an official-capacity claim against an officer of the State" is under *Ex parte Young*.[54]

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47 *Mack*, 4 F.4th at 311 (citing Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989)).

48 *Will*, 491 U.S. at 71 n.10.

49 473 U.S. 159 (1985).

50 *Id.* at 167 n.14; *see also Ex parte* Young, 209 U.S. 123, 159–60 (1908).

51 *Will*, 491 U.S. at 71 n.10 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-27, at 190 n.3 (2d ed. 1988)). Courts have distinguished damages from prospective relief in multiple ways. *See, e.g.*, *Will*, 491 U.S. at 89–90 (Brennan, J., dissenting) (noting that interests in ending an ongoing violation are weightier than interests in correcting a past violation); Wis. Hosp. Ass'n v. Reivitz, 820 F.2d 863, 867 (7th Cir. 1987) (noting the lack of effect on the state treasury in suits for prospective relief, as opposed to suits for damages, as a significant reason for this distinction).

52 *Will*, 491 U.S. at 71 n.10 (citing *In re* Ayers, 123 U.S. 443, 506–07 (1887); United States v. Lee, 106 U.S. 196, 219–22 (1882); Bd. of Liquidation v. McComb, 92 U.S. 531, 541 (1876); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)).

53 *See, e.g.*, Flint v. Dennison, 488 F.3d 816, 825 (9th Cir. 2007) ("*Will* recognized one vital exception to this general rule: When sued for prospective injunctive relief, a state official in his official capacity *is* considered a 'person' for § 1983 purposes. This exception recognizes the doctrine of *Ex parte Young* that a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity." (citations omitted)); Hedgepeth *ex rel.* Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148, 1152 n.3 (D.C. Cir. 2004) (citing *Will*, 491 U.S. at 71 n.10, to allow a § 1983 suit for prospective injunctive relief to proceed against the General Manager of the Washington Metropolitan Area Transit Authority in his official capacity, even though the Authority itself would not be a "person" under the statute); Stidham v. Peace Officer Standards & Training, 265 F.3d 1144, 1156 (10th Cir. 2001) (citing *Will*, 491 U.S. at 71 n.10, to allow suit against individual defendants in their official capacities for prospective injunctive relief although the Utah Peace Officer Standards and Training Division itself would be immune); Lett v. Magnant, 965 F.2d 251, 255 (7th Cir. 1992) (recognizing jurisdiction over official capacity defendants sued for prospective relief under *Will*, 491 U.S. at 71 n.10); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1371 (9th Cir. 1992) (applying the "distinction between injunctive and damages actions against officials" to a territory).

54 *Mack*, 4 F.4th at 311.

While the Fifth Circuit did not explicitly distinguish state judges from other state officers in its opinion, the history and purpose of § 1983 demonstrate that it applies to state judges in particular. In the words of the Supreme Court, § 1983 was designed "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, *or judicial*.'"[55] Those who supported its enactment knew that an effective statute would necessarily encompass the actions of state judges, emphasizing the failure and complicity of the state courts in the terror of the post–Civil War South when they described that "records of the [state] tribunals are searched in vain for any evidence of effective redress [of federally secured rights]"[56] and that "judges, having ears to hear, hear not."[57] Thus, "[t]he debate was not about whether the predecessor of § 1983 extended to actions of state courts, but whether this innovation was necessary or desirable."[58]

Supreme Court precedent also explicitly allows for suit under § 1983 against state judges, albeit with some limitations. While the Court has recognized some judicial immunity, it has continued to recognize the distinction between suits for damages and suits for prospective relief in the context of state judges. In *Pulliam v. Allen*,[59] the Court held that, while judicial immunity is generally a bar to damages suits against state judges, "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity."[60]

While § 1983 was amended in 1996 to abrogate *Pulliam* by prescribing a particular path to sue for prospective relief against state judges, this amendment did not make state judges immune from suit in all § 1983 actions.[61] The added text explicitly contemplates application to state judges, stating 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."[62] If an official-capacity suit could never be brought against a judicial officer, this provision of § 1983

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[55] Mitchum v. Foster, 407 U.S. 225, 242 (1972) (emphasis added) (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1880)).

[56] CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (statement of Rep. Lowe).

[57] *Id.* app. at 78 (statement of Rep. Perry).

[58] *Mitchum*, 407 U.S. at 241–42 (citing CONG. GLOBE, 42d Cong., 1st Sess. 361 (statement of Rep. Swann); *id.* at 385 (statement of Rep. Lewis); *id.* at 416 (statement of Rep. Biggs); *id.* at 429 (statement of Rep. McHenry); *id.* at 599–600 (statement of Sen. Saulsbury); *id.* app. at 179 (statement of Rep. Voorhees); *id.* app. at 216 (statement of Sen. Thurman)); *see also* Pierson v. Ray, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) ("[E]very member of Congress who spoke to the issue assumed that the words of the statute meant what they said and that judges would be liable.").

[59] 466 U.S. 522 (1984).

[60] *Id.* at 541–42.

[61] The 1996 amendment was intended to overrule *Pulliam*. Allen v. Debello, 861 F.3d 433, 439 (3d Cir. 2017).

[62] 42 U.S.C. § 1983.

would be superfluous.[63] The Senate Report confirms this reading, as it emphasizes that the amendment "does not provide absolute immunity for judicial officers."[64] Even under the amended version of § 1983, a plaintiff may still seek declaratory relief,[65] may seek injunctive relief when a declaratory decree is violated or is unavailable, and may seek damages when the basis of the suit is a judge's "nonjudicial action"[66] or action clearly exceeding the judge's jurisdiction.[67]

The Fifth Circuit should have applied this § 1983 analysis. The FFRF clearly followed the formula articulated by Congress in the 1996 amendment, requesting "[j]udgment declaring that Judge Mack's courtroom prayer practice violates the Establishment Clause of the First Amendment to the United States Constitution or, in the event declaratory relief is unavailable, injunctive relief ordering Judge Mack to discontinue his courtroom prayer practice."[68] The Fifth Circuit even explicitly acknowledged this, writing that the plaintiffs' requested relief "perfectly tracks the text of § 1983."[69] Thus, the district court did not, as the Fifth Circuit claimed, "badly los[e] its footing" in finding that the plaintiffs retained an official-capacity claim.[70] This claim was well-established under the law.

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[63] *Cf.* Gustafson v. Alloyd Co., 513 U.S. 561, 574–75 (1995) (applying the presumption against superfluous language).

[64] S. REP. NO. 104-366, at 37 (1996) ("Immunity is not granted for any conduct 'clearly in excess' of a judge's discretion, even if the act is taken in a judicial capacity. Moreover, litigants may still seek declaratory relief, and may obtain injunctive relief if a declaratory decree is violated or is otherwise unavailable.").

[65] *See* Just. Network Inc. v. Craighead County, 931 F.3d 753, 762 (8th Cir. 2019) ("Our conclusion that [defendant judges] are entitled to judicial immunity does not resolve whether [plaintiff] may seek injunctive and declaratory relief."); Severin v. Parish of Jefferson, 357 F. App'x 601, 605 (5th Cir. 2009) (per curiam) ("[J]udicial immunity does not bar declaratory relief . . . ."); 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."); Johnson v. McCuskey, 72 F. App'x 475, 477 (7th Cir. 2003); Davis v. Campbell, No. 13-cv-0693, 2014 WL 234722, at *9 (N.D.N.Y. Jan. 22, 2014) ("The doctrine of judicial immunity also does not shield judges from claims for prospective declaratory relief." (quoting LeDuc v. Tilley, No. 05CV157MRK, 2005 WL 1475334, at *7 (D. Conn. June 22, 2005))). Declaratory relief must be prospective. *Just. Network Inc.*, 931 F.3d at 764.

[66] Mireles v. Waco, 502 U.S. 9, 11 (1991) (per curiam) (citing Forrester v. White, 484 U.S. 219, 227–29 (1988); Stump v. Sparkman, 435 U.S. 349, 360 (1978)).

[67] *Id.* at 12 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)).

[68] *Mack*, 4 F.4th at 312 (quoting Complaint for Declaratory Relief at 18, Freedom from Religion Foundation, Inc. v. Mack, 540 F. Supp. 3d 707 (S.D. Tex. 2021) (No. 19-CV-1934)).

[69] *Id.*

[70] *Id.* at 313; *cf.* Dirrane v. Brookline Police Dep't, 315 F.3d 65, 71–72 (1st Cir. 2002) (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 n.10 (1989)) ("While one might at first suppose that these were injunctions against the official in his personal capacity (based on the fiction that unconstitutional action is not 'official'), the Court has stated that the injunction can be issued against the official in his official capacity. . . . Where the injunction does not implicate direct payments, the

Although this procedural point may not have changed the ultimate outcome in this case with respect to the Establishment Clause claim, the curtailing of prospective relief against judges is significant. In litigation over constitutional violations by municipal and state officials, § 1983 is the primary statute used to obtain relief.[71] Because of the existing procedural hurdles, "the success rate for § 1983 plaintiffs is [already] lower than for other kinds of litigation."[72] Individual-capacity claims cannot provide protection when prospective relief is directly linked to the defendant's official capacity.[73] Moreover, this procedural move comes at a time when the Fifth Circuit has been particularly hostile to prospective relief against state officials in some high-profile cases[74] and closes one of the few remaining doors for this important remedy. If the Supreme Court or other circuits follow the Fifth Circuit's latest development in the "pattern of narrow, debilitating construction" of the civil rights amendments and legislation,[75] states will only be incentivized to become more aggressive in their attempts to transgress Fourteenth Amendment doctrine.[76] By incorrectly curtailing the use of § 1983 against state judges for prospective relief, the Fifth Circuit has taken us one step backward to a reality where "judges, having ears to hear, hear not."[77]

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difference between personal and official capacity is largely in the details, (*e.g.*, whether the injunction runs against a successor in office) . . . .").

[71] Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 837 (2016).

[72] *Id.* at 836 (citing Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 7 (2015)).

[73] *See* Scott v. Flowers, 910 F.2d 201, 213 n.25 (5th Cir. 1990).

[74] Relying on the new conservative supermajority on the Fifth Circuit, *see, e.g.*, Ruth Marcus, Opinion, *The 5th Circuit Is Staking Out a Claim to Be America's Most Dangerous Court*, WASH. POST (Aug. 31, 2021, 6:37 PM), https://www.washingtonpost.com/opinions/2021/08/31/5th-circuit-is-staking-out-claim-be-americas-most-dangerous-court [https://perma.cc/5B7V-5DBM] (quoting Professor Stephen I. Vladeck from the University of Texas as saying the Fifth Circuit is "[a]s conservative a federal appeals court as any of us have seen in our lifetimes"), and the Supreme Court to defend them, Texas, Louisiana, and Mississippi have started to push the boundaries of Fourteenth Amendment protections, and plaintiffs have sued for prospective relief to stop them, *see, e.g.*, Whole Woman's Health v. Jackson, 13 F.4th 434, 438–39 (5th Cir. 2021) (per curiam), *aff'd in part, rev'd in part, and remanded*, 142 S. Ct. 522 (2021); Tex. Democratic Party v. Abbott, 978 F.3d 168, 174 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021).

[75] Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1342 (1951); *see* The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) ("Constitutional provisions . . . have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.").

[76] *See* 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, 525–27 (2018).

[77] CONG. GLOBE, 42d Cong., 1st Sess. app. at 78 (1871) (statement of Rep. Perry).