

CONSTITUTIONAL TORTS — STATE *BIVENS* EQUIVALENTS — EN BANC NEVADA SUPREME COURT RECOGNIZES IMPLIED RIGHT OF ACTION FOR DAMAGES UNDER STATE CONSTITUTION. — *Mack v. Williams*, 522 P.3d 434 (Nev. 2022).

Nearly fifty years ago, Justice Brennan urged state courts to “step into the breach” and interpret state constitutional provisions to be more protective of individual rights than the U.S. Supreme Court had interpreted their federal constitutional counterparts.¹ Last December, the Nevada Supreme Court did just that. In *Mack v. Williams*,² the court recognized an implied cause of action for damages under the Nevada state constitution’s search-and-seizure guarantee.³ Despite reaching the same outcome as the U.S. Supreme Court did in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁴ the Nevada court — evidently influenced by the modern Supreme Court’s retrenchment from *Bivens*⁵ — did not openly embrace the *Bivens* rationale. The court instead purported to center its constitutional analysis on interpreting the provision at issue. However, much of the court’s reasoning turned instead on the court’s conception of its inherent judicial power to craft remedies necessary to effectuate constitutional rights. The Nevada court could have embraced this reasoning — akin to the one underpinning *Bivens* — outright. Doing so would have produced a more coherent opinion and would have been justified because the doctrine animating the U.S. Supreme Court’s departure from *Bivens* is inapplicable in Nevada’s context.

In 2017, Sonjia Mack went to High Desert State Prison (HDSP) to visit her boyfriend.⁶ There, two HDSP officers approached Mack and took her to another building where a third officer strip-searched her and a fourth interrogated her regarding drugs.⁷ Mack sued the prison officials for damages under 42 U.S.C. § 1983 and the Nevada Constitution in the United States District Court for the District of Nevada.⁸ Among other claims, Mack alleged the officers violated her federal and state constitutional due process and search-and-seizure rights.⁹

¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

² 522 P.3d 434 (Nev. 2022).

³ See *id.* at 451–52.

⁴ 403 U.S. 388 (1971).

⁵ See *Mack*, 522 P.3d at 443 (citing *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022)).

⁶ *Mack v. Williams*, No. 18-cv-00799, 2019 WL 4675365, at *1 (D. Nev. Sept. 25, 2019).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* Nevada’s constitution contains equivalents to the federal Constitution’s Fourth Amendment. Compare NEV. CONST. art. 1, § 18, with U.S. CONST. amend. IV, and the Fourteenth Amendment’s Due Process Clause; compare NEV. CONST. art. 1, § 8, with U.S. CONST. amend. XIV, § 1.

The Nevada Department of Corrections (NDOC) moved for summary judgment on all claims.¹⁰ The court denied the motion with respect to the state due process claim and the state and federal search-and-seizure claims after concluding genuine issues of fact remained.¹¹ The parties disputed whether Mack consented to the search, whether there was reasonable suspicion to conduct it, and whether Mack knew she was free to leave.¹² Though the officers asserted qualified immunity, the court held it “does not shield defendants from state law claims.”¹³

NDOC moved for reconsideration, arguing no implied right of action to sue for damages existed under the Nevada Constitution.¹⁴ It also argued that qualified immunity should apply.¹⁵ Because these were issues of first impression, the district court certified questions to Nevada’s Supreme Court: (1) whether there was a private cause of action under Nevada’s due process and search-and-seizure clauses; and (2) if so, what remedies were available and whether qualified immunity could apply.¹⁶

In late December of last year, the Nevada Supreme Court responded in *Mack v. Williams*.¹⁷ The court considered only the questions related to the search-and-seizure claim because the certification order contained insufficient information for the court to adjudicate the due process claim.¹⁸ For a unanimous court, Justice Cadish¹⁹ held that Nevada’s search-and-seizure guarantee contains an implied right of action for damages.²⁰ The court also held state officers cannot raise qualified immunity in defense to such claims absent state legislative authorization.²¹

The court first considered whether the state constitution implied a cause of action for Mack’s damages claim. Mack argued that “the mere articulation of a right in the Nevada Constitution establishes an implied private cause of action” to vindicate that right through damages.²² NDOC countered that only the legislature could create such a private right of action since the state constitution was silent on the issue.²³ The court reasoned, however, that under longstanding Nevada constitutional law, provisions like article 1, section 18 that prohibit the government

¹⁰ *Mack*, 522 P.3d at 439.

¹¹ *Mack*, 2019 WL 4675365, at *3–8.

¹² *Id.*

¹³ *Id.* at *4 (quoting *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013)).

¹⁴ *Mack v. Williams*, No. 18-cv-00799, 2020 U.S. Dist. LEXIS 125901, at *3 (D. Nev. July 17, 2020).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Mack*, 522 P.3d at 434.

¹⁸ *Id.* at 440.

¹⁹ *See id.* at 452. Justice Cadish was joined by Chief Justice Hardesty and Justices Parraguirre, Stiglich, Pickering, and Herndon.

²⁰ *Id.* at 441.

²¹ *Id.* at 450–51.

²² *Id.* at 441.

²³ *Id.*

from violating rights are “self-executing”²⁴: they implicitly contain a cause of action, whether or not the legislature created one.²⁵

Parsing the distinction between the right to sue and the right to sue for a particular form of relief, the court focused on whether Nevada’s search-and-seizure provision impliedly authorizes damages to vindicate its guarantees.²⁶ It acknowledged that *Bivens* recognized an implied damages cause of action under the federal search-and-seizure guarantee, but the court claimed it would not rely on *Bivens* for two reasons.²⁷ First, *Bivens* has been hollowed out by the U.S. Supreme Court in recent years, “effectively accomplish[ing] the result that only Congress may confer a damages remedy on private plaintiffs.”²⁸ Second, *Bivens* was “incomplete” to resolve the issue; it only asked whether a court should grant a remedy, not whether the Constitution evinced an intent to provide one.²⁹ The court thus “formally adopt[ed]” a three-part framework³⁰ from a California Supreme Court decision, *Katzberg v. Regents of the University of California*.³¹ At step one, a court considers whether the text or the history of the constitutional provision at issue evinces an intent to authorize damages.³² Absent clear indication of intent, a court moves on to step two, a “constitutional tort analysis,”³³ which favors implying a constitutional remedy when doing so is “consistent with the purpose of and necessary to enforce the provision.”³⁴ Finally, at step three, a court considers whether “special factors counsel[] hesitation.”³⁵

Relying on the *Katzberg* framework, the court held that article 1, section 18 of the Nevada Constitution includes a private right of action for monetary relief.³⁶ At step one, the court briefly analyzed the text of the provision and concluded it evinced no textual mandate nor clear intent to authorize damages.³⁷ But the court also posited that nothing in the Nevada Constitution gave the legislature sole authority to recognize remedies where the constitution was silent.³⁸ Indeed, if the availability of remedies depended on the legislature, the court reasoned this would undermine its view that Nevada’s constitutional provisions

²⁴ *Id.* (quoting *Wren v. Dixon*, 161 P. 722, 729 (Nev. 1916)).

²⁵ *Id.* at 442 (quoting *Alper v. Clark County*, 571 P.2d 810, 812 (Nev. 1977)).

²⁶ *Id.* at 442–50.

²⁷ *Id.* at 443.

²⁸ *Id.* at 444 (citing *Egbert v. Boule*, 142 S. Ct. 1793, 1800 (2022)); *see also id.* at 443.

²⁹ *Id.* at 443 (citing *Katzberg v. Regents of the Univ. of Cal.*, 58 P.3d 339, 347–48 (Cal. 2002)).

³⁰ *Id.* at 445.

³¹ 58 P.3d 339.

³² *Mack*, 522 P.3d at 444 (quoting *Katzberg*, 58 P.3d at 350).

³³ *Id.* (quoting *Katzberg*, 58 P.3d at 350).

³⁴ *Id.* at 448 (citing RESTATEMENT (SECOND) OF TORTS § 874A cmt. h(2) (AM. L. INST. 1979)).

³⁵ *Id.* at 445 (alteration in original) (quoting *Katzberg*, 58 P.3d at 350).

³⁶ *Id.* at 450.

³⁷ *Id.* at 445–46.

³⁸ *Id.* at 446.

are self-executing³⁹ and that it has the power to “say what the law is.”⁴⁰ Seeing no clear indication of intent, the court moved to step two. It concluded that a constitutional remedy was necessary to effectuate the search-and-seizure guarantee, mainly because no alternative remedy could do so effectively.⁴¹ It deemed that only damages are usually sufficient “to remedy a past wrong.”⁴² And the court rejected the notion that state tort law remedies would provide “meaningful redress” for the constitutional violation.⁴³ Because the constitution imposes distinct obligations on state officials to protect and defend the rights of others — beyond any duties imposed by common law on citizens — only a constitutional remedy could account for the unique harm incurred when an official abuses their authority and violates these rights.⁴⁴

At step three, the court found no special factors counseling hesitation.⁴⁵ There were no relevant legislative judgments to which the court needed to defer, and the holding would impose no “new limitations on government conduct.”⁴⁶ Conversely, the *lack* of a damages remedy posed policy consequences, as it “render[ed] illusory the guarantees of the Nevada Constitution.”⁴⁷ The decision would also not implicate public finances, as the state had already consented to damages liability by waiving its sovereign immunity.⁴⁸ Finally, damages presented no practical issues of judicial administrability.⁴⁹

The court briefly addressed the second question — whether state officials could assert qualified immunity in defense to such claims.⁵⁰ Under Nevada precedent, the state’s waiver of sovereign immunity is construed broadly unless the legislature states otherwise, so only the legislature, not the court, could supply a qualified immunity defense.⁵¹

In establishing a framework for recognizing implied damages actions to enforce guarantees in its state constitution, the Nevada Supreme Court opted to do what the U.S. Supreme Court has now effectively disavowed. Evidently uncomfortable⁵² with the U.S. Supreme Court’s retrenchment from *Bivens* in cases like *Egbert v. Boule*,⁵³ the Nevada Supreme Court justified its decision by embracing an alternative

³⁹ *Id.* at 447 (citing *Godfrey v. State*, 898 N.W.2d 844, 865 (Iowa 2017)).

⁴⁰ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁴¹ *Id.* at 447–49.

⁴² *Id.* at 448 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409–10 (1971) (Harlan, J., concurring in the judgment)).

⁴³ *Id.*

⁴⁴ *Id.* at 448–49.

⁴⁵ *Id.* at 449.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 450.

⁵⁰ *See id.* at 450–51.

⁵¹ *Id.*

⁵² *See id.* at 443–44 (citing *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022)).

⁵³ 142 S. Ct. 1793.

framework from a peer court that supposedly addresses the deficiencies in *Bivens*'s rationale. Yet, the court misapplied the framework's most consequential step by focusing its constitutional analysis not on interpreting the provision at issue but on explicating the extent of its inherent judicial power to vindicate constitutional guarantees. The court could have reached the same decision by embracing *Bivens*'s implicit reasoning outright, as the principles underpinning the U.S. Supreme Court's rejection of *Bivens* aren't necessarily applicable in the state context.

The Nevada Supreme Court professedly adopted the *Katzberg* framework because it addressed the weaknesses the court associated with the original *Bivens* rationale. The *Bivens* decision turned on whether "a court should create or recognize a tort action premised upon violation of a constitutional provision," not on any interpretation of the constitutional provision itself.⁵⁴ The *Katzberg* framework corrected for this perceived shortcoming.⁵⁵ The framework's constitutional analysis was rooted in a plain interpretation of the constitutional guarantee at issue, rather than any analysis about whether fashioning remedies not explicitly guaranteed by the constitutional text would be within the court's legitimate judicial power under the state constitution.⁵⁶

But despite purporting to adopt *Katzberg* specifically for this improvement upon *Bivens*, the court proceeded to misapply the framework at step one by focusing on the precise *Bivens*-like analysis that the court ostensibly rejected. In its application of step one, which supposedly focused on interpreting the search-and-seizure clause, the court shoe-horned in a constitutional analysis about the scope of its judicial power.⁵⁷ Consistent with its initial description of step one, the court presented its step-one application as focused on whether the search-and-seizure guarantee "evidenced an intent" to provide a damages remedy.⁵⁸ In reality, the intent inquiry was remarkably cursory⁵⁹: the court did not attempt to analyze the drafting history or common law history of the provision, though these inquiries play a central role in the *Katzberg* framework.⁶⁰ Instead, the court's analysis at step one focused most centrally on the court's unique "duty" and "authority" to enforce the guarantees of the state constitution.⁶¹ Because Nevada's Declaration of Rights was designed to protect people from the potentially rights-undermining impulses of the majority,⁶² the court in essence reasoned

⁵⁴ *Mack*, 522 P.3d at 443 (emphasis omitted) (quoting *Katzberg v. Regents of the Univ. of Cal.*, 58 P.3d 339, 347–48 (Cal. 2002)).

⁵⁵ See *Katzberg*, 58 P.3d at 343, 350.

⁵⁶ *Mack*, 522 P.3d at 444 (citing *Katzberg*, 58 P.3d at 342–43, 350).

⁵⁷ *Id.* at 447.

⁵⁸ *Id.* at 443; see *id.* at 445.

⁵⁹ See *id.* at 445–47.

⁶⁰ See *Katzberg*, 58 P.3d at 350–54.

⁶¹ *Mack*, 522 P.3d at 446 (quoting *Bauserman v. Unemployment Ins. Agency*, 983 N.W.2d 855, 862 (Mich. 2022)) (citing NEV. CONST. art. 6, § 1).

⁶² See *id.* at 447 (citing *Godfrey v. State*, 898 N.W.2d 844, 865 (Iowa 2017)).

that under basic checks and balances principles, the judiciary must have the constitutional authority to construct necessary remedies, lest the constitution's guarantees "become all but 'a mere hope.'"⁶³ Moreover, the court observed, nothing in the text of the Nevada Constitution demanded it abdicate this duty⁶⁴ and leave people to rely on the "[l]egislature's benevolence or foresight" to vindicate their most basic rights.⁶⁵

Yet this rationale is remarkably akin to the one that drove the outcome in *Bivens*. In holding that the federal Constitution permitted it to fashion a damages remedy for Fourth Amendment violations, the *Bivens* Court reasoned that the judiciary had the authority, competence, and obligation to craft any remedy necessary "to make good the wrong done."⁶⁶ And it spent little time legitimizing this invocation of judicial power.⁶⁷ In his concurrence, Justice Harlan offered a more thorough rationale for the Court's exercise of judicial power. He argued that since the Court had long recognized its authority to fashion damages to effectuate statutory guarantees, it would be "anomalous" not to do so in the context of constitutional rights.⁶⁸ Because the Bill of Rights was "aimed predominantly at restraining the Government as an instrument of the popular will,"⁶⁹ the Court had a heightened obligation to ensure constitutional rights were not left vulnerable to the whims of the majority.⁷⁰

But the U.S. Supreme Court has since largely rejected these premises underlying *Bivens*. Most recently, in *Egbert*, the U.S. Supreme Court held that "in all but the most unusual circumstances," prescribing a constitutional damages remedy is a "job for Congress, not the courts."⁷¹ This built upon a slow retrenchment from *Bivens*, guided by the Supreme Court's changing philosophy about the judiciary's proper role.⁷² Today, *Bivens* is an artifact of the "heady days" when the Court improperly "assumed common-law powers to create causes of action."⁷³

The *Mack* court was understandably reticent to openly embrace a doctrine that has essentially been discarded at the federal level. To be

⁶³ *Id.* at 446 (citing *Bauserman*, 983 N.W.2d at 869).

⁶⁴ *Id.* at 446–47.

⁶⁵ *Id.* at 444 (citing *Alper v. Clark County*, 571 P.2d 810, 811–12 (Nev. 1977)).

⁶⁶ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

⁶⁷ The bulk of the opinion focused on whether constitutional damages, as opposed to damages rooted in state tort law, were necessary for *Bivens* to get relief. *Id.* at 390–95.

⁶⁸ *Id.* at 403 (Harlan, J., concurring in the judgment); see *id.* at 402–03 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), *abrogated by* *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)).

⁶⁹ *Id.* at 404.

⁷⁰ *Id.* at 407.

⁷¹ *Egbert v. Boule*, 142 S. Ct. 1793, 1800 (2022).

⁷² See James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 127 (2009); Jennifer L. Mascott & R. Trent McCotter, *Egbert v. Boule: Federal Officer Suits by Common Law*, 2021–2022 CATO SUP. CT. REV. 111, 124 (2022).

⁷³ *Egbert*, 142 S. Ct. at 1802 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

sure, federal court interpretations of federal constitutional law do not control state court interpretations of identical provisions in state constitutions.⁷⁴ But state courts tend to privilege federal doctrine,⁷⁵ and precedents like *Egbert* read as forceful denunciations of *Bivens* in most contexts. Yet *Bivens* fits well with the Nevada court's stated conception of its expansive judicial power to vindicate its constitution's guarantees. The court would have been justified in embracing *Bivens* outright rather than feeling the need to distance itself from it.⁷⁶

After all, while the "heady days" of fashioning such constitutional common law–like remedies may be passé at the federal level, *Mack* itself exemplifies why they don't inherently have to be at the state level. First, Nevada has implicitly interpreted its state constitution to embrace different separation of powers principles than the U.S. Supreme Court, in recent years, has interpreted the U.S. Constitution to embrace. The U.S. Supreme Court has disavowed *Bivens* remedies as a part of a broader criticism of judicial aggrandizement at the expense of the legislature.⁷⁷ But the Nevada Supreme Court appears to have interpreted its state constitution as being concerned with the opposite issue. As the *Mack* court noted, while the Nevada Constitution places specific limits on legislative action,⁷⁸ particularly vis-à-vis individual rights,⁷⁹ it delegates "interpretation and enforcement of the Nevada Constitution to the judiciary."⁸⁰ Any break from federal doctrine is certainly within Nevada's prerogatives, but the court may have been reluctant to fully embrace it, as state courts commonly interpret state constitutions in lockstep with federal separation of powers doctrine.⁸¹

Second, though the U.S. Supreme Court has moved away from crafting *Bivens* remedies because doing so is too similar to common lawmaking⁸² — an act appropriate "for common-law courts" but inappropriate for federal tribunals⁸³ — common lawmaking remains a centerpiece of state court adjudication.⁸⁴ State courts have a long pedigree as common

⁷⁴ See JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 1.06 (4th ed. 2006).

⁷⁵ See Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 *ROGER WILLIAMS U. L. REV.* 79, 79 (1998).

⁷⁶ See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 *N.Y.U. ANN. SURV. AM. L.* 329, 331 (2003).

⁷⁷ See Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 *HARV. L. REV.* 1000, 1025 (2023); see also Mascott & McCotter, *supra* note 72, at 124, 135–38.

⁷⁸ See, e.g., *Clean Water Coal. v. M Resort, LLC*, 255 P.3d 247, 253 (Nev. 2011) (citing NEV. CONST. art. IV, § 20).

⁷⁹ *Mack*, 522 P.3d at 444.

⁸⁰ *Id.* (citing *Wren v. Dixon*, 161 P. 722, 726 (Nev. 1916)).

⁸¹ Schapiro, *supra* note 75, at 88–92.

⁸² See *Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022).

⁸³ See, e.g., *id.* at 1810 (Gorsuch, J., concurring in the judgment) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

⁸⁴ Judith S. Kaye, Brennan Lecture, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 *N.Y.U. L. REV.* 1, 6 (1995).

law courts⁸⁵ with the authority to devise remedies necessary to effectuate rights.⁸⁶ Indeed, in Nevada,⁸⁷ like in many states,⁸⁸ common law has been prescribed by statute as the rule of decision when the legislature or constitution is silent on an issue. And state courts commonly “draw upon a broad reservoir of common law principles”⁸⁹ even when interpreting their constitutions.⁹⁰ *Mack* is evidence of this in action: the court determined that implied damages under the search-and-seizure guarantee were necessary to effectuate its purposes based on a common law framework from the Second Restatement of Torts.⁹¹ In *Mack*, the Nevada Supreme Court thus appears to have embraced a role perfectly appropriate for the common law tribunal that it is.

Though *Bivens* may be a bygone of a different federal era, *Mack* exemplifies that *Bivens* remedies don’t have to be anachronistic in the states. The decision serves as an important reminder that state constitutions can be vital avenues for redress, even as federal doctrines increasingly foreclose relief under the federal Constitution. Indeed, because many state constitutions,⁹² including Nevada’s,⁹³ are more rights protective than their federal counterpart, state *Bivens* remedies may ultimately provide more meaningful avenues to vindicate wrongs than the federal doctrine ever could. While *Mack* created a meaningful new tool for Nevadans to better effectuate their rights,⁹⁴ the court need not have been so reticent to fully lean into its strong conception of its inherent judicial authority to create that tool. The U.S. Supreme Court may have cabined the common law authority of federal courts, but state courts remain free to remediate state constitutional wrongs by raising up causes of action where doing so clearly comports with their constitutional and common lawmaking authority.

⁸⁵ *Id.* at 7.

⁸⁶ See Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 978–79 (2011).

⁸⁷ NEV. REV. STAT. § 1.030 (2021).

⁸⁸ See, e.g., CAL. CIV. CODE § 22.2 (West 2020); 5 ILL. COMP. STAT. 50/1 (2020); VA. CODE ANN. § 1-200 (2022); WASH. REV. CODE § 4.04.010 (2022).

⁸⁹ Ellen A. Peters, Brennan Lecture, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1070 (1998).

⁹⁰ *Id.* at 1070–71.

⁹¹ *Mack*, 522 P.3d at 447–48 (citing RESTATEMENT (SECOND) OF TORTS § 874A (AM. L. INST. 1979)).

⁹² See FRIESEN, *supra* note 74, § 1.06–.06[1].

⁹³ Nevada’s constitution carries the most sweeping equal rights guarantee of any state in the nation. Gabe Stern, *Nevada Passes Sweeping Version of Equal Rights Amendment*, AP NEWS (Nov. 10, 2022), <https://apnews.com/article/2022-midterm-elections-nevada-discrimination-gender-identity-constitutions-a8aa384a6a21c224408cd9603b1b77ce> [<https://perma.cc/F7NR-MJK7>].

⁹⁴ Like most states, Nevada lacks a § 1983 analogue authorizing these types of damages suits. Kendall Morton & Megan Cairns, *50 Shades of Government Immunity*, INST. FOR JUST. (Jan. 25, 2022), <https://ij.org/report/50-shades-of-government-immunity> [<https://perma.cc/8B28-N9J9>].