No. 17-1174

IN THE

Supreme Court of the United States

LUIS A. NIEVES, ET AL.,

Petitioners,

v.

RUSSELL P. BARTLETT,

Respondent.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. Section 1983 Was Meant To Vindicate the Unique and Fundamental Rights Guaranteed by the Federal Constitution, Not the Interests Protected by State Tort Law	5
II. State Tort Rules May Be Borrowed To Fill in the Gaps of Section 1983 Only When Those Rules Are Compatible with the Statute's Purpose	10
III. Because the Torts of False Imprisonment and Malicious Prosecution Are Not Analogous to a Claim of First Amendment Speech Retaliation, It Would Undermine Section 1983 To Impose the Rules of Those Torts Here	19
CONCLUSION	31

TABLE OF AUTHORITIES

Page(s)

Cases

Adickes v. S. H. Kress & Co.,
398 U.S. 144 (1970) 8

Ahern v. Collins,
39 Mo. 145 (1866) 27, 28, 29

Anderson v. Creighton,
483 U.S. 635 (1987) 12, 19

Baker v. McCollan,
443 U.S. 137 (1979) 9

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 14

Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr,
518 U.S. 668 (1996) 21

Bose Corp. v. Consumers Union, Inc.,
466 U.S. 485 (1984) 23

Boyd v. Cross,
35 Md. 194 (1872) 30

Briscoe v. LaHue,
460 U.S. 325 (1983) 6, 10, 13, 26

Brockway v. Crawford,
48 N.C. 433 (1856) 22, 25

Burns v. Erben,
40 N.Y. 463 (1869) 20, 22, 25

TABLE OF AUTHORITIES – cont'd

Page(s)

Cardival v. Smith,
109 Mass. 158 (1872) 27, 28

Carey v. Piphus,
435 U.S. 247 (1978) 13, 14, 15, 19

Chesley v. King,
74 Me. 164 (1882) 28

Chrisman v. Carney,
33 Ark. 316 (1878) 21, 22, 25, 27, 29

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 9, 11, 13, 16, 24

Crawford–El v. Britton,
523 U.S. 574 (1998) 22

Daniels v. Williams,
474 U.S. 327 (1986) 13

Dinsman v. Wilkes,
53 U.S. 390 (1851) 27

District of Columbia v. Carter,
409 U.S. 418 (1973) 7, 8, 9

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 2

Hartman v. Moore,
547 U.S. 250 (2006) 12, 22

Hawley v. Butler,
54 Barb. 490 (N.Y. Sup. 1868) 26

TABLE OF AUTHORITIES – cont'd

Page(s)

Heck v. Humphrey,
512 U.S. 477 (1994) 11, 16, 17

Herman v. Brookerhoff,
8 Watts 240 (Pa. 1839) 27, 28, 29

Hogg v. Pinckney,
16 S.C. 387 (1882) 27, 28, 29

Kalina v. Fletcher,
522 U.S. 118 (1997) 9, 11

Lozman v. City of Riviera Beach,
138 S. Ct. 1945, 1949 (2018) 21, 30

Malley v. Briggs,
475 U.S. 335 (1986) 11, 12, 16

Manuel v. City of Joliet,
137 S. Ct. 911 (2017) ..... *passim*

McNeese v. Bd. of Educ.,
373 U.S. 668 (1963) 9, 14, 18

Mitchum v. Foster,
407 U.S. 225 (1972) ..... *passim*

Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978) 9

Monroe v. Pape,
365 U.S. 167 (1961) 3, 7, 11, 25

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355, 367 (1977) 15

Owen v. City of Independence,
445 U.S. 622 (1980) 10, 15, 18, 19, 23

TABLE OF AUTHORITIES – cont'd

Page(s)

Owens v. Okure,
488 U.S. 235 (1989) 9, 11, 12, 16, 19

Patsy v. Bd. of Regents,
457 U.S. 496 (1982) 5, 8

Perry v. Sindermann,
408 U.S. 593 (1972) 21, 28

Pierson v. Ray,
386 U.S. 547 (1967) 13

Rehberg v. Paulk,
566 U.S. 356 (2012) 3, 5, 11, 12

Rohan v. Sawin,
59 Mass. 281 (1850) 21, 23, 25

Smith v. Wade,
461 U.S. 30 (1983) 5, 9, 15, 23

Speiser v. Randall,
357 U.S. 513 (1958) 28

Stoecker v. Nathanson,
98 N.W. 1061 (Neb. 1904) 28

Tenney v. Brandhove,
341 U.S. 367 (1951) 13, 26

Tower v. Glover,
467 U.S. 914 (1984) 16

Turner v. O'Brien,
5 Neb. 542 (1877) 29

Ventress v. Rosser,
73 Ga. 534 (1884) 27, 28

TABLE OF AUTHORITIES – cont'd

Page(s)

Wallace v. Kato,
549 U.S. 384 (2007) 11, 17, 18, 20

Wheeler v. Nesbitt,
65 U.S. 544 (1860) 28, 29, 30

Wilson v. Garcia,
471 U.S. 261 (1985) ..... *passim*

Wood v. Strickland,
420 U.S. 308 (1975) 10

Wyatt v. Cole,
504 U.S. 158 (1992) 16

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017) 2

Zwickler v. Koota,
389 U.S. 241 (1967) 8

Constitutional Provisions and Legislative Materials

17 Stat. 13 (1871) 3, 5, 6, 24

42 U.S.C. § 1983 ..... *passim*

Alaska Stat. 11.61.120(a)(1) 25

Cong. Globe, 42nd Cong., 1st Sess.
(1871) ..... *passim*

Books, Articles, and Other Authorities

2 C.G. Addison, *A Treatise on the Law of Torts* (H.G. Wood ed., 1881) 20, 25, 26

TABLE OF AUTHORITIES – cont'd

Page(s)

Thomas M. Cooley, *A Treatise on the Law of Torts* (1879) 22, 23, 25, 26

1 Francis Hilliard, *The Law of Torts or Private Wrongs* (1866) 20, 22, 25, 26, 27

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the scope of the First Amendment rights that are protected by 42 U.S.C. § 1983.

INTRODUCTION AND SUMMARY OF ARGUMENT

Russell Bartlett alleges that Petitioners Luis Nieves and Bryce Weight arrested him in retaliation for exercising his First Amendment rights—that is, because he verbally protested what he believed to be improper conduct by the officers. Petitioners argue that even if this is true, Bartlett is prohibited from seeking damages under 42 U.S.C. § 1983 for First Amendment retaliatory arrest because they had probable cause to arrest him for "harassment" under Alaska law—a crime with which he was never charged. Pet. App. 12-13. Their position is that no one in Bartlett's position may seek redress under Section 1983 if there was probable cause to arrest that

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

person for any crime, no matter how minor, and regardless of whether the actual reason for the arrest was retaliation.

This position is at odds with the text of Section 1983, contradicts the history that led to its enactment, and undermines the statute's manifest purpose. Moreover, contrary to Petitioners' contentions, state common law rules that existed when Section 1983 was enacted provide no justification for the result they seek.

Importantly, this case is about a federal statute—42 U.S.C. § 1983—and so this Court's decision should turn on the proper interpretation of that statute. Throughout Petitioners' brief, there is little indication of that. Instead, Petitioners invite this Court to base its decision on the Court's own views about what would be best for society—specifically, what rules would strike the ideal balance between the value of protecting free speech and the importance of shielding police officers from lawsuits. But this is not a *Bivens* case, in which the judiciary is crafting "an implied cause of action," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017), nor is the Court here fashioning "federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The question is whether the statute under which Bartlett seeks relief, first enacted by Congress in 1871, imposes the rule Petitioners advocate.

It does not. Section 1983 was a key part of "extraordinary legislation," Cong. Globe, 42nd Cong., 1st Sess. 322 (1871) (hereinafter "Globe") (Rep. Stoughton), that was enacted during Reconstruction to "alter[] the relationship between the States and the Nation with respect to the protection of federally created rights," *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Its purpose was to provide "some further safeguards

to life, liberty, and property," Globe 374 (Rep. Lowe), by allowing individuals to seek damages or injunctive relief in the federal courts for deprivations of rights "secured by the Constitution of the United States," 17 Stat. 13. Critically, the statute is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, [and] malicious prosecution." *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012). Instead, it furnished "a uniquely federal remedy" for incursions on "rights secured by *the Constitution*." *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985) (quoting *Mitchum*, 407 U.S. at 239) (emphasis added).

Congress placed no limits on the constitutional rights that could be vindicated under Section 1983, nor did it suggest that the scope of those rights should be narrowed to match the causes of action that state tort law already recognized. This breadth is precisely what the bill's opponents emphasized, *see Monroe v. Pape*, 365 U.S. 167, 178 (1961), with legislators complaining that its remedial terms were "as comprehensive as can be used," Globe App. 217 (Sen. Thurman). Then, as now, objections were raised that Section 1983's broad remedy would "give rise to numerous vexations and outrageous prosecutions," *id.* App. 50 (Rep. Kerr), exposing state officers to frivolous lawsuits:

> [I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, . . . pure in duty as a saint, . . . they are liable, and most certain, at the suit of any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen, *par excellence*, of the United States, to be summarily stripped of official

> authority, dragged to the bar of a distant and unfriendly court, and there placed in the pillory of vexatious, expensive, and protracted litigation . . . .

Globe 365 (Rep. Arthur); *id.* at 385 (Rep. Hawley) ("this bill . . . . puts in jeopardy the officers of the States, though in the conscientious discharge of their duties"). Those objections failed in the political process nearly a century and a half ago, and this Court should not revive them now by adding requirements to Section 1983 that are absent from its text and inconsistent with its remedial purpose.

Petitioners attempt to shore up their policy-based argument by offering an ostensibly neutral basis for it. They say that to identify the elements a plaintiff must prove in a First Amendment retaliatory arrest case, courts should impose the elements that were required by two "analogous" torts from state common law—false imprisonment and malicious prosecution. Because those two torts, according to Petitioners, required plaintiffs to plead and prove an absence of probable cause for their detention or prosecution, a Section 1983 plaintiff alleging retaliatory arrest must do the same.

Contrary to Petitioners' premise, however, these two torts were not analogous to a claim of First Amendment retaliation. As explained below, they protected fundamentally different interests and served entirely different aims than the First Amendment. And so the specific requirements of those torts, which were calibrated to balance a distinct set of concerns under state law, have no place in applying a federal statute meant to create an independent remedy for violations of the U.S. Constitution. Artificially limiting the scope of that federal constitutional remedy—in order to fit it within the confines of these

dissimilar state torts—would undermine Congress's statutory plan and the promise of Section 1983.

ARGUMENT

I. Section 1983 Was Meant To Vindicate the Unique and Fundamental Rights Guaranteed by the Federal Constitution, Not the Interests Protected by State Tort Law.

Section 1983, which derives from the first section of the Civil Rights Act of 1871, was enacted to create "a private right of action to vindicate violations of rights, privileges, or immunities secured by the Constitution." *Rehberg*, 566 U.S. at 361 (quotation marks omitted). The title of the 1871 legislation made its purpose clear: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. This Act, "along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era," *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982), which established "the role of the Federal Government as a guarantor of basic federal rights against state power," *Mitchum*, 407 U.S. at 239; *see* Globe 577 (Sen. Carpenter) ("one of the fundamental . . . revolutions effected in our Government" by the Fourteenth Amendment was to "give Congress affirmative power . . . to save the citizen from the violation of any of his rights by State Legislatures").

The text of what is now Section 1983 left no doubt about the new primacy of "federally secured rights," *Smith v. Wade*, 461 U.S. 30, 34 (1983), over state laws and practices that denied or frustrated those rights. The statute gave any person who was

deprived of "any rights, privileges, or immunities secured by the Constitution of the United States" the ability to hold the perpetrator liable, "*any . . . law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*." 17 Stat. 13 (emphasis added); *see* Globe 692 (Sen. Edmunds) (declaring it the "solemn duty of Congress . . . to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him").

"The specific historical catalyst" for the passage of this legislation "was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Wilson*, 471 U.S. at 276. In the debates over the Act, supporters "repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern states," which was made possible "because Klan members and sympathizers controlled or influenced the administration of state criminal justice." *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983); *see* Globe 158 (Sen. Sherman) ("against these roaming bands of Ku Klux the law in North Carolina is a dead letter").

Significantly, these were not "cases of ordinary crime" but rather "political offenses." Globe 158 (Sen. Sherman). The Klan, in other words, was not a criminal organization but a terrorist organization, with "a political purpose" that it "sought to carry out . . . by murders, whippings, intimidation, and violence against its opponents." *Id.* at 320 (Rep. Stoughton). "Their object was the overthrow of the reconstruction policy of Congress and the disenfranchisement of the negro." *Id.* (quoting committee testimony of former Klan member).

In particular, the Klan—sheltered from punishment by the state—strove to suppress the speech and associational rights of the former slaves and their white allies, retaliating against those who dared defy them. *See* Globe 155 (Sen. Sherman) (quoting testimony describing attack in which the Klan "made all the colored men promise they would never vote the Radical ticket again"); *id.* at 157 (Sen. Sherman) ("[t]he negroes I allude to were killed because they were summoned as witnesses in the Federal courts"); *id.* at 321 (Rep. Stoughton) (quoting testimony of Klan victim: "They wanted to run them off because the principal part of them voted the Radical ticket. . . . They have been trying to get us to vote the Conservative ticket."); *id.* (Rep. Stoughton) (following a "meeting of the citizens . . . to protest against the outrages," "warrants were issued [at the Klan's instigation] for the arrest of peaceable and well-disposed negroes upon the charge of 'using seditious language'"); *id.* at 332 (Rep. Hoar) ("these citizens so murdered, outranged, or outlawed suffer all this because of their attachment to their country, their loyalty to its flag, or because their opinions on questions of public interest coincide with those of a majority of the American people").

Although Klan violence was "the principal catalyst for the legislation," Section 1983 "'was not a remedy against the Klan or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.'" *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (quoting *Monroe*, 365 U.S. at 175-76 (brackets omitted)). Congress recognized that laws were being applied selectively across the South to punish disfavored groups (the former slaves) and disfavored viewpoints (those of their white allies). While "outrages committed up-

on loyal people through the agency of this Ku Klux organization" went unpunished, as Senator Pratt noted, "[v]igorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid." Globe 505; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167 (1970) (noting "the persistent and widespread discriminatory practices of state officials").

The fundamental problem, therefore, was not isolated acts of violence—the type of discrete, individual harms for which state tort law was designed to provide compensation. Rather, it was that the Southern states' selective and discriminatory tolerance of this violence was "denying decent citizens *their civil and political rights*." *Wilson*, 471 U.S. at 276 (emphasis added); Globe 375 (Rep. Lowe) (Southern states were "permit[ing] the rights of citizens to be systematically trampled upon"). And that denial merited a remedy. *Id*. at 333 (Rep. Hoar) ("Suppose that . . . every person who dared to lift his voice in opposition to the sentiment of this conspiracy found his life and his property insecure. . . . In that case I claim that the power of Congress to intervene is complete and ample.").

To address this problem, Section 1983 "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights." *Patsy*, 457 U.S. at 503 (quoting *Mitchum*, 407 U.S. at 242). Previously "Congress relied on the state courts to vindicate essential rights arising under the Constitution." *Carter*, 409 U.S. at 427-28 (quoting *Zwickler v. Koota*, 389 U.S. 241, 245 (1967)). But "[w]ith the growing awareness that this reliance had been misplaced," lawmakers enacted Section 1983 to provide "indirect federal control over the unconstitutional ac-

tions of state officials." *Id.* at 428. Thus, while the violence inflicted on freedmen and their sympathizers "often resembled the torts of assault, battery, false imprisonment, and misrepresentation, § 1983 was not directed at the perpetrators of these deeds as much as at the state officials who tolerated and condoned them." *Owens v. Okure*, 488 U.S. 235, 249 n.11 (1989).

Section 1983 broke new ground, first, by making available a federal forum, based on the belief that federal courts would be able to "act with more independence" and "rise above prejudices or bad passions or terror." Globe 460 (Rep. Coburn).

Second, and most critical here, "Section 1983 impose[d] liability for violations of rights protected by *the Constitution*, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (emphasis added); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 686 n.45 (1978) (Representative Bingham, the Fourteenth Amendment's principal architect, "declared the bill's purpose to be 'the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic.'" (quoting Globe App. 81)). "The coverage of the statute is thus broader than the pre-existing common law of torts." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). It "was designed to expose state and local officials to *a new form of liability*," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981) (emphasis added), by providing a remedy for "federally secured rights," *Smith*, 461 U.S. at 34, and would be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963). Regardless of what recourse might be available under state tort law for an injury, "[p]roponents of the measure repeatedly argued that . . . an independent federal remedy was

necessary." *Briscoe*, 460 U.S. at 338; *see* Globe 370 (Rep. Monroe) ("occasions arise in which life, liberty, and property require *new guarantees* for their security" (emphasis added)).

In sum, Section 1983 provides "*a uniquely federal remedy* against incursions under the claimed authority of state law upon *rights secured by the Constitution*." *Wilson*, 471 U.S. at 271-72 (quoting *Mitchum*, 407 U.S. at 239) (emphasis added). With full awareness that it was "altering the relationship between the States and the Nation with respect to the protection of federally created rights," Congress enacted Section 1983 to "protect *those* rights." *Mitchum*, 407 U.S. at 242 (emphasis added).

II. State Tort Rules May Be Borrowed To Fill in the Gaps of Section 1983 Only When Those Rules Are Compatible with the Statute's Purpose.

A. As with any statute, when interpreting Section 1983, "the starting point in [the] analysis must be the language of the statute itself." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). The statute's text clearly identifies the interests it protects, which include the "rights, privileges, or immunities secured by the Constitution," and the general types of remedies it provides, which include an "action at law." 42 U.S.C. § 1983. But the text lacks many details concerning how the constitutional tort remedy it authorizes should operate. So when a plaintiff alleges the violation of a constitutional right under Section 1983, courts "must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). That task, however, is "one essentially of statutory construction," *Wood v. Strickland*, 420 U.S. 308, 316 (1975), not an opportunity for a "freewheel-

ing policy choice," *Rehberg*, 566 U.S. at 363 (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

As this Court has recognized, "Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina*, 522 U.S. at 123. That conclusion is premised on the "important assumption . . . that members of the 42d Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport*, 453 U.S. at 258. Because Congress "borrowed general tort principles" in crafting Section 1983, *Heck v. Humphrey*, 512 U.S. 477, 485 n.4 (1994), this Court has often filled in the gaps of the statute with "federal rules conforming in general to common-law principles," *Wallace v. Kato*, 549 U.S. 384, 388 (2007); *see, e.g.*, *Monroe*, 365 U.S. at 187 (the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

Crucially, however, "the Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more." *Rehberg*, 566 U.S. at 366. Instead, it has recognized that "[t]he new federal claim created by § 1983 differs in important ways from those pre-existing torts," most significantly in that "it reaches constitutional and statutory violations that do not correspond to any previously known tort." *Id.* Because of that, "any analogies to those causes of action are bound to be imperfect." *Owens*, 488 U.S. at 248-49; *see Wilson*, 471 U.S. at 272 (the statute has "no precise counterpart in state law"); *Monroe*, 365 U.S.

at 196 (Harlan, J., concurring) ("a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right").

Accordingly, while this Court "look[s] first to the common law of torts" when "defining the contours and prerequisites of a § 1983 claim," tort principles "are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S. Ct. at 920-21 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). Thus the elements of a state cause of action are not to be mechanically imposed on a Section 1983 claim through "narrow analogies." *Owens*, 488 U.S. at 248. Instead, when "applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.[2]

Rather than rely inflexibly on analogies to specific state torts, therefore, this Court's approach has

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[2] *See, e.g.*, *Malley*, 475 U.S. at 340 ("[W]hile we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form."); *Anderson v. Creighton,* 483 U.S. 635, 644-45 (1987) ("our determinations as to the scope of official immunity are made in the light of the common-law tradition," but "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law" (quotation marks omitted)); *Rehberg*, 566 U.S. at 364 (although "tied to" the common law, the "Court's precedents have not mechanically duplicated the precise scope of the absolute immunity that the common law provided").

traditionally been to call upon more basic, fundamental, and broadly applicable principles of tort law. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951) (legislator immunity "was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation . . . a reflection of political principles already firmly established in the States"); *Briscoe*, 460 U.S. at 334 ("the common law's protection for witnesses is a tradition so well grounded in history and reason that we cannot believe that Congress impinged on it by covert inclusion in the general language before us" (citation and quotation marks omitted)); *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (relying on "[t]he cardinal principle of damages in Anglo-American law," which "hardly could have been foreign to the many lawyers in Congress in 1871" (quotation marks omitted)); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) ("The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."). Reliance on such general, foundational principles makes sense because they are the ones that "members of the 42d Congress were familiar with" and "likely intended" to apply under Section 1983. *City of Newport*, 453 U.S. at 258.

That is critical because "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254. The federal Constitution protects interests distinct from those recognized by state tort law, *Daniels v. Williams*, 474 U.S. 327, 333 (1986) ("the United States Constitution" and "traditional tort law . . . do not address the same concerns"), even when these two

sources of law prohibit conduct that is superficially similar.

B. To be sure, sometimes "the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules . . . directly to the § 1983 action." *Carey*, 435 U.S. at 258. "In other cases," however, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts." *Id.*; *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971) ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."); *Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting) (citing "a severe mismatch" between the Fourth Amendment and the elements of a claim for malicious prosecution).

Where constitutional requirements and the interests they protect do not neatly align with any particular common law tort, "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey*, 435 U.S. at 258; *see McNeese*, 373 U.S. at 674 (where "petitioners assert that respondents . . . are depriving them of rights protected by the Fourteenth Amendment," it "is immaterial whether respondents' conduct is legal or illegal as a matter of state law"). In a Section 1983 suit, the question is not whether the defendant has breached a duty of care imposed by state law, but rather whether he or she "has conformed to the re-

quirements of the Federal Constitution." *Owen*, 445 U.S. at 649.

"In order to further the purpose of § 1983," therefore, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law." *Carey*, 435 U.S. at 258-59; *see Manuel*, 137 S. Ct. at 921. Because state courts do not develop the rules of their common law "with national interests in mind," the federal courts must ensure that any reliance on state law "will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). This Court's "consideration of state common law rules is only a device to facilitate determination of Congressional intent," *Smith*, 461 U.S. at 67 (Rehnquist, J., dissenting), and "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action," *Wilson*, 471 U.S. at 269.

C. Further, even when this Court identifies a common law principle that may be appropriate to import into Section 1983, the Court does not embrace that rule without first considering whether it is consistent with the history and purpose of Section 1983.

With respect to damages, for instance, the Court has explained that, in the absence of "specific guidance" from Section 1983's text and history, it "look[s] first to the common law of torts," but only "with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute." *Smith*, 461 U.S. at 34.

Likewise, with respect to immunities, even when this Court determines that "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Malley*, 475 U.S. at 340 (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)). That is because "it would defeat the promise of the statute to recognize any preexisting immunity without determining . . . its compatibility with the purposes of § 1983." *City of Newport*, 453 U.S. at 259; *see Wyatt v. Cole*, 504 U.S. 158, 164 (1992) ("irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions").

Similarly, in deciding which kind of state statutes of limitations to apply, this Court has rejected yoking Section 1983 actions to the "multiplicity of state intentional tort statutes of limitations." *Owens*, 488 U.S. at 245 (1989). "Given that so many claims brought under § 1983 have no precise state-law analog, applying the statute of limitations for the limited category of intentional torts would be inconsistent with § 1983's broad scope." *Id.* at 249; *see id.* ("The intentional tort analogy is particularly inapposite in light of the wide spectrum of claims which § 1983 has come to span.").

D. On rare occasions, this Court has employed a variant on the approach described above. This alternative method begins by identifying a specific tort available in 1871 that represents the "closest analogy" to whatever constitutional claim is being considered. *Heck*, 512 U.S. at 484. The Court has then imposed the elements and associated rules of that spe-

cific tort on the constitutional claim. *See Manuel*, 137 S. Ct. at 920 ("Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." (citing *Wallace*, 549 U.S. at 388-90; *Heck*, 512 U.S. at 483-87)).

This approach was first used in *Heck v. Humphrey*. There, the Court reasoned that "[t]he common-law cause of action for malicious prosecution provide[d] the closest analogy" to the plaintiff's claims, and concluded that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. The Court therefore imposed the same element on a Section 1983 plaintiff challenging his state confinement. *Id.* at 486-87.

This approach risks limiting the breadth of Section 1983's constitutional remedy to the scope of the common law torts that states recognized in 1871. Despite that risk, this approach can effectuate congressional intent—when the constitutional right at issue truly is analogous to an interest that was protected by state tort law. In *Wallace v. Kato*, for instance, where a plaintiff sought damages under Section 1983 for an unlawful arrest, the question arose when the plaintiff's cause of action accrued. This Court identified the tort of false imprisonment as "the proper analogy" to the plaintiff's cause of action, because "[t]he sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*, . . . and the allegations before us arise from respondents' detention of petitioner *without legal process*." 549 U.S. at 389. The Court therefore applied the "distinctive" accrual rules of that tort to the plaintiff's claim. *Id.* Because those rules reflected

"the reality that the victim may not be able to sue while he is still imprisoned," *id.*, they were capable of vindicating the federal constitutional right at issue, notwithstanding their origin in state tort law.

But when a constitutional claim has no true analogue in the torts that were available in 1871—as here, *see infra*, Part III—restricting the breadth of that constitutional claim by forcing it within the confines of a dissimilar state tort would diminish the statute's promise of "a uniquely federal remedy" for "rights secured by the Constitution," *Wilson*, 471 U.S. at 271-72 (quoting *Mitchum*, 407 U.S. at 239). That is, if this Court were to insist on selecting a "most analogous" state tort for every type of constitutional claim—and mechanically transplanting the elements of that tort, regardless of differences between the two—the Court would undermine the purpose of Section 1983, which was meant to provide a unique federal right, "some *further safeguards* to life, liberty, and property." Globe 374 (Rep. Lowe) (emphasis added); *see McNeese*, 373 U.S. at 672 (Section 1983 was enacted to offer a federal remedy "supplementary to any remedy any State might have").

There is no valid basis for such a restrictive approach, especially because the Forty-Second Congress understood that Section 1983 would be interpreted broadly to promote its remedial goals. "Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the act was to receive." *Owen*, 445 U.S. at 636. He noted: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . As has been again and again decided by your own Supreme Court

of the United States, . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes . . . ." Globe App. 68. "Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress." *Owen*, 445 U.S. at 636; *cf. Wilson*, 471 U.S. at 272 (adopting interpretation of Section 1983 that "best fits the statute's remedial purpose").

Rigidly adhering to the "analogy" approach, even when the analogy does not fit, loses sight of the interpretive goal this approach is supposed to serve—effectuating congressional intent. Recognizing that pitfall, this Court has repeatedly avoided "drawing narrow analogies between § 1983 claims and state causes of action," *Owens*, 488 U.S. at 248, and it should maintain that course here.

III. Because the Torts of False Imprisonment and Malicious Prosecution Are Not Analogous to a Claim of First Amendment Speech Retaliation, It Would Undermine Section 1983 To Impose the Rules of Those Torts Here.

As explained above, when a plaintiff brings a Section 1983 action for a constitutional violation, and this Court "determine[s] the elements of . . . an action seeking damages for [that] violation," *Manuel*, 137 S. Ct. at 920, the "precise contours" of those elements are not to be "slavishly derived from the often arcane rules of the common law," *Anderson*, 483 U.S. at 645. Instead, they "should be tailored to the interests protected by the particular right in question." *Carey*, 435 U.S. at 259.

In this case, the right in question is the freedom to speak without being arrested by law enforcement

in retaliation for that speech. And the interests that this right protects are fundamentally unlike the interests protected by superficially similar state torts in 1871. Because of that fundamental disparity, the elements of those torts—such as the requirement of an absence of probable cause—should not be imposed on a First Amendment claim of retaliatory arrest.

False Imprisonment. False imprisonment was defined in 1871 as "the unlawful restraint of a person contrary to his will, either with or without process of law." 1 Francis Hilliard, *The Law of Torts or Private Wrongs* § 1a, at 195 (1866) (emphasis omitted). When process of law was employed, the tort was sometimes called false arrest. *See Wallace*, 549 U.S. at 388.

At first glance, false imprisonment may seem similar to First Amendment retaliatory arrest because both involve an allegedly wrongful detention. But there the resemblance ends. The nineteenth-century tort of false imprisonment served different goals, and protected different interests, than the freedom from speech-based arrests.

The essence of false imprisonment was the *absence of legal grounds* for the detention or arrest: "False imprisonment is a trespass committed by one man against the person of another, by *unlawfully* arresting him, and detaining him *without any legal authority*." 2 C.G. Addison, *A Treatise on the Law of Torts* § 798, at 13 (H.G. Wood ed., 1881) (emphasis added); *see Burns v. Erben*, 40 N.Y. 463, 466 (1869) (false imprisonment is "an *illegal* arrest and detention," and "[t]he gist of such an action is an *unlawful* detention" (emphasis added)). Indeed, the tort was sometimes even referred to as "[u]nlawful or false imprisonment." Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* § 1, at 56 (1892); *id.*

(defining the tort as "confinement or detention *without sufficient authority*" (emphasis added)).

Because an *absence of legal authority* was at the core of false imprisonment—baked into its very definition—it is clear why the existence of probable cause would defeat such a claim. An arrest could lawfully be carried out if there were reasonable and sufficient grounds for it. *Chrisman v. Carney*, 33 Ark. 316, 321 (1878); *Rohan v. Sawin*, 59 Mass. 281, 285 (1850). Therefore the existence of such reasonable and sufficient grounds meant the arrest was not unlawful. *Id.*

That principle, virtually a tautology, illustrates the fundamental mismatch between the common law claim of false imprisonment and a First Amendment claim of speech retaliation. The latter does not depend on showing that a defendant lacked legal authority to take the action he or she took. To the contrary, it is generally a given in such cases that the challenged decision was otherwise within the defendant's lawful authority. *See, e.g.*, *Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996) ("the government is entitled to terminate [an employee] for no reason at all," but may not do so "'on a basis that infringes his constitutionally protected . . . freedom of speech'" (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972))). The gravamen of the First Amendment claim, rather, is that retaliation was the deciding factor in the defendant's choice. *Id.* at 675 ("The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern."); *see Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1949 (2018). The essence of the wrong, in other words, is the government's impermissible reprisal for speech, which "offends the Constitution [because] it threatens to inhibit exercise of the protected right."

Hartman, 547 U.S. at 256 (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588 n.10 (1998)).

By contrast, false imprisonment had nothing to do with the motives or intent of the defendant. That is why, courts explained, "if the arrest was unlawful, no malice need be shown. The defendant, if he participated in it, or instigated or encouraged it, is liable for the false imprisonment, however pure his motives may have been." *Chrisman*, 33 Ark. at 321. But in a claim of First Amendment retaliation, motive is the very crux of the matter. *Hartman*, 547 U.S. at 259 (plaintiffs "must show a causal connection between a defendant's retaliatory animus and subsequent injury").

Further widening the gulf, the tort of false imprisonment was not designed specifically to address misconduct *by the government*. Private persons, no less than government officers, could be held liable for false imprisonment. *See* Hilliard, *supra*, § 16, at 206-07 ("The most numerous cases of false imprisonment, are those involving the right of peace-officers *or private individuals* to arrest without warrant . . . ." (emphasis added)).[3] As this fact underscores, the tort was not aimed at deterring or redressing *government* misconduct. Indeed, government officers were "treated with *more* indulgence" under the rules of false imprisonment than private persons were. Thomas M.

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[3] Such actions against private persons were common, because the law gave private persons broad authority to arrest suspected felons. *See Brockway v. Crawford*, 48 N.C. 433, 437 (1856) ("the law encourages every one, as well private citizens as officers, to keep a sharp look-out for the apprehension of felons, by holding them exempt from responsibility for an arrest, . . . unless the arrest is made . . . without probable cause"); *Burns*, 40 N.Y. at 466 ("any man, upon reasonable probable ground of suspicion, may justify apprehending a suspected person").

Cooley, *A Treatise on the Law of Torts* 175 (1879) (emphasis added); *see Rohan*, 59 Mass. at 285 ("as to constables, and other peace-officers, acting officially, the law clothes them with greater authority").

Likewise, the tort of false imprisonment was obviously not designed to safeguard the interests of free speech in any way. Its aim was simply to compensate individuals for "causeless arrests," Cooley, *supra*, at 175, that had impinged on their liberty of movement. The tort's rules and prerequisites were fashioned to balance *that* interest—regarded as a strictly personal one—with the countervailing societal need to encourage the arrest of felons and promote law and order: "the problem always is, how to harmonize the *individual right to liberty* with the *public right to protection*." *Id.* (emphasis added).

In stark contrast, the First Amendment is specifically and exclusively focused on *governmental suppression of speech* and the unique harms that it entails—not only for the individual targeted but for others holding similar views and for the nation at large. "The First Amendment presupposes that the freedom to speak one's mind is *not only an aspect of individual liberty*—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 503-04 (1984) (emphasis added).

Moreover, while false imprisonment rules were designed solely to compensate individual victims of unlawful detentions for their injuries, Section 1983 has a broader purpose: its constitutional remedy is "intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations." *Owen*, 445 U.S. at 651; *see Smith*, 461 U.S. at 49 ("deter-

rence of future egregious conduct is a primary purpose" of Section 1983); *City of Newport*, 453 U.S. at 268 (the goals are "compensation *and* deterrence" (emphasis added)).

Indeed, for the Forty-Second Congress, compensating individual victims for their injuries was primarily a means to an end: preventing state governments from depriving individuals of their federally guaranteed constitutional rights. The text Congress enacted reveals the centrality of its deterrent and preventive function, by making available *injunctive* relief, "or other proper proceeding for redress," in addition to damages. 17 Stat. 13. The bill's proponents also made this point clear. *See* Globe 501 (Sen. Frelinghuysen) ("How is the United States to protect the privileges of citizens of the United States in the States? It cannot deal with the States or with their officials to compel proper legislation and its enforcement; it can only deal with the offenders who violate the privileges and immunities of citizens of the United States. . . . as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts . . . ."); *id.* at 376 (Rep. Lowe) ("The Federal Government cannot serve a writ of *mandamus* upon State Executives or upon State courts to compel them to observe and protect the rights, privileges, and immunities of citizens. There is no legal machinery for that purpose. . . . Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired."). A comparable emphasis on deterrence is absent from the common law rules of false imprisonment.

None of these discrepancies should be surprising: "It would indeed be the purest coincidence if the state remedies for violations of common-law rights by pri-

vate citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." *Monroe*, 365 U.S. at 196 n.5 (Harlan, J., concurring). Quite simply, false imprisonment is an inappropriate analogy for Section 1983 retaliatory arrest claims.

Even if one ignored all this and insisted on analogizing First Amendment retaliatory arrest to false imprisonment, the rules governing false imprisonment still would not justify the probable cause rule that Petitioners seek in this case. For it was crystal clear in 1871 that false imprisonment claims were defeated only where there was probable cause to believe a *felony* had occurred. *Chrisman*, 33 Ark. at 321; *Burns*, 40 N.Y. at 466; *Brockway*, 48 N.C. at 437; *Rohan*, 59 Mass. at 285; Addison, *supra*, § 802, at 15; Cooley, *supra*, at 175; Newell, *supra*, § 1, at 56. "A constable ha[d] no power at common law to arrest a person without warrant on suspicion of his having committed a misdemeanor." Addison, *supra*, § 802, at 15; *see* Hilliard, *supra*, § 17, at 207 ("somewhat nice distinctions have been established upon this subject, depending on the nature and degree of the crime").

To be sure, the boundary between felonies and misdemeanors may not be the same today as it was in 1871, but it is doubtful that the crime of "harassment," *see* Alaska Stat. 11.61.120(a)(1), would have been understood by the members of the Forty-Second Congress as the type of offense for which a warrantless arrest could be conducted on probable cause without fear of liability. *See, e.g.*, *Rohan*, 59 Mass. at 286 ("Larceny of goods"); Cooley, *supra*, at 174

("setting fire to [a] neighbor's house"); Hilliard, *supra*, § 19, at 210 ("furious driving").[4]

Moreover, as Petitioners and the United States acknowledge, it was not even universally established among the states that probable cause of a felony always defeated an action for false imprisonment. *See, e.g.*, *Hawley v. Butler*, 54 Barb. 490, 503 (N.Y. Sup. 1868) (stating that only "the officer *acting without malice or bad motive*, will be protected" (emphasis added)). As discussed above, borrowing a specific tort rule to flesh out Section 1983 is justifiable only when that rule was so pervasive and "well grounded in history" that members of Congress cannot be assumed to have departed from it through silence. *Briscoe*, 460 U.S. at 334 (quoting *Tenney*, 341 U.S. at 376).

Significantly, therefore, even though the common law rules of false imprisonment did not safeguard speech rights, address the motives of government officers, or seek to deter violations of fundamental constitutional rights—all of which are reasons why this tort is an inapt analogy for First Amendment retalia-

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[4] It was also generally acknowledged that "[f]orcible breaches of the peace, in affrays, riots, etc." justified warrantless arrests without fear of liability, based on "their tendency to lead to serious, and perhaps fatal, injuries." Cooley, *supra*, at 175-76. Here too, it appears that the types of conduct encompassed within this rule were more serious than what Alaska's "harassment" misdemeanor covers. *See* Addison, *supra*, § 811, at 23 ("It is not enough to show that the plaintiff made a great noise and disturbance, and refused to depart, and was in great heat and fury . . . . Disturbance and annoyance of a public meeting, by putting questions to the speaker, making observations on their statements, and saying, 'That's a lie,' do not constitute a breach of the peace." (quotation marks omitted)). And if "breach of the peace" in some jurisdictions covered activity protected today by the First Amendment, that would only highlight the disparity between that Amendment and the rules of the common law.

tion—those rules *still* do not support the immunity from liability that Petitioners seek.

Malicious Prosecution. The tort of malicious prosecution fares no better as an analogy to First Amendment retaliatory arrest.

Malicious prosecution involved instigating legal process to have another person arrested or detained, such as by initiating a criminal prosecution. *Ahern v. Collins*, 39 Mo. 145, 150 (1866) ("The essential ground of an action for malicious prosecution . . . consisted in the fact that there had been a legal prosecution against the plaintiff without reasonable or probable cause."); *Chrisman*, 33 Ark. at 321 ("To have procured the warrant from malice and without probable cause is a distinct civil injury.").

In an action for malicious prosecution, therefore, the defendant was not accused of having personally apprehended or detained the plaintiff, but rather of having caused such acts by those with legal authority to carry them out. *See Cardival v. Smith*, 109 Mass. 158, 158 (1872) (malicious prosecution "is an action for bringing a suit at law"). And the wrongdoer in a malicious prosecution case—the person who allegedly acted with ill intent—was often not a government official. Under traditional common law rules, private persons could initiate criminal prosecutions, *see, e.g.*, *Ventress v. Rosser*, 73 Ga. 534 (1884) (defendant charged plaintiff with larceny and caused his arrest and prosecution); *Herman v. Brookerhoff*, 8 Watts 240 (Pa. 1839) (defendant caused a writ of detention to be issued against plaintiff for selling merchandise without a license), and they could even have someone detained as part of a *civil* lawsuit, such as "for an alleged fraud in contracting a debt," *Hogg v. Pinckney*, 16 S.C. 387, 392 (1882), or an "alleged infringement of a patent right," Hilliard, *supra*, § 22, at 219. If

they did so maliciously and without probable cause, they were liable for malicious prosecution. *Dinsman v. Wilkes*, 53 U.S. 390, 402 (1851) ("The action has been extended to civil as well as criminal cases where legal process has been maliciously used against another without probable cause."); *Cardival*, 109 Mass. at 158 ("if one maliciously causes another to be arrested and held to bail for a sum not due . . . . an action for a malicious prosecution may be maintained against him").[5]

In short, the tort of malicious prosecution had no special focus on wrongdoing by government officers. *See, e.g.*, *Stoecker v. Nathanson*, 98 N.W. 1061, 1061-62 (Neb. 1904) (defendant had plaintiff prosecuted over unpaid bill); *Wheeler v. Nesbitt*, 65 U.S. 544, 548 (1860) (defendants included both a magistrate and private persons).

That is highly significant because, as discussed above, the harm that First Amendment retaliation claims seek to deter is the harm of allowing the *government* to make reprisals for one's speech, which would allow it to "produce a result which (it) could not command directly." *Perry*, 408 U.S. at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The rules of malicious prosecution were not shaped to address this concern, but on the contrary to encourage prosecutions, *see Chesley v. King*, 74 Me. 164, 175-76 (1882); *Ventress*, 73 Ga. at 541, by ensuring that "*whatever may be the motive* of the prosecutor in a criminal action, *he is free from danger* if there be a probable cause for the accusation which he makes," *Hogg*, 16 S.C. at 393 (emphasis added). That goal is

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[5] In cases involving civil process, the tort was sometimes termed "malicious arrest" and involved slightly different rules. *See Ahern*, 39 Mo. at 150; *Herman*, 8 Watts at 241.

incompatible with the aim of deterring police officers from selectively employing their lawful authority to punish those whose speech they dislike.

Indeed, notwithstanding its name, this tort's rules and elements were not focused on deterring malice. Instead, much like false imprisonment, this tort was designed to compensate individuals for the harms that resulted from being prosecuted without an adequate reason. "The essential ground of an action for malicious prosecution," therefore, "consisted in the fact that there had been a legal prosecution against the plaintiff *without reasonable or probable cause*." *Ahern*, 39 Mo. at 150 (emphasis added); *see Herman*, 8 Watts at 241 ("[t]he gist of the action . . . is the origination of a malicious *and groundless* prosecution, which *ipso facto* put the party in peril" (emphasis added)); *Chrisman*, 33 Ark. at 322-23 ("The law does not undertake to compel—however society may respect—a nice sense of honor, by inflicting a pecuniary liability upon a person for what he might lawfully and ought to do, because his motives were selfish.").

While malice was also a "necessary ingredient," many courts allowed it to "be inferred from the want of probable cause," *Ahern*, 39 Mo. at 150; *Turner v. O'Brien*, 5 Neb. 542, 543-44 (1877) ("if want of probable cause is established . . . , then malice may be, and most commonly is inferred"), illustrating its secondary status. *See Wheeler*, 65 U.S. at 551-52 (a plaintiff must "prove affirmatively . . . that the defendant had no reasonable ground for commencing the prosecution," but the jury may make an "inference of malice"). Some authorities went so far as to actually define "malicious" actions as those with no justifiable basis. *See Hogg*, 16 S.C. at 398 ("malice in law being a wrongful act done intentionally *without just cause*

or excuse" (emphasis added)); *Boyd v. Cross*, 35 Md. 194, 197 (1872) ("there ought to be enough to satisfy a reasonable man that the accuser had *no ground for proceeding* but his desire to injure the accused" (emphasis added)).

In sum, because of how this tort treated the concepts of malice and intent, its elements are incapable of handling the unique harms addressed by the First Amendment freedom from speech-based retaliation. The common law recognized that "a person actuated by the plainest malice may nevertheless . . . have a justifiable reason for the prosecution of the charge." *Wheeler*, 65 U.S. at 550. And as far as the common law was concerned, having "a justifiable reason" was enough to immunize defendants from liability for this tort. But if one is seeking to prevent the selective use of governmental power to suppress disfavored ideas, the existence of "a justifiable reason" for an officer's conduct is not enough.

This Court, therefore, should not artificially limit First Amendment claims of retaliatory arrest by imposing on them the elements of this state tort. Doing so would be a significant step toward erasing the concept of retaliation from the remedy that Section 1983 provides. And as a result, it would become less true that "the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech." *Lozman*, 138 S. Ct. at 1949. There is not the slightest indication in the text, history, or purpose of Section 1983 "that Congress would have sanctioned this interpretation of its statute." *Wilson*, 471 U.S. at 274-75.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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