No. 19-1021

IN THE

Supreme Court of the United States

MICAH JESSOP; BRITTAN ASHJIAN, *Petitioners*,
v.
CITY OF FRESNO, ET AL., *Respondents.*

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

MOTION FOR LEAVE TO FILE AND BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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April 13, 2020

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Constitutional Accountability Center (CAC) respectfully moves under Supreme Court Rule 37.2(b) for leave to file a brief as *amicus curiae* in support of Petitioners Micah Jessop and Brittan Ashjian.

All parties were timely notified of CAC's intent to file this *amicus* brief. Petitioners consent to its filing. Respondents do not consent. CAC thus files this motion seeking leave to file the attached brief.

CAC is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and thus has an interest in this case. While the facts of this case are sufficiently egregious that this Court could reverse the decision below based on existing qualified immunity doctrine, this case also presents an appropriate opportunity to reconsider the scope of that doctrine. CAC seeks leave to file the attached brief so that it can explain why the Court should do so. More specifically, the attached brief explains why qualified immunity, in its current form, contravenes the text and history of 42 U.S.C. § 1983, and how the doctrine enables the types of abuses that the Fourth and Fourteenth Amendments were adopted to prohibit.

For the foregoing reasons, CAC respectfully requests that it be allowed to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

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 preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Micah Jessop and Brittan Ashjian, who were in the business of operating ATM machines, were subjected to searches of their homes and business by local police officers. After the searches, Petitioners determined that the officers—one of whom was later sentenced to prison for extorting bribes—had taken more than $150,000 in currency and a set of rare coins worth over $125,000. When Petitioners requested an inventory of goods seized under the warrant, however, the police gave them an inventory listing only $50,000 in currency. No criminal charges were ever filed against Petitioners. Pet. 5-7.

Despite the officers' apparent theft in the course of exercising their law enforcement powers, the court

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[1] Petitioners have consented to the filing of this brief, and their letter of consent has been filed with the Clerk. Respondents do not consent to the filing of this brief. 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.

below held that Petitioners could not sue Respondents under 42 U.S.C. § 1983 for violating their constitutional rights. According to that court, Respondents are entitled to qualified immunity because even if stealing Petitioners' money and property violated their Fourth Amendment rights, this principle was not clear when the officers committed the theft. Pet. App. 3a.

Under this Court's case law, qualified immunity shields government actors from civil liability "so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotation marks omitted). In practice, as this case illustrates, federal courts of appeals frequently apply this doctrine in a manner that creates a nearly impenetrable barrier to liability for officials sued under 42 U.S.C. § 1983. Indeed, this case shows just how high the barriers to recovery have become: the court below held that the Fourth Amendment, which prohibits "unreasonable searches and seizures" from violating "[t]he right of the people to be secure in their persons, houses, papers, and effects," U.S. Const. amend. IV, did not clearly prohibit police officers from stealing items they seized while executing a search warrant. As a result, the court issued no ruling on whether the Fourth Amendment does prohibit that conduct—meaning that future victims of the same conduct will likewise be blocked from vindicating their constitutional rights.

The facts of this case and the reasoning of the decision below are so egregious that this Court could reverse that decision based on its existing qualified immunity doctrine. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (explaining that this Court's precedent "makes clear that officials can still be on notice that their conduct violates established law even in novel factual

circumstances"). But this Court should grant the petition for the additional reason that this case provides the Court with an opportunity to reform its qualified immunity doctrine.

Such reform is warranted for at least two reasons. First, qualified immunity can be justified, if at all, only as an interpretation of 42 U.S.C. § 1983, yet the present form of the doctrine is not a credible interpretation of that statute. As with any other law, judicial interpretation of Section 1983 must endeavor to determine the "Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). While this Court has recognized that Congress did not intend to abrogate "[c]ertain immunities [that] were so well established . . . when § 1983 was enacted" that "Congress would have specifically so provided had it wished to abolish them," *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quotation marks omitted), the broad exemption from suit that this Court has fashioned in its qualified immunity decisions has no grounding in the common law immunities that existed when Section 1983 was passed, nor in any indicia of congressional intent.

Second, qualified immunity now enables the very abuses of government power that the Framers drafted the Fourth and Fourteenth Amendments to prohibit—abuses that Section 1983 was meant to deter. The Framers viewed the Fourth Amendment as an essential bulwark against unjustified searches and seizures, a form of government overreach with which they were deeply familiar. Against those intrusions, the Framers expected the Fourth Amendment to provide a powerful remedy: civil jury trials for damages. And when Southern states refused to respect the Fourth Amendment and other constitutional protections after the Civil War, a new generation of Framers crafted the

Fourteenth Amendment to "restrain the power of the States and compel them at all times to respect [the] great fundamental guarantees" set forth in the Bill of Rights. *McDonald v. Chicago*, 561 U.S. 742, 832 (2010) (Thomas, J., concurring in part and concurring in the judgment) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

Section 1983, originally part of the Civil Rights Act of 1871, reflects Congress's commitment to the promise of the Fourth and Fourteenth Amendments. When it became clear that, notwithstanding those Amendments, state governments in the Reconstruction South were letting abuses of formerly enslaved people and their allies go unchecked, and perpetuating such abuses themselves, Congress passed Section 1983 to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Qualified immunity, however, now gives state officials a broad shield against liability for violating people's Fourth and Fourteenth Amendment rights, gutting the remedial and deterrent purpose of Section 1983. *But see Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) ("Congress is best positioned to evaluate whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers" (quotation marks omitted)).

Because qualified immunity doctrine has strayed so far from statutory text and constitutional principles, virtually any change in that doctrine would mark an improvement. Granting this petition would, at a minimum, allow this Court to reaffirm that the unlawfulness of some government conduct, including the conduct at issue here, is so clear that a prior case with the same facts is not necessary to defeat an official's claim of qualified immunity. But granting the petition

would also present this Court with an appropriate opportunity to go further and restore the robust civil remedy that Congress enacted Section 1983 to provide to victims of unconstitutional government overreach.

ARGUMENT

I. Modern Qualified Immunity Is at Odds with the Text and History of Section 1983.

"Statutory interpretation, as we always say, begins with the text," *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016), and its goal is to "determine the Legislature's intent as embodied in particular statutory language," *Chickasaw Nation*, 534 U.S. at 94. The text of Section 1983 "on its face admits of no defense of official immunity," but rather "subjects to liability '[e]very person' who, acting under color of state law, commits the prohibited acts" in violation of federal law. *Buckley*, 509 U.S. at 268.

Nevertheless, in many areas "Congress is understood to legislate against a background of common-law adjudicatory principles," *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 457 (2012) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)), and "where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria*, 501 U.S. at 108 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

Applying that principle in *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court "held that Congress did not intend § 1983 to abrogate . . . [c]ertain immunities [that] were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley*, 509 U.S. at 268 (quoting *Pierson v.*

Ray, 386 U.S. 547, 554-55 (1967)). With respect to legislators, the Court in *Tenney* explained, immunity from civil suits arising from the exercise of their legislative duties traces back at least to the sixteenth century, and "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney*, 341 U.S. at 372. Employing the same standard, this Court has since found immunity for other government officials and participants in the judicial process. *See, e.g.*, *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983) ("Like the immunity for legislators at issue in *Tenney* . . . 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.'" (quoting *Tenney*, 341 U.S. at 376)).

Central to *Tenney* and similar decisions were historical findings that the immunities afforded to certain legislative and judicial functions were so well established in the common law and so central to the functioning of government that the members of Congress who enacted Section 1983 must have been aware of those immunities and could not have meant to abrogate them by implication. The immunity question was, appropriately, treated as a question of statutory interpretation—albeit one for which plain text alone could not provide an answer, thus requiring "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Tower v. Glover*, 467 U.S. 914, 920 (1984) (quotation marks omitted); *see id.* at 922-23 ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."); *Malley v. Briggs*, 475 U.S. 335, 342 (1986) ("[O]ur role is to interpret the intent of

Congress in enacting § 1983, not to make a freewheeling policy choice.").

For example, because judicial immunity is deeply entrenched in our legal system, going back to English common law, this Court held that judges are immune from suit under Section 1983 for actions taken in the course of their judicial duties. *Pierson*, 386 U.S. at 553-54. Judicial immunity was fundamental to the legal system, *see Yates v. Lansing*, 5 Johns. 282, 290-95 (N.Y. 1810) (tracing the common law history of judicial immunity); *Phelps v. Sill*, 1 Day 315, 319 (Conn. 1804) ("An action will not lie against a judge, for an erroneous judgment. Though he mistook, it is sufficient for him, that he acted *judicially*." (citing authorities)), and it was firmly established in American law by 1871, *see Bradley v. Fisher*, 80 U.S. 335 (1871). Judicial immunity is therefore supported by the rationale of *Tenney*: members of the Forty-Second Congress surely would have known of this rule and, had they wished to abolish it, "would have specifically so provided." *Pierson*, 386 U.S. at 555; *see Buckley*, 509 U.S. at 280 (Scalia, J., concurring) ("the presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute" (quoting *Burns v. Reed*, 500 U.S. 478, 498 (1991))).

In *Pierson v. Ray*, however, this Court departed from that approach with respect to immunity for police officers. Although police officers never had any general common law immunity, 386 U.S. at 555, this Court focused on the specific type of constitutional claim brought against the officers in that case and analogized it to a specific type of tort action—false arrest, *id.* The Court then held that because police officers sued for false arrest may assert "the defense of good faith and probable cause," that defense "is also

available to them in the action under [Section] 1983." *Id*. at 557.

This new approach had many problems. First, the Court in *Pierson* did not purport to analyze the common law as it existed in 1871, when Section 1983 was enacted, but instead cited sources from the 1950s and 1960s in support of its rule. *Id*. at 555.

Second, even if the same defenses were available to police officers in false arrest cases in 1871, the Court in *Pierson* made no attempt to demonstrate that those rules were so well established and widely known—like the immunity for legislators and judges—that Congress would have been aware of them and expressly eliminated them had that been its intent.

Third, the analysis in *Pierson* confused common law immunities with the elements of specific common law torts. Indeed, the Court simply erred in asserting that police officers could assert a *defense* of good faith and probable cause in false arrest cases. The absence of good faith and probable cause was, instead, "the essence of the wrong itself," and thus part of "the essential elements of the tort." *Wyatt v. Cole*, 504 U.S. 158, 172 (1992) (Kennedy, J., concurring); *accord id*. at 176 n.1 (Rehnquist, J., dissenting). The *Tenney* approach ascribed to Congress only an intent to preserve true immunities of the common law—broad, categorical principles that shielded particular types of officials and functions from liability as a general matter. But *Pierson* held that even in the absence of such immunities, plaintiffs could not vindicate their rights under Section 1983 if they could not recover under whatever state tort was "most closely analogous" to the constitutional violation they suffered. *Wyatt*, 504 U.S. at 164.

Pierson never explained why Congress would have intended to limit the breadth of Section 1983 in this

way—making the statute duplicative of the remedies already available under state tort law. As this Court has recognized elsewhere, "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); *see* 17 Stat. 13, § 1 (1871) (authorizing suits for deprivations of rights "secured by the Constitution of the United States"). The statute is not "a federalized amalgamation of pre-existing common-law claims," *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012), but rather "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), which would be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963). Because Section 1983 furnishes "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), its scope is "broader than the pre-existing common law of torts," *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). And because Section 1983 "ha[s] no precise counterpart in state law. . . . any analogies to those causes of action are bound to be imperfect." *Rehberg*, 566 U.S. at 366 (quoting *Wilson*, 471 U.S. at 272).

While this Court never provided a thorough justification for *Pierson*'s "analogous tort" approach, that approach at least tethered immunity to "limitations existing in the common law," *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring), "that the statute presumably intended to subsume," *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). The judicial task was still seen as "essentially a matter of statutory construction." *Butz v. Economou*, 438 U.S. 478, 497 (1978).

What followed, however, was a steady slide toward "less deference to statutory language and congressional intent, less belief that law is fixed and unchanging, and less commitment to the notion that the judicial function is a merely mechanical one of 'finding' the law." David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 501 (1992). Statutory interpretation, and the common law backdrop informing it, increasingly took a back seat to "the Justices' individual views of sound public policy." *Id.* For instance, in *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court "relied . . . upon a common-law tradition of prosecutorial immunity that developed much later than 1871, and was not even a logical extrapolation from then-established immunities." *Burns*, 500 U.S. at 505 (Scalia, J., concurring in the judgment and dissenting in part); *see Kalina*, 522 U.S. at 124 n.11 (acknowledging that policy considerations were "perhaps more important[]" to *Imbler*'s holding than the prosecutorial immunity cases it cited). With respect to immunity for police officers and other executive officials, that link to statutory interpretation and the common law was eventually severed entirely.

Tellingly, "it was in the context of *Bivens* that matters of policy took the reins completely and the Court abandoned any common law underpinnings to immunity doctrine." Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 Seattle U. L. Rev. 939, 955 (2014). After recognizing an implied cause of action for damages arising directly under the Constitution, at least for certain types of constitutional violations, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), this Court applied to those actions the doctrine of qualified immunity that it had developed as a matter of statutory

interpretation under Section 1983. The Court then concluded that "it would be incongruous and confusing . . . to develop different standards of immunity for state officials sued under § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution." *Butz*, 438 U.S. at 499 (quotation marks omitted). Rejecting the argument that Section 1983's statutory basis should make a difference, this Court said that such arguments "would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity." *Id.* at 501.

Having equated qualified immunity under the Civil Rights Act of 1871 with qualified immunity under the judge-fashioned *Bivens* remedy, this Court then announced a new formulation of that doctrine: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Although *Harlow*'s new formulation arose in a *Bivens* action, with no governing statute or any congressional intent to discern, this Court "made nothing of that distinction," *Burns*, 500 U.S. at 498 n.1 (Scalia, J., dissenting), and later applied *Harlow*'s novel standard to claims brought under Section 1983, *see Wyatt*, 504 U.S. at 165-67. This Court did so even though it had "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Indeed, the Court was "forthright in revising the immunity defense for policy reasons." *Crawford-El*, 523 U.S. at 594 n.15; *see Wyatt*, 504 U.S. at 165 (citing "our admonition . . . that insubstantial claims should not

proceed to trial" (quoting *Harlow*, 457 U.S. at 815-16)); *Anderson*, 483 U.S. at 640 n.2 (describing this aim as "the driving force behind *Harlow*'s substantial reformulation of qualified-immunity principles"). Gone was any consideration of Section 1983's text, much less the broad remedial goals Congress passed the statute to advance.

The end result is a doctrine that "lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983—to provide a remedy for the violation of federal rights." *Crawford-El*, 523 U.S. at 595.

II. Modern Qualified Immunity Enables the Very Abuses that the Fourth and Fourteenth Amendments Were Adopted to Prohibit and Section 1983 Was Meant to Deter.

A Fourth Amendment case like this one provides an especially appropriate context in which to revisit the doctrine of qualified immunity. In its present form, qualified immunity subverts the purpose of the Fourth Amendment and the goals of the Congress that enacted Section 1983 to enforce it.

The Fourth Amendment was adopted to ensure the security of "the people" against a form of government overreach that was familiar to the Founding generation: unjustified searches and seizures of people, their homes, and their property. The Amendment "grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England." *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *see Riley v. California*, 573 U.S. 373, 403 (2014). Shortly before the Founding, a string of prominent English decisions condemned overbroad searches and seizures, permitting juries to award sizeable tort damages to individuals

whose homes were searched and papers were seized by government officers. *E.g.*, *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763); *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765). Coming on the heels of bitter disputes over writs of assistance in the colonies, these "landmarks of English liberty" were widely covered in American newspapers, and "every American statesman, during our revolutionary period and formative period as a nation, was undoubtedly familiar" with them. *Boyd v. United States*, 116 U.S. 616, 626 (1886).

As explained in these seminal English decisions, damages awards against officers who violated individual rights were "designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future." *Wilkes*, 98 Eng. Rep. at 498-99. And notably, these damages awards were permitted even where the Court's decision itself established new precedent. *See* Barry Friedman, *Unwarranted: Policing Without Permission* 128-29 (2017) (observing that *Wilkes* and other cases "became a landmark moment in history precisely because the decisions . . . were an extraordinary *departure* from preexisting precedent").

With these English precedents as a model, the Framers adopted the Fourth Amendment on the understanding that victims of unreasonable searches and seizures would be able to vindicate their rights, and deter future violations, through jury trials and damages awards. As one commentator put it in 1787 while advocating for the inclusion of a Bill of Rights in the Constitution, if an officer committed an unjustified search or seizure, "a trial by jury would be our safest resource," because "heavy damage would at once punish the offender and deter others from committing the same." *Essay of A Democratic Federalist* (Oct. 17, 1787), *reprinted in* 3 *The Complete Anti-Federalist* 58,

61 (Herbert J. Storing ed., 1981); *see Essays by A Farmer* (Feb. 15, 1788), *reprinted in* 5 *The Complete Anti-Federalist* 14, *supra* ("no remedy has yet been found equal to the task of dete[r]ring and curbing the insolence of office, but a jury—[i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer had deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression").

The Fourth Amendment, like the rest of the Bill of Rights, was originally understood as binding only the federal government. *Barron v. Baltimore*, 32 U.S. 243 (1833). But in the wake of a bloody Civil War, and the ongoing refusal of Southern states to respect individual liberties, the Fourteenth Amendment "fundamentally altered our country's federal system," *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *McDonald*, 561 U.S. at 754), adding to the Constitution a new guarantee of liberty meant to secure "the civil rights and privileges of all citizens in all parts of the republic," *Rep. of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. xxi (1866).

Among the affronts that prompted Congress to pursue constitutional reform was the widespread insecurity of homes and property in the Reconstruction-era South. After the war, white Southerners used a fear of armed insurrection by the newly freed slaves as a pretext to break into the homes of African Americans, take their guns, and steal their property. As one former Union soldier put it, "[t]hey have been accusing the col[o]red people of an ins[ur]rection which is a lie, in order that they might get arms to carr[y] out their wicked designs." Letter from a Mississippi Black Soldier to the Freedmen's Bureau Commissioner (Dec. 16, 1865), *reprinted in Freedom: A Documentary History of Emancipation, The Black Military Experience*, at 755

(Ira Berlin et al. eds., 1982). As police, militia, and armed vigilantes ransacked the homes of black people, Cong. Globe, 39th Cong., 1st Sess. 915 (1866), valuables were taken without justification or explanation, *see* Dan T. Carter, *The Anatomy of Fear: The Christmas Day Insurrection of 1865*, 42 J. S. Hist. 345, 361 (1976); William McKee Evans, *Ballots and Fence Rails: Reconstruction on the Lower Cape Fear* 71-72 (1967). Police officers "sometimes took their friends along with them on raids that they might share in the emoluments of law enforcement." *Id*. at 73.

"We need protection for our person and property," implored the freedmen of Tappannock, Virginia, in a letter sent to the House of Representatives in 1865. Cong. Globe, 39th Cong., 1st Sess. 516 (1866). The Joint Committee on Reconstruction heard evidence that, in North Carolina, "the local police have been guilty of great abuses . . . . They go in squads and search houses and seize arms. . . . The tour of pretended duty is often turned into a spree. Houses of colored men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken." *Rep. of the Joint Committee on Reconstruction*, pt. II, at 272. In Texas, patrols "passed about through the settlements where negroes were living" and "frequently robbed them of money, household furniture, and anything that they could make of any use to themselves." *Id.*, pt. III, at 140.

In response to these and other abuses, Congress crafted the Fourteenth Amendment to "restrain the power of the States and compel them at all times to respect [the] great fundamental guarantees" set forth in the Bill of Rights. *McDonald*, 561 U.S. at 832 (Thomas, J., concurring in part and concurring in the judgment) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

But that turned out to be insufficient. Several years after the Amendment's ratification, Southern intransigence continued, with states "permit[ting] the rights of citizens to be systematically trampled upon." Cong. Globe, 42nd Cong., 1st Sess. 375 (1871) (Rep. Lowe). Recognizing that a means of enforcing the constitutional rights guaranteed by the Fourteenth Amendment was needed, Congress passed "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes," ch. 22, 17 Stat. 13 (1871), the first section of which is codified as 42 U.S.C. § 1983. To safeguard fundamental liberties, lawmakers concluded that the nation needed to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42nd Cong., 1st Sess. 376 (1871); *see id.* at 501 (because the federal government cannot "compel proper legislation and its enforcement" in Southern states, "as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts").

Like the Fourth Amendment, therefore, the remedy that Section 1983 provides was "intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). And the legislators who enacted it understood that it would be interpreted broadly to promote its goals: "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 . . . ." Cong. Globe, 42nd Cong., 1st Sess. App. 68. (1871).

Contrary to the vision of the Forty-Second Congress, however, modern qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). By fashioning that immunity from whole cloth, this Court has undermined what the Framers viewed as the strongest tool for vindicating individual rights and preventing violations of the Fourth Amendment: civil jury trials and damages awards.

III. This Court Should Reform Qualified Immunity by Returning to Statutory Interpretation and the Common Law Backdrop of Section 1983.

At this point, virtually any change to qualified immunity doctrine would enhance fidelity to statutory text and better promote the accountability for constitutional violations that the Framers and the Forty-Second Congress intended. If nothing else, this Court could simply reaffirm that when the unlawfulness of an officer's conduct is "apparent," courts should not need precedent addressing "the very action in question" to reject claims of qualified immunity. *Anderson*, 483 U.S. at 640; *see Hope*, 536 U.S. at 741 ("general statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). That principle is sufficient to resolve this case and send a much-needed corrective signal to the lower courts.

The better approach would be to go further and more closely align this Court's doctrine with standard rules of statutory interpretation and the common law doctrines that inform the meaning of Section 1983. Indeed, an examination of common law principles established by 1871 illustrates just how far this Court's modern doctrine has strayed from anything that would have been recognizable to the Congress that enacted Section 1983.

In the early Republic, government actors were strictly liable for their legal violations, a principle grounded in English common law. Because of the Crown's sovereign immunity, British subjects could only sue in tort the government officers who themselves carried out an allegedly illegal action. "Since in theory the king could do no wrong, it would be impossible for him to authorize a wrongful act, and therefore any wrongful command issued by him was to be considered as non-existent, and provided no defense for the dutiful subject." George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476, 480 (1953). Thus, government officials were strictly liable for tortious actions, even if acting upon orders from the Crown.

Early American courts took this approach as well. The seminal case illustrating this principle is *Little v. Barreme*, in which Chief Justice Marshall held that a government actor was strictly liable for violating the Constitution, although he was acting pursuant to presidential orders that were themselves unconstitutional. 6 U.S. 170, 170-71 (1804). So too in other cases. "Prior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts," Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 Minn. L. Rev. 585, 585 (1927), and

American courts continued to apply that rule for some time. For instance, in 1891, the Massachusetts Supreme Court upheld a damages award against officers who killed a horse under the mistaken belief that it was diseased, reasoning that if the statute they relied upon allowed officers to kill healthy animals without compensating the owners, it would likely be unconstitutional. *Miller v. Horton*, 152 Mass. 540, 543 (1891). This Court similarly rejected a good-faith defense in *Myers v. Anderson*, 238 U.S. 368, 380 (1915), which considered whether Maryland election officials were liable for enforcing a law that unconstitutionally deprived individuals of their voting rights. Finding the officers liable, this Court affirmed the lower court's holding that "any state law commanding such deprivation or abridgment is nugatory and not to be obeyed by any one; and any one who does enforce it does so at his own peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit." *Anderson v. Myers*, 182 F. 223, 230 (C.C.D. Md. 1910).

Strict liability did not typically require officials acting in good faith to personally bear the brunt of compensating their victims. Rather, these officials were generally indemnified. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1906-07 (2010) (surveying early petitions to Congress for indemnification and finding that where officers acted in good faith and within the boundaries conferred by law or their instructions, "Congress concluded that the government should bear responsibility for the loss"). As this Court explained: "Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a

superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." *Tracy v. Swartwout*, 35 U.S. 80, 98-99 (1836).

By insulating officials from accountability for constitutional violations, modern qualified immunity doctrine contravenes this regime, and with it the plan of the Congress that passed Section 1983. In the process, it also subverts a key aim of the Fourteenth Amendment: preventing state and local governments from applying the law in a discriminatory manner that harms disfavored groups.

Notably, people of color are hit particularly hard by the effects of qualified immunity, as they continue to be disproportionately victimized by certain forms of government overreach. Today, for example, black Americans are more likely than white Americans to be the victims of excessive force by police officers. Phillip Atiba Goff et al., Center for Policing Equity, *The Science of Justice: Race, Arrests, and Police Use of Force* 21 (July 2016), https://bit.ly/2wJdTMW; *see, e.g.*, U.S. Dep't of Justice Civil Rights Division & U.S. Attorney's Office Northern District of Illinois, *Investigation of the Chicago Police Department* 145 (Jan. 13, 2017), https://bit.ly/2wHvzIW ("the raw statistics show that CPD uses force almost ten times more often against blacks than against whites"); U.S. Dep't of Justice Civil Rights Division, *Investigation of the Ferguson Police Department* 62 (Mar. 4, 2015), https://bit.ly/2TRWNog ("African Americans have more force used against them at disproportionately high rates, accounting for 88% of all cases"). Thus, qualified immunity closes the courthouse doors to the very group of people that Congress most wanted to help when it passed Section 1983.

In sum, the Framers of the Fourth and Fourteenth Amendments envisioned a robust civil remedy available to people whose right to personal security was violated by government officials. Congress enacted Section 1983 to ensure that victims could directly seek redress in the federal courts for such constitutional violations. Modern qualified immunity doctrine effectively undoes those protections. This situation could be ameliorated by honoring Congress's plan in passing Section 1983 and ensuring that immunity determinations are guided by "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Tower*, 467 U.S. at 920 (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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