No. 20-1002

IN THE

Supreme Court of the United States

CODY WILLIAM COX,

Petitioner,

v.

DON WILSON,

Respondent.

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

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

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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 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

On an icy day in 2014, Petitioner Cody Cox became involved in a police chase after Respondent Don Wilson, a deputy in the Clear Creek, Colorado, Sheriff's Office, responded to reports of a motorist driving erratically on the interstate. Pet. App. 2a-3a. After several miles, a traffic jam forced Cox to slow down, allowing Wilson and another officer to use their patrol cars to box Cox in between the highway guardrail and another motorist's vehicle. *Id.* at 4a-5a. While Cox was stopped and sitting in his vehicle, Wilson exited his patrol car, walked up to Cox, and "[a]lmost immediately" shot him in the neck through the open passenger window, *id.* at 5a, rendering him a quadriplegic,

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented 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.

id. at 6a. Cox was unarmed at the time of the shooting. *Id.* at 23a.

Cox filed this lawsuit pursuant to 42 U.S.C. § 1983, asserting that Wilson violated his Fourth Amendment right to be free from unreasonable seizures, as incorporated against the states through the Fourteenth Amendment. Wilson filed a summary judgment motion on the ground that he was entitled to qualified immunity, but the district court denied the motion, and the case proceeded to trial. After the first trial ended in a mistrial, the case was retried, and the second jury returned a verdict for Wilson. Cox appealed, arguing that the district court erred by failing to instruct the jury on his theory of the case. Pet. 6-9.

Despite acknowledging that the district court had "incorrectly stated" the law when it declined to give the instruction Cox had requested, Pet. App. 2a, the court below refused to decide the case on that basis, *id.* Instead, it resurrected the qualified immunity issue and held that the instructional error was harmless because any rights that Wilson may have violated were not "clearly established at the time of the incident." *Id.* In analyzing that issue, the court below declined to assess whether Wilson had fair notice that his conduct was unconstitutional. Instead, it concluded that Cox's rights were not clearly established because it had previously granted qualified immunity in a factually *dissimilar* case in which the "impropriety" of the government official's conduct would be more "apparent to most laypersons." *Id.* at 18a. That analysis was improper under this Court's precedents.

Under this Court's case law, qualified immunity shields government actors from civil liability under Section 1983 "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 standard in a manner that creates a nearly impenetrable barrier to liability. Indeed, this case shows just how high the barrier to recovery has become: rather than assessing whether Wilson had "'fair warning' that his conduct deprived his victim of a constitutional right," *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002) (quoting *United States v. Lanier*, 520 U.S. 259 (1997)), the court below held that Wilson was entitled to qualified immunity based solely on its own subjective assessment of the relative egregiousness of Wilson's conduct.

That novel approach strayed so far from this Court's precedents that this Court could vacate the ruling below based on its existing qualified immunity doctrine. But the court's error also makes clear the need for this Court to provide the lower courts with additional guidance on the proper qualified immunity analysis.

In *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam), this Court reaffirmed the principle that identifying a prior case with nearly indistinguishable facts is not necessary to demonstrate that a constitutional right is "clearly established." This Court also indicated that a prior case that is "too dissimilar" from the case at hand cannot "create any doubt about the obviousness" of certain constitutional violations. *Id.* at 54 n.2. But due to the "particularly egregious facts" of *Taylor*—where a prisoner was forced "to sleep naked in sewage" in a "frigidly cold cell" for six days, *id.* at 53-54—that decision may not provide sufficient guidance to lower courts confronted with less shocking facts. *Cf. Rico v. Ducart*, 980 F.3d 1292, 1300 n.9 (9th Cir. 2020) (distinguishing *Taylor* because the facts of the case were not "as extreme as those present" in

Taylor). Thus, granting this petition would, at a minimum, allow this Court to clarify *Taylor*'s scope and provide more concrete guideposts for the lower courts, including by rejecting the subjective "relative impropriety test" applied by the court below.

But granting the petition would also present this Court with an opportunity to go further and take steps toward restoring the robust remedy that Congress created Section 1983 to provide. This Court should do so 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 construction 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 certain fundamental immunities that were well established when Section 1983 was enacted, *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993), the broad exemption from suit that this Court has fashioned 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 a bulwark against unjustified seizures of persons, enforceable by tort actions 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 compel state officers "at all times to respect [the] great fundamental guarantees" of the Bill of Rights. *McDonald v. City of 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 officials in the Reconstruction South were letting abuses of formerly enslaved people and their allies go unchecked, and perpetuating such abuses themselves, Congress created 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 purposes of Section 1983.

ARGUMENT

I. 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 (quotation marks omitted). The Court explained that legislators' 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) ("[T]he 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)). For example, because judicial immunity dates back to English common law, *see Yates v. Lansing*, 5 Johns. 282, 290-95 (N.Y. 1810), and was firmly

established in American law by 1871, *see Bradley v. Fisher*, 80 U.S. 335 (1871), this Court has recognized that had members of the Forty-Second Congress wished to abolish judicial immunity in the context of Section 1983, they "would have specifically so provided." *Pierson v. Ray*, 386 U.S. 547, 555 (1967); *see Buckley*, 509 U.S. at 280 (Scalia, J., concurring) ("[T]he 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))).

Central to *Tenney* and similar decisions were historical findings that these immunities 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 them 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 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.").

In *Pierson v. Ray*, however, this Court departed from that approach with respect to immunity for police officers. At common law, police officers had never enjoyed broad immunity from suit, and "constitutional restrictions on the scope of [their] authority w[ere] routinely applied through the nineteenth century" in damages actions. James E. Pfander, *Zones of Discretion at Common Law* 7 (Nw. Pub. Law Research Paper

No. 20-27, 2020), https://ssrn.com/abstract=3746475. Indeed, throughout the nineteenth century, courts treated law enforcement as "a 'ministerial' act" that was "subject to ordinary law" and not shielded by judicial or "quasi-judicial" immunity. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 Stan. L. Rev. Online (forthcoming 2021) (manuscript at 4), https://ssrn.com/abstract=3746068; *see, e.g.*, *Ely v. Thompson*, 10 Ky. 70, 76 (1820) (describing a justice of the peace as a "judicial officer" but a constable as a "ministerial officer"); *Sumner v. Beeler*, 50 Ind. 341, 342 (1875) (describing defendants in a false-arrest suit as "ministerial officers"). Notably, officers enjoyed no general immunity based on a good-faith belief in the legality of their actions. Thus, "[i]f [a] plaintiff was assaulted and beaten" by a police officer "without authority of law," the plaintiff was "entitled to recover, whatever may have been the defendant's motives." *Shanley v. Wells*, 71 Ill. 78, 81 (1873).

Despite this history, the Court in *Pierson* 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. *See* 386 U.S. at 555. 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 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, C.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. *Id.* at 164.

Pierson never explained why Congress would have intended to make Section 1983 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). 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)—limitations "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.*, and with respect to immunity for police officers and other executive officials, the link to statutory text and history 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 against federal officials 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 *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 statute to interpret, 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 (emphasizing its "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—flouting the principle that "Congress is best positioned to evaluate whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers." *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (quotation marks omitted).

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. 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 reconsider qualified immunity doctrine. 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 unjustified searches and seizures of individuals, their homes, and their property. Although 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), the Framers crafted its text more broadly, establishing a federal right to be secure that "transcend[s] the mere denunciation of general warrants," William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 691 (2009). To vindicate personal security, the Fourth Amendment denies law enforcement officials the unbridled discretion to search and seize whomever and however they wish, "provid[ing] an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct." *Graham v. Connor*, 490 U.S. 386, 395 (1989).

Shortly before the Founding, a string of prominent English decisions condemned abuses of law enforcement power, permitting juries to award sizable tort damages to individuals whose property was improperly searched and 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). As explained in these 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*, 19 How. St. Tr. at 1167.

With these English precedents as a model, the Framers adopted the Fourth Amendment with the understanding that victims of unreasonable searches and seizures would be able to vindicate their rights, and deter future violations, through jury trials for damages. As one commentator put it 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).

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 the Civil War, amid the Southern states' continuing refusal to respect individual liberties, particularly of African Americans, 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 were brutal acts of police violence meant to subordinate African Americans and deny them the promise of freedom. When the Joint Committee on Reconstruction convened, witness after witness testified to gratuitous, violent seizures by police officers, who were a "terror to . . . all colored people or loyal men." *Id.*, pt. II, at 271. A Freedman's Bureau

officer recounted an incident in which "[a] sergeant of the local police . . . brutally wounded a freedman when in his custody, and while the man's arms were tied, by striking him on the head with his gun, coming up behind his back; the freedman having committed no offence whatever." *Id.* at 209. Others described how, in New Orleans, "the police of that city conducted themselves towards the freedmen, in respect to violence and ill usage, in every way equal to the old days of slavery." *Id.*, pt. IV, at 79.

Police brutality and murder flared up in the spring and summer of 1866 as Congress completed its work on the Fourteenth Amendment. In Memphis and New Orleans, police led white mobs that killed and brutalized hundreds of African Americans. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 261-63 (1988). These massacres demonstrated that, without changes to the Constitution, unchecked police violence would continue. *See New Orleans Riots*, H.R. Rep. No. 39-16, at 35 (1867) ("[T]he whole body of colored men" would continue to be "hunted like wild beasts, and slaughtered without mercy and with entire impunity from punishment."); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 Geo. L.J. 1275, 1307 (2013) ("No single event in 1866 more clearly illustrated the states' continued failure to protect the constitutionally enumerated rights of American citizens than the New Orleans Riot of July 30, 1866.").

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)). The Fourteenth Amendment repudiated rule by "the policeman's club," ensuring a remedy against the police "driving away and murdering like outlaws the most faithful friends of the Union of liberty." Carl Schurz, *The Logical Results of the War* (Sept. 8, 1866), *in* 1 *Speeches, Correspondence and Political Papers of Carl Schurz* 413, 390 (Frederic Bancroft ed., 1913).

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, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe). Police violence remained pervasive. *Id.* at app. 185 (Rep. Platt) (describing how white police officers "shot [men] down like dogs in the very portals of the temple of justice without provocation"). Recognizing the need for a means of enforcing the rights newly guaranteed by the Constitution, 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.

Section 1983 was modeled on Section 2 of the Civil Rights Act of 1866. *See* Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) (Rep. Shellabarger). But unlike Section 2 of the 1866 Act, Section 1983 provided a civil, not criminal, remedy. *See id.* To safeguard fundamental liberties, Congress 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." *Id.* at 376 (Rep. Lowe); *see id.* at 501 (Rep. Frelinghuysen) (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").

The remedy that Section 1983 created was "intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations," much like the Fourth Amendment and the Civil Rights Act of 1866 that preceded it. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). And the legislators who enacted Section 1983 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, 42d Cong., 1st Sess. App. 68 (1871).

Essential to the remedial goals of Section 1983 was the principle that exceptions to liability would be construed narrowly. In this manner, Section 1983 paralleled its 1866 predecessor: in debates preceding the enactment of Section 2 of the Civil Rights Act of 1866, legislators repeatedly debated and rejected exemptions for law enforcement officers, such as constables and sheriffs. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (Sen. Trumbull) (arguing that exempting state officials from penalty for actions taken under color of law improperly "places officials above the law"); *id.* at 1267 (Rep. Raymond) ("[I]f a . . . sheriff . . . should take part in enforcing any State law making distinctions among the citizens of the State on account of race or color, he shall be deemed guilty of a misdemeanor and punished with fine and imprisonment under this bill."). Because arguments for such sweeping

exemptions had already been rejected in the criminal context of the 1866 Act, the broad reach of what would become Section 1983 was comparatively uncontroversial. *See Briscoe*, 460 U.S. at 361 (Marshall, J., dissenting) ("Of all the measures in the Ku Klux Klan Act, § 1 [codified at 42 U.S.C. § 1983] generated the least controversy since it merely provided a civil counterpart to the far more controversial criminal provision in the 1866 Act.").

Contrary to the vision of the Forty-Second Congress, however, 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), undermining what the Framers viewed as a critical tool for vindicating individual rights and preventing constitutional violations: 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 envisioned. If nothing else, this Court could reject the novel approach of the court below, which hinged qualified immunity on a subjective assessment of the relative egregiousness of factually dissimilar conduct. It could recommit itself to a test that turns on whether a government official had "fair warning that [the official's] conduct violated the Constitution," *Hope*, 536 U.S. at 741—an approach that, importantly, does not invite "rigid, overreliance on factual similarity," *id.* at 742, especially where a

government official's conduct is "particularly egregious," *Taylor*, 141 S. Ct. at 54. A simple reaffirmation of those principles would be sufficient to resolve this petition: the troubling facts of this case, combined with two factually on-point Tenth Circuit precedents denying qualified immunity, lead to the inescapable conclusion that Deputy Wilson was not entitled to qualified immunity. Pet. 17-20.

However, 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. In English common law and early American cases, government actors were strictly liable for their legal violations. George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476, 480 (1953); *see, e.g.*, *Little v. Barreme*, 6 U.S. 170, 170-71 (1804). At the same time, those government 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). As this Court explained, "[s]ome 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, qualified immunity contravenes this regime, and with it the plan of the Congress that enacted Section 1983.

Moreover, damages against government officials were awarded in English common law courts 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 eighteenth-century cases premised on improper government seizures "became a landmark moment in history precisely because the decisions . . . were an extraordinary *departure* from preexisting precedent"). The judge-fashioned rule that a constitutional right must be "clearly established" for an officer to be held liable negates that principle. Indeed, when Section 1983 was created in 1871 to provide a means of enforcing the guarantees of the Bill of Rights and the Fourteenth Amendment, that Amendment was only three years old, and this Court had not yet interpreted its sweeping guarantees. The idea that victims of abuse of power would be required to show that those acting under color of law violated "clearly established" legal precedents would have strangled the statute at birth.

Qualified immunity 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 police officers' use of excessive force. 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 ("[T]he 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 people that Congress most wanted to help when it created 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. Qualified immunity effectively undoes those protections. This situation could be ameliorated by honoring Congress's plan in passing Section 1983 and ensuring that, if immunities are read into the statute's text, they are based on "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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