No. 20-1438

IN THE

Supreme Court of the United States

TINA CATES,

Petitioner,

v.

BRUCE D. STROUD; BRIAN WILLIAMS, SR.; JAMES DZURENDA; ARTHUR EMLING, JR.; MYRA LAURIAN,

Respondents.

On Petition for 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 PETITIONER

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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 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 therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On February 19, 2017, Petitioner Tina Cates went to visit her boyfriend at Nevada's High Desert State Prison, just as she had done nearly every week for approximately six months. Pet. App. 3a. Unbeknownst to Cates, the prison had received a confidential tip that she might try to bring drugs into the prison and opened an investigation into her. *Id.* at 4a.

Cates's entry through prison security that day proceeded as usual until two criminal investigators with the Nevada Office of the Inspector General, Respondents Myra Laurian and Arthur Emling, Jr., abruptly, and without explanation, asked Cates to follow them to a prison administrative building. *Id.* at 4a-5a. Laurian then took Cates into a bathroom and ordered her

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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.

to strip naked, remove her tampon, and bend over and spread her cheeks. *Id.* at 5a. Cates, feeling she had no other option, complied. *Id.* Laurian conducted a visual inspection of Cates's person and body cavities but found no drugs or other contraband. *Id.* At no point during the encounter did anyone inform Cates of her right to refuse to be strip-searched and simply leave the prison. *Id.* Cates later departed the prison without visiting her boyfriend—she drove straight home and did not leave her house for several days as she coped with the trauma of the encounter. *Id.* at 6a-7a.

Cates filed this lawsuit pursuant to 42 U.S.C. § 1983, asserting that Laurian, Emling, and several prison officials violated her Fourth Amendment right to be free from unreasonable searches, as incorporated against the states through the Fourteenth Amendment. The court below agreed with Cates, as well as three other circuits, *see Burgess v. Lowery*, 201 F.3d 942, 945 (7th Cir. 2000); *Spear v. Sowders*, 71 F.3d 626, 632 (6th Cir. 1995) (en banc); *Marriott ex rel. Marriott v. Smith*, 931 F.2d 517, 518, 520 (8th Cir. 1991), that there is no acceptable justification for strip-searching a prison visitor without giving the visitor the option to simply leave the prison. Pet. App. 23a-24a. The court's "agreement with [its] sister circuits follow[ed] naturally from [Ninth Circuit] precedent on prison searches and on screening measures in sensitive facilities more generally." *Id.* at 17a-18a; *see, e.g.*, *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1447 (9th Cir. 1991) (holding that even for individuals who themselves have been arrested and detained, warrantless strip searches are permitted "only where such searches are necessary to protect the overriding security needs of the institution"). And the court's conclusion was buttressed by precedent from this Court

confirming that "only in limited circumstances" may strip searches be conducted "even of inmates." Pet. App. 13a-14a (citing *Florence v. Bd. of Chosen Freeholders of the Cty. of Burlington*, 566 U.S. 318 (2012)); *see also Florence*, 566 U.S. at 332 (relying on the Ninth Circuit's prior analysis in *Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc)).

But despite concluding that Respondents had violated the Constitution, the court determined that they were entitled to qualified immunity, thus insulating them from liability for this egregious breach of personal privacy and security. *Id.* at 24a-25a.

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: despite unanimous agreement among three other circuits that strip-searching a prison visitor without offering the option to leave is unconstitutional—a conclusion no circuit has ever disagreed with—and despite Ninth Circuit and Supreme Court precedent further pointing to that same conclusion, the court below granted the Respondents qualified immunity because the Ninth Circuit did not have a prior case of its own directly on point. Perhaps even worse, the court suggested that the lack of a "precise factual analogue" can never be overcome by an obvious violation of the Fourth Amendment given the "endless permutations of outcomes and responses" in the

Fourth Amendment context, Pet. App. 25a (quotation marks omitted)—even though this case involved a basic question of prison-visitor protocol with no heat-of-the-moment exigencies. Indeed, there is no dispute that Cates was calm, compliant, and under the control of the officers throughout the entire encounter.

The facts of this case are so egregious and the reasoning of the decision below so flawed that this Court could reverse that decision based on its existing qualified immunity doctrine. *See Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam) (holding that where "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, [the officer's conduct] was constitutionally permissible," the absence of factually analogous precedent did not warrant a grant of qualified immunity); *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 the fraught analysis of the court below—exacerbating two circuit splits on the scope of qualified immunity, *see* Pet. 11-26—also makes clear the need for this Court to go further and grant plenary review to reform, or eliminate, its qualified immunity doctrine.

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 invasions of personal privacy and security, 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 judges. 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 persons, 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 "physically intrusive governmental conduct." *Graham v. Connor*, 490 U.S. 386, 395 (1989).

Unjustified strip searches are the epitome of "physically intrusive governmental conduct." *Id.* As this Court has explained, "[w]e do not underestimate the degree to which [strip-]searches may invade the

personal privacy." *Bell v. Wolfish*, 441 U.S. 520, 560 (1979); *see also Florence*, 566 U.S. at 341 (Alito, J., concurring) ("Undergoing such an inspection is undoubtedly humiliating and deeply offensive to many.").

These precedents are consistent with the Framing-era understanding of the Fourth Amendment's protections. "Persons," of course, are first in the list of categories protected from "unreasonable searches" in the Fourth Amendment's text. *See* U.S. Const. amend. IV ("The right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." (emphasis added)). And at the core of the Framers' resistance to general warrants and writs of assistance was their objection to unjustified government invasions of "the privacies of life." *Riley v. California*, 573 U.S. 373, 403 (2014) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). As this Court has explained, "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property." *Boyd*, 116 U.S. at 630. The Framers thus wrote the Fourth Amendment to protect against "the invasion of this sacred right." *Id.*

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 the widespread insecurity and invasions of privacy inflicted on Black Americans in the Reconstruction-era South. After the war, white Southerners, including police officers, militias, and armed vigilantes, used a fear of insurrection by formerly enslaved people as an excuse to break into their most private spaces and search and seize without justification or explanation. *See* Dan T. Carter, *The Anatomy of Fear: The Christmas Day Insurrection Scare 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 ransacked homes and brutally raped Black women with impunity. *Memphis Riots and Massacres*, H.R. Rep. No. 39-101, at 13-15 (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)).

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). 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) (arguing that 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) (Rep. Shellabarger).

Essential to the remedial goals of Section 1983 was the principle that exceptions to liability would be construed narrowly. The Congress that enacted Section 1983 insisted that "whoever interferes with the rights and immunities granted to the citizen by the Constitution of the United States, though it may be done under State law or State regulation, shall not be exempt from responsibility to the party injured when he brings suit for redress either at law or in equity." *Id.* at App. 310 (Rep. Maynard). 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 v. LaHue*, 460 U.S. 325, 361 (1983) (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 Eliminate or 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 clarify that out-of-circuit, factually analogous precedent is sufficient to render a constitutional violation "clearly established" because it gives a government official "fair warning that [the official's] conduct violated the Constitution." *Hope*, 536 U.S. at 741. Similarly, the Court could reaffirm that a constitutional right may be "clearly established" even in the *absence* of factually analogous precedent where a government official's conduct is "particularly egregious," *Taylor*, 141 S. Ct. at 54, and reject the Ninth Circuit's suggestion that it is essentially impossible to meet that standard in Fourth Amendment cases—especially where, as here, the officers were not engaged in the sort of split-second decision-making inherent in a street encounter. *Compare Missouri v. McNeely*, 569 U.S. 141, 158 (2013) (explaining the need to judge certain police actions "based on fact-intensive, totality of the circumstances analyses . . . in situations that are more likely to require police officers to make difficult split-second judgments"), *with* Pet. App. 4a-7a (describing how Cates was in the custody and control of

Emling and Laurian throughout the entirety of the encounter and never posed a threat to the officers or anyone else).

A simple reiteration of those principles would be sufficient to resolve this petition. The egregiously unconstitutional conduct of the officers, combined with uncontroverted authority from three other circuits holding that strip-searching a prison visitor without offering the visitor the option to leave the prison is unconstitutional, leads to the inescapable conclusion that the Respondents are not entitled to qualified immunity.

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 officers and their government employers from accountability for constitutional violations, qualified immunity

eviscerates the purpose of Section 1983—no one is held accountable.

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 a string of prominent eighteenth-century English cases awarding damages for improper government searches and 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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