No. 21-806

In the Supreme Court of the United States

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, *ET AL.*,

Petitioners,

v.

IVANKA TALEVSKI, PERSONAL REPRESENTATIVE OF THE ESTATE OF GORGI TALEVSKI, DECEASED,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF FOR THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether this Court should overrule a half-century of precedent that has consistently interpreted § 1983 as capable of securing "rights" under "laws" enacted pursuant to the Spending Clause.

2. Whether the Federal Nursing Home Reform Act's rights against chemical restraint and improper discharge and transfer are federal rights that § 1983 protects.

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice is a nonprofit public interest law center committed to defending the essential foundations of a free society by securing greater protection for individual liberty. Central to that mission is promoting accountability to the Constitution for government officials and state actors. To accomplish that, the Institute for Justice launched its Project on Immunity and Accountability, which is devoted to a simple idea: If we the people must follow the law, our government must follow the Constitution. Section 1983 is the best, most reliable way to sue individual government officials for violating constitutional rights. But immunity doctrines, such as qualified immunity, let the government avoid constitutional accountability. These immunity doctrines are not rooted in the text of Section 1983, but rather in common-law principles or policy decisions.

Similarly, Petitioners ask the Court to further narrow the reach of Section 1983 by grafting even more common-law doctrines onto the statute. The Institute for Justice, however, is dedicated to restoring a textualist approach to Section 1983, including an understanding of the 42d Congress's decision to abrogate the common law from the statute. This would restore the original intent of Section 1983 and hold state officials liable whenever they violated someone's constitutional rights, even if the common law said their

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae or its counsel made a monetary contribution to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioners and Respondent filed letters granting blanket consent to the filing of amicus briefs. *See* Sup. Ct. R. 37.3(a).

conduct was okay. As a result, the Court should base its decision on the text of Section 1983, not on the common law. But that said, the Institute for Justice has no view on whether the relevant sections of the Federal Nursing Home Reform Act create "rights" enforceable under Section 1983.

SUMMARY OF THE ARGUMENT

Since the Founding, two sources of law have shaped the rights and remedies of Americans: statutes and the common law. Along with the Constitution, both remain critical centerpieces in our legal system today. But when Congress decides to enact a new statute, it has a choice to make about the common law. It can either incorporate common-law principles into the statute, or it can abrogate them. That choice is left solely for Congress to make. For the Court then, it must evaluate what path Congress ultimately chose. And to make that determination, the Court starts in a familiar place: with the text of the statute.

That statute here is Section 1983. Petitioners argue that, when passing the Ku Klux Klan Act of 1871 (now 42 U.S.C. § 1983), Congress decided to incorporate the common law. As a result, Petitioners say, common-law contract principles block Respondent's Section 1983 claims, which stem from various nursing home abuses. But before the Court can get there, it must first decide the important threshold question: whether Section 1983 incorporated (or abrogated) common-law principles.

The 42d Congress, responsible for enacting Section 1983 in 1871, made its decision about the

common law clear.[2] The 42d Congress guaranteed that Section 1983 would hold state officials liable "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13. The Court has never interpreted this Notwithstanding Clause. But as the 42d Congress would have understood it, "custom or usage" meant the common law. And "notwithstanding" meant "in spite of" or "without prevention." Combined then, when passed in 1871, the common law did not prevent Section 1983 from applying. The 42d Congress had a choice to make—and it decided to abrogate the common law from Section 1983 by including the Notwithstanding Clause.

A few years later, the Notwithstanding Clause was dropped from Section 1983 in the Revised Statutes of 1874. But this omission did not alter the 42d Congress's decision to abrogate the common law. We know this for a few reasons. To start, the Revised Statutes were not designed to make substantive changes to the law. Rather, the Revised Statutes were just a compilation—putting all existing federal laws in the same place for the first time. In doing so, the 43d Congress simply meant to consolidate, organize, and condense existing laws, not change them. But the 43d Congress also understood the practical realities it faced when undertaking such a massive compilation.

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[2] Section 1983 has had many homes. It was originally located in the U.S. Statutes at Large of 1871–1873, ch. 22, § 1, 17 Stat. 13. It then moved to Section 1979 of the U.S. Revised Statutes (1878), then again to 8 U.S.C. § 43 (1925), and finally to 42 U.S.C. § 1983 (1952). This brief uses "Section 1983" to include this entire history.

It knew that *some* changes to the text were necessary. After all, it would have been impossible to "condense seventeen volumes into one and use precisely the same words that have been used in those seventeen." 2 Cong. Rec. 646, 1210 (1874). And so, when the Revised Statutes omitted a phrase, like it did here, that omission was just an effort "to strike out the obsolete parts and to condense and consolidate." 2 Cong. Rec. 129 (1873). Such an omission did not, however, substantively change the law.

This result tracks the Court's approach of evaluating an editorial change by the Revisors when codifying the Statutes at Large into the Revised Code. When the Revisors change a statute, such as rearranging words, the Court looks back at the original text to understand Congress's initial, intended meaning. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 101, 170 (forthcoming), available at https://tinyurl.com/QI-Flawed-Fnd; *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). This approach is especially helpful when the Revisors' editorial decision creates some ambiguity in the statute.

That approach is helpful here. The Revised Statutes from 1874 are silent about the common law. But the 1871 version from the Statutes at Large, which includes the Notwithstanding Clause, reveals that the 42d Congress already chose to abrogate the common law. As a result, the original text of the Notwithstanding Clause resolves any ambiguity or confusion about the common law and Section 1983.

With that starting point, the Court's presumption against implicit statutory changes preserves the 42d Congress's decision about the common law even when the Notwithstanding Clause was dropped from Section 1983 a few years later. When Congress wants to repeal or change some part of a statute, it must do so with "clear and manifest" intent. *See Watt v. Alaska*, 451 U.S. 259, 266–67 (1981). This preserves both the original intent of the statute and concerns about separation of powers—tasking Congress, not the courts, with making explicit any decision to pull a policy U-turn. So just as the 42d Congress needed to make clear its decision to abrogate the common law, which it did by including the Notwithstanding Clause, the 43d Congress needed to do the same thing before the opposite could occur (and the common law could become incorporated back into Section 1983).

But that never happened. The Revised Statutes did not mention the common law. Nor did they include any language indicating that the 43d Congress was reneging on its predecessor's decision to abrogate the common law. It makes sense, then, that this Court has already viewed the omission of two other Notwithstanding Clauses from other civil rights statutes as non-substantive changes to the law. *See United States v. Price*, 383 U.S. 787, 803 (1966); *The Civil Rights Cases*, 109 U.S. 3, 16–17 (1883). In the end, the 42d Congress decided to abrogate the common law when it passed Section 1983. And when the next Congress compiled the Statutes at Large into the Revised Statutes, that did not change.

For their part, Petitioners ignore the text of Section 1983 completely. Instead, they rely exclusively on

case law that "presume[d]" that the 42d Congress wanted the common law to apply. Pet. Br. at 12. But in no case Petitioners cite (nor in any case) has this Court actually evaluated the 42d Congress's decision to include the Notwithstanding Clause.[3] Rather, it has let non-textual, public-policy concerns shape the incorporation of common-law principles. But now, the Court should seize this case for what it is—an opportunity to reclaim Section 1983's textualism—and apply, for the first time, the Notwithstanding Clause and the 42d Congress's decision to abrogate the common law.

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[3] Petitioners are also wrong in how they frame this case. From the start of their brief, Petitioners try to paint this case as an opportunity for the Court to reign-in what they call "judicially implied private rights of action." Pet. Br. at 2. Indeed, again and again, Petitioners say that allowing the federal rights at issue to be enforced through Section 1983 would amount to "bypass[ing] the legislative process" altogether. *Id.* at 23–26, 29, 35. Setting aside whether this "particular statutory provision gives rise to a federal right," *Blessing v. Freestone*, 520 U.S. 329, 340 (1997), something the Institute for Justice takes no position on, Petitioners are simply wrong about their characterization of this case. There is nothing "implied" about a cause of action under Section 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) ("Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes."); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (explaining how Section 1983 "provides a federal remedy" for damages).

ARGUMENT

When Congress passes new legislation, it "does not write upon a clean slate." *United States v. Texas*, 507 U.S. 529, 534 (1993). Rather, it legislates against a backdrop of established "common-law principle[s]." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). So when Congress decides to craft a new law, it has a choice to make about the common law. Congress can pass legislation that either (a) retains "long-established and familiar principles" in the common law, or (b) invalidates the common law altogether (or in part). *Texas*, 507 U.S. at 534. Courts assume that Congress chose the former (and kept the common law) unless it says otherwise in the text of the statute. *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35–36 (1983) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812)). It is thus the statutory text that decides whether common-law principles survive and apply to any particular statute.

I. The original text of Section 1983 reveals that the 42d Congress abrogated common-law principles.

The 42d Congress passed Section 1983 in 1871. The original text of the statute was longer than its contemporary counterpart. Rather than having just two relevant clauses, the original text had three. The first and the third clauses are largely the same today as they were in 1871:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress[.]

Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871). This language is all too familiar. *Cf.* 42 U.S.C. § 1983 (1996). It creates a "mechanism for enforcing individual rights" against state and local government officials. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002); *see also Maine v. Thiboutot*, 448 U.S. 1, 5 (1980).

The original statute, however, contained "additional significant text" where the ellipsis appears above—"[i]n between the words 'shall' and 'be liable.'" Reinert, 111 Calif. L. Rev. at 166–67. There, the original second clause of Section 1983 was located. It said that government officials "shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable" under the statute. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added).

The Court has never interpreted what this "Notwithstanding Clause" means, which reveals the 42d Congress's decision about the common law. So if the Court really wants to know, "Did Congress by the . . .

language of its 1871 statute mean to overturn the tradition of [the common law]," *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), it should look to the actual language used by the 42d Congress in 1871—including the Notwithstanding Clause. This will help the Court answer the threshold question here—and set the baseline for whether Section 1983 incorporated the common law. To accomplish that, the Court should look to the "ordinary public meaning" of the Notwithstanding Clause "at the time of its enactment." *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). This means the Court needs to evaluate two key phrases: (1) "custom[ ] or usage of the State," and (2) "to the contrary notwithstanding."

1. Start with "custom[ ] or usage of the State." As understood by the 42d Congress, a "usage or custom" was the common law itself. *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 437 (1838). More specifically, this Court defined "usage" to mean "that which has arisen from those things which a man says and does, and is of long continuance, and without interruption." *Id.* at 445. And "custom" was understood to mean "the law or rule which is not written, and which men have used for a long time, supporting themselves by it in the things and reasons with respect to which they have exercised it." *Id.* at 445–46. These terms, however, were "often used synonymously." *Eames v. H.B. Claflin Co.*, 239 F. 631, 634 (2d Cir. 1917); *Walls v. Bailey*, 49 N.Y. 464, 472 (1872) ("But the words custom and usage are often used in the books as convertible terms.").

But whether a rule was established by "usage" or through "custom," it existed by "a common right, which means a right by common law." *Strother*, 37

U.S. at 437. Put more simply, "[a] general custom is the common law itself, or a part of it." *Walls*, 49 N.Y. at 471; Am. Dictionary of the English Language (Webster's 1828) (defining the "unwritten or common law" as "a rule of action which derives its authority from long usage, or established custom . . . ."); Complete Dictionary of the English Language 757 (Webster's 1886) (same). And when a custom or usage was "of so long continuance, so well established, so notorious, so universal and so reasonable in itself," *Walls*, 49 N.Y. at 472–73, it became the common law, meaning that "a party would not be heard to say that he was ignorant of the custom" or "usages." *Id.* at 471–72, 476. This was true for each state. "The judicial decisions, the usages and customs of the respective states" established the "common law . . . in each [state]." *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659 (1834). Applied to contracts, for example, established customs and usages were "universally understood" to be automatically part of the contract unless the parties said otherwise. *Walls*, 49 N.Y. at 472.

The legislative history of Section 1983 confirms this common understanding of "custom and usage" from 1871. For example, "Senator Thurman, speaking in opposition to Section 1 of the 1871 Act (what is now Section 1983), clearly understood that 'custom or usage' was equivalent to 'common law.'" Reinert, 111 Calif. L. Rev. at 167. In fact, while expressing his concern over "how comprehensive [the statute's] language is," Senator Thurman was alarmed that an official could be liable for any "deprivation under color of law," which, in his words, included any "'custom or usage' which has become common law." Cong. Globe, 42d

Cong., 1st Sess., App. 217 (1871). So Senator Thurman, just like this Court and other courts in the nineteenth century, understood that when the 42d Congress used the phrase "custom[ ] or usage of the State," it meant the common law of each state.

2. The original text of Section 1983 also said that officials will be liable for constitutional violations "notwithstanding" any "contrary" common-law principles. The ordinary public meaning of "notwithstanding" remains that same today as it did for the 42d Congress in 1871. *See* Bryan A. Garner, *Garner's Modern English Usage* 635 (4th ed. 2016) ("This usage [of notwithstanding] has been constant from the 1300s to the present day.").

"Notwithstanding" means "[w]ithout opposition, prevention, or obstruction from," or "in spite of." Complete Dictionary of the English Language 894 (Webster's 1886); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (explaining that the ordinary meaning of "notwithstanding" is "in spite of" or "without prevention or obstruction from or by"). Many contemporaneous dictionaries confirm this meaning. *See, e.g.*, Etymological Dictionary of the English Language 344 (Chambers's 1874) ("*not standing against* or opposing; nevertheless."); 2 A New Dictionary of the English Language 1351 (1837) ("*Not* opposing, resisting, hindering, preventing."). As a result, the Notwithstanding Clause means that the common law does not prevent Section 1983 from applying.

Two popular dictionary examples from the relevant era bear this out. "It is a rainy day, but *notwithstanding* that, the troops must be reviewed; that is,

the rainy day not opposing or preventing." Complete Dictionary of the English Language 894 (Webster's 1886); Am. Dictionary of the English Language (Webster's 1828) (same). So just like the rain did not prevent evaluation of the troops, the common law does not prevent liability under Section 1983.

The second historical example confirms this meaning: "Those on whom Christ bestowed miraculous cures were so transported that their gratitude made them, *notwithstanding* his prohibition, proclaim the wonders he had done for them." Complete Dictionary of the English Language 894 (Webster's 1886); Am. Dictionary of the English Language (Webster's 1828) (same). In other words, Christ's proscription did not prevent his followers from talking about his miracles. Likewise, the common law does not prevent liability under Section 1983.

In sum, the 42d Congress spoke directly about the common law when it enacted Section 1983. It said that the statute would apply "any such . . . custom[ ] or usage of the State to the contrary notwithstanding." This means that, as originally enacted, Section 1983 applied despite common-law principles. Reinert, 111 Calif. L. Rev. at 166–67 ("Its implications are unambiguous: state law immunity doctrine, however framed, has no place in Section 1983."). As a starting point, then, the 42d Congress abrogated common-law principles from Section 1983.

II. The removal of the Notwithstanding Clause in 1874 did not change Section 1983's abrogation of the common law.

Just a few years after passing the Civil Rights Act of 1871, Congress compiled the Revised Statutes of 1874. Before the Revised Statutes, the country lacked an official compilation of federal laws. So lawyers often found themselves relying on newspapers or private compilations to even know what the law was. Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1008–09 (1938). To address this, "President Andrew Johnson appointed a commission to revise, simplify, arrange, and consolidate all statutes of the United States." Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. Library J. 213, 218 (2020) (internal quotation marks omitted). At its core, this compilation was organizational in design—just putting all existing federal laws in the same place for the first time.

1. But after six years of trying, Congress wasn't satisfied with the results. Dwan & Feidler, 22 Minn. L. Rev. at 1013. It was concerned that the commission had made some changes to existing law, which would trigger debate on the House and Senate floors. 2 Cong. Rec. 646, 648 (1874). If that happened, such an endless debate would have been "utterly impossible" given the sheer size of the Revised Statutes. *Id.* So congress hired Thomas Jefferson Durant, a D.C. lawyer not involved in the initial drafting, to comb through the proposed revisions. *Id.* at 646.

Congress tasked Durant to strike out any provision that substantively changed the law, but to keep "mere changes of phraseology not affecting the meaning of the law." *Id.* at 646, 648. For the latter, Congress understood that *some* changes had to be made. After all, it would be impossible to "condense seventeen volumes into one and use precisely the same words that have been used in those seventeen." *Id.* at 1210 (remarks of Rep. Poland); *see also id.* at 650 (remarks of Rep. Lawrence) (same). This meant that some language would be "necessarily changed." *Id.* But that said, Congress intended "to preserve absolute identity of meaning" in the law. 2 Cong. Rec. 4220 (1874) (Sen. Conkling). Indeed, as one representative stressed, "We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense." 2 Cong. Rec. 129 (1873). Rather, when a change was made, that change, "however minute," was simply meant to miniaturize and condense the law. 2 Cong. Rec. 4220 (1874). This was true for omissions, too, which the 43d Congress viewed as a necessary tool "to strike out the obsolete parts and to condense and consolidate." 2 Cong. Rec. 129 (1873). Such an omission did not, however, substantively change the law. As a result, the omission of the Notwithstanding Clause in 1874 did not alter the 42d Congress's original decision to abrogate the common law from Section 1983.

2. This result fits neatly with the Court's approach of comparing a subsequent version of the Revised Code (as codified) to the original version in the Statutes at Large. While "the Revised Statutes can be taken . . . as 'prima facie' evidence of the law," that

evidence "can be rebutted by pointing to the originally enacted version."[4] Reinert, 111 Calif. L. Rev. at 170; *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (same). For example, when Revisors make a "change of arrangement" in a statute, that change does not substantively alter the statute. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). That is because, when Congress decides to "revis[e] and consolidat[e] the laws," it does not change the effect of the law unless Congress explicitly says so. *Id.* Thus, when the Revisors make an editorial decision about a statute that results in some ambiguity, the Court looks back at the original text to understand and apply the statute's intended meaning.

So here, if there were any doubt about Congress's decision about the common law and Section 1983, the original text resolves it. Even though the Revised Statutes were silent about the common law in 1874, the original text from 1871 shows that the 42d Congress already abrogated the common law. And by dropping the Notwithstanding Clause without also adding explicit language to incorporate the common law back into Section 1983, the 43d Congress left its predecessor's decision undisturbed.

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[4] While this rule does not technically apply because the 43d Congress passed the Revised Statutes as positive law, the rule remains a powerful and fitting tool here. *See* Reinert, 111 Calif. L. Rev. at 170–71. This is especially true because the Revised Statutes were still derived from editorial decisions from Revisors to consolidate, organize, and simplify the Statutes at Large—not the normal legislative process through Congress. *See* pp. 13–14, *supra*.

3. This approach matches the Court's presumption against implicit statutory changes. When Congress wants to repeal or change some part of a statute, it must do so with "clear and manifest" intent. *See Watt v. Alaska*, 451 U.S. 259, 266–67 (1981). This preserves both the original intent of a statute and concerns about separation of powers—tasking Congress, not the courts, to make explicit any decision to reverse policy. This is especially true when it comes to a statute's relationship with the common law. If a statute changes the state of the common law, Congress must "effect the change with clarity." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012). Indeed, to change either the common law or a statute, "the alteration of prior law must be clear." *Id.* So just like the 42d Congress needed to make explicit its decision to abrogate the common law, which it did by including the Notwithstanding Clause, the 43d Congress needed to do the same thing before the opposite occurred. In other words, to incorporate the common law back into Section 1983, the Revised Statues would have needed to include some form of positive text about the common law. *See* Reinert, 111 Calif. L. Rev. at 169–71 (explaining that the removal of the Notwithstanding Clause was "not the product of any positive lawmaking").

But that addition to the text never happened. The Revised Statutes did not mention the common law. Nor did the 43d Congress include language indicating that it was reversing the 42 Congress's decision to excise the common law from Section 1983. It makes sense, then, that this Court has already viewed the

omission of two other Notwithstanding Clauses from other civil rights statutes as non-substantive changes to the law. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968); *The Civil Rights Cases*, 109 U.S. 3, 16–17 (1883). In *Jones*, for example, this Court viewed the omission of another Notwithstanding Clause—in Section 1982—as a non-substantive change. 392 U.S. at 422 n.29. The Court recognized that the Notwithstanding Clause was "obviously inserted" to "emphasiz[e] the supremacy of the 1866 statute over inconsistent state or local laws." *Id.* And later, when "[i]t was deleted" in the Revised Statutes, the Court presumed the omission was just a decision to remove perceived "surplusage." *Id.*

The same was true in *The Civil Rights Cases*, 109 U.S. at 16–17. While addressing the constitutionality of the Civil Rights Act, the Court recognized that the Notwithstanding Clause in the original text was "a very important clause," *id.* at 16, for it was this Clause that negated contradictory state laws. *Id.* But despite its omission in the Revised Statutes, the Court said that the character of the statute endured. *Id.* at 16–17. And just like in *Jones*, the Revised Statutes included no additional language that somehow revived contradictory state laws over the Civil Rights Act. So even though the underlying holding in *The Civil Rights Cases* is, at best, questionable, *see, e.g.*, *Jones*, 392 U.S. at 438–39, its analysis about the omission of a similar Notwithstanding Clause, which *Jones* agreed with, holds true.

This reasoning applies with equal force here. Because Section 1983 originally contained the Notwithstanding Clause, it nullified any contradictory

common law. And when the Revised Statutes dropped this language without adding other language about the common law, the 43d Congress did not somehow flip the common law from a position of abrogation to incorporation. Rather, this omission was likely a stylistic choice in favor of concise language or removing "surplusage." *See* Reinert, 111 Calif. L. Rev. at 169–171 (explaining that the Revised Statutes removed the Notwithstanding Clause "for unclear reasons," but that the "originally enacted version" controls). But whatever the reason, it cannot change the fact that the 42d Congress decided to abrogate the common law when it passed Section 1983. And when the next Congress compiled the Revised Statutes, that did not change.

III. Petitioners, like this Court, incorrectly "presume" that the 42d Congress intended to incorporate common-law principles.

Petitioners start with the correct rule. Although "[t]he Court presumes 'that members of the 42d Congress were familiar with common-law principles, . . . and that they likely intended these common-law principles to obtain," Petitioners concede that this presumption applies only "absent specific provisions to the contrary.'" Pet. Br. 12 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989)). The next step, then, is to look at the text of Section 1983 and determine whether any specific provisions addressed the common law.

But Petitioners never examine (or even mention) the text of Section 1983 when addressing the common law. Instead, they just stack one presumption on top

of another—Petitioners *presume* that the common-law *presumption* applies to Section 1983. Pet. Br. 12. Petitioners then string-cite dated cases to argue that the Court has already determined that Section 1983 did, in fact, preserve the common law. Pet. Br. 12 ("[T]he Court has repeatedly construed the reach of Section 1983 in accordance with the common law as it existed in 1871, when Section 1983 was enacted, and 1874, when it was amended.") (citing five cases from this Court).

But in none of those cases (or in any case) did the Court address the effect of the Notwithstanding Clause or the 42d Congress's decision to abrogate the common law. Rather, the Court has largely assumed—for policy reasons—that the 42d Congress would have likely wanted the common law to survive. But that approach departs from the Court's modern approach to statutory interpretation. As a result, the Court should correct its policy-driven decisions of the past and, for the first time, look at the 42d Congress's decision to abrogate the common law from Section 1983 by including the Notwithstanding Clause.

1. Start with the Court's decision in *Tenney v. Brandhove*, 341 U.S. 367 (1951). There, a state legislature raised absolute immunity as a defense to Section 1983 claims related to legislative activity. As a textual matter, of course, state legislators are not excluded from Section 1983's reach. *See Pierson v. Ray*, 386 U.S. 547, 563 (1967) (Douglas, J., dissenting) (explaining that Section 1983 applies to "any person" without exception). So to create absolute immunity for legislators, the Court applied common-law principles. *Tenney*, 341 U.S. at 372–76 (recognizing that the

"presuppositions of our political history" would not impose liability on legislative activity). To get there, the Court did start with the correct threshold question: "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom . . . ?" *Id.* at 376.

But to answer that question, the Court never looked at the original text of Section 1983 from 1871—it just recited the Revised Statutes from 1874. *Id.* at 369. As a result, the Court didn't have the full picture in front of it. This caused the Court to miss the Notwithstanding Clause altogether. And without the benefit of that text, the Court explained that it "cannot believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Id.* at 376. But that conclusion—about what the 42d Congress intended to do—did not evaluate the actual words that the 42d Congress used. Nor did it evaluate the effect of the Notwithstanding Clause.

2. The same is true for *Pierson v. Ray*, 386 U.S. 547 (1967), the seminal case that imported the common-law "defense of good faith and probable cause" into Section 1983, which has now warped into the modern doctrine of qualified immunity. *See* Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How* Tanzin v. Tanvir*,* Taylor v. Riojas*, and* McCoy v. Alamu *Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. Crim. L. & Criminology 105, 121–25 (2022). In *Pierson*, a group of anti-segregationist ministers were arrested under a statute later declared unconstitutional. 386 U.S. at 550–51. Once cleared, the

ministers sued the responsible police officers and a local judge under Section 1983 for false arrest and imprisonment. *Id.*

This Court took the case to decide whether any form of common-law immunity applied to protect the government officials. *Id.* at 551–52. For the judge, the Court applied absolute judicial immunity, which it called a "settled principle of law." *Id.* at 553–54. And for the officers, the Court imported a good-faith defense from "the common law of Mississippi" that historically applied to "the common-law action for false arrest and imprisonment." *Id.* at 555–57. But when the Court addressed the threshold question of whether these common-law principles survived the passage of Section 1983 (which, again, does not contain these immunities textually), the Court failed to look at the statute itself. Rather, it looked to "[t]he legislative record," which it thought gave "no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. So *Pierson*, just like *Tenney*, is not helpful in answering the threshold question here. Even worse, *Pierson* did not look at any statutory text—much less the Notwithstanding Clause—before it applied the common law.

3. A few years later, in *Imbler v. Pachtman*, the Court dropped any pretense that it was engaging in statutory interpretation when grafting the common law onto Section 1983. 424 U.S. 409, 417–27 (1976). This time, the Court admitted that Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Id.* at 417. But the Court did not stay with the statutory text to see whether the common law applied. Rather, it extended absolute judicial

immunity to prosecutors because, according to the Court, "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." *Id.* at 424. In other words, the Court let policy—not the text—drive its decision. For example, the Court said prosecutorial immunity was needed to avoid "harassment by unfounded litigation" that, in its view, would "cause a deflection of the prosecutor's energies from his public duties." *Id.* at 423–24. And the Court openly balanced the interests of prosecutors against the individuals whose constitutional rights they violated—picking the former over the latter. *Id.* at 427 ("To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest."). Put simply, *Imbler's* reasoning directly contradicts the Court's modern statutory approach and usurps Congress's job "to make policy judgments." *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012).

The Court also acted as a policymaking body in *Harlow v. Fitzgerald* to craft qualified immunity. 457 U.S. 800 (1982). In *Harlow*, the Court was upfront that it was creating a form of non-textual immunity after weighing the "competing values" at play, such as the relevant "social costs" and the "dampen[ing]" of enthusiasm for public officials if they faced unqualified liability. *Id.* at 814–15. Even worse, this form of qualified immunity was not even rooted in the common law. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871

(2017) (Thomas, J., concurring in part). This shows the dangers of straying so far from the statutory text—judges are left guessing (or fighting over) whether "policy" justifies immunity "and to what degree." Jaicomo & Bidwell, 112 J. Crim. L. & Criminology at 125 n.136 (collecting examples).

4. The trend of ignoring the text of Section 1983 continued in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). In *Buckley*, prosecutors made false statements and fabricated evidence to get an indictment. *Id.* at 261–62. The prosecutors raised absolute immunity as a defense. The Court, like it did in *Imbler*, conceded that "Section 1983, on its face admits no defense of official immunity," but it still held that common-law immunities could apply. *Id.* at 268. In doing so, the Court returned to its presumption that "[c]ertain immunities were so well established in 1871" that "Congress would have specifically . . . provided had it wished to abolish them." *Id.* (quoting *Pierson*, 386 U.S. at 554–55 (internal quotation marks omitted)). But again, just like *Pierson*, the Court made that assumption without ever looking at the text of Section 1983 or evaluating the effect of the Notwithstanding Clause. *See Buckley*, 509 U.S. at 270 n.4 (returning to the policy considerations in *Imbler*, 424 U.S. at 424–25). So *Buckley*, just like all the Court's previous cases, is not helpful in answering the threshold question here.

5. More recently, the Court has simply relied on its assumption about the common law without ever looking back at the statute. As a result, the threshold question is now usually skipped over. For example, in *Nieves v. Bartlett*, it was uncontested whether the

common law applied: "When defining the contours of a claim under § 1983, we look to 'common-law principles that were well settled at the time of its enactment.'" 139 S. Ct. 1715, 1726 (2019) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997)). And in the case *Nieves* cited, the Court just cited back to the Court's original mistake in *Tenney*. *See Kalina*, 522 U.S. at 123. So now, the Court is stuck applying the common law under Section 1983 because it has already applied the common law under Section 1983. *See, e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) (relying on the same presumption that the 42d Congress "likely intended" for the common law to apply). But in the 70-plus years since *Tenney*, "[n]either the Court nor its scholarly critics have ever grappled with the significance of the Notwithstanding Clause." Reinert, 111 Calif. L. Rev. at 167. Thus, Petitioners' sole argument for why Section 1983 incorporated the common law—this Court's precedent—is wrong (or at least incomplete) at a bedrock level.

CONCLUSION

Congress always has a choice about the common law when it enacts a new statute: It can keep it or get rid of it. And for Section 1983, the 42d Congress made that decision clear—the Notwithstanding Clause abrogated the common law. And a few years later, when the Revised Statutes dropped this language if an effort to consolidate, compile, and simplify the Statutes at Large, that omission did not affect Section 1983's abrogation of the common law. As a result, the Court should, for the first time, evaluate the effect of the

Notwithstanding Clause (rather than just presuming that the common law from 1871 applies).

Respectfully submitted.

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September 23, 2022