No. 21-783

IN THE
Supreme Court of the United States

PATSY K. COPE; ALEX ISBELL, as Dependent Administrator of, and on behalf of, Estate of DERREK QUINTON GENE MONROE, and his heirs at law,
Petitioners,

v.

LESLIE W. COGDILL; MARY JO BRIXEY; JESSIE W. LAWS,
Respondents.

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

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

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
BRIAN R. FRAZELLE
CHARLOTTE SCHWARTZ
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org
Counsel for Amicus Curiae

December 22, 2021 * Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	9
I. Qualified Immunity Is at Odds with the Text and History of Section 1983	9
II. This Court Should Eliminate or Reform Qualified Immunity by Returning to Statutory Interpretation and the Common Law Backdrop of Section 1983	16
CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 15

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 9

Baker v. McCollan,
443 U.S. 137 (1979) 13

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

Bradley v. Fisher,
80 U.S. 335 (1871) 10

Bromage v. Prosser,
4 B. & C. 247 (1825) 19

Buckley v. Fitzsimmons,
509 U.S. 259 (1993) 7, 9, 10

Burns v. Reed,
500 U.S. 478 (1991) 10, 15

Butz v. Economou,
438 U.S. 478 (1978) 13, 14

Chickasaw Nation v. United States,
534 U.S. 84 (2001) 7, 9

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

TABLE OF AUTHORITIES – cont'd

Page(s)

Converse v. City of Kemah,
961 F.3d 771 (5th Cir. 2020) 4

Crawford-El v. Britton,
523 U.S. 574 (1998) 13, 15, 16

Dinsman v. Wilkes,
53 U.S. 390 (1851) 18, 19

Dynes v. Hoover,
61 U.S. 65 (1857) 18

Ely v. Thompson,
10 Ky. 70 (1820) 11

Frasier v. Evans,
992 F.3d 1003 (10th Cir. 2021) 18

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 15

Hernandez v. Mesa,
140 S. Ct. 735 (2020) 15

Hope v. Pelzer,
536 U.S. 730 (2002) 6, 17

Isbrandtsen Co. v. Johnson,
343 U.S. 779 (1952) 9

Jacobs v. Feliciana Sheriff's Dep't,
228 F.3d 388 (5th Cir. 2000) 4

Kalina v. Fletcher,
522 U.S. 118 (1997) 13

TABLE OF AUTHORITIES – cont'd

Page(s)

Kendall v. Stokes,
44 U.S. 87 (1845) 19

Little v. Barreme,
6 U.S. 170 (1804) 18

Malley v. Briggs,
475 U.S. 335 (1986) 5, 10

McDonald v. City of Chicago,
561 U.S. 742 (2010) 7

McNeese v. Bd. of Educ.,
373 U.S. 668 (1963) 13

Mitchum v. Foster,
407 U.S. 225 (1972) 8, 13

Mohamad v. Palestinian Auth.,
566 U.S. 449 (2012) 9

Mullenix v. Luna,
577 U.S. 7 (2015) 5

Murray v. The Charming Betsy,
6 U.S. 64 (1804) 18

Otis v. Watkins,
13 U.S. 339 (1815) 19

Pierson v. Ray,
386 U.S. 547 (1967) 10, 11, 12

Rehberg v. Paulk,
566 U.S. 356 (2012) 13

TABLE OF AUTHORITIES – cont'd

Page(s)

Rico v. Ducart,
980 F.3d 1292 (9th Cir. 2020) 18

Ross v. Blake,
136 S. Ct. 1850 (2016) 9

Sands v. Knox,
7 U.S. 499 (1806) 18

Shanley v. Wells,
71 Ill. 78 (1873) 11

South v. State of Maryland for Use of Pottle,
59 U.S. 396 (1855) 19

Sumner v. Beeler,
50 Ind. 341 (1875) 11

Taylor v. Riojas,
141 S. Ct. 52 (2020) 5, 6, 16, 18

Tenney v. Brandhove,
341 U.S. 367 (1951) 9, 10

Timbs v. Indiana,
139 S. Ct. 682 (2019) 7

Tower v. Glover,
467 U.S. 914 (1984) 10, 21

Tracy v. Swartwout,
35 U.S. 80 (1836) 18, 19

Wilkes v. Dinsman,
48 U.S. 89 (1849) 19

TABLE OF AUTHORITIES – cont'd

Page(s)

Wilson v. Garcia,
471 U.S. 261 (1985) 13

Wise v. Withers,
7 U.S. 331 (1806) 18

Wyatt v. Cole,
504 U.S. 158 (1992) 12, 13, 15

Yates v. Lansing,
5 Johns. 282 (N.Y. 1810) 10

Statutes and Legislative Materials

42 U.S.C. § 1983 ..... 3, 6

Cong. Globe, 39th Cong., 1st Sess.
(1866) 7, 8

Cong. Globe, 39th Cong., 2d Sess.
(1867) 17

Cong. Globe, 42d Cong., 1st Sess.
(1871) 8, 13

Books, Articles, and Other Authorities

David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*,
86 Nw. U. L. Rev. 497 (1992) 14

TABLE OF AUTHORITIES – cont'd

Page(s)

William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 Stan. L. Rev. Online (forthcoming) 11

Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* (1889) 19

Thomas M. Cooley, *A Treatise on the Law of Torts* (1879) 19

Barry Friedman, *Unwarranted: Policing Without Permission* (2017)..... 20

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 (2010) 19

James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. Colloquy 148 (2021)..... 11

The Sentencing Project, *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* (Mar. 2018) 20

Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 Seattle U. L. Rev. 939 (2014)..... 14

TABLE OF AUTHORITIES – cont'd

Page(s)

Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987 (1983) 17

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

Petitioner Patsy Cope's son, Derrek Monroe, wrapped a thirty-inch telephone cord around his neck and hung himself in a jail cell while Respondent Jessie Laws, the lone jailer on duty, watched. Pet. App. 3a, 4a, 25a. Laws did not attempt to render aid, nor did he call 911. *Id.* at 4a. Instead, he simply called his supervisors. But by the time they arrived and emergency medical services were finally requested, it was too late, and Monroe died the next day. *Id.*

Monroe's death was both predictable and preventable. He said he wanted to kill himself when he was booked at the jail two days earlier; he attempted suicide twice the day after that; and he had been diagnosed with schizophrenia, was in emotional distress,

---

[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.

and had also tried to end his life two weeks prior. *Id.* at 2a.

Respondents were also on notice that telephone cords posed a serious risk to detainees who might attempt to commit suicide. In 2015, the Texas Commission on Jail Standards ("the Commission") circulated a memorandum warning that multiple deaths by suicide involving phone cords had occurred in Texas jails in recent months. *Id.* at 25a-26a. Based on this experience, the Commission instructed that "**ALL** phone cords be no more than twelve (12) inches in length." *Id*. at 26a.

Despite knowing about Monroe's suicide attempts and the risks posed by long phone cords, Respondents repeatedly failed to take steps, including steps required by their training and official jail policies, that could have prevented his death.

First, Respondents kept Monroe at the Coleman County Jail despite the jail's policy requiring that detainees at risk of suicide be "transferred to a facility better equipped to manage an inmate with mental disabilities." *Id.* at 26a-27a.

Second, even after Monroe twice attempted to commit suicide, Respondents placed him in the jail's only single-occupancy cell. *Id.* at 25a. This decision directly contradicted their training, which instructed that detainees at risk of suicide should not be isolated. *Id.* at 24a-25a.

Third, Respondents placed Monroe in a cell with a thirty-inch telephone cord—two-and-a-half-times longer than permitted by the Commission memorandum warning of the risks posed by long telephone cords. *Id.* at 25a.

Fourth, Respondents chose to implement jail policies virtually guaranteeing that jailers could not render aid quickly enough to detainees attempting suicide. On nights and weekends, only one jailer was placed on duty, and this jailer was not allowed to enter a cell without backup support. *Id.* at 23a. Therefore, if a detainee attempted suicide at night or on a weekend, it was impossible for the lone jailer to come to the detainee's aid. Respondents Brixey and Cogdill conceded that this policy was "just not safe." *Id.* at 24a.

Fifth, when Monroe wrapped the telephone cord around his neck and began strangling himself, Respondent Laws stood on the other side of the cell and watched, even though he had been trained to contact EMS immediately in such a situation. *Id.* at 27a-28a. For no apparent reason, Laws never called EMS. *Id.* at 28a (Laws responding "I don't know" when asked why he never called EMS). Instead, Laws called his supervisors and, with no indication as to when they might arrive at the jail, stood outside Monroe's cell and did nothing. *Id.* On the phone, Respondents Brixey and Cogdill did not instruct Laws to call 911, nor did they call 911 themselves. Only after Brixey arrived did anyone call an ambulance. *Id.* at 29a.

At every turn, Respondents failed to follow their training, official policy, and common sense. Derrek Monroe died as a result.

Monroe's mother and his estate filed this lawsuit pursuant to 42 U.S.C. § 1983, asserting that Cogdill, Laws, and Brixey violated Monroe's Fourteenth Amendment rights by consciously disregarding his known risk of suicide. *Id.* at 2a, 4a. But a divided panel of the Fifth Circuit granted qualified immunity to all Respondents.

The majority acknowledged that binding precedent established pretrial detainees' Fourteenth Amendment due process right to adequate medical care, including the right to be protected from a known risk of suicide. *Id.* at 10a. It agreed that "[c]alling for emergency assistance was a precaution that Laws knew he should have taken," and that failing to do so was "an effective disregard for the risk to Monroe's life." *Id.* at 16a. Accordingly, the court held that Laws violated Monroe's constitutional rights by acting with deliberate indifference. Nevertheless, the court ruled that Laws was entitled to qualified immunity: while existing precedent held that doing nothing in response to a detainee's dire medical needs was unconstitutional, that "case law . . . was not so clearly on point," the court reasoned, because Laws had done something—he had called his supervisors. *Id.* at 17a.

Fifth Circuit precedent also clearly establishes that officers who place a detainee "exhibit[ing] a serious risk of suicide" in conditions that the officers know "to be obviously inadequate" are not entitled to qualified immunity. *Jacobs v. Feliciana Sheriff's Dep't*, 228 F.3d 388, 397 (5th Cir. 2000); *see Converse v. City of Kemah*, 961 F.3d 771, 778 (5th Cir. 2020) (denying qualified immunity to officers who knew the detainee was "at a substantial risk of committing suicide and had a means of doing so"). But the court concluded that those precedents were not applicable because they concerned detainees who committed suicide using "bedding." Pet. App. 19a (quotation marks omitted). In the court's view, "[t]he danger posed by the phone cord was not as obvious," and therefore Brixey and Cogdill were entitled to qualified immunity for their decision to place Monroe in a cell with a thirty-inch phone cord. *Id.* at 19a-20a. The court also held that Brixey and Cogdill were entitled to qualified immunity for their

decision to maintain a staffing policy that even they admitted was "just not safe," *id.* at 24a, because no prior case established that "jailers must deviate from the typical staffing procedures if they believe that a detainee is a suicide risk," *id.* at 21a-22a.

Finally, the court acknowledged this Court's admonition in *Taylor v. Riojas* that courts need not identify closely analogous case law where the constitutional violation is "obvious," *id.* at 9a-10a (quoting *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam)), but distinguished *Taylor* on the ground that it presented a more extreme set of circumstances. Pet. App. 9a-10a. The dissent faulted the majority for distinguishing *Taylor* in this way, noting that it "repeats the very same analytical error [the Fifth Circuit] made in *Taylor* and which the Supreme Court found necessary to correct." *Id.* at 41a. As the dissent explained, the court should not have focused exclusively on whether the facts are analogous and instead should have asked "whether the violation was so obvious that any reasonable officer should have realized that their conduct offended the Constitution." *Id.* (quotation marks omitted). The answer to that question is plainly yes.

Indeed, this case shows just how high the barrier to recovery for constitutional violations by state actors has become. 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*, 577 U.S. 7, 11 (2015) (quotation marks omitted). That standard is meant to immunize "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). But as this case illustrates, federal courts of appeals frequently apply this standard in a

manner that immunizes "the plainly incompetent," *id.*, creating a nearly impenetrable barrier to liability.

Although the court below recognized that Laws acted with deliberate difference to Monroe's known risk of suicide in violation of the Fourteenth Amendment, it ruled that because the precise ligature Monroe used was different from that described in previous case law concerning detainee suicides, Respondents could not be held liable for their role in Monroe's death. Pet. App. at 19a-20a. Under this reasoning, when a prisoner dies by suicide, there must be binding precedent involving the precise tool used by the prisoner before jail officials can be held accountable for their "unreasonable" actions that "effective[ly] disregard" the lives of detainees in their custody. *Id.* at 16a.

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*, 141 S. Ct. at 53-54 (holding that where "no reasonable correctional officer" could have believed that the officer's conduct was constitutionally permissible, the absence of factually identical 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 analysis of the court below 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 Fourteenth Amendment to prohibit and that Section 1983 was meant to deter.

When Southern states refused to respect constitutional protections after the Civil War, a new generation of Framers "fundamentally altered our country's federal system," *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010)), crafting the Fourteenth Amendment to compel state officers "at all times to respect [the] great fundamental guarantees" of the Bill of Rights, Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), and to impose sweeping new guarantees of equal protection and due process of law.

Section 1983, originally part of the Civil Rights Act of 1871, reflects Congress's commitment to the promise of the Fourteenth Amendment. Once it became clear that, notwithstanding that Amendment, 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).

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. 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).

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, refusing to "place[] officials above the law." Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (Sen. Trumbull).

Qualified immunity, however, now gives state officials a broad shield against liability for violating people's Fourteenth Amendment rights, gutting the remedial and deterrent functions of Section 1983. Having fashioned that doctrine out of whole cloth with no textual basis, this Court should correct its mistake and restore the statute that Congress enacted.

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 (quoting 42 U.S.C. § 1983).

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 throughout the nineteenth century" in damages actions. James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. Colloquy 148, 167 (2021). 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) (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 (majority opinion).

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). As the debates over Section 1983 reflect, the statute was aimed at "injuries, denials, and privations of rights and immunities under the Constitution," "not injuries inflicted by mere individuals or upon ordinary rights of individuals." Cong. Globe, 42d Cong., 1st Sess. App. 79 (1871). 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).

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. 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 reaffirm that a constitutional right may be "clearly established" even in the absence of factually identical precedent, *Taylor*, 141 S. Ct. at 53, rejecting the Fifth Circuit's novel view that officers may avoid liability for an obvious constitutional violation simply because it was not "as obvious" as some other violation. Pet. App. 20a.

A simple reiteration of that principle would be sufficient to resolve this petition. Given "the obviousness" of the constitutional violations here, "any reasonable officer should have realized" that Respondents' indifference to Monroe's known suicide risk "offended the Constitution." *Taylor*, 141 S. Ct. at 54 & n.2. As the district court recognized, there was "clearly" a "high and obvious risk of suicide by maintaining a policy of housing suicidal inmates in a cell with a phone (and attached cord)," and "all named Defendants were aware of Mr. Monroe's attempts at suicide the days immediately preceding the incident." Pet. App. 69a, 70a; *see id.* at 71a (noting with respect to Laws that "the suicide of an inmate/detainee is almost never watched by a jail official as it occurs").

Such callous indifference to a detainee's life is not only an obvious violation of the Fourteenth

Amendment—it is also the type of abuse of which the Reconstruction Congress was aware as it sought to combat "the maladministration of justice in the South," including by "sheriffs" and "jailors." Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 1009 n.151 (1983). For example, one representative during this period highlighted the "barbarity" of a South Carolina jailer who refused to open the doors to a jail that was on fire because he did not have "the authority of the sheriff," resulting in the deaths of twenty-two Black citizens. Cong. Globe, 39th Cong., 2d Sess. 560 (1867) (Rep. Donnelly).

Notably, too, Petitioners are not relying here on mere "general statements of the law," even though such general statements are fully capable "of giving fair and clear warning" and applying "with obvious clarity." *Hope*, 536 U.S. at 741 (quotation marks omitted). Instead, Petitioners have highly analogous Circuit precedent on their side, which the court below dismissed based on the most tenuous factual distinctions: bed sheets versus phone cords, Pet. App. 19a-20a, and doing "nothing at all" versus doing something that had no realistic chance of helping, *id.* at 17a. In the Fifth Circuit, *nearly identical* precedent is no longer enough to overcome the judge-made barrier of qualified immunity, notwithstanding this Court's admonishment to the contrary in *Taylor*. This Court should fix that and ensure that qualified immunity does not turn into absolute immunity.

Doing so is especially important because a number of courts, not just the Fifth Circuit, have begun marginalizing *Taylor* and the principles it reaffirmed into irrelevance—relegating them to only the most "extreme circumstances." *Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021) (quoting *Taylor*, 141 S. Ct.

at 53); *see also, e.g.*, *Rico v. Ducart*, 980 F.3d 1292, 1300 n.9 (9th Cir. 2020) (distinguishing *Taylor* because the circumstances were not "as extreme"). Due to the "particularly egregious facts" of *Taylor*, 141 S. Ct. at 54, that decision has failed to provide sufficient guidance to the lower courts—empowering them to disregard its message even when, as here, they are confronted with similarly shocking facts. At a minimum, therefore, granting the petition would allow this Court to clarify *Taylor*'s scope and provide more concrete guideposts for the lower courts.

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 nineteenth-century American cases, government actors were strictly liable for legal violations that deprived people of their rights. *See, e.g.*, *Little v. Barreme*, 6 U.S. 170, 178-79 (1804); *Murray v. The Charming Betsy*, 6 U.S. 64, 122-26 (1804); *Sands v. Knox*, 7 U.S. 499, 503 (1806); *Wise v. Withers*, 7 U.S. 331, 335-37 (1806); *Tracy v. Swartwout*, 35 U.S. 80, 95 (1836); *Dynes v. Hoover*, 61 U.S. 65, 80-81 (1857). As this Court said: "It would be a most dangerous principle to establish, that the acts of a ministerial officer . . . injurious to private rights, and unsupported by law, should afford no ground for legal redress." *Tracy*, 35 U.S. at 95. Thus, if an officer's injurious conduct was "forbidden by law, or beyond the power which the law confided" to him, "he would be liable whatever were his motives." *Dinsman v. Wilkes*, 53 U.S. 390, 404 (1851).

Even in areas where officers were vested with "*quasi* judicial" authority, *Wilkes v. Dinsman*, 48 U.S. 89, 129 (1849), an officer was still "responsible to one

injured by his wrongful doing" if his act was "malicious," Thomas M. Cooley, *A Treatise on the Law of Torts* 411 (1879), that is, "done intentionally without just cause or excuse," *id.* at 209 n.3 (quoting *Bromage v. Prosser*, 4 B. & C. 247, 255 (1825) (Bayley, J.)); *accord* Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* 92, 365-66 (1889); *see South v. State of Maryland for Use of Pottle*, 59 U.S. 396, 403 (1855); *Kendall v. Stokes*, 44 U.S. 87, 98-99 (1845); *Otis v. Watkins*, 13 U.S. 339, 355-56 (1815); *Dinsman*, 53 U.S. at 404; *Wilkes*, 48 U.S. at 123, 131.

At the same time, government officials were generally indemnified for their violations. 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, therefore, while "[s]ome personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts . . . as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." *Tracy*, 35 U.S. at 98-99.

Those principles formed the backdrop for Congress's enactment of Section 1983. But by insulating government officers and their employers from accountability for constitutional violations, qualified immunity eviscerates the purpose of the statute—no one is held accountable.

Moreover, damages against government officials were awarded in 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 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 in circumstances like those here, as they are disproportionately likely to be jailed before trial, making them more vulnerable to abuses. *See* The Sentencing Project, *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* 6 (Mar. 2018), https://bit.ly/3rCW38Z (while discussing "pretrial" racial disparities in the criminal justice system, noting that "African Americans were incarcerated in local jails at a rate 3.5 times that of non-Hispanic whites"). 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 Fourteenth Amendment envisioned a robust civil remedy available to people whose constitutional rights are violated by government officials. Congress enacted Section 1983 to

ensure that victims could directly seek redress in the federal courts for such violations. Qualified immunity effectively undoes those protections. This situation could be ameliorated by honoring the plain text of Section 1983 and Congress's purpose in passing it. If immunities are read into the statute's text at all, they must at least be 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,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
BRIAN R. FRAZELLE
CHARLOTTE SCHWARTZ
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

December 22, 2021 * Counsel of Record