No. 23-__

IN THE
Supreme Court of the United States

KEVION ROGERS,
Petitioner,
v.
JEFFREY JARRETT; JEREMY BRIDGES; TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's qualified-immunity precedent derives from the premise that there is "no evidence that Congress intended to abrogate the traditional common-law" immunities in Section 1983 actions. *Briscoe* v. *LaHue*, 460 U.S. 325, 337 (1983). But that premise is wrong, as Judge Willett's concurring opinion in the decision below explains. Section 1983 as originally enacted in 1871 contained express language abrogating state common-law immunities. That text was mistakenly omitted during codification, and this Court has never addressed it.

This petition presents the question whether the qualified-immunity doctrine is irreconcilable with the text of Section 1983 as Congress originally enacted it in 1871.

PARTIES TO THE PROCEEDING

Kevion Rogers, petitioner on review, was the plaintiff-appellant below.

Jeffrey Jarrett, Jeremy Bridges, and the Texas Department of Criminal Justice, respondents on review, were the defendants-appellees below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

Rogers v. *Jarrett*, No. 21-20200 (5th Cir. Mar. 30, 2023) (reported at 63 F.4th 971)

U.S. District Court for the Southern District of Texas:

Rogers v. *Jarrett*, No. 4:19-cv-02330 (S.D. Tex. Mar. 15, 2021) (unreported, available at 2021 WL 1433064)

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

PETITION FOR A WRIT OF CERTIORARI

Kevion Rogers respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 63 F.4th 971. Pet. App. 1a-18a. The District Court's opinion is not reported but is available at 2021 WL 1433064. *Id.* at 19a-38a.

JURISDICTION

The Fifth Circuit entered judgment on March 30, 2023. On June 21, 2023, this Court extended Petitioner's deadline to petition for a writ of certiorari to

July 28, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment of the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the U.S. Constitution, § 1, provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

Section 1 of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871), provided in relevant part:

> [A]ny 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, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress * * *.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen

> of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION

This Court should grant certiorari to address the urgent question whether its qualified-immunity precedent has failed to interpret the text of Section 1983 as Congress originally enacted it in 1871.

More than fifty years ago, this Court first held that qualified immunity protects officers facing Section 1983 liability. *See Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). This Court's holding derived from the premise that "[t]he legislative record" of the statute "gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* Ever since, this Court's qualified-immunity precedent has followed from that same premise—that there is "no evidence that Congress intended to abrogate the traditional common-law" immunities in Section 1983. *Briscoe* v. *LaHue*, 460 U.S. 325, 337 (1983).

As the concurring opinion below powerfully shows, that premise was wrong. The evidence this Court could not locate when it crafted the doctrine of qualified immunity has been found. As originally enacted, Section 1 of the Civil Rights Act of 1871 provided for liability for persons acting under color of law who violate a victim's constitutional rights, then added a sixteen-word clause making clear that this liability must be imposed "*any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*." Civil Rights Act of 1871, ch. 22, § 1, 17

Stat. 13 (1871) (emphasis added). The original public meaning of this clause, known as the Notwithstanding Clause, expressly and unambiguously abrogated state common-law immunities. The statute was therefore broadly understood to abrogate common-law immunities when it was enacted.

The Notwithstanding Clause was erroneously omitted when Congress tasked the Reviser of Statutes with consolidating the federal laws into one compilation in 1874. That error was not corrected in subsequent codifications, and it ultimately made its way into the United States Code. But the government official charged with compiling federal law 150 years ago had no authority to rewrite it. Changes to statutes during codification are nonsubstantive and cannot change the meaning of clear statutory text. The text that Congress enacted and the President signed into law governs.

As Judge Willett noted below, the Notwithstanding Clause is "game-changing" for qualified immunity. Pet. App. 17a (citing Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023)). There is no principle of statutory interpretation more basic than that courts must construe statutes according to the text that Congress enacted as it was originally understood. *See New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019). The original text of Section 1983 makes clear that "what the 1871 Congress meant for state actors who violate Americans' federal rights is not immunity, but liability—indeed, liability *notwithstanding* any state law to the contrary." Pet. App. 16a (Willett, J., concurring). This

Court should take this opportunity to evaluate qualified immunity under the actual, original text of Section 1983.

The question presented could hardly be more important. The viability of qualified immunity affects the tens of thousands of civil-rights lawsuits filed in federal and state courts each year. If the statutory text forecloses qualified immunity, then victims of unconstitutional misconduct will be wrongly denied the recovery Congress afforded them. And the uncertainty caused by the revelations about the missing text of Section 1983 will cast a shadow over every qualified-immunity case until this Court resolves it. Because every circuit is bound to apply this Court's qualified-immunity precedent until this Court holds otherwise, there is no prospect that a circuit split will emerge and no reason to await further development in the courts of appeals. Fundamental rule-of-law principles are at stake, and this Court should address the question immediately. This Court should grant certiorari and reverse.

STATEMENT

A. Factual Background

Petitioner Kevion Rogers suffered a traumatic brain injury after the ceiling of a jail facility collapsed on his head and jail staff repeatedly refused his pleas for medical help. Pet. App. 1a-2a.

Rogers's prison job was to help take care of the prison's hogs. *Id.* at 2a, 20a. As a low-risk, trusted inmate, he lived in a dormitory outside the prison unit's security fence and was allowed to work outside the security fence with periodic unarmed supervision. *Id.* at 20a. On the morning Rogers was injured, he was supervised by respondent Jeffrey Jarrett. *Id.*

Early that morning, Jarrett entered one of the hog barns and saw that "[t]here was water coming out of the ceiling" and that part of the ceiling was hanging from the area of the leak. *Id.* at 21a. Jarrett shut off the water to the barn and removed the still-hanging portions of the ceiling, leaving a hole in the ceiling. *Id.* at 21a-22a.

Jarrett later directed Rogers to enter the barn to retrieve something. *Id.* at 22a. Rogers complied, and, as he left the barn, part of the ceiling collapsed, striking him in the head and knocking him unconscious. *Id.* at 2a, 22a. When Rogers regained consciousness, he "stagger[ed]" out of the barn and sought help. *Id.* at 23a n.5. Covered in insulation, he told Jarrett the ceiling had collapsed on him, that he had blacked out, and that he was "seriously injured." *Id.* at 22a. He told Jarrett that he needed "to go to the infirmary" because "a whole ceiling just fell on me!" *Id.* Jarrett ignored the request and did not investigate further because he believed Rogers "looked fine." *Id.* at 2a-3a, 23a.

Rogers's condition deteriorated. Other inmates tried to keep him awake as he went "in and out of consciousness." *Id.* at 3a, 24a. As his condition worsened, Rogers requested "medical attention" from another prison official, who radioed his supervisor, respondent Jeremy Bridges, for instructions. *Id.* at 24a. Because Rogers said that, in addition to wanting medical attention, he wanted to eat lunch, Bridges believed Rogers's condition was not "serious." *Id.* at 3a. Bridges instructed that Rogers be taken to his bunk rather than the infirmary. *Id.* at 24a.

By the time Rogers arrived at the dormitory, "he was wheezing, he had mucus draining, his face was bruising, and his eye and head were swelling." *Id.* He eventually collapsed, began to "seize violently, began vomiting, and lost consciousness." *Id.* at 25a. Three and a half hours after Rogers first asked to be taken to the infirmary, prison officials finally radioed for medical assistance. Rogers had to be airlifted to a nearby hospital, where he was diagnosed with a traumatic brain injury. *Id.* at 3a-4a, 25a.

B. Procedural Background

1. As relevant here, Rogers sued Jarrett and Bridges in Texas state court under 42 U.S.C. § 1983. *Id.* at 25a. Rogers alleged that the defendants violated his Eighth and Fourteenth Amendment rights by acting with deliberate indifference to his safety and medical needs. *Id.* at 26a.

Defendants removed the case to federal court and moved for summary judgment on all claims, asserting qualified immunity. The District Court granted the motion, and Rogers appealed. *Id.* at 25a-26a, 28a-29a.

A Fifth Circuit panel affirmed. *Id.* at 2a. The panel concluded that even if defendants violated Rogers's constitutional rights, the violated rights were not clearly established, and defendants were therefore entitled to qualified immunity. *Id.* at 10a. The panel explained that the "Supreme Court has articulated an exacting standard" for qualified immunity, and that, to overcome that standard, Rogers needed to point to "a case or body of relevant case law in which an officer acting under similar circumstances was held to have violated the Constitution." *Id.* (quoting *Batyukova* v. *Doege*, 994 F.3d 717, 726 (5th Cir. 2021)). The panel concluded that Rogers failed to identify such a case.

2. Judge Willett wrote the panel opinion, but he separately concurred. *Id.* at 13a. He noted that this Court's precedents "compelled" the outcome the panel reached, *id.*, but highlighted "game-changing arguments" from recent scholarship discussing the original, forgotten text of Section 1983, as first enacted in the Civil Rights Act of 1871, *id.* at 17a. As Judge Willett explained, this scholarship shows that "the qualified-immunity doctrine [i]s flawed—foundationally—from its inception." *Id.* at 13a, 17a (discussing Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023)).

Judge Willett explained that this Court's qualified-immunity precedent reasons that "certain common-law immunities existed when § 1983 was enacted in 1871," and that " 'no evidence' suggests that Congress meant to abrogate these immunities rather than incorporate them." *Id.* at 13a (citation omitted). But Judge Willett concluded that "the Supreme Court's original justification for qualified immunity" is mistaken "because the 1871 Civil Rights Act *expressly included such language*." *Id.* at 13a, 16a.

As originally enacted, Section 1983 included a "Notwithstanding Clause" comprising sixteen words that the Reviser of Federal Statutes erroneously omitted from the first compilation of federal law in 1874, and which has been omitted from every compilation of federal laws since. *Id.* at 14a-15a. Those sixteen "unsubtle and categorical" words "explicitly displace[] common-law defenses." *Id.* at 14a-15a. The Clause shows that what "the 1871 Congress meant for state actors who violate Americans' federal rights is not immunity, but liability—indeed, liability *notwithstanding* any state law to the contrary." *Id.* at 16a.

Judge Willett noted that this Court has never interpreted the Notwithstanding Clause in evaluating whether to grant qualified immunity. *Id.* at 15a, 17a n.11. But "however seismic" the lost text may be, Judge Willett emphasized that, "[a]s middle-management circuit judges," he and his colleagues could not overrule decades of this Court's qualified-immunity precedent. *Id.* at 17a (citation omitted). Only this Court "can definitively grapple with § 1983's enacted text and decide whether it means what it says." *Id.*

This petition follows.

REASONS FOR GRANTING THE PETITION

This Court's qualified-immunity doctrine has been flawed from its inception. This Court has never interpreted Section 1983's original text as Congress enacted it in 1871. The question whether this Court's qualified-immunity precedent remains tenable in light of Section 1983's original text is enormously consequential and should be addressed immediately; this case is an excellent vehicle to address it.

I. THIS COURT'S QUALIFIED-IMMUNITY DOCTRINE CONTRAVENES THE TEXT CONGRESS ENACTED IN 1871.

No rule of statutory interpretation is more fundamental than that this Court must construe statutory text as Congress drafted it. "Only the written word is the law." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (citation omit-

ted). Section 1983, as originally enacted, unequivocally provided that state actors who violate constitutional rights are liable *notwithstanding* any state common-law immunity to the contrary. That text thoroughly refutes this Court's qualified-immunity precedent, all of which rests on the mistaken premise that Congress did not intend to abrogate common-law immunities.

A. The Court's Qualified Immunity Precedents Presume Section 1983 Incorporated Common-Law Immunities.

Congress enacted the statute now known as Section 1983 as Section 1 of the Civil Rights Act of 1871. Signed into law in the aftermath of the Civil War, Section 1983 "was enacted for the express purpose of 'enforcing the Provisions of the Fourteenth Amendment' " and securing the Federal Government's role as "guarantor of basic federal rights against state power." *Mitchum* v. *Foster*, 407 U.S. 225, 238-239 (1972) (citation and alteration omitted). Congress accomplished that goal by opening "the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution." *Id.* at 239. The "very purpose" of the statute "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Id.* at 242.

Nearly 100 years after Section 1983's enactment, this Court first considered whether the statute preserved common-law immunities for law-enforcement officials charged with unconstitutional conduct. *See*

Pierson, 386 U.S. at 548, 550-552. The version of Section 1983 codified in the U.S. Code when this Court decided *Pierson* was silent as to common-law defenses. Quoting this version, *see id.* at 548 n.1, this Court concluded that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. This Court concluded that although there was no tradition of an "absolute and unqualified immunity" at common law for law-enforcement officers, the officers would have been entitled to qualified immunity under Mississippi's common law for "good faith" acts. *Id.* at 554-555. This Court therefore held that qualified immunity should protect the officers because the Court "presume[d] that Congress would have specifically so provided had it wished to abolish" immunities as they existed at common law. *Id.*

Pierson rested on what has come to be known as the derogation canon, which presumes that Congress would not have abrogated common-law immunities absent explicit statutory language. In the years following *Pierson*, the Court applied the derogation canon to expand the scope of immunity available under Section 1983. In *Wood* v. *Strickland*, 420 U.S. 308 (1975), for example, this Court explained that "[c]ommon-law tradition, recognized in our prior decisions" supports "a construction of § 1983 extending a qualified good-faith immunity" for certain defendants. *Id.* at 318. In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), this Court concluded that prosecutors are entitled to "the same immunity under § 1983 that the prosecutor enjoys at common law." *Id.* at 427. In *Procunier* v. *Navarette*, 434 U.S. 555 (1978), the court extended qualified immunity to prison officials because Section

1983 "has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials." *Id.* at 561. In *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), the Court found "no evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions." *Id.* at 337. And in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), this Court reasoned that "[c]ertain immunities 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." *Id.* at 268 (quotation marks omitted).

The presumption that Congress intended to preserve common-law defenses in Section 1983 has become the foundation of modern qualified immunity. Qualified immunity is justified, exclusively, as deriving from "the common-law backdrop against which Congress enacted the 1871 Act." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment). It is a legitimate product of statutory interpretation, rather than "freewheeling policy choices," only because "certain immunities were so well established in 1871 that we presume that Congress would have specifically so provided had it wished to abolish them." *Id.* at 1870-71 (cleaned up).

B. The Original Text of Section 1983 Explicitly Abrogated Common-Law Immunities.

This Court has been construing the wrong statutory text. Shortly after Congress enacted the Civil Rights Act of 1871, the first Reviser of Statutes erroneously removed a sixteen-word clause from the statute dur-

ing the codification process. The omitted Notwithstanding Clause refutes the premise of the Court's qualified-immunity cases.

1. As enacted by Congress and signed into law by President Grant in 1871, Section 1 of the Civil Rights Act of 1871 provided:

> [A]ny 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, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added). The sixteen italicized words, known as the "Notwithstanding Clause," provide for liability for any violation of constitutional rights, notwithstanding any "custom" or "usage" "of the State" to the contrary. *Id.* This Clause clearly and unambiguously abrogates common-law immunities.

Contemporaneous dictionaries show that, in 1871, the terms "custom" or "usage" unmistakably referred to the "common law." *See* Noah Webster, *An American Dictionary of the English Language* (1828), *available at* https://webstersdictionary1828.com/Dictionary/law (defining the "unwritten or common law" as "a

rule of action which derives its authority from long usage, or established custom"); Noah Webster, *Webster's Complete Dictionary of the English Language* 757 (1886), *available at* https://archive.org/details/websterscomplete00webs/page/756/mode/2up (same). This Court's precedent confirms that "custom" or "usage" refers to the common law: "The judicial decisions, the usages and customs of the respective states" established the "common law." *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 659 (1834); *see Strother* v. *Lucas*, 37 U.S. (12 Pet.) 410, 436-437 (1838) ("Every country has a common law of usage and custom . . . ."); Reinert, *supra*, at 235 & n.230. Accordingly, under the plain meaning of the Notwithstanding Clause in 1871, Section 1983 abrogated state common-law immunities.

To the extent further confirmation is needed, the legislative history provides it. "[F]ar from being silent about immunities," the legislative debates over the Civil Rights Act of 1871 are "replete" with evidence that the provision would override common-law immunities. Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741, 771 (1987). When Congress debated "the civil liability components of the 1871 Civil Rights Act, opponents of Section 1983 liability explicitly objected to its imposition of liability on judges and other state officials" even if they acted in "good faith"—indeed, the statute's withholding of common-law immunities "was precisely why they opposed it." Reinert, *supra*, at 238–239.

As Judge Willett explained below, the language of Section 1983 as originally enacted "is unsubtle and categorical." Pet. App. 15a (Willett, J., concurring). It subjects state officials to liability for the violation of

constitutional rights "notwithstanding" "*any*" "custom" or "usage"—i.e., common law—"of the State to [the] contrary." *Id.*

2. In 1874, the Notwithstanding Clause was erroneously omitted from the first compilation of federal law. Congress tasked the Reviser of Federal Statutes with compiling and consolidating the federal statutes in one place for the first time. *See* Reinert, *supra*, at 236-237; Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. Library J. 213, 218-219 (2020). In consolidating the laws into the 1874 compilation, the Reviser for unknown reasons erroneously omitted the Notwithstanding Clause.

The Reviser's changes were meant to "consolidat[e] the laws," not change their meaning. *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1964). As this Court explained, where a statutory change "was made by a codifier without the approval of Congress, it should be given no weight." *Id.*; *see also Fourco Glass Co.* v. *Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957) (Reviser's changes "do not express any substantive change"). Thus, when this Court has considered the Reviser's changes to Section 1983, the Court made clear that the changes "were not intended to alter the scope of the provision." *Hague* v. *Committee For Indus. Org.*, 307 U.S. 496, 510 (1939). And when this Court considered the removal of similar clauses from two other federal statutes, the Court concluded that the removal was "immaterial" because the Reviser had no authority to alter federal law. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968) (Reviser's removal of a clause in Section 1982 did not change the statute's meaning); *see also United States* v. *Price*, 383

U.S. 787, 803 (1966) (removal of a clause in Section 241 was accompanied by "the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance").

The Reviser's 1874 compilation was supplemented and corrected over time. A new compilation of Revised Statutes was prepared in 1878, and the first United States Code was published in 1926. *See* Andrew Winston, Library of Congress, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, https://tinyurl.com/v2trjfas (posted July 2, 2015); Reinert, *supra*, at 207, 237. But the Reviser's initial omission of the Notwithstanding Clause carried through into those compilations and eventually carried through into 42 U.S.C. § 1983.

C. This Court's Qualified Immunity Precedent Is Untenable Under The Original Text of Section 1983.

It is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime*, 139 S. Ct. at 539 (alterations and quotation marks omitted); *see also Bostock*, 140 S. Ct. at 1738 (statutory text must be evaluated pursuant to its "ordinary public meaning" "at the time of its enactment"); *Milner*, 562 U.S. at 569 ("Statutory construction must begin with the language employed by Congress.") (citation omitted). The original text of Section 1983 fatally undermines this Court's qualified-immunity precedent, all of which follows from the premise that "Congress by the general language of its 1871 statute" did not intend "to overturn the tradition" of common-law immunity. *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951). The Notwithstanding

Clause proves that this premise is mistaken: The original text of Section 1983 expressly displaces state common-law immunities.

This Court should follow the text that Congress enacted rather than the text that a government bureaucrat inserted into the U.S. Code. "Though the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law," the United States Code is not the law, and this Court should not follow it where it departs from the text as Congress drafted it. *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (quoting 1 U.S.C. § 204(a)).

This Court's opinions have occasionally quoted the Notwithstanding Clause, confirming that the Clause is properly considered part of the statutory text. *See, e.g.*, *Ngiraingas* v. *Sanchez*, 495 U.S. 182, 188 n.8 (1990); *Wilson* v. *Garcia*, 471 U.S. 261, 262 n.1 (1985); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 691-92 (1978). And this Court has noted that the Reviser's changes to the statute "were not intended to alter the scope of the provision." *Hague*, 307 U.S. at 510. But this Court's qualified-immunity cases trace back to *Pierson*, which erroneously omitted the Notwithstanding Clause. Thus, as Judge Willett noted below, even when the Court has accurately quoted the Clause, it has never attempted to interpret the correct statutory text. *See* Pet. App. 17a-18a n.11.

Because this Court's prior qualified-immunity decisions did not construe the text of Section 1983 as Congress enacted it, this is a quintessential case where the Court's "doctrinal underpinnings" have "eroded over time," which provides the justification needed to

overcome *stare decisis*. *See Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015). The Court should not adhere to its flawed qualified immunity precedent merely because Congress could theoretically correct the mistake. As this Court has explained, the Court does "not have a license to establish immunities from § 1983 actions in the interests of what" the Court deems "sound public policy." *Tower* v. *Glover*, 467 U.S. 914, 922-923 (1984). This Court's role "isn't to write or revise legislative policy but to apply it faithfully." *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part). If Congress wishes to grant the immunity it withheld when it first enacted Section 1983, it is free to do so, but this Court has no license to ignore the statutory language as Congress drafted it.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND SHOULD BE RESOLVED IMMEDIATELY.

This Court's review is urgently needed. Only this Court can resolve the question whether qualified immunity remains available under Section 1983's original text. Any delay in addressing the question presented will lead to uncertainty for litigants and will jeopardize fundamental rule-of-law principles. This Court should address the question now.

1. This case is an excellent vehicle for resolving the question presented. The panel below held that respondents were entitled to qualified immunity, and its decision therefore squarely implicates the propriety of qualified immunity. Pet. App. 12a. While Rogers did not specifically cite the original text of Section 1983 in his briefing below, he vehemently disputed the propri-

ety of qualified immunity. *See Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). In any event, arguing that qualified immunity was unlawful would have been futile under binding circuit precedent. *See MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007) (party's decision not to argue an issue at length "merely reflects counsel's sound assessment that the argument would be futile" under circuit precedent). Because Judge Willett "passed on the issue presented," it is preserved for this Court's review, particularly given that the issue is "in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (citations omitted).

In addition to holding that Rogers was not entitled to qualified immunity, the panel alternatively held that Rogers failed to show deliberate indifference. But this Court need not address that alternative holding. It could instead resolve only the qualified-immunity question and remand for the Fifth Circuit to reconsider its deliberate-indifference holding in light of this Court's decision. Judge Willett's concurrence—which highlighted that the panel's decision was "control[ed]" by this Court's qualified-immunity precedent, Pet App. 13a, 17a—confirms that the panel may have reached a different conclusion had qualified immunity not applied.

2. This Court should not delay resolving the question presented. Until this Court decides whether the text of the Civil Rights Act of 1871 abrogates common-

law immunities, lower courts will have no authority to answer the question. Accordingly, there is no prospect of a circuit split on this issue and no reason for this Court to wait for further proceedings in the courts of appeals. As Judge Willett noted, only this Court "can definitively grapple with § 1983's enacted text and decide whether it means what it says." *Id.* at 17a.

Lower courts have already acknowledged Congress's clear language in 1871, but they have declined to resolve the question presented given that existing precedent requires them to grant qualified immunity until this Court holds otherwise. *See, e.g.*, *id.* ("As middle-management circuit judges, we cannot overrule the Supreme Court.") (citation and alteration omitted); *Crosland* v. *City of Philadelphia*, No. CV 22-2416, 2023 WL 3898855, at *4 (E.D. Pa. June 8, 2023) (acknowledging the Notwithstanding Clause, and concluding that "[r]econsidering whether the [qualified-immunity] doctrine should continue in its current form, however, is not within this court's purview") (cleaned up); *Abshire* v. *Livingston Parish*, No. 22-548-JWD-SDJ, 2023 WL 3589657, at *10 (M.D. La. May 22, 2023) (Issues surrounding qualified immunity "are best left for the Supreme Court . . . not for a district court.").

The question presented will cast a shadow over every qualified immunity case until this Court resolves it. *See* Adam Liptak, *16 Crucial Words That Went Missing From a Landmark Civil Rights Law*, N.Y. Times (May 15, 2023).

3. This Court's immediate review is especially needed given the far-reaching implications of the

question presented. If qualified immunity is unlawful, fundamental rule-of-law principles make it important for this Court to say so immediately.

Continuing to apply qualified immunity erroneously will stunt the evolution of federal law. The law allows courts to grant qualified immunity for lack of factually analogous precedent without first determining whether the challenged behavior is unconstitutional. *See Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009). Qualified immunity thereby prevents courts from reaching constitutional questions that should form the heart of the Section 1983 analysis under the language Congress drafted. And "if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue will never become clearly established." Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 65-66 (2017).

Perpetuating qualified immunity in violation of Section 1983's original text would also be deeply unjust for litigants seeking to vindicate their federal rights. Qualified immunity deprives civil-rights plaintiffs of a recovery that Congress intended to afford them. This result would be indefensible even if modern Section 1983 doctrine correctly applied common-law immunities. But this Court has "diverged to a substantial degree from the historical standards" that governed immunity at common law. *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring); *see Abbasi*, 137 S. Ct. at 1871 (Thomas, J., concurring in part and concurring in the judgment). Immunity is especially problematic in light of some courts' tendency to grant immunity reflexively, no matter how egregious

the misconduct, unless the plaintiff can identify factually identical precedent—an inquiry that bears no resemblance to the common law. *See, e.g.*, *Cope* v. *Cogdill*, 142 S. Ct. 2573, 2575 (2022) (Sotomayor, J., dissenting from denial of certiorari).

Finally, applying qualified immunity in violation of the original text will tax the judicial system. Federal and state courts oversee an enormous volume of Section 1983 litigation. In 2022 alone, nearly 15,000 Section 1983 suits were filed in federal district courts, and that number does not count the suits filed in state courts. *See* Admin. Off. of the U.S. Cts., *Judicial Facts and Figures* tbl. 4.4 (Sept. 30, 2022), https://tinyurl.com/5d78p68z. Parties have up to three opportunities to appeal the denial of qualified immunity—at the motion to dismiss stage, the summary judgment stage, and after final judgment—and these piecemeal immunity appeals can threaten "proceedings with delay, adding costs and diminishing coherence." *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995). For judges, moreover, qualified immunity is a tangled web "of complexity and confusion." *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010). Some judges find "wading through the doctrine of qualified immunity [to be] one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Hon. Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. Ann. Surv. Am. L. 445, 447 (2000).

* * *

Compelling new evidence suggests that this Court's qualified-immunity doctrine is fundamentally flawed. This issue impedes recovery for thousands of litigants

every year, disproportionately affects the disposition of federal law, and will raise profound and troubling questions about the rule of law in this Nation until this Court resolves it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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