Case No. 23-30879

United States Court of Appeals

for the

Fifth Circuit

WESLEY PIGOTT, ON HIS OWN BEHALF AND ON BEHALF OF HIS MINOR CHILD, K.P., AND MYA PIGOTT,

Plaintiffs-Appellants,

v.

Paul Gintz (Shield No. 91581),

Defendant-Appellee,

On Appeal from the United States District Court For The Western District Of Louisiana, Alexandria Division

Brief of Amicus Curiae Professor Alexander A. Reinert on Behalf of Plaintiffs-Appellants

ALEXANDER A. REINERT, ESQ.
55 Fifth Avenue, Suite 1005
New York, New York 10003
(212) 790-0403
areinert@yu.edu

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

Amicus curiae certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1) Plaintiffs-Appellants:
Wesley Pigott, on his own behalf and on behalf of his minor child K.P.;
Mya Pigott

2) Defendant-Appellee:
Paul Gintz

3) Counsel for Plaintiffs-Appellants:
Nora Ahmed, Erin Bridget Wheeler, American Civil Liberties Union of Louisiana
Bruce Hamilton, Rebecca Ramaswamy, Southern Poverty Law Center
Delia Addo-Yobo, Robert F. Kennedy Human Rights

4) Counsel for Defendant-Appellee
Bradford Calvit, Eli Meaux, Provosty, Sadler & deLaunay, APC

5) Amicus Curiae
Professor Alexander A. Reinert

6) Counsel for Amicus Curiae
Alexander A. Reinert

s:/Alexander A. Reinert
ALEXANDER A. REINERT
Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTEREST OF AMICUS CURIAE[1]

Professor Alexander A. Reinert is the Max Freund Professor of Litigation and Advocacy at the Benjamin N. Cardozo School of Law.[2] He is a legal scholar with expertise in civil procedure, constitutional law, and federal courts, among other disciplines. He researches and teaches in all of these areas and has a particular scholarly focus on the doctrine of qualified immunity, having authored or coauthored numerous articles regarding civil rights litigation and qualified immunity. *See, e.g.*, Alexander A. Reinert, *Asymmetric Review of Qualified Immunity*, 20 J. EMPIRICAL L. STUD. 1 (2023); Alexander A. Reinert, Joanna C. Schwartz, and James E. Pfander, *New Federalism and Civil Rights Enforcement: A Progressive Platform for State and Local Governments*, 116 NORTHWESTERN L. REV. 737 (2021); James E. Pfander, Alexander A.

---

[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for *amicus curiae* certifies that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than *amicus* and his counsel have contributed money for this brief.

[2] Institutional affiliation is provided for purposes of identification only.

Reinert, and Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561 (2020); Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2063 (2018); Alexander A. Reinert, *The Influence of Government Defenders on Affirmative Civil Rights Enforcement*, 86 FORDHAM L. REV. 2181 (2018); Alexander A. Reinert, *Does Qualified Immunity Matter?* 8 U. ST. THOMAS L. J. 477 (2011); Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010).

Most germane to *amicus*'s interest in this proceeding, Professor Reinert's recent article regarding qualified immunity doctrine explores the critical flaws in the Supreme Court's judge-made qualified immunity doctrine. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201 (2023). The arguments examined in this Article have been recognized as significant by several members of this Court. *See*, *e.g.*, *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring); *Villarreal v. City of Laredo*, No. 20-40359, 2024 WL 244359, at *23 n. 14, __ F.4th __ (5th Cir. Jan. 23, 2024) (en banc) (Willett, J., dissenting, joined by Elrod, Graves, Higginson, Ho, and

Douglas, J.J.). Amicus has a demonstrated interest in a proper understanding of the doctrine of qualified immunity and the significant flaws in its origins.

II. SUMMARY OF ARGUMENT

The court below granted Defendant-Appellee Paul Gintz's motion for summary judgment on the grounds of qualified immunity—the affirmative defense available to government officials sued in damages for violations of federal law. As your *amicus* will show, however, qualified immunity is and always has been a fundamentally flawed doctrine, ripe for reconsideration. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201 (2023) [hereafter "Reinert, Flawed Foundation"]. Even if this Court lacks the authority to put an end to the Supreme Court's qualified immunity misadventure, appellate courts are well-positioned to bring the doctrine's flaws to the High Court's attention.

A wide spectrum of jurists and advocates have expressed growing concern about qualified immunity's legitimacy and application. *Ziglar v. Abbasi*, 582 U.S. 120, 157 (2017) (Thomas, J., concurring in part and concurring in the judgment) (noting his "growing concern with our

qualified immunity jurisprudence"); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court's "one-sided approach to qualified immunity [which] transforms the doctrine into an absolute shield for law enforcement"); Brief for Institute for Justice, Cato Institute, American Civil Liberties Union & American Civil Liberties Union of Colorado as Amici Curiae Supporting Appellee 16–21, *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2019) (No. 19-1015), 2019 WL 2024705 (criticizing qualified immunity); Brief for Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Allah v. Milling*, 139 S. Ct. 49 (2018) (No. 17-8654), 2018 WL 3388317 (arguing that Court should revisit qualified immunity doctrine). Scholarly criticism of the doctrine spans decades, with commentators pointing out that it lacks a foundation in Section 1983's text or purpose, that it creates significant gaps between rights and remedies, and that it has no empirical justification. *See* Reinert, Flawed Foundation, at 203-04 & nn.2-5 (summarizing literature).

This submission builds on the substantial questions that have been raised about the legitimacy of qualified immunity to show that the

Supreme Court's qualified immunity jurisprudence has been flawed from the outset. As detailed below, the Court's qualified immunity journey began with a 1967 decision that made two critical errors when it created the doctrine. First, the Court found that Section 1983 implicitly incorporated a common-law "good faith" defense based on a misapplication of the canon of construction that statutes cannot displace common-law rights without explicit an explicit statutory command [hereafter the "Derogation Canon"]. According to the Court, because Congress had not explicitly ruled out common-law defenses in Section 1983, it was authorized to incorporate them via the Derogation Canon. As will be shown below, the Derogation Canon was never meant to apply to common-law defenses. Hence the first flaw in the Court's reasoning.

When the Court applied this flawed methodology, it compounded its error by making a second mistake: it disregarded the explicit (albeit obscured) statutory text of the 1871 Civil Rights Act, the original version of Section 1983, which reads as the very command the Court claimed was lacking. This text reflects the Reconstruction Congress's intent to create liability for constitutional violations and displace any existing common law immunities. The Supreme Court has never explained how this text

can be squared with qualified immunity jurisprudence. And although that Court is the only body that can overrule its flawed precedent, this brief explains why it should do so.

III. ARGUMENT

A. When the Supreme Court Invented Qualified Immunity, It Misapplied Relevant Canons of Statutory Construction

1. Qualified Immunity Doctrine Is Founded on the Derogation Canon

On its face, Section 1983 offers no textual support for qualified immunity, stating without qualification that liability flows from unconstitutional conduct by state actors. 42 U.S.C. § 1983. Nor can one discern any basis for the defense in the legislative history surrounding the 1871 Civil Rights Act. *See* Reinert, Flawed Foundation, at 238-41. Thus, a central riddle to solve is how, despite the absence of text or legislative history, the Supreme Court found any legitimate basis for announcing the qualified immunity defense. The answer? The Court relied on the Derogation Canon to hold that common-law defenses akin to qualified immunity were implicitly incorporated into the text of Section 1983. This is the first fundamental flaw with the Court's qualified immunity doctrine, as the Derogation Canon is a long-criticized

canon that, even when it had force, was never meant to apply to common-law defenses.

To excavate this flaw, one must begin at the beginning: a 1967 decision involving Mississippi police officers' treatment of civil rights activists, *Pierson v. Ray*, 386 U.S. 547 (1967). There, the Court held that 42 U.S.C. § 1983 incorporated a "good faith" immunity defense that protected government officials from liability at common law in 1871, when Congress enacted Section 1983. *Id.* at 557. *Pierson* and its progeny's logic was rooted in the Derogation Canon. *See Rehberg v. Paulk*, 566 U.S. 356, 361–62 (2012) (collecting cases discussing Court's assumption that Congress did not intend Section 1983 to revoke common-law immunities). If Congress meant to overrule the common law doctrine of qualified immunity, according to this account, it would have done so explicitly. And although the contours of the qualified immunity doctrine have evolved since *Pierson*, the Court's application of the Derogation Canon lies at the heart of the defense. Without the canon, courts would

be constrained to read Section 1983 plainly, without the defense of qualified immunity.[3]

2. *Pierson*'s Use of the Derogation Canon Was Inconsistent with 150 Years of Commentary

But *Pierson*'s logic was unmoored from relevant history and jurisprudence. As a matter of interpretive methodology, the Derogation Canon has a tenuous foothold, subjected to trenchant criticism for more than a century. At the time of Reconstruction, Theodore Sedgwick's influential treatise on statutory interpretation criticized the canon as a creature of judicial skepticism of legislation, borne out of the belief that judge-made law was "the perfection of human wisdom." Theodore Sedgwick, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 270 (2d ed. 1874).[4] If the canon served any purpose, Sedgwick maintained, it was "to preserve the individual from

---

[3] This brief addresses only qualified immunity doctrine. Other immunities that have been applied in the context of Section 1983, particularly absolute legislative and judicial immunities, stand on a different footing. *See* Reinert, Flawed Foundation, at 244 & nn. 276-77.

[4] Sedgwick's treatise remained influential into the mid-twentieth century. Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 76 & n.92 (1997).

having his personal rights taken away by any means that are not strictly legal." *Id.* And by the mid-nineteenth century, well before the 1871 Civil Rights Act, courts had also coalesced around the view that remedial statutes like Section 1983, even ones in derogation of the common law, should be liberally construed. *Id.* The Reconstruction Congress thus would have had no reason to believe that the Derogation Canon would be applied to limit the reach of Section 1983 via the importation of common-law defenses.

Scholarly criticism of the Derogation Canon persisted well after the passage of the 1871 Civil Right Act as well. Roscoe Pound, writing in 1908, recognized its obsolescence and its grounding in an era of judicial supremacy. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387–88 (1908). The late Justice Antonin Scalia, writing with Bryan Garner, rejected the canon as "a relic of the courts' historical hostility to the emergence of statutory law." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012). In short, over the course of 150 years, commentators have cast doubt on the utility of the Derogation Canon, particularly as applied to remedial statutes such as Section 1983.

3. Supreme Court Case Law from the Founding to Reconstruction Shows that the Derogation Canon Was Never Meant to Apply to Common-Law Defenses

The limitations of the Derogation Canon are not confined to commentary, however, but are also revealed by considering the Supreme Court cases between the Founding Era and Reconstruction in which the canon was implicated or applied. Most critically, during this time frame, the Court never relied on the Derogation Canon to dilute statutory rights by implying a common law defense. Instead, consistent with the critical scholarly commentary about the Derogation Canon, the Supreme Court relied on the canon sparingly to protect existing common law rights or interests.

Three categories of cases can be discerned from a review of Supreme Court decisions addressing the Derogation Canon in civil cases between the Founding and Reconstruction: (1) those in which the Court reviewed novel procedural devices that arguably affected reliance interests; (2) those in which litigants argued that statutes interfered with common law property rights; and (3) those in which a plaintiff sought to bring a common law claim that the defendant argued had been displaced by a statute. *See* Reinert, Flawed Foundation, at 222-228 (reviewing

nineteenth century case law). Critically, no case during this period relied on the Derogation Canon to sub silentio incorporate common law *defenses* into a newly created cause of action like Section 1983. *See id.* Based on both the contemporaneous commentary and Supreme Court jurisprudence, Reconstruction legislators had no reason to suspect that courts would rely on the Derogation Canon to limit the reach of Section 1983 via incorporation of various common-law defenses.

The United States Supreme Court first adverted to the Derogation Canon in 1797 in *Brown v. Barry*, 3 U.S. 365, 367–68 (1797), in which the defendant argued that a claim on a debt, authorized by a Virginia statute passed in 1748, was not viable because the Virginia legislature had repealed the 1748 act via 1789 legislation. Although the resolution of this issue was complex, the Supreme Court's reasoning turned in part on its holding that the 1789 law should be strictly construed because of the Derogation Canon. *Id.* at 367. By limiting the reach of the 1789 statute, the Court held that the 1748 statute was still in effect, enabling the survival of the plaintiff's claim. Thus, from the outset, the Court used the canon to amplify common law *claims*, not common law defenses.

Most early nineteenth century cases applying the canon, however, related to procedural innovations created by statute. For example, lawyers challenged—without success—statutes authorizing so-called "summary proceedings" because they were in tension with common law procedures that provided for a more fulsome hearing. *See*, *e.g.*, *Peyton v. Brooke*, 7 U.S. 92, 96 (1805) (argument by counsel that canon applied to summary proceeding); *Stuart v. Laird*, 5 U.S. 299, 301–02 (1803) (argument by counsel that canon applied to Virginia law providing summary remedy); *Wilson v. Mason*, 5 U.S. 45, 54 (1801) (argument by counsel that statute regarding summary proceeding should be strictly construed). Litigators also invoked the canon in response to the evolution of an array of new procedural devices including the process by which judgment was executed, *Mitchell v. St. Maxent's Lessee*, 71 U.S. 237, 243–44 (1866); rules of joinder, *Fullerton v. Bank of U.S.*, 26 U.S. 604, 607 (1828); rules of evidence, *Moore v. United States*, 91 U.S. 270, 273–74 (1875); *Smith v. United States*, 30 U.S. 292, 300 (1831); discovery, *Shutte v. Thompson*, 82 U.S. 151, 161 (1872); *Harris v. Wall*, 48 U.S. 693, 704 (1849); *Bell v. Morrison*, 26 U.S. 351, 355–56 (1828); and jurisdiction, *Turner v. Fendall*, 5 U.S. 117, 124 (1801); *Voorhees v. Jackson, ex dem.*

Bank of U.S., 35 U.S. 449, 458–59 (1836). Although invocation of the Derogation Canon was sometime successful, none of these cases concerned common law defenses. Rather, the upshot was that if litigants could claim some legitimate reliance interest in the expectation that common law procedures would be followed, they might be able to successfully invoke the Derogation Canon.

Moreover, as statutory law proliferated over the course of the nineteenth century, the Supreme Court gave greater consideration to indications that legislators intended procedural innovation. In *Metro. R. Co. v. Moore*, 121 U.S. 558 (1887), for example, the Court held that the Derogation Canon did not bar a federal statute from displacing prior common-law practice regarding appeals for denials of motions to set aside a verdict. Id. at 570-72. By 1887, then, the Supreme Court accepted that legislatures could innovate in contravention of common law expectations about procedure.

The second category of cases in which the Derogation Canon was implicated related more directly to reliance interests: those involving common law property rights and their interaction with statutory innovations. In *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 622–23

(1812), for example, the Court held that a Virginia statute should not be read to extinguish a common law claim to title in real property. But even in less notable cases, counsel argued that statutes implicating property rights should be strictly construed. *McCool v. Smith*, 66 U.S. 459, 470–71 (1861) (applying canon in context of validity of title necessary for commencement of ejectment action); *Wheaton v. Peters*, 33 U.S. 591, 599 (1834) (argument by counsel to strictly construe constitutional provision which takes away a "private right" or property); *Clarke's Lessee v. Courtney*, 30 U.S. 319, 329–30 (1831) (argument by counsel that canon should apply to statute regarding relinquishing title to land to the commonwealth). Critically, there is no suggestion that a common law defense such as the good-faith immunity recognized in *Pierson* had the status of a property right during this time frame.

These first two categories of cases were the ones that occupied the field of Derogation Canon jurisprudence for the vast majority of the nineteenth century. Prior to Reconstruction, the Court also invoked the canon, though rarely, in a third kind of case which also implicated reliance interests: those in which a statute interfaced with common law rights of action. *See* Reinert, Flawed Foundation, at 224-28. During this

time the Court never even hinted, let alone held, that common law defenses are incorporated into statutory causes of action absent express legislative direction to the contrary. Indeed, defenses were not conceived of as "rights" deserving of protection from derogation. *See*, *e.g.*, Thomas G. Shearman & Amasa A. Redfield, TREATISE ON THE LAW OF NEGLIGENCE § 300, at 367-68 (1st ed. 1869) (arguing that wrongful death statutes, which provided a remedy for instantaneous death, did not run afoul of derogation canon because they were not in derogation of a claim, even though at common law the immediacy of death would have been a defense against the claim).

Though not concerning an affirmative defense, *United States v. Stansbury*, 26 U.S. 573, 575-576 (1828), is an early example of the Court declining to incorporate a common law barrier to relief even where Congress was silent on the issue. In *Stansbury*, the United States brought suit against a debtor and his two sureties. The sureties argued that because the United States, pursuant to statute, had agreed to release the debtor from prison, the United States was barred from recovery by the common law doctrine that the voluntary release of a debtor from custody constituted a release of the judgment itself. *Id.* at

575. The Court rejected that argument, finding that notwithstanding the common law doctrine the judgment against the debtor remained valid and capable of being satisfied in the future. *Id*. at 575-76. That the statute was silent as to the common law's treatment of sureties was of no moment, especially because the common law rule was "occasioned by a technical rule, originating in remote ages; which has never been applied to a statutory discharge of the person." *Id*. at 575.

In late nineteenth century cases, both during and after Reconstruction, the Supreme Court's Derogation Canon cases increasingly arose in this third setting: those involving the relationship between statutes and common law rights of action. *See* Reinert, Flawed Foundation, at 225-28 (reviewing case law). But whether the Court was reviewing statutes that a party argued had operated to displace a common law claim, or cases in which the Court construed statutes that created new remedies and rights of action, it never relied on the Derogation Canon to incorporate common-law defenses to a statutory cause of action. *See*, *e.g.*, *The Main v. Williams*, 152 U.S. 122, 132–33 (1894) (construing statute to derogate the rights of claimants as little as

possible and holding that, in the absence of express words to the contrary, the statute would not be construed to limit shipowner's right to damages).

While this jurisprudence reflects the Supreme Court's concern that statutes not unduly undermine preexisting rights, they do not suggest any connection between the Derogation Canon's and common law defenses, which did not implicate reliance interests. Indeed, the Supreme Court explained in 1885 that a statute of limitations defense was not a "property" right protected by the Fourteenth Amendment, even if the "most liberal extension" of the meaning of property could include "choses in action" or "incorporeal rights," property could not encompass a defense to pay a judgment. *Campbell v. Holt*, 115 U.S. 620, 629 (1885) ("We are unable to see how a man can be said to have property in the bar of the statute as a defense to his promise to pay.") (emphasis in original).

Moreover, at the same time that Supreme Court jurisprudence pre- and post-dating Reconstruction provided no support for the proposition that common-law defenses were a proper subject of the Derogation Canon, the Court also increasingly gravitated to a broad construction of remedial statutes. *White v. Cotzhausen*, 129 U.S. 329, 341–42 (1889) (construing statute concerning assignment of property to creditors and

stating the "rule [that] though it may be in derogation of the common law, . . . everything is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.") (*quoting R.R. Co. v. Dunn*, 52 Ill. 260, 263 (1869)). Section 1983 is without a doubt such a "remedial" statute, meant to be construed broadly. Michael Sinclair, *"Only A Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y. L. SCH. L. REV. 919, 943 (2006) ("[i]f the statute is seen not as imposing a restriction or right or duty on the common law, but as fixing it to cover a new situation or an otherwise unforeseen problem, then it is remedial."). Construing remedial statutes liberally meant, in a leading treatise's words, "to give effect to it according to the intention of the law-maker, as indicated by its terms and purposes." J.G. Sutherland, 2 STATUTES AND STATUTORY CONSTRUCTION § 400, at 531 (1st ed. 1891). But *Pierson* compounded its misapplication of the Derogation Canon by also failing to construe Section 1983, as a remedial statute, broadly as to reach and remedy.

To sum up, the Derogation Canon has always stood on shaky footing. But the Supreme Court's use of the Derogation Canon up until and contemporaneously with Reconstruction betrayed no suggestion that

it would sub silentio incorporate common law defenses into new statutory causes of action. The canon has almost always been concerned with protecting common law claims or rights, not common law defenses. Moreover, for remedial statutes like Section 1983, contemporaneous canons of statutory construction called for broad readings, not crabbed ones. If we take seriously the proposition that interpretation of Section 1983 is guided by the understanding of the Reconstruction Congress when it enacted the statute, it follows that the Court had no legitimate basis to rely on the Derogation Canon that legislators at the time would not have expected to apply to Section 1983. *Smith v. Wade*, 461 U.S. 30, 65–66 (1983) (Rehnquist, J., dissenting) ("Members of the 42d Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to consider the legal principles and rules that shaped the thinking of its Members."); *cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 588 n.9 (2010) (looking to "likely intent" of enacting Congress); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) ("Of course, it is Congress' understanding of what it was enacting that ultimately controls."). There is thus no foundation

to the central premise of the Supreme Court's qualified immunity jurisprudence.

B. Qualified Immunity Doctrine Does Not Account for the Original Text of the 1871 Civil Rights Act

The Supreme Court's Section 1983 immunity jurisprudence has another failing, however. Assuming *arguendo* that the Derogation Canon is viable and applicable to remedial statutes like Section 1983, the legislature can still displace common law by explicit command. But as your *amicus* demonstrates below, the Civil Rights Act of 1871 contained precisely that: an explicit legislative command abrogating common law immunities. Although the relevant text was never included in the codified version of Section 1983, that omission was a product of the first Reviser of the Federal Statutes' unauthorized alteration of positive law in the first version of the Revised Statutes in 1874. *See* Reinert, Flawed Foundation, at 235-38. What's more, accounting for the original text of Section 1983 makes sense of the 1871 Civil Rights Act's legislative history and overall framework. The Supreme Court's flawed immunity jurisprudence, by contrast, only creates dissonance.

1. The Civil Rights Act of 1871 Explicitly Abrogated Common-Law Defenses

The codified version of Section 1983 is silent as to any common law defenses:

> 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. . . .
>
> 42 U.S.C. § 1983.

But the Civil Rights Act of 1871 as enacted contained additional significant text. In between the words "shall" and "be liable," the statute contained the following clause: "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding" [hereafter the "Notwithstanding Clause"]. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871). In other words, the 1871 Congress created liability for state actors who violate federal law, notwithstanding any state law to the contrary.

Importantly, the good-faith immunity that the *Pierson* Court incorporated into Section 1983 was a creature of state law, the subject of the Notwithstanding Clause. *Pierson*, 386 U.S. at 557 (1967); *see also Wood v. Strickland*, 420 U.S. 308, 318–20 & nn.9 & 12 (1975) (collecting state court cases in support of extending qualified immunity to school board officials). Although there was a body of nineteenth century federal immunity doctrine that arguably applied to the actions of federal officials, whatever good-faith or other immunity that had been recognized for state and local officials was a creature of state law. *See* Reinert, Flawed Foundation, at 235-41.[5] Thus, to the extent the Reconstruction

[5] Even in the era of *Swift v. Tyson*, 41 U.S. 1 (1842), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), state law, whether statutory or judge-made, governed "[q]uestions of public policy as affecting the liability for acts done . . . within one of the States of the Union," unless controlled by federal law or by considerations requiring national uniformity such as commercial relations. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 175 U.S. 91, 100 (1899). Even under *Swift*, there was a critical distinction between "general" law, which knew no sovereign, and "local" or customary law, which was considered state law. *See* Caleb Nelson, *A Critical Guide to Erie Railroad v. Tompkins*, 54 WM. & MARY L. REV. 921, 944–50 (2013). And the tort liability of cities and states involved "local" law during this time, making state court decisions on such matters dispositive for the purposes of federal courts. *See* Reinert, Flawed Foundation, at 242-43. Thus, even in the *Swift* era, the Notwithstanding Clause, along with the legislative history and overall purpose of the Civil Rights Act, should be read to displace "local" common law immunities.

Congress even contemplated that these defenses would apply to the Civil Rights Act of 1871, the Notwithstanding Clause would have sufficed to assuage those concerns, striking directly at the Court's reasoning in *Pierson*.

One might wonder whether the omission of the Notwithstanding Clause from the codified version of Section 1983 was the product of legislative deliberation or lawmaking. If that were so, perhaps a case could be made that Congress had second thoughts about including the Notwithstanding Clause in Section 1983. But that could not be further from the truth. The Notwithstanding Clause was omitted from Section 1983 as codified not because of any positive lawmaking but because the first Reviser of Federal Statutes, for unknown reasons, removed the Notwithstanding Clause when the first edition of the Revised Statutes of the United States was published in 1874. See XXIV Rev. Stat. § 1979, at 348 (1874).[6] The Reviser, however, had no power to alter substantive

[6] Because of complaints about the accuracy of the 1874 Revised Statutes, Congress authorized the appointment of a new Reviser to prepare a second edition of the Revised Statutes, which was published in 1878. *See The Revised Statutes of the United States*, LIBR. CONGRESS, https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/ [https://perma.cc/S3ME-KDYV] (posted July 2, 2015). The 1878 version of the Revised Statutes

law. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939) (stating that Reviser's changes were "not intended to alter the scope" of Section 1983); REVISED STATUTES OF THE UNITED STATES, Preface, at v (1878) (stating that Reviser had no authority to make substantive changes).

Thus, there are two versions of Section 1983. The first, actually enacted by the Reconstruction Congress, created a cause of action that explicitly rejected any state law limitations on Section 1983 liability. The second codified version omits that language but still admits of no common-law defenses to liability. And because the Reviser's changes could not have the effect of altering positive law, any court should strive to give effect to the enacted version of Section 1983, containing the Notwithstanding Clause, even if as a formal matter the codified version is "legal evidence" of federal law. *See* Will Tress, *Lost Laws: What We Can't Find in the U.S. Code*, 40 GOLDEN GATE U. L. REV. 129, 135 (2010).

But that is not what the Supreme Court has done. Instead, in *Pierson* and its progeny, the Court has overlooked the importance of the

---

contained the same error as the 1874 version with respect to what we now know as Section 1983. *See* XXIV Rev. Stat. § 1979, at 347 (1878).

Notwithstanding Clause and incorporated state law immunity defenses into Section 1983, relying on the Derogation Canon. But even assuming the Derogation Canon were applicable to Section 1983, the Notwithstanding Clause strongly suggests that Congress intended that Section 1983 would create liability notwithstanding the state-law immunity doctrine applied in Pierson.

2. The Notwithstanding Clause Reinforces the 1871 Civil Rights Act's History and Purpose

Taking account of the Notwithstanding Clause also provides a more coherent account of Section 1983 than the Supreme Court's immunity jurisprudence. For example, one cannot square the Supreme Court's case law with contemporaneous statements made by Reconstruction lawmakers. The legislative record for the 1871 Civil Rights Act is replete with objections by opponents of the legislation that it would result in liability for state officials "for a mere error of judgment" and regardless of their good faith. *See* CONG. GLOBE, 42d Cong., 1st Sess. 365–66 (1871) (statement of Rep. William Arthur); *id.* at 385 (statement of Rep. Joseph Lewis). None of the proponents offered assurances to the contrary, confirming that opponents had accurately understood the legislation. Richard A. Matasar, *Personal Immunities Under Section 1983: The*

Limits of the Court's Historical Analysis, 40 ARK. L. REV. 741, 772-75 (1987) (reviewing legislative history). This history, in combination with the absence of any language in Section 1983 regarding immunity, offers a strong indication that Congress meant to abrogate common-law immunities, even without taking account of the Notwithstanding Clause. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 502 (1992).

And given the evidence that supporters of the Civil Rights Act did not trust state courts to protect constitutional rights, it is implausible that the very same Congress would permit Section 1983 liability to be limited by common law elaborated by state court judges. *See*, *e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 820, 394 (1871) (Rep. Joseph Rainey describing state courts as being "under the control of those who are wholly inimical to the impartial administration of law and equity."). Given the legislative purpose to disarm a Confederate State judiciary hostile to Reconstruction, "it seems unlikely that the local common law elaborated by the very judiciary that the federal courts were designed to supersede was to be given primacy." Seth F. Kreimer, *The Source of Law*

in Civil Rights Actions: Some Old Light on Section 1988, 133 U. PA. L. REV. 601, 617 (1985). The Notwithstanding Clause thus both reflects and confirms the 1871 Civil Rights Act's history and purpose.

As demonstrated herein, qualified immunity doctrine was the product of at least two critical errors. First, the Supreme Court misapplied the Derogation Canon to add a defense to Section 1983 liability that cannot be found in statutory text. Second, the Court compounded that error by disregarding the actual enacted text of the Civil Rights Act of 1871, which along with relevant legislative history, clarified the Reconstruction Congress's intent to craft a broad remedy for constitutional violations. Qualified immunity is the result of these two interrelated errors. The time is ripe to reconsider the Supreme Court's misadventure.

CONCLUSION

This Court should reverse the judgment of the district court.

Dated: February 27, 2024

s:/Alexander A. Reinert
ALEXANDER A. REINERT
55 Fifth Avenue, Room 1005
New York, New York 10003
(646) 592-6543

areinert@yu.edu
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because it contains 5,447 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

s:/Alexander A. Reinert
ALEXANDER A. REINERT
Counsel for Amicus Curiae