No. 20-659

In The
Supreme Court of the United States

LARRY THOMPSON,

Petitioner,

v.

POLICE OFFICER PAGIEL CLARK,
SHIELD #28472,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONER

MARIE MILLER*
ANYA BIDWELL
PATRICK JAICOMO
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
mmiller@ij.org
abidwell@ij.org
pjaicomo@ij.org

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. Straying from the common law goes against this Court's precedents and does the law a disservice 5

A. Section 1983 should be read in harmony with common-law principles that were prevalent in 1871 6

B. Grounding claims' prerequisites in the common law produces a stable, neutral rule of law 10

II. The Eleventh Circuit's position in *Laskar* is the only approach consistent with the common-law history surrounding Section 1983 13

A. The *Laskar* majority identified a well-settled common-law principle, which may exist without uniformity in the states 14

B. The positions of the *Laskar* dissent and seven other circuits foretell instability and unpredictability in an indications-of-innocence approach 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Anderson v. *Creighton*,
483 U.S. 635 (1987) 12

Atlantic Sounding Co. v. *Townsend*,
557 U.S. 404 (2009) 9

Awabdy v. *City of Adelanto*,
368 F.3d 1062 (9th Cir. 2004).....17, 18

Baxter v. *Bracey*,
140 S. Ct. 1862 (2020) 12

Briscoe v. *LaHue*,
460 U.S. 325 (1983) 6

Brownback v. *King*,
141 S. Ct. 740 (2021) 1

Buckhannon Bd. & Care Home, Inc. v.
West Va. Dep't of Health & Hum. Res.,
532 U.S. 598 (2001) 17

Buckley v. *Fitzsimmons*,
509 U.S. 259 (1993) 6

Carey v. *Piphus*,
435 U.S. 247 (1978) 6, 7, 8

Carter v. *United States*,
530 U.S. 255 (2000) 9

City of Newport v. *Fact Concerts, Inc.*,
453 U.S. 247 (1981) 6, 10, 18

Consolidated Rail Corp. v. *Gottshall*,
512 U.S. 532 (1994) 8

TABLE OF AUTHORITIES—Continued

Page

Cordova v. *City of Albuquerque*,
816 F.3d 645 (10th Cir. 2016)..... 17, 21, 22

CSX Transp., Inc. v. *McBride*,
564 U.S. 685 (2011) 8, 19

Donahue v. *Gavin*,
280 F.3d 371 (3d Cir. 2002) 17

Harlow v. *Fitzgerald*,
457 U.S. 800 (1982) 12

Heck v. *Humphrey*,
512 U.S. 477 (1994) 6, 7, 11

Hernandez v. *Mesa*,
140 S. Ct. 735 (2020) 1

Imbler v. *Pachtman*,
424 U.S. 409 (1976) 5

Isbrandtsen Co. v. *Johnson*,
343 U.S. 779 (1952) 8

Jaffe v. *Stone*,
114 P.2d 335 (Cal. 1941).....18

Jessop v. *City of Fresno*,
936 F.3d 937 (9th Cir. 2019).....1

Jones v. *Clark County*,
959 F.3d 748 (6th Cir. 2020).....17

Jordan v. *Town of Waldoboro*,
943 F.3d 532 (1st Cir. 2019) 14, 17

Kalina v. *Fletcher*,
522 U.S.118 (1997) 6

TABLE OF AUTHORITIES—Continued

Page

Kisela v. *Hughes*,
138 S. Ct. 1148 (2018) 13

Lanning v. *City of Glens Falls*,
908 F.3d 19 (2d Cir. 2018) 1, 4, 14, 17, 20

Laskar v. *Hurd*,
972 F.3d 1278 (11th Cir. 2020).....*passim*

Lech v. *Jackson*,
791 Fed. Appx. 711 (10th Cir. 2019) 1

Malley v. *Briggs*,
475 U.S. 335 (1986) 21

Manuel v. *City of Joliet*,
137 S. Ct. 911 (2017) 6, 19, 23

McDonough v. *Smith*,
139 S. Ct. 2149 (2019) 7, 11

Michigan Cent. R.R. v. *Vreeland*,
227 U.S. 59 (1913) 8

Monessen Sw. Ry. v. *Morgan*,
486 U.S. 330 (1988) 8, 16

Monell v. *Department of Soc. Servs.*,
436 U.S. 658 (1978) 6

Monroe v. *Pape*,
365 U.S. 167 (1961) 21

Murphy v. *Lynn*,
118 F.3d 938 (2d Cir. 1997) 22

Nieves v. *Bartlett*,
139 S. Ct. 1715 (2019) 6, 7, 11, 16

TABLE OF AUTHORITIES—Continued

Page

Norfolk S. Ry. v. *Sorrell*,
549 U.S. 158 (2007) 8, 17

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

Rehberg v. *Paulk*,
566 U.S. 356 (2012) 6, 21

Robert C. Herd & Co. v. *Krawill Mach. Corp.*,
359 U.S. 297 (1959) 9

Rogers v. *City of Amsterdam*,
303 F.3d 155 (2d Cir. 2002) 22

Salley v. *Myers*,
971 F.3d 308 (4th Cir. 2020).....14, 17

Savory v. *Cannon*,
947 F.3d 409 (7th Cir. 2020).....11

Serrano v. *Customs & Border Patrol*,
975 F.3d 488 (5th Cir. 2020).....1

Simmons v. *Himmelreich*,
136 S. Ct. 1843 (2016) 8

Tanzin v. *Tanvir*,
141 S. Ct. 486 (2020) 1, 9, 21

Tenney v. *Brandhove*,
341 U.S. 367 (1951) 6, 12

Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*,
204 U.S. 426 (1907) 9, 19

United States v. *Texas*,
507 U.S. 529 (1993) 8, 16

TABLE OF AUTHORITIES—Continued

Page

University of Tenn. v. *Elliott*,
478 U.S. 788 (1986) 7

Wallace v. *Kato*,
549 U.S. 384 (2007) 6, 7

West v. *City of Caldwell*,
931 F.3d 978 (9th Cir. 2019).....1

White v. *Pauly*,
137 S. Ct. 548 (2017) 13

Will v. *Michigan Dep't of State Police*,
491 U.S. 58 (1989) 12, 21

Wyatt v. *Cole*,
504 U.S. 158 (1992) 8, 13

Ziglar v. *Abbasi*,
137 S. Ct. 1843 (2017) 12

STATUTES

42 U.S.C. 1983 .....*passim*

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) 6

OTHER AUTHORITIES

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).....9

Restatement (First) of Torts
(Am. L. Inst. 1938).....17

TABLE OF AUTHORITIES—Continued

Page

Restatement (Second) of Torts
(Am. L. Inst. 1965).....18

Restatement (Second) of Torts
(Am. L. Inst. 1977).....17, 20

William Baude, *Is Qualified Immunity Unlawful?*,
106 Cal. L. Rev. 45 (2018) 11, 12

INTEREST OF AMICUS CURIAE[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society. One such foundation is the American people's ability to hold the government and its officials accountable. For this reason, part of IJ's mission is to remove procedural barriers to individuals' enforcement of their constitutional rights. IJ represents clients in cases about government accountability for rights violations,[2] and it regularly files amicus briefs on the topic.[3]

IJ urges reversal of the Second Circuit's requirement that plaintiffs who assert Section 1983 claims based on a seizure through legal process must show that the underlying prosecution "affirmatively indicates" their innocence. *Lanning* v. *City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018). This requirement adds a procedural barrier to the enforcement of constitutional rights. As a result, IJ has an interest in this Court's

---

[1] Both petitioner and respondent consented to the filing of this amicus brief. No counsel for a party authored this amicus brief in whole or in part. No person other than amicus or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

[2] See, *e.g.*, *Brownback* v. *King*, 141 S. Ct. 740 (2021); *Serrano* v. *Customs & Border Patrol*, 975 F.3d 488 (5th Cir. 2020), cert. denied, No. 20-768, 2021 WL 1520791 (Apr. 19, 2021); *West* v. *City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), cert. denied, 141 S. Ct. 111 (2020); *Lech* v. *Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019), cert. denied, 141 S. Ct. 160 (2020).

[3] See, *e.g.*, *Tanzin* v. *Tanvir*, 141 S. Ct. 486 (2020); *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020); *Jessop* v. *City of Fresno*, 936 F.3d 937 (9th Cir. 2019), cert. denied, 140 S. Ct. 2793 (2020).

review of the Court of Appeals' decision, which departs from this Court's precedents and rests on an unstable rule grounded on neither the text of Section 1983 nor common-law principles that existed when Congress enacted the statute.

SUMMARY OF THE ARGUMENT

This Court should adopt the Eleventh Circuit's position in *Laskar* v. *Hurd*: Section 1983 plaintiffs who assert that they were unreasonably seized through legal process need not show that the prosecution ended in a way that affirmatively indicates their innocence; they need only show that the prosecution ended in a way consistent with innocence. 972 F.3d 1278, 1293 (11th Cir. 2020).

That position is the superior view among the circuits. It tracks this Court's precedents and stands on a stable, common-law foundation. This Court has long maintained that the text of a statute, including Section 1983, should be interpreted in harmony with its purpose and common-law principles that existed when Congress enacted the statute. This ensures a neutral rule of law based on the statute's historical context, which does not change over time.

While the Eleventh Circuit has followed this decisional rule, all other circuits that have weighed in have departed from it. Although these seven circuits have arrived at a common conclusion—that Section 1983 plaintiffs asserting claims based on a legal-process

seizure must show that the prosecution ended with affirmative indications of innocence—none have based their decisions on common-law principles that existed in 1871, when Congress enacted Section 1983. Instead, their decisions largely rest on a stray comment in the Restatement (Second) of Torts and judicial policy preferences. As a result, these circuits have already split from one another in refining their indications-of-innocence tests. In this way, they reveal how departing from common-law principles when deciding a claim's prerequisites produces volatility and inconsistency in the law.

This Court should reject the mercurial indications-of-innocence approach. Not only does it create uncertainty in the law going forward, but it undermines the essential purpose of Section 1983, which is to enforce the provisions of the Fourteenth Amendment.

The Court should therefore reverse the Second Circuit's decision and adopt the Eleventh Circuit's view that a plaintiff asserting a Fourth Amendment claim like Thompson's need not show that the underlying criminal record affirmatively evinces innocence.

ARGUMENT

Petitioner Larry Thompson faced criminal prosecution simply because he asserted his constitutional rights. He insisted that four New York police officers obtain a warrant before entering his home. See C.A.

App. 173.[4] The officers responded by tackling him, entering his home, and putting him in jail. *Id.* at 175, 177–178. Based on the officers' false statements about what happened, a prosecutor charged Thompson with resisting arrest and obstructing government administration. *Id.* at 153–154. Thompson maintained his innocence, and eventually the prosecutor dismissed the charges. *Id.* at 181–182; J.A. 158.

Thompson then asserted a Fourth Amendment claim against respondent under 42 U.S.C. 1983, for unreasonably seizing him through legal process. J.A. 33–34. The Second Circuit held that Thompson could not proceed on his claim without showing that the prosecution ended in a way that "affirmative[ly] indicat[es] * * * innocence"—something Thompson could not do because the prosecutor dismissed the charges against him before the record could show that his innocence was a reason for the dismissal. *Id.* at 20 (quoting *Lanning* v. *City of Glens Falls*, 908 F.3d 19, 25 (2d Cir. 2018)).

The Second Circuit's indications-of-innocence requirement has no basis in Section 1983's text or the common law in 1871, when Congress enacted the statute. As a result, it will continue to destabilize the rule of law for Section 1983 claims unless this Court reverses that trend.

---

[4] C.A. App. refers to the joint appendix before the Court of Appeals, No. 19-580 (2d Cir.), ECF No. 34.

I. Straying from the common law goes against this Court's precedents and does the law a disservice.

Section 1983's text does not spell out the prerequisites for each type of claim that a plaintiff may bring under the statute. Indeed, the text simply states that

> [e]very 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[.]

42 U.S.C. 1983. But this Court has long recognized that Section 1983 should be read "in harmony" with general common-law principles that existed in 1871. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976). A result is that the common law provides a fixed foundation to decide what a plaintiff must show to proceed with a Section 1983 claim. Departing from that foundation—as the Second Circuit and six others have done—conflicts with the statute's text and purpose, leading to unpredictability and instability in the law.

A. Section 1983 should be read in harmony with common-law principles that were prevalent in 1871.

This Court has repeatedly instructed that when defining the prerequisites of a Section 1983 claim, courts are to "look to 'common-law principles that were well settled'" when Congress enacted Section 1983 in 1871.[5] *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1726 (2019) (quoting *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997)).[6] Common-law rules are "the appropriate starting point" for defining the prerequisites for recovery, *Carey* v. *Piphus*, 435 U.S. 247, 258 (1978), because Congress adopts statutes against the backdrop of common-law principles and "likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983) (quoting *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)).[7]

---

[5] Section 1983 codifies what was originally Section 1 of the Civil Rights Act of 1871. That is why 1871 is the reference point to identify prevalent common-law principles. See 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) (codified as amended at 42 U.S.C. 1983); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 664 (1978).

[6] See also *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920 (2017); *Rehberg* v. *Paulk*, 566 U.S. 356, 361–363 (2012); *Wallace* v. *Kato*, 549 U.S. 384, 388–390 (2007); *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994).

[7] See also *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993); *Imbler*, 424 U.S. at 421; *Tenney* v. *Brandhove*, 341 U.S. 367, 372–376 (1951).

Examples are easy to find. For instance, in *Heck* v. *Humphrey*, the Court identified a common-law principle that civil tort actions are not proper vehicles to challenge a criminal judgment. See 512 U.S. 477, 484–486 (1994). Relying on this principle, the Court decided that plaintiffs may not bring Section 1983 claims that would collaterally attack a still-valid conviction or sentence. *Id.* The Court turned to that same common-law principle again in *McDonough* v. *Smith*, to determine when the statute of limitations would start running on a fabricated-evidence claim. See 139 S. Ct. 2149, 2156–2158 (2019). Likewise, in *Wallace* v. *Kato*, common-law principles helped determine when a wrongful-arrest claim accrued. See 549 U.S. 384, 388–391 (2007). And in *Nieves* v. *Bartlett*, the Court drew upon common-law rules to conclude that probable cause should generally defeat a retaliatory-arrest claim. See 139 S. Ct. at 1726–1727.[8]

To be sure, common-law rules may not answer all questions about the scope of liability under Section 1983. See *Carey*, 435 U.S. at 258. After all, there may be no analogous common-law tort for a certain cause of action under Section 1983. See *id.* And common-law rules should not be adopted for Section 1983 claims if doing so would defeat the statute's purpose—which is "to deter state actors from using the badge of their authority to deprive individuals of their federally

[8] See also *University of Tenn.* v. *Elliott*, 478 U.S. 788, 796–797 (1986) (concluding that Congress, in enacting Section 1983, did not create an exception to the general common-law rules of preclusion).

guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt* v. *Cole*, 504 U.S. 158, 161 (1992); see *Carey*, 435 U.S. at 258. But unless the statute's effectiveness requires otherwise, common-law principles that were well settled in 1871 largely determine the prerequisites for claims under Section 1983. See *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

This method for identifying prerequisites to recover damages is by no means limited to Section 1983. Indeed, this Court has routinely looked to the common law when determining the scope of federally created causes of action. For example, common-law principles have shaped the conditions for recovery under the Federal Employers' Liability Act (FELA), the Federal Tort Claims Act, the Debt Collection Act, the Carriage of Goods by Sea Act, and the Jones Act. See, *e.g.*, *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165–166 (2007) ("Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law.");[9] *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1849 n.5 (2016) (Federal Tort Claims Act); *United States* v. *Texas*, 507 U.S. 529, 530, 533–534 (1993) (Debt

[9] See also, *e.g.*, *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543–544 (1994); *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337–338 (1988); *Michigan Cent. R.R.* v. *Vreeland*, 227 U.S. 59, 67–68 (1913). But see *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 695, 702–703 (2011) (departing from the common-law history, pointing to the statutory text and purpose).

Collection Act); *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297, 301, 304, 308 (1959) (Carriage of Goods by Sea Act); *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404, 415–418 (2009) (Jones Act). And just recently in *Tanzin* v. *Tanvir*, this Court emphasized the importance of tying statutory interpretation to historical principles, looking to the common law and rejecting new policy considerations as an appropriate method for statutory interpretation. 141 S. Ct. 486, 491–493 (2020).

The rule that courts should first turn to common-law principles when determining claims' prerequisites also reinforces two interpretive canons: (1) the canon that statutes in derogation of common law are to be strictly construed, see *Herd*, 359 U.S. at 304–305, and (2) the canon that common-law terms in a statute are to be interpreted with reference to their meanings at common law, see *Carter* v. *United States*, 530 U.S. 255, 266 (2000); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012) ("The age-old principle is that words undefined in a statute are to be interpreted and applied according to their common-law meanings."). All three rules reflect a long-standing presumption that statutes displace established common-law principles only when the statute's text or its efficacy requires. See generally *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907) ("[A] statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required[.]").

Thus, adherence to common-law principles is engrained in this Court's precedents.

B. Grounding claims' prerequisites in the common law produces a stable, neutral rule of law.

The importance of turning to common-law principles to resolve questions unanswered by a statute's text cannot be overstated. Because Section 1983's text does not outline each condition a plaintiff must satisfy to bring a claim under the statute, those claims' conditions must be defined some other way. Common-law principles that were prevalent when Congress enacted Section 1983 provide a neutral, steadfast option. Common-law principles established in 1871 are cemented in history; they do not change with judicial policy preferences over time.

Grounding claims' prerequisites on the common law of 1871 also honors the statute's text. This is because, again, we presume that Congress was familiar with widespread common-law principles when it enacted Section 1983. And we presume that if the statute were to displace those principles, Congress would have explicitly said so. See *Fact Concerts*, 453 U.S. at 258.

Another benefit to basing claims' prerequisites on a common-law foundation is that it produces a neutral rule of law—one that favors neither the plaintiff nor the defendant in all cases. Sometimes, a common-law principle will favor the defendant. For example, in

Heck, *McDonough*, and *Nieves*, the guiding common-law principle precluded the plaintiffs' claims absent specific conditions.[10] Other times, however, a common-law principle will favor the plaintiff. This case is one example. Another is when—thanks to the common-law principle underlying *Heck*'s deferred-accrual rule—a plaintiff's claim is timely rather than barred by the statute of limitations. See, *e.g.*, *Savory* v. *Cannon*, 947 F.3d 409, 411 (7th Cir. 2020) (en banc) (holding that the plaintiff's claim was timely because it accrued under *Heck* not when he was released from prison but when he was pardoned five years later).

The Court should not now deviate from its practice of defining Section 1983 claims' prerequisites using common-law principles. Such a deviation would undermine this Court's prior decisions resting on the common law, and it would create unpredictability in how courts will identify viable Section 1983 claims in the future. Indeed, if neither a law's text nor its historical context is the basis for claims' preconditions, then something less concrete must be, such as judicial policy preferences or ad hoc rules conceived case by case.

For an illustration of how departing from common-law principles can destabilize the rule of law, one need only look to the development of the modern qualified-immunity doctrine. When Congress enacted Section 1983, there was no well-settled, good-faith defense in lawsuits for constitutional violations. See William

---

[10] See *McDonough*, 139 S. Ct. at 2156–2157; *Nieves*, 139 S. Ct. at 1726; *Heck*, 512 U.S. at 486–487.

Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55 (2018). In line with this history, the Court "did not recognize an immunity under § 1983 for good-faith official conduct" during the first century of the statute's existence. *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1863 (2020) (Thomas, J., dissenting from denial of cert.).

But in 1967, the Court departed from the common law by introducing qualified immunity based on good faith and probable cause. See *Pierson* v. *Ray*, 386 U.S. 547, 555–557 (1967). Although the Court initially purported to root this immunity in the common law, the Court later replaced that historical reasoning with a judge-made rule, which has transformed the qualified-immunity doctrine. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (basing qualified immunity on "clearly established law"). The doctrine no longer finds any support in either the statute's text or its common-law history.[11] See *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987) (observing that in *Harlow*, "the Court completely reformulated qualified immunity along principles not at all embodied in the common law"); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and in judgment). In the 40 years since the Court abandoned common-law principles in

[11] Contrasting with this treatment of qualified immunity, the Court has maintained a common-law inquiry for judicial, legislative, and state sovereign immunities. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 66–67 (1989) (state sovereign); *Pierson*, 386 U.S. at 553–555 (judges); *Tenney*, 341 U.S. at 372–376 (legislators).

Harlow, qualified immunity has generated confusion and disagreement within the federal judiciary.[12]

Qualified immunity's retreat from the statute's text and history is a cautionary tale not to similarly abandon the common-law inquiry here—a case about the prerequisites of a Fourth Amendment claim under Section 1983. See *Wyatt*, 504 U.S. at 171 (Kennedy, J., joined by Scalia, J., concurring) (explaining that *Harlow*'s departure from history should not be extended to other contexts). Emphasizing this warning, the seven circuits that have already departed from the common-law inquiry have refined their tests on an ad hoc basis, producing unclear standards and inconsistent guidance to district courts. See Part II.B, *infra*.

To restore a stable, neutral rule of law, this Court should adhere to the common-law method for defining prerequisites to Section 1983 claims.

II. The Eleventh Circuit's position in *Laskar* is the only approach consistent with the common-law history surrounding Section 1983.

The circuits are united in a basic requirement for claims like Thompson's. The plaintiff must show that

[12] See generally *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases."); *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting) (observing a "disturbing trend" in summary reversals when lower courts deny officers qualified immunity).

the prosecution ended in the accused's favor—known as the favorable-termination requirement. Compare *Laskar* v. *Hurd*, 972 F.3d 1278, 1284 (11th Cir. 2020), with *Lanning*, 908 F.3d at 24. But they disagree about what this favorable-termination requirement entails.

The Eleventh Circuit panel majority in *Laskar* stands alone in deciding this issue based on common-law principles that were settled in 1871. The seven other circuits that have addressed the issue have adopted an approach based not on Section 1983's historical context (or the statute's text) but on the Restatement of contemporary common-law torts or on state cases relying on the Restatement.

These seven circuits all require the plaintiff to show that the criminal proceeding ended in a way that "indicates" or "implies" innocence. See, *e.g.*, *Salley* v. *Myers*, 971 F.3d 308, 313 (4th Cir. 2020); *Jordan* v. *Town of Waldoboro*, 943 F.3d 532, 545–546 (1st Cir. 2019). But exactly how a plaintiff can do that in most cases remains largely a mystery. And the circuits provide conflicting guidance to district courts about how to determine whether their indications-of-innocence tests have been met.

A. The *Laskar* majority identified a well-settled common-law principle, which may exist without uniformity in the states.

The Eleventh Circuit panel majority did exactly as this Court has instructed. It first looked to the

common-law analogue tort for a Fourth Amendment claim of unreasonable seizure through legal process. 972 F.3d at 1286. That analogue is common-law malicious prosecution. *Id.* And in 1871, the panel observed, the "clear majority of American courts did not limit favorable terminations to those that suggested the accused's innocence." *Id.* at 1287. Rather, "under prevailing standards, a plaintiff could satisfy the favorable-termination element of malicious prosecution by proving that a court formally ended the prosecution in a manner that was not inconsistent with his innocence." *Id.* at 1292. Only one state—Rhode Island—required evidence of innocence to satisfy the favorable-termination requirement. See *id.* at 1287.

Despite this outlier state, the predominant view for determining whether a prosecution ended in the accused's favor was clear. The matter did not turn on evidence of innocence. Instead, a prosecution ended favorably for the accused if (1) no conviction resulted and (2) the accused did not concede guilt—for example, in a compromise with the prosecutor. See *id.* at 1289.

The dissent in *Laskar* believed that the common-law waters were too muddy to discern a well-settled principle. See *id.* at 1299 (Moore, J., dissenting). In support of this view, the dissent pointed out differences in how states determined whether a prosecution had terminated. See *id.* at 1300–1301. Setting aside the flaws in that historical analysis, see *id.* at 1289–1291, this Court's precedents confirm that the common law did not have to be uniform, stagnant, or crystal clear in the states to reflect a settled principle. For example,

despite debate about the prevalence of certain common-law principles, those principles guided this Court's analysis of recovery under the FELA and the Debt Collection Act. Compare *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337 (1988) (relying on the common law), and *Texas*, 507 U.S. at 533–534 (same), with *Monessen*, 486 U.S. at 346–347 (Blackmun, J., concurring in part and dissenting in part) (contending that because the common law was in flux leading up to the FELA's passage, the majority improperly relied on a common-law principle), and *Texas*, 507 U.S. at 541–542 (Stevens, J., dissenting) (disagreeing that Congress would have recognized the common-law rule relied upon by the majority).

Likewise, states' favorable-termination requirements at common law in 1871 may have differed in their details. But that does not preclude a predominant, "settled" common-law principle. *Nieves*, 139 S. Ct. at 1726. Indeed, identifying such a principle is an exercise in seeing the forest for the trees. The *Laskar* majority extensively surveyed the common law of 1871 and found a prevailing common-law principle—"whether a particular termination affirmatively supported a plaintiff's innocence was not material to the favorable-termination element [of malicious-prosecution claims]." *Laskar*, 972 F.3d at 1292. The majority then went on to analyze whether that principle aligns with the Fourth Amendment. *Id.* at 1292–1293. The principle does, as a rule to determine when a claim accrues. *Id.* In other words, under Section 1983 a Fourth Amendment claim based on a seizure through legal

process does not accrue unless the prosecution ended in a way consistent with innocence. *Id.* at 1293.

B. The positions of the *Laskar* dissent and seven other circuits foretell instability and unpredictability in an indications-of-innocence approach.

Because the Eleventh Circuit's approach is grounded in the common law, this Court should not be troubled that it differs from seven other circuits' rules. After all, a majority position can be wrong. See, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 621 (2001) (Scalia, J., concurring) ("[O]ur opinions sometimes contradict the *unanimous* and longstanding interpretation of lower federal courts."); *Norfolk*, 549 U.S. at 167–168 ("It is of course possible that everyone is out of step except Missouri[.]"). And an inspection of those circuits' reasons for adopting the indications-of-innocence approach reveals that their common position is indeed erroneous.

The circuits requiring indications of innocence have based their decisions almost exclusively on the Restatement (Second) of Torts (Am. L. Inst. 1977).[13] If

[13] See, *e.g.*, *Salley*, 971 F.3d at 313; *Jones* v. *Clark County*, 959 F.3d 748, 764 (6th Cir. 2020); *Jordan*, 943 F.3d at 545; *Lanning*, 908 F.3d at 26; *Cordova* v. *City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016); *Donahue* v. *Gavin*, 280 F.3d 371, 383 (3d Cir. 2002). The Ninth Circuit's rule stems from a case decided by the Supreme Court of California, which, in turn, drew upon the Restatement (First) of Torts (Am. L. Inst. 1938). See *Awabdy* v.

that Restatement accurately captures common-law principles from any point in history, it is the mid-twentieth century, when the Restatement was published—not 1871. See Restatement (Second) of Torts, Intro. (Am. L. Inst. 1965) (explaining that a "prime objective" of the Second Restatement is to revise descriptions in light of the "enormous change in torts"). So it does not reflect the principles that Congress "likely intended * * * to obtain" in Section 1983, "absent specific provisions to the contrary." *Fact Concerts*, 453 U.S. at 258.

Not one of those circuits has refuted the Eleventh Circuit's historical analysis of the common law in 1871. The *Laskar* dissent criticized it. But the dissenting judge did not identify a well-settled common-law principle supporting an indications-of-innocence approach. To the contrary, the dissent acknowledged that only Rhode Island applied an indications-of-innocence rule. *Laskar*, 972 F.3d at 1301 (Moore, J., dissenting). The dissent also conceded that "courts in most states would permit a claim where the plaintiff's prosecution ended in any termination whereby the claimant was either discharged or could not be subject to further prosecution on the same charge." *Id.* at 1299. Still, the dissent concluded that "there is no 'well-settled' common-law principle as to what a malicious prosecution claimant had to aver to satisfy the favorable termination requirement." *Id.* Thus, even by the dissent's own

---

City of Adelanto, 368 F.3d 1062, 1068 (9th Cir. 2004) (citing *Jaffe* v. *Stone*, 114 P.2d 335, 338–339 (Cal. 1941)).

analysis, the common law of 1871 does not underpin an indications-of-innocence rule.

Even if the common-law principle that the *Laskar* majority identified were not perfectly clear, "it is often easier to disparage the product of centuries of common law than to devise a plausible substitute." *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 707 (2011) (Roberts, C.J., dissenting). Neither the *Laskar* dissent nor the seven other circuits weighing in on the issue have offered a suitable substitute rule. The dissent, for its part, largely defers to the seven other circuits. *Laskar*, 972 F.3d at 1303–1305 (Moore, J., dissenting). And none of those circuits have based their decisions on Section 1983's text, history, or purpose.

To start, nothing in Section 1983's text suggests that plaintiffs must point to evidence of innocence. The statute's text says that a plaintiff may sue for "the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. 1983. A deprivation of rights secured by the Fourth Amendment occurs when a person is unreasonably seized through legal process. *See Manuel* v. *City of Joliet*, 137 S. Ct. 911, 918–919 (2017). Thus, a plaintiff may sue under Section 1983 for that deprivation unless Section 1983 incorporated a settled common-law principle precluding the claim.[14] In 1871, such a principle demanding evidence of innocence did not exist.

---

[14] The statute did not incorporate settled common-law principles that negate Section 1983's purpose. See *Abilene Cotton*, 204 U.S. at 437.

Against this text and history, the First, Second, Third, Fourth, Sixth, Ninth, and Tenth circuits ultimately relied instead on the Restatement. But even the Restatement does not clearly endorse an indications-of-innocence approach. It is true that one comment (comment a to Section 660) states that "[p]roceedings are 'terminated in favor of the accused,' * * * only when their final disposition is such as to indicate the innocence of the accused." Restatement (Second) of Torts § 660 cmt. a (Am. L. Inst. 1977); see, *e.g.*, *Lanning*, 908 F.3d at 26 (relying on this statement). But Section 659 states that "[c]riminal proceedings are terminated in favor of the accused by * * * the formal abandonment of the proceedings by the public prosecutor," *id.* § 659, and the corresponding comment recognizes that entry of a *nolle prosequi* is the usual method for this kind of favorable termination, *id.* § 659 cmt. e. No circuit has reconciled its dependence on comment a to Section 660 with the rest of the Restatement.

With no support in text or history—and, at best, equivocal support from the Restatement—the circuits (and the *Laskar* dissent) are left only with policy arguments that undermine Section 1983's purpose. For example, Judge Moore (dissenting in *Laskar*) reasoned that requiring indications of innocence "strike[s] the best balance between filtering out meritless claims and permitting claims that demonstrate some likelihood of success." *Laskar*, 972 F.3d at 1305 (Moore, J., dissenting). In his view, this requirement addresses concerns with an "influx of malicious prosecution cases

filed on federal dockets" and federal courts' "difficulty in efficiently disposing with unsupported claims." *Id.* at 1306; cf. *Cordova* v. *City of Albuquerque*, 816 F.3d 645, 654 (10th Cir. 2016) (observing that the circuit's indications-of-innocence test "serves as a useful filtering mechanism, barring actions that have not already demonstrated some likelihood of success").

But Section 1983 and the Fourth Amendment were not created to reduce the federal courts' caseload. On the contrary, Section 1983 opened federal courthouse doors to victims of unconstitutional acts at the hands of state actors. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) ("[A] principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims[.]"); *Monroe* v. *Pape*, 365 U.S. 167, 172–185 (1961).[15]

The consequence of ignoring this history is to invite courts to improvise on an ad hoc basis, promising division and uncertainty in the law going forward. This is already evident in variations that have emerged in how circuits view their indications-of-innocence tests. For example, the Second Circuit has announced that dismissals based on "the accused's assertion of a constitutional or other privilege, * * * such as the right

[15] Also, this Court has rejected the proposition that policy can justify a departure from statutory text. See *Tanzin*, 141 S. Ct. at 493 ("We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted * * * years ago."); *Rehberg*, 566 U.S. at 363 ("We have made it clear that it is not our role 'to make a freewheeling policy choice[.]' " (quoting *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986))).

to a speedy trial," will usually satisfy that circuit's indications-of-innocence test. *Murphy* v. *Lynn*, 118 F.3d 938, 949 (2d Cir. 1997); see also *Rogers* v. *City of Amsterdam*, 303 F.3d 155, 160 (2d Cir. 2002). The Tenth Circuit, meanwhile, has rejected that guidance, preferring district courts to focus on the merits with "individual consideration of the circumstances surrounding each dismissal." *Cordova*, 816 F.3d at 652.

What's more, each of these circuits' tests raises more questions than it answers. How strong must the evidence of innocence be? Must it overcome a preponderance standard? Something less, like reasonable suspicion or probable cause? Something more, like beyond a reasonable doubt? What kind of evidence is relevant? And to what sources are courts supposed to turn for answers? This proliferation of questions is natural, because no indications-of-innocence test is tethered to Section 1983's text or history. Thus, although seven circuits require indications of innocence, their standards are unclear and primed to develop in different directions.

The Eleventh Circuit's approach eliminates this morass of uncertainty. It does so by adhering to the rules of decision already charted by this Court: Look to the common law that existed when Congress enacted the statute; if a well-settled principle existed and aligns with the right at issue, the statute tacitly incorporates the principle. Here, the predominant view among the states in 1871 was that a plaintiff could proceed with a malicious-prosecution claim if the prosecution ended without a conviction or concession of guilt.

That principle aligns with the values and purposes of Section 1983 and the Fourth Amendment. See *Manuel*, 137 S. Ct. at 914, 917–920 (holding that the Fourth Amendment protects against unreasonable seizures after legal process begins). Section 1983 therefore incorporates the principle for Fourth Amendment claims based on seizure through legal process.

CONCLUSION

The approach adopted by the Second Circuit in this case—like the approaches in the First, Third, Fourth, Sixth, Ninth, and Tenth Circuits—departs from this Court's precedents and Section 1983's text and history. As a result, it undermines stability and uniformity in the rule of law. By contrast, the Eleventh Circuit's and petitioner's approach adheres to this Court's precedents and honors Section 1983's text, history, and purpose, providing a stable rule fixed in a common-law principle that was well settled in 1871.

The Court should reverse the Second Circuit's decision and adopt the Eleventh Circuit's and petitioner's approach.

Respectfully submitted,

MARIE MILLER*
ANYA BIDWELL
PATRICK JAICOMO
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
mmiller@ij.org
abidwell@ij.org
pjaicomo@ij.org

**Counsel of Record*

Dated: June 11, 2021