Case No. 24-1875

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HAMDI A. MOHAMUD,

Plaintiffs-Appellants,

v.

HEATHER WEYKER, in her individual capacity as a St. Paul Police Officer,

Appellees.

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL WITH CONSENT OF PARTIES

On Appeal from the United States District Court
for the District of Minnesota

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, Amicus Goldwater Institute certifies that it is a non-partisan tax-exempt education foundation under Section 501(c)(3) of the Internal Revenue Code, has no parent corporation, has issued no stock, and has no parents, trust, subsidiaries, and/or affiliates that have issued shares or debt securities to the public.

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a nonprofit, nonpartisan public policy and research foundation established in 1988, and is dedicated to advancing the principles of limited government, economic freedom, and individual liberty. GI advances these principles through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are directly affected.

GI frequently litigates under 42 U.S.C. § 1983, or appears as amicus in cases involving Section 1983. *See, e.g.*, *Lavigne v. Great Salt Bay Cmty. Sch. Bd.*, No. 2:23-cv-00158-JDL, 2024 WL 1975596 (D. Me. May 3, 2024); *Pomeroy v. Utah State Bar*, 598 F. Supp.3d 1250 (D. Utah 2022); *Marszalek v. Kelly*, No. 20-cv-4270, 2022 WL 225882 (N.D. Ill. Jan. 26, 2022); *Boudreaux v. Louisiana State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2021). As such, the applicability of Section 1983 is vital to GI's work in litigating in state and federal courts in defense of individual rights.

[1] The Goldwater Institute's counsel authored this brief in its entirety. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no other person—other than the amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

If a government official causes an injury and, in doing so, violates the Constitution, the harmed individual should be able to hold that official accountable in a court of law. There would be no point in having laws and a Constitution that restrict the government and its officials if officials who transgress those restrictions cannot be held accountable by those whose rights they violate. And, at least initially, the federal judiciary agreed.

Early in U.S. history, the Supreme Court imposed a system of strict liability against federal officers. *See* Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity and the Betrayal of Butz v. Economou: How the Supreme Court Quietly Granted Federal Officials Absolute Immunity for Constitutional Violations*, 126 Dick. L. Rev. 719, 724–29 (2022). That rule was first announced by the Court in *Marbury v. Madison*. 5 U.S. (1 Cranch) 137 (1803). There, the Court explained: "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id*. at 163. This rule was drawn from the British common law, which held that "it is a vain thing to imagine a right without a remedy." *Ashby v. White*, 92 Eng. Rep. 126, 136 (K.B. 1703); 3 W. Blackstone, *Commentaries* *23 ("where there is a legal right, there is also a legal remedy").

Justice Story expounded upon this in his 1824 opinion in *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824). There, a ship was wrongfully seized by a customs agent and its owner sued for damages when the government sought to forfeit the vessel. *Id*. at 363–65. In affirming the grant of damages to the vessel's owner, Story explained that a federal court "can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress." *Id*. at 367. For judges to fashion an immunity doctrine from the bench which had not been established by the legislature would amount to policy-making which would be an encroachment of the provinces of the other branches. *Id*. at 366.

The traditional system of liability for government officials who violate the law was well known when Congresses created the private right of action for individuals whose federal rights were violated by state officials, now known as Section 1983. Under that statute:

> *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 (emphasis added). This use of the word "every" is absolute and unequivocal; and courts should read it as such.

Taken together, the tradition of strict liability and the enactment of Section 1983 create a presumption of accountability: courts should presume that there is an avenue whereby victims of official wrongdoing can obtain redress against *state* (as opposed to federal) officials, following a prima facie showing that the sued official does, or at the time of the challenged action did, have the power to act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." *Id*. This is a rebuttable presumption, and can be overcome by showing that the official was not acting under color of law at the time of the challenged action, but it should otherwise be applied.

This presumption fits with the legal tradition in existence when Congress enacted Section 1983, and it would ensure that individuals have the chance to prove that the challenged actions were taken under color of law and deprived them of their constitutional rights. This would *not* create a presumption that any specific individual is liable, but simply that, in general, those acting under the color of state law are subject to suit under Section 1983.

ARGUMENT

I. The early legal tradition under the Constitution shows that the original public understanding of this country's legal system included a mechanism for harmed individuals to hold individual government officials accountable in federal courts.

From 1804 to 1877, the Supreme Court enforced a system of strict liability for government officials who violated constitutional rights. *See* David Engdahl,

Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 17 (1972) (noting that during this period "[an] official was of course personally liable for any positive wrong which was not actually authorized by the state" and citing cases). Under this system, a citizen injured by the actions of a government official could sue the official in tort for damages. The only question the court considered was whether the individual was harmed by the official and if damages was the appropriate remedy for the injury. Whether the official should—for policy reasons—be liable for damages was not a question the court considered.

For example, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804), the Supreme Court held a naval officer liable for seizing—on the orders of President John Adams—a Dutch ship during the Quasi-War between the United States and France. Congress had enacted a statute directing the seizure of ships sailing *to* French ports, but President Adams ordered the seizure of ships sailing to *or from* French ports. *Id*.; *See also* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1877–79 (2010). Captain Little followed the orders of the President, seizing the *Flying Fish* after it departed a French port. *Little*, 6 U.S. (2 Cranch) at 176. *Flying Fish*'*s* owner sued Little for damages and he pointed to the President's instructions as his defense. Pfander & Hunter, *supra* at 1880.

The Court rejected this argument. Chief Justice Marshall, writing for the Court, explained that instructions of a commander—even of a president—simply "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Little*, 6 U.S. (2 Cranch) at 179. "Captain Little then must be answerable in damages to the owner of this neutral vessel." *Id*. Importantly, Marshall explained that his "first bias" was to excuse Little from paying damages for policy reasons—he was simply following orders of the President, after all. *Id*. But he concluded that the Court could *only* look to the law and whether Little had violated it. *Id*. Becuase the answer was yes, Little was liable for the damages caused by his actions. *Id*.

The Court reaffirmed the rule holding federal officials strictly liable two years later in *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806). There, a District of Columbia fine collector entered the home of a Justice of the Peace to seize property to satisfy an order from a court martial for not completing required militia duty. *Id*. at 335. The Justice of the Peace sued the fine collector, arguing that he was statutorily exempt from militia duty, and the Court agreed. *Id*. at 337. Further, because the statute exempted Justices of the Peace, the officer executing the court-martial's order was liable. *Id.*

As one scholar notes, the strict liability rule "required [an official] judge at his peril whether his contemplated act was actually authorized by the law under

which he purported to act," and "whether [his] contemplated act, even if actually authorized, would constitute a trespass or other positive wrong," because if so, he could be held liable in court (although he would likely be entitled to indemnity). Engdahl, *supra* at 18.

The line of cases allowing individuals to hold government officials accountable for violating their constitutional rights extends far beyond the Founding Era. In *Mitchell v. Harmony*, the Court held that a *military officer* was liable for the seizure of a merchant's property in Mexico. 54 U.S. (13 How.) 115, 137 (1851). There, a company of merchants followed the Army from Missouri toward Chihuahua when the Mexican-American War broke out. *Id*. at 128–29. One merchant, Harmony, decided to leave the caravan, but Colonel Mitchell, on orders from his superiors, forced him to remain with the group to prevent the goods from falling into enemy hands. *Id*. at 129. During various engagements, Harmony lost all his property, *id*. at 130, and later sued Mitchell. Although Mitchell presented numerous justifications for his actions, including that he was obeying orders, *id*. at 132, the Court rejected that defense, holding that "the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed." *Id*. at 137.

Similarly, in *Bates v. Clark*—after the Civil War and after the passage of the Civil Rights Act of 1871 which introduced Section 1983—the Supreme Court

continued its strict liability approach to federal officers. 95 U.S. (5 Otto) 204 (1877). There, two army officials seized whiskey from merchants in Dakota Territory, believing that they were in "Indian Country," where Congress forbade the importation of alcohol. *Id*. at 204–06. The officers were wrong—neither the merchants nor the officers were actually in Indian Country. *Id*. And while the officers eventually returned the whiskey, the merchants still sued for damages and the Dakota Territory Supreme Court granted them, explaining: "[h]owever good the intentions and purposes of the defendants … they committed against the plaintiffs a willful and unlawful act from which flowed all the damages they sustained." *Clark v. Bates*, 46 N.W. 510, 512 (Dakota 1874).

The U.S. Supreme Court affirmed. It explained that the officers "were utterly without any authority in the premises; and their honest belief that they had [authority] is no defense." *Bates*, 95 U.S. (5 Otto) at 209. Thus, even in 1877, the Supreme Court still allowed individuals to hold even military officers, acting under an honest mistake, directly accountable for violations of law.

Thus, throughout the nineteenth century, courts presumed that federal officials were strictly liable for actions that went beyond their authority and violated the law. *See*, *Belknap v. Schild*, 161 U.S. 10, 18 (1896) ("[T]he exemption of the United States from judicial process does not protect their officers and agents … from being personally liable to an action of tort by a private person whose rights

of property they have wrongfully invaded or injured, even by authority of the United States."). Absent some specific congressional enactment waiving liability, government officers were liable to the individuals whose rights they violated. *United States v. Lee*, 106 U.S. (16 Otto) 196, 220 (1882) ("[a]ll the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."). And while Congress could shield officers from liability, it could not authorize unconstitutional conduct, which meant that "[s]ince an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense." *Butz v. Economou*, 438 U.S. 478, 490–91, nn.15–16 (1978).

It was against the backdrop of this presumption that individuals could hold federal officials liable for violating their rights that Congress enacted the Civil Rights Act of 1871.

II. Congress enacted the Civil Rights Act of 1871 to ensure that citizens would have legal remedies against government agents who violated their constitutional rights.

The end of the Civil War did not bring about an end to racial violence, of course, and in response to that violence, especially state-sponsored violence, Congresses enacted the Civil Rights Act of 1871. While most of its provisions have been significantly amended since then, one remains generally unchanged, as does the motivation behind it: 42 U.S.C. § 1983.

Section 1983 created a private cause of action against "any person who, under color of any law of any State shall subject any person to the deprivation of any rights, privileges, or immunities secured by the Constitution." 17 Stat. 13 (cleaned up)**.** This "was designed primarily in response to the unwillingness or inability of the *state* governments to enforce their own laws against those violating the civil rights of others." *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (emphasis added). There was no general worry at that time regarding *federal* officers, because they were already strictly liable for their conduct in the federal courts. *See, e.g.*, *Milligan v. Hovey*, 17 F. Cas. 380 (C.C.D. Ind. 1871) (No. 9,605). With the passage, then, of Section 1983, both state *and* federal officials could be held accountable by individuals whose rights they violated. In short, Congress in enacting Section 1983 placed state officials on the same level as federal officials in federal courts by allowing individuals harmed by those officials to hold them accountable through the U.S. legal system.

Courts, when interpreting the applicability of Section 1983 to a specific harm look to the state of the law in 1871, when Congresses enacted Section 1983.[2]

[2] As Professor Alexander Reinert has shown, the law of Section 1983 immunity has been infected with a perhaps fatal legal error for decades: the version of Section 1983 that Congress adopted (apparently by accident) omitted the codification of that statute, and different wording—never enacted by Congress—was substituted, instead. As a result, courts have been interpreting a version of Section 1983 that is actually not the law. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 234–38 (2023). That's

See, e.g. Thompson v. Clark, 596 U.S. 36, 43–44 (2022). It should do the same when determining the general availability of a remedy under Section 1983. The purpose of Section 1983 was to permit state officials to be held accountable by the people whose rights they violated. That was the general standard at the time—one of strict liability and accountability.

This Court should permit this suit to go forward, then, as it fits within the system of accountability at the time Congress enacted Section 1983 and as there is no question that Appellee was cloaked with *state* authority even if she also possessed some federal authority, that would not have defeated an attempt of Appellant to hold Appellee accountable in 1871.

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relevant here because the wrongfully codified version omitted the phrase "any … law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding"—a phrase intended to override traditional state-law immunities. *Id.* at 235. As Judges Nalbandian, Denniss, and Willett have acknowledged, this discovery sheds crucial new light on the legitimacy of court-invented immunity doctrines. *See Price v. Montgomery Cnty.*, 72 F.4th 711, 727 n.1 (6th Cir. 2023) (Nalbandian, J., concurring) *cert. denied*, 144 S. Ct. 2499 (U.S. July 2, 2024); *Jimerson v. Lewis*, 94 F.4th 423, 431 n.1 (5th Cir. 2024) (Dennis, J., dissenting); *Rogers v. Jarrett*, 63 F.4th 971, 979–81 (5th Cir., 2023) (Willett, J., concurring), *cert. denied*, 144 S. Ct. 193 (2023). But it also sheds light on the overall presumption of accountability that Section 1983—*the version Congress actually enacted*—was intended to reinforce.

III. Both the history of strict liability at the time Congress enacted Section 1983 and the empowering text of Section 1983 should lead to a rebuttable presumption of accountability.

This Court should recognize a presumption of accountability based on both the legal tradition of holding federal officials strictly liable and Congress' decision, in Section 1983, to allow wronged citizens to hold state officials liable for violations of their rights. Recognizing such a rebuttable presumption would be in line with the original public understanding of Section 1983 and the system that existed for the first eight decades of our constitutional existence. The presumption would not be one that an accused *official* is accountable, but only that an individual injured by the actions of a government official can hold *someone* accountable unless good reason exists to defeat that presumption.

In practice, this presumption would mirror and reinforce the longstanding "presumption of regularity," whereby the law presumes that public officials act in good faith unless there is reason to conclude otherwise. *Cooper v. United States*, 233 F.2d 821, 824 (8th Cir. 1956). The latter presumption is based in part on empiricism—on the everyday experience of the reliability of public institutions and practices, *Latif v. Obama*, 666 F.3d 746, 768 (D.C. Cir. 2011) (Henderson, J., concurring), and particularly "the basic fact that public officials usually do their duty," *Stone v. Stone*, 136 F.2d 761, 763 (D.C. Cir. 1943)—and in part on policy concerns: a presumption against regularity would commit the same fallacy as a

presumption of guilt, and would require the proof of a negative (that is, it would require government to disprove an infinite number of hypothetical objections to its actions).

A presumption of accountability accomplishes similar ends: it would hold that because public officials are presumed to follow the law, they also presumably have no reason to fear having their actions inquired into by a court. If public officials usually do their duty, they also presumptively have no need for a court-created shield of immunity, which would only be of benefit to those who do not. What's more, a presumption against accountability imposes massive and unjust legal hurdles in the path of wronged citizens who have rights and therefore should have remedies. Just as democratic values warrant a presumption of regularity, it they also warrant a presumption of accountability—because official accountability is the hallmark of democracy, no less than of law itself. *Cf. Judicial Watch, Inc. v. U.S. Dep't of State*, 344 F. Supp.3d 77, 78 (D.D.C. 2018) ("A democracy requires accountability, and accountability requires transparency." (quoting President Obama)); *Miller v. Cunningham*, 512 F.3d 98, 103 (4th Cir. 2007) (Wilkinson, J., dissenting) ("any political system that lacks accountability, 'democracy's essential minimal condition,' does not conform with even the barest requirements of equal protection." (citation omitted)).

As applied here, the presumption would be that Section 1983 applies to Appellee Heather Weyker unless that presumption can be overcome by some factual or legal argument. This presumption would operate to allow the suit to continue on the grounds that Weyker was indisputably a St. Paul Police Officer—a quintessential state actor—and to place the burden on Weyker to prove that she was *not* acting under the color of state law in her capacity as a St. Paul police officer at the times of her challenged conduct.

The presumption would better fit the express language of Section 1983: "*Every person* who, under color of any statute, … subjects, or causes to be subjected, any … person … to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable … .") (emphasis added). The italicized words make clear the breadth of this provision, which is consistent with the longstanding tradition of strict liability for *federal* officials at the time Section 1983 was enacted, and that statute's long-neglected "notwithstanding" clause. *See supra* note 2. This Court should apply this presumption and allow the case to proceed until and if Appellee Weyker can prove she was not acting under color of state law at the time Appellant alleges she violated her constitutional rights.

CONCLUSION

The Court should *reverse* the lower court's dismissal.

Respectfully submitted this 15th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,475 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: July 15, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Timothy Sandefur*
Timothy Sandefur