No. 07-854

In The
Supreme Court of the United States

JOHN VAN DE KAMP
and CURT LIVESAY,

Petitioners,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

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

BRIEF AMICI CURIAE OF LAW PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

Amici Curiae write, research, and teach in the fields of Constitutional Law, Civil Rights, and Criminal Justice, with particular focus on the enforcement of civil rights laws and the protection of constitutional rights. They are interested in this case because its outcome will affect the scope of absolute prosecutorial immunity, a doctrine that frequently deprives victims of a remedy for even willful prosecutorial misconduct, and because they believe that the interpretation of § 1983 should reflect the history of the Reconstruction era in which it was enacted.

Amici are **Vikram Amar**, Associate Dean for Academic Affairs and Professor of Law at the University of California, Davis, School of Law, **Erwin Chemerinsky**, Dean and Distinguished Professor of Law at the University of California, Irvine, School of Law, **David Cole**, Professor of Law at the Georgetown University Law Center, **Randy Hertz**, Professor of Clinical Law and the Director of Clinical and Advocacy Programs at the New York University School of Law, **Burt Neuborne**, the Inez Milholland Professor of Civil Liberties at New York University School of Law and the Legal Director of the Brennan

[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, amici state that no counsel for either party has authored this brief in whole or in part, and no person other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

Center for Justice, **Charles Ogletree**, the Jesse Climenko Professor of Law at Harvard Law School and the Director of the Charles Hamilton Houston Institute for Race and Justice, **Barry Scheck**, Professor of Law at the Benjamin N. Cardozo School of Law and Director of the Innocence Project, and **Carter C. White**, King Hall Civil Rights Clinic, University of California, Davis, School of Law.

SUMMARY OF THE ARGUMENT

Following the Civil War, the Reconstruction Congress sought to restructure the legal and moral foundation of the nation by eliminating slavery, granting citizenship to former slaves, and providing effective redress for the deprivation of civil rights. But this enlightened effort faced complex, intransigent resistance. Former Confederates seized control in many parts of the South and launched a campaign of revenge against newly freed slaves, Union supporters, and federal officials. This was no mere vigilantism; it also included state-sanctioned malicious prosecutions of Union officers and federal officials for attempting to enforce federal laws.

To counter this resistance, Congress adopted the Civil Rights Act of 1866, the Fourteenth Amendment (ratified in 1868), and the Ku Klux Klan Act of 1871 (§ 1 of which is codified as 42 U.S.C. § 1983). The history of the enactment of these measures makes one thing clear: Congress was far more concerned

with providing a robust federal response to – and federal remedy for – civil rights abuses in the South than it was with preserving any then-existing common law tort immunities for some of the very same actors who were wreaking havoc in former slave states.

The Court has repeatedly held that § 1983 must be interpreted in light of the historical context (including the congressional intent) of 1871, the year that the 42nd Congress enacted the Ku Klux Klan Act. While noting that § 1983's text provides for no immunities, the Court has concluded that Congress did not intend to eliminate well-established common law immunities that existed when the statute was enacted. *See Tenney v. Brandhove*, 341 U.S. 367 (1951) (upholding legislative immunity). Understandably unwilling to substitute its policy preferences for a legislative enactment, however, the Court has made clear that when "a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983." *Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in part and dissenting in part). Moreover, because the undisputed purpose of § 1983 was to create liability for unlawful conduct of state officials, the Court has always stressed that it would confer absolute immunity sparingly. *See Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (White, J., concurring) ("[T]o extend absolute immunity to any [class] of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create.").

The common law as of 1871 did not confer absolute immunity for prosecutorial conduct. No court held a prosecutor absolutely immune until 1896, and such immunity was not firmly established until some fifty years after the Ku Klux Klan Act. The relevant species of absolute immunity that did exist in 1871 – "judicial immunity" for adjudicative conduct and "defamation immunity" for statements made or offered in court – did not provide immunity for all the conduct we associate today with the prosecution of criminal cases. Instead, the common law of the Reconstruction era provided the equivalent of qualified immunity to persons performing most prosecutorial functions, who were held liable only for malicious misconduct.

Given the absence of a common law tradition of absolute prosecutorial immunity in 1871, the historical basis for the Court's decision in *Imbler* is questionable. Nonetheless, *Imbler's* requirement of an "intimate" nexus between the challenged prosecutorial conduct and the "judicial phase of the criminal process," *id*. at 430, does have some footing in the common law of the period. Amici recognize that some prosecutorial functions are analogous to conduct that received absolute immunity as of 1871, *e.g.*, statements made or evidence offered by the prosecutor at trial or in grand jury proceedings (conduct at least resembling that to which defamation immunity applied in 1871), or a prosecutor's quasi-adjudicative weighing of evidence in deciding whether to commence a prosecution (conduct bearing at least some – if only a tenuous

– relation to that to which judicial immunity applied in 1871).

But Petitioners' administrative conduct bears no resemblance to any function protected by absolute immunity in 1871. Therefore, even if the Court retains *Imbler's* approach to prosecutorial immunity, the Court should not expand it to cover Petitioners' highly injurious managerial failure here. So limiting the scope of absolute immunity for claims that a state actor has violated § 1983 is consistent with the intent of the Congress that enacted that watershed statute; extending absolute immunity to cover the unlawful prosecutorial conduct asserted here is not.

Because the conduct alleged – a management decision not to implement a system to disseminate information to staff – is so far removed from the judicial process and would not remotely have been protected by the absolute immunities available in 1871, the decision below should be affirmed.

ARGUMENT

I. THE RECONSTRUCTION CONGRESS PASSED SWEEPING NEW LEGISLATION TO PROVIDE EFFECTIVE REDRESS FOR THE DEPRIVATION OF CONSTITUTIONAL RIGHTS

In 1857, Chief Justice Taney concluded that no descendant of an imported slave, even if born in America to parents who had been emancipated, could

be a citizen of the United States. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). That decision was anathema to abolitionists and the Republican Party; indeed, President Lincoln's Attorney General soon opined that, contrary to the *Dred Scott* decision, free men of color, if born here, were citizens of the United States. 10 Op. Att'y Gen. 382 (1862). But *Dred Scott* remained the law.

The Civil War profoundly changed the legal landscape. After slavery was abolished by the Thirteenth Amendment, the Republicans – who had won greater than 70% majorities in both houses of Congress during the 1864 elections – set out to repudiate *Dred Scott*. They did so with the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866), and the Fourteenth Amendment (ratified in 1868). Those enactments made clear that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside[,]" U.S. CONST. amend. XIV § 1, and that all citizens enjoy certain privileges and immunities. *Id.* Congress plainly intended that no person acting under color of the law of any State (including any former slave state), would be permitted to violate the civil rights of any citizens, whatever their race or political affiliation. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 243 (1988) (describing how Republicans succeeded in enacting legislation to prohibit any law or custom of a State from violating what Sen. Trumbull described as

the "'fundamental rights belonging to every man as a free man'").

A. Congress acted to combat violence and abusive prosecutions in the South

Republicans controlled Congress, but the former slave states hardly shared their view of what Union victory in the Civil War should mean for the country. After Appomattox, many in the South mounted a campaign of terror against former slaves, federal agents, and Union sympathizers. *See* REPORT OF CARL SCHURZ ON THE STATES OF SOUTH CAROLINA, GEORGIA, ALABAMA, MISSISSIPPI AND LOUISIANA, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess., at 5 (1865) (describing groups of "incorrigibles" who "persecute Union men and negroes whenever they can do so with impunity").

The violence was rampant. Certain former Confederates and their sympathizers seized control of state and local governments and launched a vengeful campaign of abusive criminal and civil prosecutions against Union supporters and federal officials who tried to enforce federal policies following the war. *See* David Achtenberg, *With Malice Toward Some: United States v. Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 275 (1995). As one newspaper explained, in Kentucky, Confederates and their sympathizers "have possession of the courts; they constitute the juries, they are legislators, judges, magistrates, sheriffs, constables, jurors, and

with the spirit of disloyalty, they intend to take vengeance upon those who have been zealous in the cause of the Union." *Id*. at 298. More than three thousand such prosecutions were brought in Kentucky alone against former Union soldiers. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2054 (1866) (remarks of Sen. Wilson) (attributing the numerous prosecutions to Kentucky's refusal to transfer such cases to federal court).

Southern officials used their judicial systems to frustrate Reconstruction and intimidate federal officers. When federal officials used force to arrest violators of the Civil Rights Acts, they often were indicted unlawfully for assault or murder. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 23 (2005). Southern prosecutors also targeted Union military commanders and officials of the Freedmen's Bureau who sought to enforce the 1866 Civil Rights Act. *See* MELVIN I. UROFSKY AND PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 441 (2d ed. 2002) (describing reports of "countless" lawsuits by Southerners against federal officials).

News of these malicious prosecutions designed to deprive persons of their civil rights reached the highest officials in Washington. For example, in 1866, United States Attorney Benjamin H. Bristow wrote to Attorney General James Speed to explain that state prosecutions were being initiated against Union supporters and federal officials in an apparently

concerted attempt to force them to leave the state. *See* Achtenberg, *supra*, at 329. General John M. Palmer, the Union military commander in Kentucky, wrote directly to Attorney General Speed to relate that he had repeatedly been indicted for "aiding slaves escape" merely because he had issued travel passes to former slaves. *Id*. at 299. He also was subjected to civil lawsuits commenced by prominent officials, including a congressman and a senator, for tens of thousands of dollars based on the supposed value of slaves he had helped to free. *Id*. As he explained, "there are twenty thousand crimes for which I am punishable and Congress will have to pass a law extending my life – lengthen it out a few thousand years that I may [serve] this punishment." *Id*.

In response to this wave of lawless prosecutions, General Ulysses S. Grant issued an Order forbidding state courts from prosecuting federal officials for actions taken within the scope of their authorized duties. *See* General Order 3, Jan. 12, 1866. The Order further sought to curb state prosecutors' abuse of the judicial system by requiring them to punish African Americans in the "same manner and degree" as every other citizen. *Id*. The abuses of the judicial system were so pervasive that, as part of the first Civil Rights Act, Congress gave federal authorities the power to take control of state criminal prosecutions if a fair result could not be achieved. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 § 3 (1866). During the first year this law was in effect, the Commissioner of the Freedman's Bureau, the agency charged with

handling the administration of cases removed from state court, estimated that their courts handled 100,000 complaints concerning abusive state actions. *See* PATRICIA ALLAN LUCIE, FREEDOM AND FEDERALISM: CONGRESS AND THE COURTS 1861-1866, at 166 (1986).

Congress too was well aware of prosecutors' systematic abuse of the judicial process. During the debates on the 1866 amendments to the Habeas Corpus Suspension Act, Senator Trumbull, Chairman of the Judiciary Committee, urged action because "several thousand . . . loyal men" were being subjected to baseless civil and criminal prosecutions. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1983 (1866) (remarks of Sen. Trumbull).[2] Senator Trumbull was not alone. As Congress debated the Civil Rights Act of 1866, legislators expressed concern about the vexatious use of prosecutions against Union supporters and federal officials. *See id.* at 2065 (remarks of Sen. Doolittle) (describing the widespread nature of the problem of unfounded prosecutions against federal officials); *see also* Achtenberg, *supra*, at 338-42 ("For the 39th Congress, the problem of baseless prosecutions. . . . was a pressing current crisis that provoked vigorous debate and decisive legislative action."). In recommending the

[2] Senator Trumbull knew the common law of his time, including that prosecutors could be held liable for their actions in tort. During his service as a Justice of the Illinois Supreme Court, he wrote an opinion holding that "the law secures every person from unfounded arrests, maliciously instituted against him without probable cause." *Jacks v. Stimpson*, 13 Ill. 701, 704 (Ill. 1852).

passage of the Fourteenth Amendment, the Joint Committee on Reconstruction stated:

> Southern men who adhered to the Union are bitterly hated and relentlessly persecuted. In some localities prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed. All such demonstrations [of hostility to the Union] show a state of feeling against which it is unmistakably necessary to guard.

REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. XVII-XVIII (1866). Cognizant of these state abuses, the Reconstruction Congress sought a way to hold errant state officials accountable.

B. Because of continuing abuses, the 42nd Congress enacted § 1983

In April 1866, Congress passed the Civil Rights Act, which provided for criminal penalties against any person who caused the deprivation of the rights of former slaves. Ch. 31, 14 Stat. 27 § 2 (1866). But the violence continued unabated. *See* FONER, *supra*, at 342 (quoting the former Governor of Louisiana as complaining in October 1866 that "murder and intimidation are the order of the day in this state"). Resistance to national authority was flagrant in much of the South. Otherwise "respectable" Southerners – including

lawyers and state officials – openly or tacitly directed, participated in or condoned the Ku Klux Klan's campaign of terror. *Id.* at 432-34.

In 1871, Congress reacted. Buttressed by the constitutional authority of the Fourteenth Amendment, it expanded the scope of the 1866 Act by adding a civil liability provision pursuant to the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 § 1 (1871). That law, now codified at 42 U.S.C. § 1983, prohibited any person from depriving any citizen or other person of the rights, privileges and immunities secured by the Constitution.[3] Section 1983 was modeled on § 2 of the 1866 Act. *See Briscoe v. LaHue*, 460 U.S. 325, 360 (1983) (Marshall, J., dissenting) (citing the statements of Rep. Shellabarger and Sen. Edmunds).

Section 1983 was far less controversial than the other sections of the 1871 Act (which, as noted, authorized federal military incursions and the suspension of habeas corpus). Thus, this new regime of civil liability met with essentially no opposition. *See* CONG. GLOBE, 42d Cong., 1st Sess. App. 310 (remarks of Rep. Maynard) ("Pray, tell me who objects to [§ 1]? I suppose there is not much objection to it, from the fact that so far there has been very little said about it."); CONG. GLOBE, 42d Cong., 1st Sess. 568 (remarks of

[3] The 1871 Act also included criminal penalties for conspiring to violate civil rights, *id*. at § 2, authorized the President to send military forces to suppress violence aimed at depriving civil rights, *id*. at § 3, and authorized the suspension of habeas corpus for a limited time. *Id*. at § 4.

Sen. Edmunds) ("The first section is one that I believe nobody objects to . . . "); *id.* at 482 (remarks of Rep. Wilson) (observing that objections to the bill were primarily aimed at §§ 3 and 4, rather than §§ 1 and 2).

But § 1 was debated, and the discussion makes clear that it was viewed as an important part of the remedial package, to be construed broadly to achieve its important remedial purpose. Thus, Representative Shellabarger declared:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

CONG. GLOBE, 42d Cong., 1st Sess. App. 68 (1871); *see also id.* at 217 (1871) (remarks of Sen. Thurman) (expressing his opposition by remarking that "there is no limitation whatsoever upon the terms that are employed [in § 1983], and they are as comprehensive as can be used"); CONG. GLOBE, 42d Cong., 1st Sess. 800 (remarks of Rep. Perry) ("Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied.").

It bears remembering today that the Congress that framed § 1983 intended to create a potent new

tool for innocent victims to obtain redress from state actors who trammeled their constitutional rights. *See id*. at 476 (remarks of Rep. Dawes) (The person who "invades, trenches upon, or impairs one iota or title of the least of [constitutional rights], to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor").

II. GIVEN THE LEGISLATIVE INTENT, THE COURT SHOULD NOT EXPAND THE REACH OF ABSOLUTE IMMUNITY DEFENSES IN § 1983 ACTIONS

As the Court has acknowledged, nothing in the text of § 1983 suggests that any class of persons or category of conduct would be immune from liability. *Imbler*, 424 U.S. at 417 (§ 1983 "creates a species of tort liability that, on its face, admits of no immunities"); *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997) ("The text of the statute purports to create a damages remedy against every state official for the violation of any person's federal constitutional or statutory rights.").[4] Moreover, amici have not found a single

[4] The statute provides, "*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

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comment in the legislative history of the 42nd Congress that evinces the intention to create such immunity from liability.

In fact, the legislative history suggests that Congress did *not* intend to incorporate common law immunities. For example, Democratic Senator Thurman of Ohio argued against the Act that it would override the immunity of state legislators, and he challenged the bill's Senate manager, Senator George Edmunds, to deny it:

> Now, I put it to the member of the committee who has this bill in charge [Senator Edmunds], does [§ 1] include the legislators of a State?. . . . It is a deprivation under color of law, a deprivation which some one shall inflict or cause to be inflicted upon some other; and now if the legislators of a State pass a law which, in the judgment of some person, deprives him of some right, privilege, or immunity, and a district judge of the United States should be of the same opinion, I put it to the Senator, where is the clause that exempts those legislators from the action that is provided in this section of the bill? I do not know what answer can be given to this. They pass the law, and they are therefore the very persons who do cause the man to be deprived of what is held to be his privilege.

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equity, or other proper proceeding for redress. . . . " 42 U.S.C. § 1983 (emphasis added).

CONG. GLOBE, 42d Cong., 1st Sess. App. 217 (1871). The next day, although Senator Edmunds responded to several of Senator Thurman's arguments, neither he nor any other supporter of the Act addressed this issue. CONG. GLOBE, 42d Cong., 1st Sess. 691-702. Indeed, President Johnson had vetoed the 1866 Act based on his concern that it would abrogate common law immunities.[5]

As Justice Marshall demonstrated in his scholarly dissenting opinion in *Briscoe*, the legislative history of § 2 of the 1866 Act, President Johnson's veto message, and Congress's decisive overriding of that veto, all made clear that the civil rights laws were not intended to immunize state judges or officials, but were instead deliberately *aimed* at the conduct of such officials. *Briscoe v. LaHue*, 460 U.S. 325, 358-61 (1983). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (remarks of Sen. Trumbull) ("The assumption that State judges and other officials are not to be held responsible for violations of United States laws . . . places officials above the law. . . . The

[5] *See* CONG. GLOBE, 39th Cong., 1st Sess. 1680 (1866) (President's Message to Congress) (stating that the bill "invades the judicial power of the State" because "State judges, in execution of their judgments, could be brought before other tribunals and there subjected to fine and imprisonment"). Congress quickly overrode the President's veto due to the overwhelming support for the Act, making 1866 "the first time in American history, [that] Congress enacted a major piece of legislation over a President's veto." *See* FONER, *supra*, at 251.

right to punish persons who violate the laws of the United States cannot be questioned.").

Despite this history, the Court has held that Congress would not have intended to abrogate settled common law tort immunities without doing so expressly. *See, e.g., Tenney*, 341 U.S. at 376; *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Briscoe*, 460 U.S. at 339. Yet the Court consistently has required that defendants shoulder the heavy burden of demonstrating that absolute immunity is justified by the historical common law. If that burden is not met, "the defendant simply loses." *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring).

Amici are sensitive to the policies behind *stare decisis* and do not urge that *Imbler* be overturned. But given the history of Reconstruction and the express intentions of Republican congressional leaders in the 39th and 42nd Congresses, amici believe that the Court should exercise significant restraint in extending absolute immunity for officials in actions brought under § 1983. Without evidence of a firmly established common law tradition according absolute immunity, there should be no such extension. We turn now to the history of the relevant common law immunities as of 1871.

III. UNDER THE 1871 COMMON LAW, PROSECUTORS DID NOT ENJOY ABSOLUTE IMMUNITY

Everyone agrees that when the Court weighs whether to recognize absolute immunity for official misconduct that allegedly gives rise to a § 1983 action, it must be guided by the intent and understanding of Congress in 1871. The 42nd Congress would not have contemplated absolute prosecutorial immunity because the common law did not accept that doctrine until 1896, twenty-five years after the adoption of § 1983. Moreover, none of the absolute immunities that did exist in the common law in 1871 would have applied to Petitioners' conduct.

A. Even if Congress intended to preserve certain immunities, only immunities firmly established in 1871 can be incorporated into § 1983

As the Court has interpreted it, § 1983 incorporates common law immunities that were well established at the time of its enactment in 1871. *See Tenney*, 341 U.S. at 376. The existence at common law of the particular immunity for the function at issue is the *sine qua non* for recognizing such immunity under § 1983. The Court simply does "not have a license to establish immunities from § 1983 in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984); *see also Malley v. Briggs*, 475 U.S. 335, 342 (1986) (the Court's "role is to interpret the intent of Congress in enacting § 1983,

not to make a freewheeling policy choice"); *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in part and dissenting in part) ("[T]he presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute."). In determining whether absolute immunity applies, the Court "examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted." *Forrester v. White*, 484 U.S. 219, 223-24 (1988).

Over the years, the Court has considered whether the Reconstruction Congress intended to retain various absolute immunities for suits brought under § 1983. In *Tenney*, the Court held that because absolute immunity for legislative functions had been established at common law long before 1871 – indeed, the concept is enshrined in the Speech and Debate Clause of the Constitution – Congress must have intended to preserve such immunity from liability for claims under § 1983. 341 U.S. at 376. In *Pierson*, the Court upheld the absolute immunity defense for judicial conduct because, in the Court's view, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . even when the judge is accused of acting maliciously and corruptly." 386 U.S. at 553-54.[6]

[6] The question of the scope of absolute judicial immunity is subject to scholarly debate. *See* Margaret Z. Johns, *A Black Robe*

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In *Briscoe*, a police officer claimed he was absolutely immune from suit under § 1983 because plaintiff's allegation was based on the officer's in-court testimony. 460 U.S. at 328. Because, as of 1871, a defendant in a defamation suit at common law had absolute immunity for even defamatory statements made in the context of judicial proceedings, the Court held that such immunity was incorporated into § 1983. *Id.* at 340-41.[7]

In short, the Court consistently has insisted on historical support for absolute immunity defenses. As Justice Scalia explained, "While we have not thought a common-law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, . . . we have thought it to be a *necessary* one." *Burns*, 500 U.S. at 497 (Scalia, J., concurring in part and dissenting in part) (emphasis in original).

B. Absolute prosecutorial immunity did not exist in 1871

In the first § 1983 case to recognize absolute prosecutorial immunity, the Court explained that the

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Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases, 59 SMU L. REV. 265, 271 n.42 (2006).

[7] *But see Briscoe*, 460 U.S. at 346-64 (Marshall, J., dissenting) (making well-supported argument that the legislative history demonstrated that Congress did not intend to provide immunity for defendants alleged to have violated plaintiff's constitutional rights *via* false testimony).

only warrant for reading immunities into the text of § 1983 is a finding that "the Reconstruction Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials." *Imbler*, 424 U.S. at 417-18. The relevant history, therefore, concerned the common law of tort immunity that existed as of 1871 – the only history the 42nd Congress could have known when it enacted § 1983. The Court announced the right rule, but then proceeded to ignore it.

Justice Powell acknowledged that the "first American case to address the question" of a prosecutor's absolute immunity from suit for malicious prosecution was decided in 1896. *Id*. at 421 (citing *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896)). The Court, however, glided over the fact that this "first" case was decided twenty-five years after § 1983 was adopted and therefore could not have reflected the common law as the 42nd Congress understood it in 1871. But the timing is critical when the issue is whether the common law was settled at a particular moment in history.

There was nothing close to a settled tradition of absolute prosecutorial immunity at any time in the nineteenth century. Even after *Griffith*, the common law in this area was not settled until the mid-1920s – fifty years after the adoption of § 1983. For example, while Indiana adopted the doctrine in 1896, the very next year Kentucky concluded that prosecutors could be liable if they acted with malice or corrupt motives.

Arnold v. Hubble, 38 S.W. 1041 (Ky. Ct. App. 1897). This split in authority persisted into the 1920s. *See* Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to its Absolute Means*, 59 ALB. L. REV. 1135, 1169 (1996); *see also* Note, *The Civil Liability of a District Attorney for Quasi-Judicial Acts*, 73 U. PA. L. REV. 300 (1925); Annotation, *Immunity of Prosecuting Officer from Action for Malicious Prosecution*, 34 A.L.R. 1504 (1925) (recognizing the split in authority and collecting cases). Thus, California rejected absolute prosecutorial immunity in 1908, *Carpenter v. Sibley*, 94 P. 879 (Cal. 1908), and Hawaii held that a public prosecutor could be liable for malicious prosecution and rejected the doctrine of absolute prosecutorial immunity in 1916. *Leong Yau v. Carden*, 23 Haw. 362 (Haw. Terr. 1916).[8] In the federal system, absolute prosecutorial immunity was not recognized until 1927. *Yaselli v. Goff*, 275 U.S. 503 (1927).

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[8] The Oregon Supreme Court supplies perhaps the best example of how unsettled the question of absolute immunity for prosecutors was more than fifty years after 1871. In 1924, that court, sitting en banc, refused to grant a prosecutor absolute immunity, holding that a prosecutor who intentionally falsely accused someone of a crime could be held liable in tort. *Watts v. Gerking*, 222 P. 318, 321 (Or. 1924). Months later, on re-argument, a divided court reversed itself, withdrew its earlier decision, and held that the prosecutor was protected by absolute immunity for the exercise of his quasi-judicial position. 228 P. 135 (Or. 1924).

Congress cannot have intended to abrogate or retain a legal rule in 1871 that did not yet exist. *See Kalina v. Fletcher*, 522 U.S. 118, 124 n.11 (1997) (noting that *Imbler* did not cite pre-1871 cases and relied primarily on "policy considerations").

C. The absolute immunities that were firmly established in 1871 did not immunize prosecutorial functions

There were only two species of absolute immunity from tort liability recognized at common law as of 1871 that might apply to prosecutorial functions – judicial immunity and defamation immunity. *See Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part). These immunities do not extend to Petitioners' conduct. A rule of "quasi-judicial" immunity also existed at the time, but provided only qualified immunity. Therefore, none of the immunities established in 1871 shielded prosecutorial conduct with absolute immunity.

1. Judicial immunity

In 1871, judicial immunity was absolute for all claims arising from the exercise of adjudicative functions. *Id*. It was not limited to those holding judicial office, but extended to officers in courts martial, grand and petit jurors, assessors valuing property, commissioners appraising damages, town council members allowing claims, and arbitrators. *Id.* at 499-500.

While both public officials and private citizens received protection, common law judicial immunity was limited to the core adjudicative functions of resolving disputes or authoritatively determining private rights. *Id.* at 500; *see also Forrester*, 484 U.S. at 227-28 (judicial immunity protects judging, not judges; where there is no adjudication, judicial immunity does not apply). Consistent with this focus, the Court has stressed that the purpose of judicial immunity is to protect the adjudicative function from exposure to harassing litigation by disappointed litigants who have alternative remedies through appellate review. *Forrester*, 484 U.S. at 226-27. Thus, a judge's decisions about secretarial staff are not protected by judicial immunity, *id.* at 229-30, and a judge's promulgation of rules governing professional conduct is not protected by judicial immunity because that function is considered rulemaking, not adjudication. *See Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731 (1980).

This functional approach has historically been followed for absolute judicial immunity. Nineteenth-century judges, like judges today, not only weighed competing claims and adjudicated disputes, but also performed ministerial functions. Whether a judge enjoyed judicial immunity depended on "whether the given act shall be considered as judicial or ministerial in character." FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 9 (1890) (citing BOUVIER'S LAW DICTIONARY); *see also* Laura Oren, *Immunity and Accountability in Civil Rights Litigation:*

Who Should Pay?, 50 U. PITT. L. REV. 935, 949 n.54 (1989).

Under the common law as of 1871, a judge's ministerial or quasi-judicial acts received either no immunity at all or only qualified immunity. *See Pike v. Megoun*, 44 Mo. 491, 496 (Mo. 1869) ("When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct.") (quoting *Rochester White Lead Company v. City of Rochester*, 3 N.Y. 463, 466-67 (N.Y. 1850)). Courts reasoned that because judicial officers are granted far-reaching power to perform important ministerial functions, any knowing abuse of such power would taint the office of the judiciary. *See Briggs v. Wardwell*, 10 Mass. 356, 357 (Mass. 1813) ("[W]hen a magistrate . . . willfully abuses the power which is intrusted to him, the law will scrutinize his conduct with more severity than that of a private citizen[.]").

The common law regarding whether conduct was judicial or ministerial was in flux during this period. In 1869, the Supreme Court of Missouri found the question of whether an act is ministerial to be "of considerable embarrassment" because courts had issued "multiplied, various, and conflicting opinions" in making such determinations. *Pike*, 44 Mo. at 494; *see also Tompkins v. Sands*, 8 Wend. 462, 466 (N.Y. 1832) ("It may sometimes be difficult to determine whether an act is judicial or ministerial."). This is not

surprising, given the absence of bright-line distinctions. *See* H. GERALD CHAPIN, HANDBOOK OF THE LAW OF TORTS 152-53 (1917) ("The mere fact that the officer is called upon to exercise some judgment . . . does not change the character of his acts from ministerial to judicial[.]"); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 482 (2d ed. 1888) ("[T]here are various duties lying along the borders between those of a ministerial and those of a judicial nature.").

Courts drew the line in different places. Some held that an act was "judicial" if it required the exercise of discretion by an officer invested with the power to adjudicate and issue a final decision, yet still refused to accord absolute immunity. *See First Universalist Society in Fletcher v. Leach et al.*, 35 Vt. 108 (Vt. 1862) (holding that the functions were judicial because the officials could make inquiries and consider evidence to make a final determination, but allowing only qualified immunity); *Bevard v. Hoffman*, 18 Md. 479, 484 (Md. 1862) (noting that "judges of elections" were "judicial officers" required to "exercis[e] judgment[,]" but holding that defendant judges could face both civil and criminal liability for malicious conduct). Other courts stated what seemed like a clear rule that a "judicial act" was absolutely immune while the actions of ministerial officers were fully subject to liability, *Tompkins*, 8 Wend. at 468, but then held that even where a judicial officer exercised discretion in approving an appeal bond, he was not accorded absolute immunity because his discretionary act involved "the same discretion exercised by

every ministerial officer who takes bail." *Id.* at 469; *see also Briggs v. Wardwell*, 10 Mass. 356 (Mass. 1813) (holding that magistrate's issuance of execution of judgment was ministerial because lower judicial officials could perform the same function). The common law, it is fair to say, was murky.[9]

But the line between core adjudicative conduct and tangential administrative functions was clear. Judges and other judicial officials were subject to liability for record-keeping and other managerial functions. *See Garfield v. Douglass*, 22 Ill. 100 (Ill. 1859) (stating that a judge could be liable for altering the court's docket if he acted with malice); *Disbrow v. Mills*, 62 N.Y. 604, 609 (N.Y. 1875) (surrogate "acts at his own peril" and is liable in tort if he fails to ensure that "accounts [are] kept in such manner as to show to what estates or parties the fund . . . belongs"); *Lee v. Lide*, 20 So. 410 (Ala. 1896) (upholding liability of judge for actions of court clerk who improperly collected fees from plaintiff).

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[9] As the court put it in *Shaw v. Moon*:

> The books are full of decisions relative to the civil liability of judicial officers, and the great variance in the authorities well demonstrates that the law is not an exact science. One line of cases emphasizes the necessity of maintaining, as a matter of public policy, the independence of the judiciary; while another stresses the right of personal liberty and frowns upon any attempt to interfere therewith. In our opinion the better reasoned cases seek the golden mean.

245 P. 318, 319 (Or. 1926).

One can liken some aspects of modern prosecutorial conduct to the judicial functions protected under the common law as of 1871. Therefore, under the Court's functional approach, to the extent a prosecutor's conduct is adjudicative, it conceivably could qualify for protection under the aegis of absolute judicial immunity. But this rarely will be the case. Prosecutors *advocate*; they rarely can be said to *adjudicate*. Thus, though the Court in *Imbler* mentioned judicial immunity, it invoked only the general policies supporting the doctrine. *See Imbler*, 424 U.S. at 422-23 n.20 (discussing policy reasons for judicial and grand juror immunity). It did not attempt to show (and we do not believe that it could have been shown) that the prosecutorial conduct at issue in that case – the offering of false testimony and the suppression of exculpatory evidence – was sufficiently adjudicative to qualify for absolute judicial immunity.

The conduct here was ministerial, not adjudicative. Nothing about Petitioners' failure to implement a policy to require dissemination of information regarding the identity of jailhouse informants to all line prosecutors involved "resolving disputes between parties, or . . . authoritatively adjudicating private rights." *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part). Therefore, the pre-1871 common law tradition of judicial immunity provides no basis for shielding Petitioners with absolute immunity today.

2. Defamation immunity

The Court has occasionally looked to the "defamation immunity" that existed at common law prior to 1871 for justification for upholding a defense of absolute immunity to a claim under § 1983 for defamatory in-court statements. *See Briscoe*, 460 U.S. at 330-31; *Burns*, 500 U.S. at 489-90. Both Justice Marshall, who dissented in *Briscoe*, and Justice Scalia, who dissented in part in *Burns*, appear to have accepted that false in-court statements by prosecutors bear sufficient resemblance to the conduct that received defamation immunity to be covered. *Briscoe*, 460 U.S. at 350 (Marshall, J., dissenting); *Burns*, 500 U.S. at 496-97 (Scalia, J., concurring in part and dissenting in part).

Even assuming "defamation immunity" can apply in something other than a defamation case, however, the conduct at issue here did not involve false statements made in court, but the out-of-court decision not to adopt an administrative policy to collect and distribute information about the use of and consideration provided to informants. Defamation immunity would not have been applied to this function because it is so far removed from in-court advocacy. Accordingly, there is no basis to uphold absolute immunity for Petitioners under this doctrine.

3. Quasi-judicial immunity

That leaves a third, and final, pre-1871 common law immunity that might be said to apply here. This "quasi-judicial" immunity was an outgrowth of the judicial immunity discussed above.[10] It protected government servants for official acts that required the exercise of policy discretion, but not the adjudication of disputes. *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part). It applied where the law "commits to any officer the duty of looking into facts, and acting upon them, not in any way which it specifically directs, but after a discretion in its nature judicial." JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 365-66 (1889). For example, quasi-judicial immunity protected a tax assessor determining liability, *see id.* at 366; a school board expelling a student, *id.*; a town board of equalization determining land value, *see Steele v. Dunham*, 26 Wis. 393 (Wis. 1870); a court clerk accepting an insufficient bond on appeal, *see Billings v. Lafferty*, 31 Ill. 318, 322 (Ill. 1863); and a surveyor-general revoking the commission of a deputy surveyor, *see Reed v. Conway*, 20 Mo. 22, 44-52 (Mo. 1854).

Quasi-judicial immunity is a good fit for contemporary prosecutors because they investigate facts and exercise vast policy discretion but do not finally adjudicate disputes. But this common law immunity

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[10] *See supra* pp. 25-27 (discussing cases declining to grant absolute immunity to quasi-judicial persons or conduct).

was not absolute; it was qualified in that it could be overcome by a showing of malice. *See Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part); Note, *Immunity of Quasi-Judicial Persons from Suits for Malicious Acts*, 3 MINN. L. REV. 515, 517 (1919).

IV. AS OF 1871, THE COMMON LAW GRANTED ONLY QUALIFIED IMMUNITY TO PROSECUTORS ALLEGED TO HAVE ABUSED THE JUDICIAL PROCESS

In 1871, prosecutors were not accorded the protection of absolute immunity; instead, they were liable for the tort of malicious prosecution if they unsuccessfully prosecuted a defendant with malice and without probable cause. Although the office of public prosecutor was not widely established before 1871,[11] it was common then (as now) for courts to

[11] Prior to 1871, a system of private prosecution flourished because public prosecutors lacked the resources to prosecute crime effectively. *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEG. HIST. 43, 43-46 (1995) (describing "deficiencies" including a lack of qualified attorneys, poor funding, and the inability to travel throughout a prosecutor's assigned territory). Victims, unable to rely on the government, continued to use the English common law system of hiring private counsel to seek justice for both criminal and civil misconduct. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 108-15 (2005). While the public-private distinction might suggest different policy arguments, it is of limited relevance here because it is the function – not the title of the

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uphold liability against laypersons for the commencement of malicious prosecutions.[12] Private attorneys who prosecuted such claims were also subject to liability.[13] Most pertinent here, the tort of

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person who performs it – that matters for purposes of the absolute immunity analysis. *See Forrester*, 484 U.S. at 224 (holding that courts should examine the nature of the function for which immunity is sought).

[12] *See, e.g., Randall v. Henry*, 5 Stew. & P. 367 (Ala. 1834) (upholding liability of person responsible for malicious prosecution of criminal charges); *Stone v. Stevens*, 12 Conn. 219 (Conn. 1837) (affirming the malicious prosecution conviction of a defendant who claimed plaintiff had stolen items but lacked probable cause for this allegation); *Long v. Rodgers*, 19 Ala. 321 (Ala. 1851) (upholding the conviction of defendant who alleged kidnapping despite knowing the alleged victim had gone willingly); *Vanderbilt v. Mathis*, 5 Duer 304 (N.Y. 1856) (ordering a new trial of malicious prosecution action because the jury had not been instructed that to be liable defendant must act with malice); *William M. Ross & Co. v. Innis*, 35 Ill. 487 (Ill. 1864) (upholding claim for malicious prosecution because evidence that business accused an employee of stealing even though the owners knew he was simply reimbursing himself for expenses sufficed to show malice); *Chapman v. Cawrey*, 50 Ill. 512 (Ill. 1869) (affirming malicious prosecution judgment against landlords who had accused plaintiff of breaking into an apartment he was renting from them).

[13] *See* C.G. ADDISON, THE LAW OF TORTS 260 (3d ed. 1874) ("If an attorney maliciously, and without reasonable and probable cause, knowing that his client has no just claim against the plaintiff, assists in putting the law in motion, . . . he, as well as his client who has authorized the proceeding, will be responsible in damages."); *Warfield v. Campbell*, 35 Ala. 349, 350 (Ala. 1859) ("The liability [for malicious prosecution] extends to the attorney or agent who sues out such process through malice."); *Burnap v. Marsh*, 13 Ill. 535, 538 (Ill. 1852) (explaining that prosecuting attorneys may be held liable because to hold otherwise would

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malicious prosecution was not limited to laypersons or private prosecutors; public prosecutors were also held liable for malicious conduct.[14]

Although the common law did not provide absolute immunity for persons responsible for a criminal prosecution, prosecutors were not left unprotected. There was no liability on a tort claim for malicious prosecution unless the prosecutor acted without probable cause and with malice. 1 FRANCIS HILLIARD, THE LAW OF TORTS 480-81 (1861). This high bar for liability served the policy interest of encouraging persons to act as private prosecutors to protect the community. *See* MARTIN L. NEWELL, MALICIOUS PROSECUTION 21-22 (1892); Fowler Harper, *Malicious Prosecution*, 15 TEX. L. REV. 157, 165-70 (1937); 3 WILLIAM BLACKSTONE, COMMENTARIES *126. Given the burdens of proof, an action for malicious prosecution essentially incorporated the elements of qualified

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"authoriz[e] those who are the most capable of mischief to commit the grossest wrong"); *Wood v. Weir et al*., 44 Ky. (5 B. Mon.) 544, 547 (Ky. 1845) (explaining that attorneys acting maliciously should face liability because judges rely heavily on the integrity of attorneys, giving them great power "for good or evil," and "holding [attorneys] to a strict accountability will have the effect to exalt and dignify the profession by purging it of ignorant, meretricious and reckless members").

[14] *Parker v. Huntington*, 68 Mass. (2 Gray) 124, 127-28 (1854) (holding that where plaintiff accused the District Attorney and another defendant of lying to the court to obtain his indictment for perjury, "[t]he plaintiff can maintain his case by proof of a malicious prosecution by both or either of the defendants").

immunity. *Kalina v. Fletcher*, 522 U.S. 118, 133 (1997) (Scalia, J., concurring). If, however, the plaintiff satisfied the heavy burden of proof, the plaintiff would "ordinarily be handsomely rewarded . . . [for] the outrageous character of the defendant's conduct." Harper, *supra*, at 170.

Against this common law background of liability, the 42nd Congress would have understood that prosecutors – including those who were waging a campaign of abusive prosecutions in the South – would be held liable for unconstitutional conduct under the civil rights remedy it created with § 1983.

CONCLUSION

In the period before 1871, the Reconstruction Congress confronted organized resistance in the South to the new law of the land. Congress enacted § 1983 in order to provide a federal remedy for civil rights abuses, specifically including abusive prosecutions. This broad remedial legislation sought to impose liability – not to grant absolute immunity – for such official misconduct. Even if it could be said that Congress intended to preserve well-established immunities, no absolute immunity that existed in 1871 would apply to Petitioners' conduct. To the contrary, the common law imposed tort liability on prosecutors for malicious prosecution. Because as of 1871 there was no tradition of absolute immunity for administrative conduct like that challenged here, the

Court should refuse to grant such immunity under § 1983.

Respectfully submitted,

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