No. 15-1485

In the Supreme Court of the United States

DISTRICT OF COLUMBIA, ET AL.,
Petitioners,

v.

THEODORE WESBY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CECILLIA D. WANG
EZEKIEL R. EDWARDS
American Civil Liberties Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ANDREW J. PINCUS
COUNSEL OF RECORD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

ARTHUR B. SPITZER
SCOTT MICHELMAN
American Civil Liberties Union of the District of Columbia
4301 Connecticut Avenue, NW Suite 434
Washington, DC 20008
(202) 457-0800

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil rights laws. Since its founding in 1920, the American Civil Liberties Union has appeared in numerous cases before this Court, both as counsel representing parties and as *amicus curiae*.

The American Civil Liberties Union of the District of Columbia, an affiliate of the national ACLU, is devoted to advocacy on behalf of more than 20,000 District members and supporters. This brief refers to *amici* collectively as "the ACLU."

This case presents two issues of particular importance to the ACLU: first, vindicating the Fourth Amendment's protections of individuals' liberty and privacy; and, second, ensuring that federal courts—through the remedy provided by 42 U.S.C. § 1983—are able to provide an effective means of redress for persons harmed by violations of their constitutional rights.[1]

SUMMARY OF ARGUMENT

The constitutional protections at issue in this case were critical to the Founding generation. Searches and arrests by the British without sufficient particularized suspicion—under the authority

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

of general warrants and writs of assistance—were a key reason for our Revolution. Americans saw firsthand how unchecked power could be abused to punish enemies, to single out unpopular persons or causes, or simply to serve a government official's personal ends.

Indeed, the 1787 Constitution was criticized because it did not prohibit such intrusions on liberty and privacy. The Fourth Amendment was adopted to address that deficiency and to codify the principle that individualized suspicion is essential to establish the lawfulness of an arrest or a search.

The dramatic expansion of government at all levels since the Framers' time has only increased the importance of this protection. With much broader authority and many more government officials exercising it, the ability of government to reach into individuals' lives is greater than ever before. Ensuring that the Fourth Amendment fulfills its role as an effective bulwark against unreasonable government intrusions on liberty and privacy is therefore especially important today.

The probable cause standard is the Amendment's key protection against unjustified government intrusions. The Court has long held that "'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan* v. *DeFillippo*, 431 U.S. 31, 37 (1979).

That standard requires a comparison between the reasonably trustworthy facts known to the officer

and the elements of the offense. If a prudent person would not conclude that those facts satisfy all of the elements, then an arrest is not permissible.

Petitioners' argument that an officer may ignore some elements of the offense—including *mens rea* when it is a requirement—makes no sense. A criminal offense is composed of *all* of its elements. And, as this Court has repeatedly observed, *mens rea* in particular plays a critical role in separating unlawful from lawful actions. Allowing an officer to arrest someone without facts sufficient to believe that the individual acted with the requisite *mens rea* would allow officers to intrude on individuals' liberty without the particularized justification that the Fourth Amendment requires. Because the probable cause standard is not satisfied here, the courts below properly concluded that the arrests were unconstitutional.

Moreover, the individual petitioners are not entitled to qualified immunity. Three Justices have raised serious questions about the Court's current qualified immunity jurisprudence. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871-1872 (2017) (Thomas, J., concurring opinion); *Wyatt* v. *Cole*, 504 U.S. 158, 171-172 (1992) (Kennedy, J., joined by Scalia, J., concurring). Although the Court initially justified the recognition of qualified immunity by reference to the common law backdrop against which Congress enacted Section 1983, the current immunity standard diverges sharply from the principles courts applied in 1871, and creates a very different, and much more expansive, immunity from damages liability.

Awarding qualified immunity here would further limit availability of the Section 1983 remedy, moving the Court's qualified immunity standard even far-

ther from the background legal principles that applied in 1871. That would conflict with Congress's intent in enacting Section 1983, seriously undermining injured individuals' ability to obtain redress for constitutional violations and to hold government officers accountable for their unconstitutional actions. A qualified immunity ruling in the officers' favor here would also deviate from the intent of the Framers of the Fourth Amendment

When the Fourth Amendment was adopted, executive officers were strictly liable for harm resulting from unconstitutional acts. Such damages actions were a staple of litigation—indeed, they were the means by which individuals vindicated their Fourth Amendment rights. The resulting burden on government officers was ameliorated by the availability of indemnification.

The same general principle prevailed in 1871, when Section 1983 was enacted. Courts had begun to recognize tailored exemptions from liability in particular contexts, or to modify liability standards to protect government officials. But there was no generally-accepted, across-the-board immunity principle that applied to every executive official who violated the Constitution.

The current qualified immunity standard asks whether the government official violated "clearly established" law such that the unlawfulness of his or her actions was "apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). The official's subjective good faith is irrelevant—even though subjective good faith was a critical element of the common law precedents on which the Court's initial qualified immunity standard was based. Thus, an officer who acts with subjective bad faith and in violation of the

Fourth Amendment may escape liability merely because there are no clear precedents applying the law to the particular facts of the case. This is not consistent with Congress's purpose in enacting Section 1983 or the Framers' intent to protect the people from unreasonable searches and seizures.

For these reasons, the Court in an appropriate case should reconsider its qualified immunity jurisprudence.

Here, the lower courts faithfully applied the Court's current immunity precedents to conclude that the individual petitioners are not entitled to immunity. Given the very significant questions regarding the correctness of that current standard, the Court in this case should not further expand the availability of immunity—which would move even farther away from the Framers' purpose of protecting against unreasonable searches and seizures and from the principles known to the Congress that enacted Section 1983.

ARGUMENT

PETITIONERS WERE PROPERLY HELD RESPONSIBLE FOR VIOLATING THE FOURTH AMENDMENT.

A. The Fourth Amendment's Protections Against Abuse Of Government Power Were Critical To The Founding Generation And Remain Fundamental Today.

This Court has repeatedly recognized Americans' hatred of the unjustified intrusions on privacy and liberty that resulted from the British use of general warrants and writs of assistance to conduct searches and make arrests without any individualized suspi-

cion. The colonists' opposition to these measures "was in fact one of the driving forces behind the Revolution itself." *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014).

Because the Fourth Amendment "grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England," *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977), that history is highly relevant in interpreting the Amendment and configuring the remedies available when Fourth Amendment rights are violated—the issues before the Court in this case.

The history shows that the Founding generation viewed particularized facts—which became "probable cause" in today's parlance—as an essential prerequisite both searches and arrests. That requirement effectively precluded the use of general warrants and writs of assistance, which were resented because they permitted searches and arrests without any reason to believe that the individuals targeted had engaged in criminal activity. The history further demonstrates that the Framers viewed juries as an essential protection against government overreaching, with damages actions the principal mechanism for vindicating Fourth Amendment rights.

The Founding generation's aversion to general warrants was rooted in the celebrated *Wilkes* and *Entick* cases,[2] described by one legal historian as "the most famous colonial-era cases in all America—the O.J. Simpson and Rodney King cases of their

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[2] *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (1763); *Entick* v. *Carrington*, 95 Eng. Rep. 807 (1765).

day." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 65 (1996).

Wilkes involved a broad warrant that was issued by the Secretary of State without probable cause under oath and that authorized both arrests and searches of the homes and private papers of 49 individuals potentially responsible for publication of *The North Briton No. 45*, which criticizing the King. Government agents "ransacked houses and printing shops in their searches, arrested forty-nine persons (including the pamphlet's author, Parliament member John Wilkes), and seized incriminating papers—all under a single general warrant." M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. Rev. 905, 910 (2010).

Several of the individuals targeted brought tort actions against those executing the warrant seeking damages in trespass for the searches, seizure of papers, and arrests. *E.g.*, *Wilkes*, 98 Eng. Rep. at 491-492. The courts held that the general warrant did not provide a defense against liability, because such warrants were "illegal, and contrary to the fundamental principles of the constitution." 98 Eng. Rep. at 499; see also *Money* v. *Leach*, 97 Eng. Rep. 1075, 1088 (1765); *Huckle* v. *Money*, 95 Eng. Rep. 768, 769 (1763).

Another general warrant targeted the publisher of an allegedly seditious pamphlet. In the suit by the publisher seeking damages in trespass for harm resulting from the search and arrest, the court rejected the defendants' reliance on the general warrant: "we can safely say there is no law in this country to justify the defendants in what they have done; if there

was, it would destroy all the comforts of society." *Entick*, 95 Eng. Rep. at 817. There is a direct link between these cases and the Fourth Amendment. As Joseph Story put it, the inclusion of the Fourth Amendment in the Bill of Rights "was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution." Joseph Story, *Commentaries on the Constitution of the United States* § 1895 (1833). See also William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 538 (2009) ("[T]he reaction of the colonial press to [the Wilkes] controversy was intense, prolonged, and overwhelmingly sympathetic to Wilkes.").

After the Revolution, provisions were included in a number of State Constitutions that prohibited general warrants. *Maryland* v. *King*, 133 S. Ct. 1958, 1980-1981 (2013) (Scalia, J., dissenting) (quoting Virginia and Maryland provisions); Cuddihy, at 603.

In the debates over ratification of the new Federal Constitution, antifederalists criticized the absence of such a protection, "sarcastically predict[ing] that the general, suspicionless warrant would be among the Constitution's 'blessings.'" *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting); see also Cuddihy, at 674. "Patrick Henry warned that the new Federal Constitution would expose the citizenry to searches and seizures 'in the most arbitrary manner, without any evidence or reason.'" *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting).

The bill of rights proposed by Virginia's ratifying convention included a provision stating that "all general warrants to search suspected places, or to apprehend any suspected person, without specially

naming or describing the place or person, are dangerous and ought not to be granted." Cuddihy, at 684. A number of other States proposed similar language. *Id*. at 685. "The magnitude of [the] publicity [regarding inclusion of an express prohibition on general warrants] indicated the emergence of a consensus for a comprehensive right against unreasonable search and seizure." *Id*. at 686.

By 1789, James Madison had concluded that the new Constitution should be amended to include protection of "essential rights," including providing "security against general warrants." Letter from James Madison to George Eve (Jan. 2, 1789), https://cdn.loc.gov/service/mss/mjm/03/03_0893_0894.pdf; see also *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting) ("Madison's draft of what became the Fourth Amendment answered" the antifederalists' concerns about the lack of any constitutional protection against general warrants.). That protection, subsequently embodied in the Fourth Amendment, was deemed "indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property." Story, § 1895.

The initial text of the amendment specifically targeted general warrants issued without particularized suspicion:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

1 *Annals of Cong.* 452 (1789) (Joseph Gales ed., 1834).

The modified language that subsequently was adopted even more emphatically protects against "unreasonable searches and seizures" by affirmatively providing that "[t]he right of the people to be secure * * * against unreasonable searches and seizures[] shall not be violated." See Amar, 30 Suffolk U. L. Rev. at 66-68 & n.54 (discussing this construction in the context of pre-existing state constitutional provisions and the Fourth Amendment). Thus, "even when a warrant is not constitutionally necessary, the Fourth Amendment's general prohibition of 'unreasonable' searches [and seizures] imports the same requirement of individualized suspicion." *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting).

The latter point is particularly important with respect to seizures of individuals, because the common law at the time provided only narrow authority for warrantless arrests. Thus, an arrest for a felony was permissible only if (1) the officer observed the commission of the offense; (2) the arrestee was subsequently convicted (this justification "involved a gamble—the officer had to predict *whether* a felony conviction would result"); or (3) there was proof that the felony "had actually been committed by someone and that there was 'probable cause of suspicion' to think the arrestee was that person." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 632 (1999) (emphasis added).

Only in 1780 did the English courts permit law enforcement officers to arrest based on probable cause even if it turned out that a felony had not been committed. See *Samuel* v. *Payne*, 99 Eng. Rep. 230 (1780). But that case was not published until 1782, it

was not adopted in the United States until some years later, and the Massachusetts constitutional provision on which the Fourth Amendment was based was adopted in 1780. Davies, 98 Mich. L. Rev. at 634-635.

Under the prevailing standard at the time of the Fourth Amendment, therefore, probable cause to believe that the arrestee committed a crime was not sufficient to justify an arrest. An officer also had to be able to prove that a crime in fact had been committed by someone. And if the officer could not satisfy that standard, he was held liable in damages.

This history demonstrates that the Amendment's Framers recognized individualized suspicion as an essential element in establishing the reasonableness of an arrest or search—because of the protection it provided against abuse of government power. The Founding generation saw firsthand how unchecked power could be abused to punish enemies, to quash dissent, or to target unpopular persons or causes. Their solution was to hold government to a standard of reasonableness, based on particularized information, when intruding on individuals' privacy or liberty.

The importance of that safeguard has only increased since the Framers' time.

Government at all levels—federal, state, and local—has expanded in size and authority beyond anything that the Framers could have contemplated. The dramatically enhanced size and power means that government's ability to reach into individuals' lives is correspondingly greater than ever before. The myriad of laws and regulations governing aspects of everyday personal and business activities is mind-

boggling. And the individuals able to exercise that authority—often with little or no effective oversight—numbers in the hundreds of thousands.

Preserving the Fourth Amendment's role as an effective bulwark against unreasonable government intrusions on liberty and privacy is therefore particularly important today.

B. The Probable Cause Standard Requires Reasonably Trustworthy Facts Satisfying Each Element Of The Criminal Offense.

A warrantless arrest is constitutional only if "at the moment the arrest was made, the officers had probable cause to make it." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). That inquiry turns on "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Ibid.*; see also *Michigan* v. *DeFillippo*, 431 U.S. 31, 37 (1979) ("'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense"); *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949) (facts that "warrant a man of reasonable caution in the belief that an offense has been or is being committed" (internal quotation marks omitted)).

Properly calibrating the probable cause requirement is essential to ensure that the Fourth Amendment serves the purpose intended by its Framers.

Setting the standard too low opens the door to illegitimate government intrusion on individuals' liberty for improper reasons or for no reason at all.

That is especially true when, as here, the officer acted without a warrant. "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck*, 379 U.S. at 96.

The content of the probable cause requirement should be shaped by reference to the reason for its existence: to constrain the discretion of law enforcement officers so that intrusions on individual liberty are limited to situations in which there is a sufficient likelihood that the individual committed a crime.

That, in turn, requires a comparison of the facts known to the officer to the elements of the offense—which is the inquiry that this Court has undertaken in reviewing such probable cause determinations. See, *e.g.*, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001); *Michigan* v. *DeFillippo*, 443 U.S. at 36-37.

Petitioners appear to argue (Br. 35) that because the probable cause inquiry is "fluid," an officer need not possess facts sufficient for a "prudent man" to believe that each element of the putative offense is satisfied. Petitioners appear in particular to assert that facts relating to the requisite *mens rea* need not meet this standard. That contention—not endorsed by the Acting Solicitor General in his *amicus* brief—is wrong.

To begin with, a criminal offense cannot be separated from its elements—the elements are what define the crime. *E.g.*, *United States* v. *O'Brien*, 560 U.S. 218, 224 (2010).

Of course, facts directly probative of one element of an offense may in some circumstances provide indirect evidence of another element. But the ultimate inquiry must be whether the reasonably trustworthy facts known to the officer would be sufficient to convince a prudent person that each element is present and any obvious defense is negated.

Petitioners' plea for a special exemption for *mens rea* is particularly misplaced. That element plays an especially critical role in distinguishing criminal from non-criminal conduct. *E.g.*, *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015); *Rosemond* v. *United States*, 134 S. Ct. 1240, 1248 (2014); *Morissette* v. *United States*, 342 U.S. 246, 252 (1952). Permitting an officer to arrest when he or she lacks reasonably trustworthy facts sufficient to convince a prudent person that an individual had the requisite mental state therefore would permit an arrest in a wide variety of circumstances in which the facts known to the officer indicated only entirely lawful activity.

In the aiding-and-abetting context, for example, the *actus reus* may consist of entirely lawful conduct; it is only the actor's *mens rea* that makes the conduct unlawful. *Rosemond*, 134 S. Ct. at 1248-1251. If an officer could arrest someone based solely on knowledge of facts relating to the individual's conduct—without facts justifying the conclusion that the individual acted with the required *scienter*—the officer would be able to seize and detain the individual

without sufficient reason to believe that the individual acted unlawfully.

Respondents have explained in detail why the facts known to the officers here did not satisfy the probable cause standard. Resp. Br. 25-40, 46-57. This Court therefore should uphold the ruling below that the officers lacked probable cause to arrest respondents.

C. The Individual Petitioners Are Not Immune From Damages Liability.

Three Justices have raised serious questions about the Court's qualified immunity jurisprudence. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871-1872 (2017) (Thomas, J., concurring); *Wyatt* v. *Cole*, 504 U.S. 158, 171-172 (1992) (Kennedy, J., joined by Scalia, J., concurring).

Justice Thomas concluded that "[i]n an appropriate case," the Court "should reconsider our qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1872 (concurring opinion).

Here, the lower courts faithfully applied this Court's immunity precedents and correctly concluded that the individual petitioners were not entitled to immunity. Because the current standard provides far broader immunity than either Congress in 1871 or the Fourth Amendment's Framers would have envisioned or countenanced, the Court in this case should not further expand the availability of immunity—which would move the doctrine even farther away from the background principles known to the Congress that enacted Section 1983.

1. Current Qualified Immunity Doctrine Has No Basis In Congress's Enactment Of Section 1983.

The Court has justified its immunity decisions by reference to the common law background against which Congress enacted Section 1983. It has "read [the statute] in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986) (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976)) (internal quotation marks omitted). "Certain immunities were so well established in 1871 * * * that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)); accord *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring); *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983).

The Court's qualified immunity standard, however, cannot be justified by this rationale because it does not bear any relation to the background legal principles that applied in 1871. See William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. (forthcoming 2018), https://papers.ssrn.com/sol3/-papers.cfm? abstract_id=2896508; John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013).

a. *The Framers of the Fourth Amendment envisioned broad monetary liability for officers who committed unconstitutional acts.*

Early American cases held executive officers were strictly liable for damages resulting from unlawful acts, including violating the Constitution.

E.g., Baude, at 12 ("at and shortly after the founding, lawsuits against officials for constitutional violations did not generally permit a good faith defense"); 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, 1863-1864, 1874-1887 (2010); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14-21 (1972).

Chief Justice John Marshall addressed the question of official liability in *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804). The case involved a suit in trespass for damages against a naval captain, who had seized a Danish ship. The Court held that the relevant federal law authorized only seizure of ships headed to a French port, but Little had acted in reliance on orders from the Secretary of the Navy to seize ships departing from—as well as sailing to—French ports.

The Court asked: "Is the officer who obeys [such orders] liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him." 6 U.S. at 178. Even though Captain Little had acted "with pure intention" in reliance on the orders (*id.* at 179), he nonetheless was liable in damages.

Indeed, Chief Justice Marshall, in his opinion for the Court, "confess[ed]" that "the first bias of [his] mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages," but he was "convinced that [he] was mistaken," and

concluded that good faith reliance on the orders could not prevent the imposition of damages liability. 6 U.S. at 179. That "personal aside" shows "the deep roots of the strict liability principle." Baude, at 12.

Little is not at all unique. Damages actions against executive officials were a staple of litigation—and damages were imposed when the official acted unlawfully. David E. Engdahl, 44 U. Colo. L. Rev. at 16-21 (collecting cases); Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 Yale L.J. 1425, 1506 (1987). See, *e.g.*, *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115 (1851) (seizure of property); *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806) (upholding action in trespass against official collecting illegal fine).

That historical practice is not surprising. As we have discussed (at pp. 6-8), the protections ultimately embodied in the Fourth Amendment were first enunciated in *Wilkes* and *Entick*—actions in English courts against government officials seeking damages in trespass for harm resulting from unlawful general warrants.

The strict liability rule was ameliorated to a significant degree by the availability of indemnification by government employers. Captain Little, for example, was indemnified through a private bill enacted by Congress. Pfander & Hart, 85 N.Y.U. L. Rev. at 1902. As this Court explained in 1836, "[s]ome personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." *Tracy* v. *Swartwout*, 35 U.S. 80, 98-99 (1836).

Thus, a comprehensive study of the indemnification process at the federal level found that "nineteenth-century legislators viewed reimbursement of a well-founded claim more as a matter of right than as a matter of legislative grace." Pfander & Hart, 85 N.Y.U. L. Rev. at 1867. Accordingly, "[c]ourts were to decide whether the conduct in litigation was lawful and award damages against the officer if it was not; Congress was to decide whether the officer had acted for the government within the scope of his agency, in good faith, and in circumstances that suggested the government should bear responsibility for the loss." *Id*. at 1868. Courts "simply addressed the issue of legality and left Congress in charge of calibrating the incentives of government officials"—which Congress did by "offer[ing] government employees a mix of salary, fees, and forfeitures to ward off bribery and ensure zealous enforcement" and "by indemnifying from any liability only those government officials who acted in good faith." *Id*. at 1870.

b. *The common law in 1871 did not provide a general immunity defense for executive officers, but only specific defenses to certain tort claims.*

The general background principle of strict liability for executive officials' illegal and unconstitutional acts had not been overturned when Section 1983 was enacted in 1871.

To be sure, courts had begun to recognize tailored exemptions from liability in specific circumstances. Thus, *Wasson* v. *Mitchell*, 18 Iowa 153 (1864)—a case cited by this Court in addressing a qualified immunity question in *Filarsky* v. *Delia*, 566 U.S. 377, 383 (2012)—was a suit against a board of

supervisors for approving the bond provided by a constable that subsequently was found to contain forged signatures of the sureties. The Iowa court recognized a rule of immunity limited to that particular factual context, analogizing the board's action to a judicial function:

> If, in the fair exercise of their judgment, they are of opinion that the sureties on a bond are solvent, they are not civilly liable if they should be mistaken; but would be thus liable if they approved a bond whose sureties were known to them to be worthless. * * * [W]e believe this to be the true rule, viz., exempting the board of supervisors, in the approval of bonds, from honest mistake and errors of judgment, whether of law or fact, but holding them at the same time personally liable for negligence, carelessness and official misconduct such as are alleged in the petition.

18 Iowa at 156-157.

In other contexts, courts modified substantive rules of liability to circumscribe liability. Thus, in *The Marianna Flora*, 24 U.S. 1, 52 (1825), the Court held that an official's decision to retain a captured ship for adjudication would not subject him to liability where "he acted with honourable motives, and from a sense of duty to his government" and not "with gross negligence or malignity, [or] a wanton abuse of power." A similar process led courts to hold that law enforcement officers could not be held liable in tort for an arrest as long as the officer acted with probable cause—even if the arrestee was subse-

quently exonerated. See Davies, 98 Mich. L. Rev. at 634-639 (1999); pp. 10-11, *supra*.[3]

But there certainly was no generally-accepted, across-the-board immunity principle for executive officials who violated the Constitution. See, *e.g.*, *Milligan* v. *Hovey*, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871) (No. 9,605) (holding that a federal statute barring damages liability for acts in connection with the Civil War was unconstitutional as applied to claims based on unconstitutional acts); *Griffin* v. *Wilcox*, 21 Ind. 370, 372-373 (1863) (same); see also Baude, at 16 & n.72; Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 Minn. L. Rev. 585, 585 (1927) ("[p]rior to 1880 there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts").[4]

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[3] This Court cited that principle in *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)—but relied on twentieth century authorities. See *ibid*. (referring to "the prevailing view in this country").

[4] Professor Baude discusses *Myers* v. *Anderson*, 238 U.S. 368 (1915), which involved a damages claim against government officials who had refused to register the plaintiffs to vote because state law barred registration of African-Americans. The defendants argued that the damages judgment should be set aside because—among other reasons—they had acted in the good faith belief that the statute was constitutional. This Court upheld the judgment against the state officials, although it did not expressly discuss the good faith defense. Baude, at 13-15.

c. *Current qualified immunity jurisprudence bears no resemblance to the defenses available to executive officers at common law—and produces much more expansive immunity.*

The qualified immunity rule that the Court applies today bears no resemblance to any principle recognized at common law in 1871.

Availability of immunity "turns on the 'objective legal reasonableness' of the [defendant's] action, assessed in light of the legal rules that were 'clearly established' at the time [it] was taken." *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (citation omitted) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that, in the light of pre-existing law the unlawfulness must be apparent." *Id*. at 640 (citation omitted). The officer's subjective good faith and subjective belief about the constitutionality of his or her actions are wholly irrelevant. *Harlow*, 457 U.S. at 815-819 (1982).

But the common law precedents that the Court has cited turn, at least in part, on the subjective good faith of the government official. See pp. 19-21, *supra*. And the relevant common law decisions at the time Section 1983 was enacted—to the extent they recognized any immunity at all—examined both subjective good faith and the objective reasonableness of the defendant's actions.

Moreover, courts in 1871 undertook the latter inquiry from a very different perspective than this

Court's current qualified immunity jurisprudence. They precluded immunity when the defendant acted negligently or recklessly in violating the Constitution. That is a much more restrictive immunity standard than a rule that permits liability only when the constitutional violation was apparent.

In sum, the Court's current qualified immunity jurisprudence confers immunity based on different standards—and in a broader range of situations—than did the common law at the time Section 1983 was enacted.

d. *There are strong reasons for the Court to reconsider its qualified immunity jurisprudence in an appropriate case.*

The Court has observed that, as a general matter, *stare decisis* considerations are strongest with respect to questions of statutory interpretation. That principle does not apply here, for several reasons.

First, the absence of a qualified immunity rule at the Founding rested in part on the availability of indemnification. See pp. 18-19, *supra*. Indemnification is widely available today.

A comprehensive study of indemnification in the context of claims against police officers over a five-year period (from 2006-2011) found that law enforcement officers "almost never contributed to settlements and judgments in police misconduct lawsuits during the study period." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912 (2014). In particular:

- "Approximately 9225 civil rights cases were resolved with payments to plaintiffs between

> 2006 and 2011 in the forty-four largest jurisdictions in [the] study. Officers financially contributed to settlements or judgments in approximately .41% of those cases."
>
> - "Indemnification practices in the thirty-seven small and mid-sized jurisdictions in [the] study are consistent with practices in the larger departments. None of the 8141 officers employed by these thirty-seven jurisdictions contributed to a settlement or judgment in any type of civil claim resolved from 2006 to 2011."

Id. at 912, 915 (footnotes omitted).

The Court's immunity decisions have not taken account of the widespread availability of indemnification.

Second, scholars have noted the Court's "special treatment of qualified immunity issues on its certiorari docket." Baude, at 39; see also Susan Bendlin, *Qualified Immunity: Protecting "All But the Plainly Incompetent" (And Maybe Some of Them, Too)*, 45 J. Marshall L. Rev. 1023 (2012).

"[N]early all of the qualified immunity cases come out the same way—by finding immunity for the officials. Indeed, in the 35 years" since *Harlow*, the Court "has applied it in 27 qualified immunity cases. The officials have won all but three—maybe two and a half." Baude, at 39; see also Bendlin, 45 J. Marshall L. Rev. at 1025-1026 (observing that the Court has "grant[ed] qualified immunity in every case except the most egregious instances of incompetent

conduct by state officials").[5] Because "lower courts are somewhat regularly reversed for erring on the side of liability, but almost never reversed for erring on the side of immunity, the current docket sends them a signal that they should drift toward immunity." *Id*. at 40.

This factor therefore puts an additional, heavy, weight on the scale in favor of reconsidering the qualified immunity standard in an appropriate case.

Third, there are particular reasons to reconsider the qualified immunity standard as it applies to Fourth Amendment claims.

To begin with, the Framers of the Fourth Amendment anticipated that damages actions would be the means by which the Amendment was enforced. The English cases that gave rise to the Amendment—*Wilkes* and *Entick*—were damages actions. And the antifederalists who agitated for an express amendment to the Constitution protecting against general warrants saw damages awards by juries as the mechanism by which that protection would be enforced:

> [S]uppose for instance, that an officer of the United States should force the house, the asylum of a citizen, by virtue of a general warrant, I would ask, are general warrants illegal by the [C]onstitution of the United

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[5] In addition, the Court summarily reverses decisions denying qualified immunity at a greater rate than any other category of case other than habeas petitions. Baude, at 41-43. This "special dispensation from the normal principles of certiorari" (*id*. at 42) multiplies the impact of the legal flaws in the Court's qualified immunity jurisprudence.

> States? * * * [N]o remedy has yet been found equal to the task of deterring and curbing the insolence of office, but a jury—[i]t has become an invariable maxim of English juries, to give ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of any unnecessary act of insolence or oppression. * * * [By contrast,] an American judge, who will be judge and jury too, [will probably] spare the public purse, if not favour a brother officer.

Essays by a Farmer (I) (Feb. 15, 1788), *reprinted in* 5 *The Complete Anti-Federalist* 14 (Herbert J. Storing ed., 1981); see also Akhil Reed Amar, *Fourth Amendment First Principles,* 107 Harv. L. Rev. 757, 777 (1994) ("[n]otes from a speech delivered by Marylander Samuel Chase suggest that the future Justice likewise saw juries and warrants as linked and stressed the need for civil juries in trespass suits against government 'officers'" (citing Notes of Samuel Chase (IIB), in 5 *The Complete Anti-Federalist* 82 (Herbert J. Storing ed., 1981))).

That is precisely how the Amendment was enforced. "[A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit—with both parties represented at trial and a jury deciding between the government and citizen. If the jury deemed the search or seizure unreasonable—and reasonableness was a classic jury question—the citizen plaintiff would win and official would be obliged to pay (often heavy) damages. Any federal defense that the official might try to claim would collapse, trumped by the finding that the federal action was unreasonable, and thus unconstitutional under the Fourth Amendment, and thus no de-

fense at all." Akhil Reed Amar, 107 Harv. L. Rev. at 774 (footnote omitted).

The current qualified immunity standard significant limits the availability of such damages actions in the Fourth Amendment context because where, as here, the constitutional standard is heavily fact-dependent—whether "probable cause" or "exigent circumstances" or "excessive force"—the government official will argue that the absence of prior cases with similar facts precludes the imposition of damages liability. That is not at all what the Framers of the Fourth Amendment, or the Congress that enacted Section 1983, intended.

In addition, the Framers of the Fourth Amendment, and Congress in 1871, saw the jury's role in damages actions as a critical element of the Constitution's protection against unreasonable intrusions on liberty and privacy. See pp. 25-27, *supra*. But the Court's current qualified immunity standard was expressly designed to eliminate the jury's role and promote resolution of qualified immunity claims on summary judgment by eliminating the requirement of subjective good faith. *Harlow*, 457 U.S. at 815-818. That too is squarely inconsistent with Congress's and the Framers' intent.

The current immunity standard's substantial constriction of the damages remedy enacted by Congress in Section 1983 is particularly consequential in light of the Court's recent jurisprudence regarding the alternative mechanism for enforcing the Fourth Amendment—the exclusionary rule. The recognition and expansion of the good faith exception to that rule, particularly if it were extended to warrantless searches and seizures, would mean that there would be no remedy at all for large categories of serious

Fourth Amendment violations that inflict significant harm.

The absence of any effective remedy raises serious questions about the extent to which the Fourth Amendment's protections can be enforced—and therefore violations of those protections adequately deterred.[6]

For all of these reasons, the Court should reconsider its qualified immunity jurisprudence in an appropriate case. It need not do so here, because the court below properly applied the Court's precedents. To reverse the decision below would mark a further

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[6] Recent reports by the Department of Justice reveal widespread Fourth Amendment violations in a number of police departments. See, *e.g.*, U.S. Dep't of Justice, *Investigation of the Chicago Police Department* 5 (Jan. 13, 2017) (finding that Chicago police officers "engage in a pattern or practice of using force, including deadly force, that is unreasonable" and that "officers' force practices unnecessarily endanger themselves and others and result in unnecessary and avoidable shootings and other uses of force"); U.S. Dep't of Justice, *Investigation of the Cleveland Division of Police* 3 (Dec. 4, 2014) (finding "reasonable cause to believe" that the Department "engages in a pattern or practice of using excessive force in violation of the Fourth Amendment"). Those reports are corroborated by information developed in other contexts. D.C. Police Complaints Board, *Report and Recommendations: Warrantless Entries into Private Homes by MPD Officers* 2-5, 11-13 (June 12, 2013) (analyzing complaints about unlawful entries into homes by police officers); *Floyd* v. *City of New York*, 959 F. Supp. 2d 540, 559, 560 (S.D.N.Y 2013) (finding "*at least* 200,000 [*Terry*] stops were made without reasonable suspicion"; that "blacks were 30% more likely to be arrested (as opposed to receiving a summons) than whites, for the same suspected crime"; and that "blacks who were stopped were about 14% more likely—and Hispanics 9% more likely—than whites to be subjected to the use of force").

erosion of accountability for Fourth Amendment violations, contrary to the intent of the Framers and Congress's purpose in enacting Section 1983.

2. The lower courts properly rejected respondents' immunity claim.

The Court should uphold the lower courts' conclusion that immunity is not available here, for several reasons.

First, any expansion of the current immunity standard would move even farther away from the legal background against which Congress acted when it adopted the statute in 1871. The Congress that enacted Section 1983 would have anticipated broad executive officer liability for Fourth Amendment violations, which was the norm at common law. See pp. 16-21, *supra*.

Second, the Court should reject petitioners' contention that immunity is available in the absence of multiple judicial decisions holding the facts known to the officers—or closely analogous facts—insufficient to satisfy probable cause. Given the intensely fact-specific nature of the probable cause inquiry, and the limitless factual contexts in which arrests are made, that is a recipe for transforming qualified immunity into close-to-absolute immunity for warrantless searches and seizures. See *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances").

The probable cause standard itself leaves substantial room for officer mistakes. "[T]he Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.' * * *

[Thus,] 'searches and seizures based on mistakes of fact can be reasonable. * * * The limit is that 'the mistakes must be those of reasonable men.'" *Heien* v. *North Carolina*, 135 S. Ct. 530, 536 (2014) (citation omitted) (quoting *Brinegar*, 338 U.S. at 176). The same is true of mistakes of law. *Id.* at 536-537.

In the arrest context, when the elements of the offense for which the arrest was made are clearly set forth in the relevant statute or in settled caselaw, the probable cause standard itself provides sufficient protection for the officer's application of those legal rules to the facts at hand. The legal standard itself allows the officer to make "mistakes"—there is no need for additional protection to satisfy the purposes of qualified immunity, even under the Court's current standard. As respondents explain (Br. 16-46), petitioners are not entitled to immunity under that standard.

In a future case, the Court should be consider adopting an immunity standard that will return Section 1983 claims to the standard prevailing at the time the law was adopted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CECILLIA D. WANG
EZEKIEL R. EDWARDS
American Civil Liberties Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

ARTHUR B. SPITZER
SCOTT MICHELMAN
American Civil Liberties Union of the District of Columbia
4301 Connecticut Avenue, NW Suite 434
Washington, DC 20008
(202) 457-0800

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic[*]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

Counsel for Amici Curiae

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[*] The representation of *amici* by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.