No. 23-1239

IN THE

Supreme Court of the United States

JANICE HUGHES BARNES, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ASHTIAN BARNES, DECEASED,

Petitioner,

v.

ROBERTO FELIX, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICUS CURIAE*

The Southern Poverty Law Center ("SPLC")[1] is a nonprofit 501(c)(3) civil rights organization and a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. SPLC aims to reduce the incarcerated and detained population by decriminalizing and decarcerating Black and Brown people. SPLC has experience litigating 42 U.S.C. § 1983 cases and has served as counsel or *amicus curiae* before the U.S. Supreme Court, federal appellate and district courts, and state courts in its efforts to secure equal treatment and opportunity for marginalized members of society.

SUMMARY OF ARGUMENT

Petitioner Janice Hughes Barnes sought to hold Respondent Roberto Felix, a Harris County constable, accountable after he killed her son over unpaid tolls in 2016. Ms. Barnes sued Respondent under 42 U.S.C. § 1983 ("Section 1983"). But Ms. Barnes' experience turned into that of too many people, specifically too many Black people, who have sought a modicum of justice as victims of police violence. A Texas federal district court dismissed her case before she could present it to a jury, and the Fifth Circuit affirmed that dismissal under its moment-of-the-threat doctrine.

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1. Pursuant to Rule 37.6, *amicus curiae* certifies that no party or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Nor did any person other than *amicus curiae* make such a monetary contribution.

The history of Section 1983 makes clear that this doctrine should have no place in Section 1983 litigation. Originally enacted as Section 1 of the Ku Klux Klan Act of 1871, Section 1983 aimed to protect the constitutional rights of emancipated Black people in the South. During many congressional hearings between 1866 and 1871, Congress took testimony from Black people about the violence they experienced at the hands of those who sought to preserve slavery and its vestiges, including violence inflicted by police, the Ku Klux Klan, and others acting under color of law. This testimony formed the basis of and reason for Section 1983.

For its first ninety years, Section 1983 was infrequently used and, during this time, Black people in the South suffered continued violence at the hands of those acting under color of law. Federal courts struggled with whether they had jurisdiction in a variety of Section 1983 cases. The few Section 1983 cases from this period more often concerned economic disputes than the suffering of Black people under state sponsored violence—suffering like being placed on chain gangs, lynched, or subjected to convict leasing. Courts in this way lost sight of Section 1983's objective for close to a century.

It was not until 1961 in *Monroe v. Pape* did the Court recognize Section 1983's true purpose. 365 U.S. 167 (1961), *overruled by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). Yet, the promise of Section 1983 was short-lived, and the Court soon limited its reach. Doctrines like qualified immunity, municipal liability, and injunctive relief in police violence cases have hamstrung Section 1983. The result is evident: continued police brutality, disproportionately felt by Black people,

for which victims can find no federal court remedy. The moment-of-the-threat doctrine is yet another limitation on Section 1983—one never legislated or intended by Congress, and one that contradicts the Court's precedent. The Court should reverse the Fifth Circuit to preserve what protections remain of Section 1983.

ARGUMENT

I. VIOLENCE AGAINST BLACK PEOPLE MOTIVATED THE PASSAGE OF 42 U.S.C. § 1983, BUT THE STATUTE WAS VIRTUALLY UNUSED BETWEEN 1871 AND 1961.

The roots of 42 U.S.C. § 1983 lie in Emancipation and Reconstruction. Section 1983 was originally enacted as Section 1 of the Ku Klux Klan Act of 1871 ("the Act"), formally titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[2] The statute was recodified as Rev. Stat. § 1979 (1875), again as 8 U.S.C. § 43 (1946), and finally as 42 U.S.C. § 1983 (1970).[3] Though Section 1983 has been modified slightly since 1871,[4] its purpose has remained the same for over 150 years: to establish liability for any person who, under color of law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

2. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

3. Unless otherwise articulated, *amicus curiae* uses "Section 1983" to refer to all versions of the statute.

4. *E.g.,* Pub. L. 96-170, 93 Stat. 1284 (1979) (amending § 1983 to include the District of Columbia).

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[5]

Section 1983's lofty goal was the result of Congress's thorough investigation of the violence suffered by Black people in the South before and immediately after Emancipation. Over the course of five years, Congress heard compelling testimony about the Black experience, and this testimony became the basis for all Reconstruction Era legislation, including Section 1983. But in the ninety years after its passage, federal courts did not follow Congress's intent or the legislative history of Section 1983. The statute went effectively unused, and during this time the endemic violence against Black people in the South persisted.

a. Congress Passed Reconstruction Era Legislation, Including Section 1983, After Congressional Hearings on Terror Experienced by Black People in Former Confederate States.

i. Congress heard testimony on police violence against Black people.

Section 1983's legislative history should be examined in the context of the legislative histories of all major Reconstruction Era laws. Between 1865 and 1870, Congress ratified the Thirteenth, Fourteenth, and Fifteenth Amendments, extending legal protections to formerly enslaved people. Congress passed these amendments against the backdrop of unrest in the South.

5. 42 U.S.C. § 1983.

In 1866, through a Joint Committee on Reconstruction, Congress investigated conditions in the South.[6] The committee heard testimony about violence, including violence at the hands of law enforcement. It considered descriptions of policemen who took "negroes, tied them up by the thumbs, and whipped them unmercifully."[7] Congress heard about a police sergeant who "brutally wounded a freedman," who was in his custody with his arms tied, "by striking him on the head with his gun."[8] On the same day, this same sergeant whipped another freedman so severely that "from his neck to his hips his back was one mash of gashes."[9] In New Orleans, an officer "went up and down the street knocking in the head every negro man, woman, and child that he met."[10] Besides direct violence, the committee heard accounts of law enforcement's failure to intervene: "I state these facts to show that the citizens will not take any steps to arrest the murderers of negroes, and that you cannot trust even the police organized under military orders to do that work."[11] This testimony informed Congress's

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6. David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 Colum. J. Race & L. 239, 275 (2021).

7. Report of the Joint Committee on Reconstruction, H.R. Rep. 39-30, pt. 2, at 185 (1866). *See also* Due Process Institute et al. Cert.-Stage *Amicus* Br. 16-17.

8. Report of the Joint Committee on Reconstruction, H.R. Rep. 39-30, pt. 2, at 209 (1866).

9. *Id.*

10. *Id.* pt. 4, at 80.

11. *Id.* pt. 2, at 185.

drafting of the Fourteenth Amendment[12] as well as the First Enforcement Act in 1870.[13]

Yet Congress's investigative work did not end in 1870. To better ascertain the extent of racial violence in the South, the Senate formed a Select Committee to "Investigate Alleged Outrages in the Southern States." As a result of this investigation, Congress amended the First Enforcement Act by passing the Second Enforcement Act in February 1871.[14] A few weeks later, the select committee released its report in March 1871.[15]

Congress was not the only branch of government concerned with conditions in the South. While Congress took testimony, President Ulysses S. Grant urged it to pass legislation to address these conditions:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. . . . That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United

12. Gans, *supra* note 6, at 275.

13. Act of May 31, 1870, ch. 114, § 8, 16 Stat. 142.

14. Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1044 (2021) (noting that Second Enforcement Act established federal election administration, among other amendments).

15. Report on the Alleged Outrages in the Southern States, S. Rep. No. 42-1 (1871).

> States, acting within the limits of existing laws is insufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. . . . There is no other subject upon which I would recommend legislation during the present session.[16]

President Grant's exhortation coupled with the testimony taken by the two committees ultimately led to Section 1983.

ii. Congress passed the Ku Klux Klan Act of 1871 after congressional hearings on Klan violence and the failure of the states to protect Black people.

On March 28, 1871, Representative Samual Shellabarger introduced the first iteration of the Ku Klux Klan Act of 1871.[17] Section 1 of the Act, which would eventually become Section 1983, provided that any person acting "under color of law" who deprived any person of their constitutional rights would be liable in the United States courts.[18] Representative Shellabarger explained that Congress had both the power and responsibility to enact Section 1:

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16. Cong. Globe, 42d Cong., 1st Sess. 244 (1871).

17. *Id.* at 317.

18. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

> [T]here can be no rational doubt, of the right to enact the first section of this bill . . . . To say in our Constitution that all our people in the States shall be United States citizens . . . and in it to say that State laws shall not be made or enforced to abridge these rights of United States citizens nor the States deny protection of these rights under law, and that Congress may enforce these provisions securing these rights, and then to say that Congress can do no such thing as to make any law so enforcing these rights, nor open the United States courts to enforce any such laws, but must leave all the protection and law-making to the very States which are denying the protection, is plainly and grossly absurd.[19]

Representative Shellabarger thus echoed President Grant's expression of exigency in asking Congress to pass the bill.

During debate on the bill, Congress acknowledged the findings of the Select Senate committee report, noting that the evidence established the Ku Klux Klan's "object was the overthrow of the reconstruction policy of Congress and the disfranchisement of the negro."[20] Representatives noted that the Klan carried out violence against Black people with impunity:

> People of the South are murdered morning, noon, and night . . . . The whole South . . . is

19. Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871).

20. Cong. Globe, 42d Cong., 1st Sess. 320 (1871).

> rapidly drifting into a state of anarchy and bloodshed, which renders the worst Government on the face of the earth respectable by way of comparison. There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals.[21]

One representative found the details of the investigation to be "absolutely shocking,"[22] and another suggested the violence was worse than documented. "Anywhere and everywhere a judicial investigation has been had, has it not corroborated, has it not sustained the assertion? Has it not affirmed the existence of these outrages? Ay, sir, it has gone far beyond what the papers have stated."[23] Debate over the bill lasted slightly more than two weeks and, by passing Section 1983, Congress affirmed the federal government's "power to intercede when state officials violated the federal constitution."[24]

President Grant ratified the bill on April 20, 1871,[25] but Congress's investigative work was not finished. Shortly after its signing, and in recognition of the need to further examine the Ku Klux Klan, Congress formed

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21. *Id.* at 321.

22. *Id.* at 270.

23. *Id.* at 180-81.

24. Tiffany R. Wright et al., *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 Dick. L. Rev. 685, 686 (2022).

25. Cong. Globe, 42d Cong., 1st Sess. 838 (1871).

a Joint Select Committee to "inquire into the condition of the late insurrectionary States." Over eight months, the committee held the "Ku Klux Klan hearings," taking testimony from 586 witnesses that resulted in more than 8,000 transcribed pages bound into thirteen volumes.[26] The hearings were one of the "most extensive congressional investigations in American history and remain the federal government's closest attempt to impanel a post-slavery truth and reconciliation commission."[27]

The testimony recounted familiar instances of violence outlined in both the reports of the Joint Committee on Reconstruction and the Senate Select Committee to Investigate the Alleged Outrages. The witnesses revealed common themes: "The details differed, but the general stories were sickeningly similar: White terrorists—sometimes high-placed members of Southern society—violently raped, murdered, and assaulted Black people without reproach from state governments."[28] Those who testified did so at great risk of retaliation, and recounted gruesome, personal details of the violence against them—including sexual assault, torture, and murder.[29]

Though the hearings took place after the Act's passage, they covered the violence that preceded it. By

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26. *Portraits in Oversight: Congress Investigates KKK Violence During Reconstruction*, Levin Center, https://www.levin-center.org/congress-investigates-kkk-violence-during-reconstruction/; s*ee also* Wright et al., *supra* note 24, at 704-05.

27. Wright et al., *supra* note 24, at 691–92.

28. *Id.* at 705.

29. *Id.* at 705-06.

the end of 1867, there were about 550,000 Ku Klux Klan members in the South. By 1868, the Klan had a presence in every former Confederate state and Kentucky.[30] Between 1866 and mid-1867, the Klan murdered 197 people and committed 548 aggravated assaults in just two states.[31] In passing Section 1983, Congress provided a remedy not just against Klan members themselves, but "against those who representing a State in some capacity were unable or unwilling to enforce a state law."[32] The decision to expand the remedy beyond just Klan members "was undoubtedly informed by evidence linking [them] to state law enforcement or when Klansmen acted without fear of state prosecution."[33]

b. Section 1983 Litigation Was Limited from 1871 to 1961.

In federal courts, Congress's intent to remedy the violence inflicted on Black people through Section 1983 was not realized for close to a century. There was no notable reliance on Section 1983 as a litigation tool; to the contrary, litigants rarely used Section 1983 in the first ninety years of its existence. It was not until after 1961, when the Court decided *Monroe* did the legal landscape of Section 1983 change. 365 U.S. at 167.

30. *Id.* at 709.

31. *Id.* at 710.

32. *Id.* at 711 (quoting *Monroe*, 365 U.S. at 175-76).

33. Wright, et al., *supra* note 24, at 711–12.

Between 1871 and 1920, appellate courts decided only twenty-one Section 1983 cases.[34] Many of those cases revolved around economic and property rights and not police violence inflicted on Black people. *See, e.g., Bowman v. Chicago & N.W. Ry. Co.*, 115 U.S. 611 (1885) (considering dispute over railway company's refusal to transport goods); *Holt v. Indiana Mfg. Co.*, 176 U.S. 68 (1900) (considering dispute over personal income tax); and *Tuchman v. Welch*, 42 F. 548 (C.C.D. Kan. 1890) (deciding dispute over sale of alcohol). In the non-economic contexts, plaintiffs used Section 1983 to challenge infringements on other constitutional rights. *See, e.g., Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (examining alleged violations of freedom of speech and assembly). Many of these early cases examined the question of what were the "rights, privileges, or immunities secured by the Constitution,"[35] and thus struggled with whether there was federal jurisdiction in various Section 1983 cases.

In the rare instances plaintiffs used Section 1983 to pursue remedies for police abuse, courts similarly declined to reach the merits. *Brawner v. Irvin*, 169 F. 964 (C.C.N.D. Ga. 1909), is illustrative. There, a Black woman alleged a Georgia police chief arrested her and "maliciously and cruelly assaulted and beat her with a whip, cutting her flesh in scars, causing her much pain and suffering, all without fault on her part." *Id.* at 965. The federal court refused to allow the woman's case to proceed under Section 1983, holding that it did not have jurisdiction because "[i] t does not appear from the declaration in this case that

34. *See Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?* 26 IND. L.J. 361, 363-64 (1951).

35. 17 Stat. 13; 42 U.S.C. § 1983.

the defendant has deprived the plaintiff of any rights, privileges, or immunities secured by the Constitution and laws of the United States." *Id.* at 966.

To this extent, Section 1983 litigation strayed from its legislative roots, specifically the testimony of Black southerners that compelled Congress to pass the statute. This testimony was the reason Congress passed Section 1983, explicitly establishing federal jurisdiction in cases where police and others acting under color of state law harmed Black people.[36] Courts considering Section 1983 cases immediately lost sight of this.

Because federal courts struggled with whether police abuse violated a Black person's federal rights, the number of cases brought under Section 1983 remained low for its first ninety years. "[A]s recently as 1960, in the entire country, only 287 civil rights suits against state and local governments and their officers were filed in, or removed to, federal court."[37] All that changed with this Court's decision in *Monroe*, but until then, violence against Black people remained pervasive.

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36. 17 Stat. 13 § 1 (1871) ("[A]ny action [under this act] … to be prosecuted in the several district or circuit courts of the United States.").

37. Erwin Chemerinsky, Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights 133 (2021) (citing Theodore Eisenberg, Civil Rights Legislation: Cases and Materials 86 (2d ed. 1987)).

c. Between 1871 and 1961, People Acting Under Color of Law Continued to Inflict Violence on Black People.

i. Black people suffered severe physical violence in the form of lynchings.

Without access to federal courts under Section 1983, Black people who experienced violence at the hands of those acting under color of law were unable to seek remedies between 1871 and 1961. State court doors remained locked to them,[38] and law enforcement was either ineffectual against or complicit in the abuses inflicted on them. The problem of lack of remedies was not just theoretical. Those ninety years witnessed some of the worst race-based violence, specifically in the form of lynchings, in the nation's history.

Lynching predated Emancipation and was not geographically bound.[39] But by the 1870s, when the number of lynchings dropped in most of the country, the "exception to this national trend was the Southern states, where rates increased rather than decreased. These divergent trends continued, so that by 1890 the institution

38. *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 485 (1982) (discussing states' "inability or unwillingness to deal with Klan" violence).

39. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 Law & Soc'y Rev. 793, 801 (2005) ("Up until the last decades of the nineteenth century, American lynchings were typically instances of vigilante justice occurring in frontier areas, with a geographical spread that included western, northern, and southern states.")

of lynching had become a predominantly Southern one, and its victims overwhelmingly black."[40] Between 1889 and 1929, a Black person was lynched every four days.[41] The Equal Justice Initiative documented "4,084 racial terror lynchings in twelve Southern states between the end of Reconstruction in 1877 and 1950."[42] And there can be no doubt that lynching was race-based: between 1882 and 1889, the ratio of Black lynching victims to white lynching victims was four to one; between 1890 and 1900, it was more than six to one; and after 1900, it was more than seventeen to one.[43]

The act of lynching was vigilante justice—an extrajudicial killing for suspected crimes. Nearly 25% of lynching victims were accused of sexual assault, nearly 30% were accused of murder, and "[h]undreds more Black people were lynched based on accusations of far less serious crimes like arson, robbery, non-sexual assault, and vagrancy, many of which were not punishable by death if convicted in a court of law."[44] Suspicion of a crime was by no means required, and white people too often killed Black

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40. *Id.* (citations omitted).

41. Zamir Ben-Dan, *Deeply Rooted in American History and Tradition: The U.S. Supreme Court's Abysmal Track Record on Racial Justice and Equity*, 15 Ala. C.R. & C.L.L. Rev. 45, 88–89 (2024).

42. Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 4 (3d ed. 2017), https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf.

43. *Id.* at 27.

44. *Id.* at 29.

people simply for a perceived lack of respect, including for a perceived lack of respect for the police themselves.[45]

Law enforcement too frequently either ignored, supported, or participated in lynchings. To be sure, there were police officers who "resisted the efforts of lynch mobs and vigorously protected black suspects held in their custody," sometimes placing themselves in danger.[46] But the police often did not interfere with lynchers and, after a person was lynched, refused to participate in their prosecution.[47] For example, in Oklahoma, "[i]n many instances, law enforcement officers worked in conjunction with Klan members, and often they were Klan members. That cooperation between law enforcement and the Klan most frequently took the form of administering extra-legal punishments . . . ."[48] Across the nation, the Klan "inflicted" their "atrocities . . . with impunity because judges, politicians, and law enforcement officers were fellow Klansmen and loyal sympathizers."[49] At the

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45. *E.g.*, *International Labor Defense Survey Reveals Fifteen Lynchings in 1940*, New York Amsterdam News, p. 8 (Feb. 22, 1941) (describing killing of Black teenager in Alabama for perceived disrespect toward white police officers).

46. Sherrilyn A. Ifill, *Creating A Truth and Reconciliation Commission for Lynching*, 21 Law & Ineq. 263, 299–300 (2003).

47. *Id.* at 300.

48. Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 Harv. BlackLetter L.J. 17, 31 (2004).

49. Robin D. Barnes, *Blue by Day and White by (k)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 Iowa L. Rev. 1079, 1099 (1996).

beginning of the twentieth century, Klan "violence and terrorist activities were all but openly endorsed by many government officials," including law enforcement.[50]

ii. There was an economic motivation for police violence against Black people.

The violent exploitation of Black labor during slavery continued after Emancipation. Before Emancipation, formal policing in the South took its early form in slave patrols. The role of slave patrols was to chase down and apprehend enslaved people, to spread "organized terror" to deter revolts, and to discipline enslaved workers. *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 227 (S.D. Ohio 2021) (citations omitted).

> By the end of the [18th] century, every slave state had slave patrols. . . . [They] were a 'government-sponsored force [of about 10 people] that was well organized and paid to patrol specific areas to prevent crimes and insurrection by slaves against the white community' in the antebellum South. . . . After the Civil War ended, the slave patrols developed into southern police departments."[51]

Because slave patrols were arms of the state, the violence and terror they inflicted on Black people was state sponsored.

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50. *Id.*

51. Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of U.S. Policing*, 46 Hum. Rts. 6, 6-7 (2021).

After Emancipation, Southern policing continued its connection to the violent economic exploitation of Black people through chain gangs and convict leasing. "In a region where dark skin and forced labor went hand in hand, leasing would become a functional replacement for slavery, a human bridge between the Old South and the New."[52] State governments, assisted by police, forced Black people convicted of crimes onto chain gangs they controlled, or leased them to private entities for forced labor.[53] Chain gangs and convict leasing, under conditions as severe as slavery, rebuilt southern roads, prisons, and plantations destroyed during the Civil War.[54] After the war, "essentially free black labor was safely returned to its place at the foundation of state revenue and infrastructure development for southern states like Alabama, Georgia, North Carolina, Florida, South Carolina, and Louisiana."[55]

Because of courts' restrictive view of Section 1983 from 1871 to 1961, the remedies that should have been provided to Black people in federal court were unavailable. And although Black people continued to disproportionately suffer violence at the hands of those acting under color of law, the doors of federal courts opened—albeit never fully—after 1961.

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52. David M. Oshinsky, "Worse than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice 57 (1996).

53. Shaytonna V. Bullock, *Fee Simple Subject to Executory Interest: An Analysis of the Preemption and Revocation of Black Property Rights*, 12 S.J. Pol'y & Just. 205, 216 (2018).

54. *Id.*; James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. Rev. 1465, 1501-03 (2019).

55. Bullock, *supra* note 53, at 213.

II. EVEN AFTER 1961, 42 U.S.C. § 1983 NEVER REACHED ITS FULL POTENTIAL.

In 1961, the Court finally established that police abuse was actionable in federal court under Section 1983. Before 1961, Section 1983 jurisprudence was frequently concerned with whether certain rights, privileges, or immunities were covered by the statute, and therefore whether federal courts had jurisdiction to hear Section 1983 cases.[56] That changed with *Monroe*. 365 U.S. at 167. After 1961, the number of civil rights lawsuits grew exponentially. More than 20,000 lawsuits were filed in 1977, more than 36,000 in 1985, more than 57,000 in 1995, and more than 60,000 in 2019.[57]

Monroe ushered in a new era of Section 1983 litigation by shifting focus away from examining "rights, privileges, or immunities" and toward the definition of "under color of law." Until 1961, the Supreme Court "had always assumed that 'under color of law' was limited essentially to the small number of cases where a state law itself was unconstitutional."[58] But the Court in *Monroe* held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" 365 U.S. at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

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56. *See supra* Section I.b.

57. Chemerinsky, *supra* note 37, at 133 (citing Administrative Office of U.S. Courts, Annual Report of the Director (2019)).

58. Oliver Vernon Butler and Armand Derfner, Justice Deferred: Race and the Supreme Court 226 (2021).

In *Monroe*, the Court recognized "Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." 365 U.S. at 171–72. The Court thus "gave life to § 1983 in holding that § 1983 provides a remedy for persons deprived of their Fourteenth Amendment rights by a state official's abuse of his position."[59] *Monroe* opened the federal courthouse doors to those who sought to sue state officials like the police for violations of state law under the Fourteenth Amendment. 365 U.S. at 187.

But beginning just six years after the Court recognized that the scope of Section 1983 covered state police abuse, the Court started contracting that scope. First, in 1967, the Court introduced the doctrine of qualified immunity. Second, the Court introduced a limited version of municipal liability of police departments and the ability to recover damages from them. Finally, the Court severely restricted the ability to obtain injunctive relief from police departments. These three limitations constrained Section 1983's strength in ways never intended by Congress. The Fifth Circuit's moment-of-the-threat doctrine is yet another way Section 1983 is eroded, to the disproportionate harm of Black people across the country.

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59. Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 Geo. L.J. 1719, 1722 (1989).

a. Qualified Immunity Limited Federal Court Access Under Section 1983.

Just six years after *Monroe*, the Court started to limit Section 1983's reach through its creation of the qualified immunity doctrine. Qualified immunity's roots lie in *Pierson v. Ray*, 386 U.S. 547, 549 (1967), in which fifteen Black and white clergy members tried to use the white section of a segregated bus terminal in Jackson, Mississippi, in 1961. On an interstate pilgrimage "to promote racial equality and integration," these clergy members tried to enter the terminal's segregated area, and police arrested them when they refused to disperse. *Id.* at 552–53. The clergy members sued the police under Section 1983, and the Court ultimately considered the question of whether the police had a good faith defense: if the police in good faith believed in the validity of the law under which they arrested the clergy members, even if the law was later determined to be unconstitutional, could the police officers nevertheless be liable for false arrest under Section 1983? *Id.* at 555. In holding that the officers could be immune from liability under those circumstances, the Court created a doctrine that would limit the ability of victims of police misconduct to recover under Section 1983.

Only fifteen years after *Pierson*, the Court expanded and reshaped qualified immunity into the form it holds today. *Pierson* did not require Section 1983 claims be automatically dismissed if a police officer had a good faith defense. Rather, the Court ruled that officers could present that defense at a new trial. *Id.* at 557–58. At minimum, post *Pierson*, plaintiffs claiming police misconduct could present their cases to a jury.

That changed in 1982 when the Court altered and expanded qualified immunity, further limiting Section 1983's power. In *Harlow v. Fitzgerald*, the Court considered a government employee's Section 1983 claim that he was illegally fired. 457 U.S. 800 (1982) (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). Siding with the officials who fired the employee, the Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The Court thus changed the *Pierson* qualified immunity test from whether someone acting under color of law had a good faith defense to the test courts apply today, which is whether that person violated clearly established law.

Critically, the Court also changed the moment when qualified immunity might be raised and decided. Specifically, the Court held that a Section 1983 claim can be dismissed "without resort to trial" because of the "general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 813, 816. The Court in this way shifted the concern from the harm suffered by people at the hands of the police and other government officials to the burdens those officials might face if forced to defend themselves at trial. Even police officers acting in bad faith could escape liability because they no longer needed to testify thanks to the expansion of qualified immunity.[60] In establishing and strengthening

60. Joanna Schwartz, Shielded: How the Police Became Untouchable 75 (2023).

qualified immunity, "the Court simply turned a blind eye to Congress's decision to create a federal cause of action to enable individuals victimized by state officers to obtain redress in the federal courts [under Section 1983]."[61]

b. *Monell* Established Limited Municipal Liability.

Since 1961, the Court also limited the ability of police abuse victims to recover from the municipalities, police departments, and police supervisors that employed the offending police officers. *Monroe* itself absolved the employing municipalities entirely, holding that "Congress did not undertake to bring municipal corporations within the ambit of" Section 1983. 365 U.S. at 187. Seventeen years later, the Court overruled *Monroe*, stating that "[o] ur analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell*, 436 U.S. at 690 (emphasis in original).

But *Monell* was not the panacea for municipal liability that it appears to be at first glance. Municipalities, police departments, and police supervisors are only subject to liability if they adopt a custom or policy that "is responsible for a deprivation of rights protected by the Constitution." *Id.* at 690–91. Municipalities and police departments are emphatically not subject to liability on a *respondeat superior* theory. *Id.* at 691. And as a practical matter, "local governments do not usually adopt policies

61. Wright et al., *supra* note 24, at 716 (quoting Gans, *supra* note 6, at 329).

that are unconstitutional on their face—a policy requiring officers to use excessive force, for example . . . ."[62] Without the ability to proceed under vicarious liability, and with the low chance that a police department adopted an unconstitutional policy, victims of police abuse who wish to hold a police department or supervisor liable have an exceedingly narrow path for relief under Section 1983.

c. *Lyons* Severely Limited Injunctive Relief.

One year after *Harlow*, the Court established yet another limitation on Section 1983 claims. Through *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Court erected an additional obstacle, this time related to injunctive relief.

In the case, Lyons alleged that Los Angeles police officers placed him in a chokehold pursuant to an unconstitutional police department policy. *Id.* at 98. He sought not only monetary relief but also, central to the Court's consideration, preliminary and permanent injunctions that would ban the police from using these holds. *Id.* In an echo of early Section 1983 jurisprudence, the Court decided *Lyons* on jurisdictional grounds. It found that Lyons' standing to seek an injunction "depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers." *Id.* at 105. The Court created a near-impossible burden:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter

62. Schwartz, *supra* note 60, at 103.

> with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or, (2) that the City ordered or authorized police officers to act in such manner.

Id. at 105–06 (emphasis in original). It is no surprise the Court found Lyons unable to meet his burden and affirmed the dismissal of the case. *Id.* at 109.

Lyons' impact on plaintiffs' ability to effect police policy improvements was immediately apparent. When *Lyons* was decided, scholars observed that the "majority's unprecedentedly high case-or-controversy threshold may constitute a major obstacle for civil rights plaintiffs."[63] Furthermore, the Court's standing requirement contradicted Congress's explicit intent to allow injunctive relief in Section 1983 cases, further restricting its scope.[64] The impact of *Lyons* compounded the Court's limitations on relief—not only would people suing the police have difficulty securing individual relief because of qualified immunity and *Monell*, but they also would face an added obstacle to systemic change post-*Lyons*.

63. *Standing to Seek Equitable Relief*, 97 Harv. L. Rev. 215, 220 (1983).

64. 17 Stat. 13 § 1 (allowing recovery "in any action at law, *suit in equity*, or other proper proceeding for redress") (emphasis added).

d. The Moment-of-the-Threat Doctrine Further Limits Section 1983.

The moment-of-the-threat doctrine is yet another restriction on Section 1983, and one contradicted by the Court's precedent. In 1989, the Court shifted analysis of Section 1983 cases from the Fourteenth Amendment to the Fourth Amendment. With this critical change, the Court established that its longstanding Fourth Amendment totality-of-the-circumstances test should apply in Section 1983 cases—a test inconsistent with the Fifth Circuit's moment-of-the-threat doctrine.

Until 1989, courts evaluated excessive police force cases under the Fourteenth Amendment Due Process Clause. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952) (evaluating excessive force in criminal cases under Fourteenth Amendment). In *Graham v. Connor*, 490 U.S. 386 (1989), the Court altered that jurisprudential underpinning: "We hold that [excessive police force] claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." *Id.* at 383. The Court's change of the constitutional basis for Section 1983 claims is critical to the analysis of this case. By changing the excessive police force focus to the Fourth Amendment in 1989, the Court adopted a Fourth Amendment analysis for future Section 1983 cases.

That analysis makes clear that this Court should disregard the Fifth Circuit's moment-of-the-threat doctrine. *Graham* recognized that the Fourth Amendment demands a "totality of the circumstances" examination in excessive force cases. *Id.* at 396 (citing *Tennessee*

v. Garner, 471 U.S. 1 (1985)). That test, when applied to Section 1983 excessive force cases, as in all Fourth Amendment cases, is "not capable of precise definition or mechanical application." *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). The Court ruled that factors such as the severity of an alleged crime, the immediate threat to public safety, whether a person is resisting arrest or fleeing, the nature and quality of the Fourth Amendment intrusion, and the governmental interest that justifies that intrusion should all be considered under this test. *Graham*, 490 U.S. at 396; *United States v. Place*, 462 U.S. 696, 703 (1983). The moment-of-the-threat doctrine does not require consideration of these factors and, moreover, might preclude consideration of many of them, depending on the case facts. Most importantly, the moment-of-the-threat doctrine is inconsistent with the flexibility that *Graham* and other precedent demand when examining police use of force in Section 1983 cases.

The additional restriction that the moment-of-the-threat doctrine imposes on Section 1983 has real world consequences. Police violence against Black people today is not the same as it was from 1871 through the first half of the twentieth century.[65] But police violence continues to exist at high rates 150 years after the enactment of Section 1983 and continues to disproportionately impact Black people. The ability of victims of police violence to obtain relief under Section 1983 would be further narrowed unless this Court reverses the Fifth Circuit.

65. *See supra* Sections I.a and I.c.

III. THERE IS AN ONGOING RACIAL JUSTICE CRISIS IN LAW ENFORCEMENT.

a. Police Violence Persists.

The police killings of George Floyd and Breonna Taylor in 2020 brought the enduring problem of policing and racial justice into the national consciousness. These killings sparked what is considered the largest movement for justice in United States history—tens of millions of people participated in racial justice demonstrations across more than 40% of United States counties.[66]

Although it is clearly no longer the late nineteenth or early twentieth century, the police violence disproportionately inflicted on Black people persists. In 2016, the year Respondent killed Ashtian Barnes, police killed another 1,066 people in the United States, 280 of whom were Black.[67] In Texas, Mr. Barnes was one of twenty-one Black people whom police killed in 2016, at a rate of 6.1 Black people killed per million people compared with 3.45 white people killed per million.[68] In

66. Larry Buchanan, et al., *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. Times, July 3, 2020, https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

67. Mapping Police Violence, https://mappingpoliceviolence.org/ (last visited November 9, 2024) [hereinafter Police Violence].

68. *Id. See also Civilians Shot*, Texas Justice Initiative, https://texasjusticeinitiative.org/datasets/civilians-shot (last visited November 9, 2024) (filter by "year" "2016," "Civilian Race" "Black," and "Civilian Died" "Death") (reporting 20 police killings of Black people in 2016) [hereinafter Texas Justice].

the eight years since, conditions have not improved. To date in 2024, police have killed 1,097 people in the United States, 260 of whom were Black.[69] Moreover, in the United States between January and September 2024, police killed seventeen more Black people than in the same period of 2023.[70] In Texas, Black people are 2.3 times more likely to be killed by police than white people; nationwide, that figure increases to 2.9 times more likely.[71]

Police violence occurs frequently through traffic stops, a subset of police violence most relevant to this case. In 2022 in the U.S., traffic stops were the most common type of police-initiated contact with those sixteen or older, amounting to more than sixteen million encounters that year.[72] An extensive body of literature has long made clear that police do not stop or investigate all community members equally.[73] Racial and ethnic disparities in traffic

69. Police Violence, *supra* note 67.

70. *Id.*

71. *Id.*

72. *Contacts Between Police and the Public, 2022*, Dept. of Justice Bureau of Justice Statistics (Oct 2024), https://bjs.ojp.gov/document/cbpp22.pdf (publishing data that showed police had contact with 12,446,800 drivers and 3,817,800 passengers during traffic stops in 2022).

73. *See, e.g.*, Charles R. Epp et al., Pulled Over: How Police Stops Define Race and Citizenship (2014); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. Chi. L. Rev. 809, 854–59 (2011) (citing numerous studies providing evidence of racial profiling); Emma Pierson et al., *A Large-scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Human Behaviour 736 (2020), https://5harad.com/papers/100M-stops.pdf.

stops have persisted for decades,[74] despite evidence indicating that white drivers commit moving violations at equal or higher rates than other racial groups.[75] Not surprisingly, the police disproportionately kill Black people during traffic stops. Since Campaign Zero began collecting data for its Mapping Police Violence Database in 2013, police have killed 1,459 people during traffic stops, nearly a third of them Black.[76]

Many stops began with common traffic violations like broken taillights or running a red light; relative to the population, Black drivers were overrepresented among those killed. The recurrence of such cases and the rarity of convictions both follow from an overstatement, ingrained in court precedents and police culture, of the danger that vehicle stops pose to officers. Claiming a sense of mortal peril—whether genuine in the moment or only asserted

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74. In the 1990s, for example, litigation in New Jersey and Maryland provided irrefutable statistical evidence of racial profiling in traffic stops. David A. Harris, Profiles in Injustice 60–62 (2003) (discussing *State v. Soto*, 734 A.2d 350 (N.J. Sup. Ct. 1996), and *Wilkins v. Maryland State Police*, Civ. No. MJG-93-468 (D. Md. 1993)).

75. *See* William Cai et al., *Measuring Racial and Ethnic Disparities in Traffic Enforcement with Large-scale Telematics Data*, 2022 PNAS Nexus 1, https://academic.oup.com/pnasnexus/article/1/4/pgac144/6652221.

76. *Mapping Police Violence*, Airtable, https://airtable.com/appzVzSeINK1S3EVR/shroOenW19l1m3w0H/tblxearKzw8W7ViN8 (last visited November 9, 2024) (filter by "encounter type" is "traffic stop," and "race" is "Black"); s*ee also* Texas Justice, *supra* note 68 (filter by "Civilian Race, Black" and "Civilian Died" (reporting that since September 2015, police have shot 439 Black civilians, killing more than half of them).

later—has often shielded officers from accountability for using deadly force.[77]

Behind these numbers are people with family and friends. They include Eddie Irizarry, shot by Philadelphia police six times as he was trying to get out of his parked car and away from the police after they claimed he drove erratically.[78] They also include Ronnell Foster, a 33-year-old father shot by police in Vallejo, California, after being stopped because his bicycle had no lights and because he was weaving in and out of traffic.[79] And finally, they include Sam DuBose, a 43-year-old man shot in the head after being pulled over by a Cincinnati police officer for a missing front license plate.[80] Like Ashtian Barnes, police killed these individuals during traffic stops.[81]

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77. David D. Kirkpatrick, et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. Times, Oct. 21, 2021, https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html.

78. Remy Tumin, *Philadelphia Police Officer Charged in Fatal Shooting*, N.Y. Times, Sept. 8, 2023, https://www.nytimes.com/2023/09/08/us/philadelphia-eddie-irizarry-police-shooting.html.

79. Cheryl W. Thompson, *Fatal Police Shootings Of Unarmed Black People Reveal Troubling Patterns*, NPR, Jan. 25, 2021, https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns.

80. Dan Sewell, *Case Against Officer Who Killed Unarmed Motorist Is Dropped*, Associated Press, July 18, 2017, https://www.usnews.com/news/us/articles/2017-07-18/prosecutor-to-announce-plans-in-fatal-ohio-police-shooting.

81. Kirkpatrick et al., *supra* note 77 (describing how police kill unarmed motorists attempting to flee seventy-five percent of time).

b. The Connection Between Policing and Economics Persists.

Aside from being demonstrative of the enduring police violence against Black people, this case also is emblematic of the enduring connection between policing and economics. We are no longer in an era of slave patrols and convict leasing,[82] but the economic connection persists. Respondent, a Harris County constable, stopped Mr. Barnes because of unpaid tolls. *Barnes v. Felix*, 91 F.4th 393, 395 (5th Cir. 2024).

The Houston Chronicle found that Texas constables like Respondent spent most of their time on traffic infractions and minor disturbances.[83] In 2020, 190 constables patrolled Texas toll roads, with 75% of them patrolling a single tollway surrounding Houston.[84] In fiscal year 2022, the four Texas toll entities generated $1 billion, $800 million, $500 million, and $175 million in revenue, respectively.[85] And a 2019 study found Texas to be one of

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82. *See supra* Section I.c.ii.

83. Neena Satija et al., *What is a constable, and why are Harris County's 'contract deputies' in the news?* Houston Chron., March 18, 2024, https://www.houstonchronicle.com/news/investigations/article/constable-what-is-it-houston-18611636.php.

84. Eric Dexheimer, *Drivers pay for 160 constables to patrol Sam Houston Tollway, even when there's little road to cover*, Houston Chron., March 18, 2024, https://www.houstonchronicle.com/news/investigations/article/constables-toll-roads-18656133.php.

85. Francisco Uranga, *Texas drivers vexed by toll road payment problems got little relief from state lawmakers*, Texas Tribune, Aug. 18, 2023, https://www.texastribune.org/2023/08/18/texas-toll-roads-payment-problems/.

the country's top states in terms of communities reliant on traffic fines for their budgets.[86] Last year, constables made about 18,000 traffic stops, a 40% increase from 2019.[87]

Cities and municipalities throughout the country also rely on revenue generated from tickets and court fees to fund government services.[88] This dependence creates a perverse incentive to overpolice minor traffic infractions: at least twenty states measure police performance using traffic stops per hour.[89] Black drivers are about 20% more likely to get pulled over than white drivers,[90] and thus bear the brunt of these economic incentives. And because these encounters, as in Mr. Barnes' case, often turn fatal,[91] this economic incentive contributes to a cycle of enforcement that prioritizes revenue over life. When the police take someone's life during a traffic stop, the moment-of-the-threat doctrine should not prevent their

86. St. John Barned-Smith, Eric Dexheimer, *Speeding in Texas? Here's where police pulled over the most people,* Houston Chronicle, May 13, 2022, https://www.houstonchronicle.com/news/investigations/article/texas-speed-traps-16395228.php.

87. Dexheimer, *supra* note 84.

88. Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. Times, Oct. 31, 2021, https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html.

89. *Id.*

90. AJ Willingham, *Researchers studied nearly 100 million traffic stops and found black motorists are more likely to be pulled over*, CNN, March 21, 2019, https://www.cnn.com/2019/03/21/us/police-stops-race-stanford-study-trnd/index.html.

91. *See supra* note 81.

family from presenting their case to a jury in federal court under Section 1983.

CONCLUSION

The legislative history of 42 U.S.C. § 1983, the history of police violence borne disproportionately by Black people in the United States, and this Court's precedent compel one result. The Court should reverse the Fifth Circuit and preserve what remains of Section 1983.

Respectfully submitted,

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