No. 20-56254

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Paulette SMITH, individually and as Successor in Interest to Albert Dorsey, deceased, Plaintiff–Appellee,

v.

Edward AGDEPPA, an individual, Defendant–Appellant

and

City of Los Angeles, a municipal entity; Does, 1 through 10, Defendants.

On Appeal from an Order of the
United States District Court for the Central District of California
Christina A. Snyder, District Judge, Presiding, Case No. 2:19-cv-05370-CAS-JC

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR *EN BANC* REVIEW

Lauren Bonds
Keisha James
Eliana Machefsky
NATIONAL POLICE ACCOUNTABILITY PROJECT
2022 St. Bernard Ave.
Suite 310
New Orleans, LA 70016
(504) 220-0401

Michael J. Haddad
HADDAD & SHERWIN LLP
505 Seventeenth Street
Oakland, CA 94612
(510) 452-5500
michael.julia@haddadsherwin.com

John Burton
THE LAW OFFICES OF JOHN BURTON
128 North Fair Oaks Avenue
Pasadena, CA 91103
(626) 449-8300
jb@johnburtonlaw.com

Counsel for Amicus Curiae *National Police Accountability Project*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *amicus curiae* respectfully submits the National Police Accountability Project is a non-profit organization. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock because it has no stock. *Amicus* does not have a financial interest in the outcome of this litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—continued

INTEREST OF THE *AMICUS CURIAE*

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including over one hundred in California. Every year, NPAP members litigate the thousands of cases of law enforcement and detention facility abuse that do not make news headlines as well as many of the high-profile cases that capture national attention. NPAP provides training and support for its member attorneys and resources for non-profit organizations and community groups working on law enforcement and detention facility accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as amicus curiae in cases, such as this one, presenting issues of particular importance for its members and their clients.

AUTHORSHIP AND PREPARATION OF THE BRIEF

Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amicus Curiae* NPAP certifies that no party or counsel for any party authored any portion of the brief, in whole or in part. No party or counsel for any party contributed money for the preparation or submission of the brief. No person, other than *Amicus Curiae* NPAP, contributed money for the preparation or submission of the brief.

INTRODUCTION

The Court should reconsider the split, flip-flop panel decisions below. When pretrial disposition of a 42 U.S.C. § 1983 death action turns on which judges are randomly assigned to the panel, rather than on controlling Supreme Court and Circuit precedent, both the judiciary's credibility and impartiality are thrust into question. Here, after one judge in the majority on the first panel retired, the dissenting judge and the new judge decided *sua sponte* to rehear the case, resulting in a diametrically opposite decision. *Amicus* NPAP contends that the Court needs to step in en banc and set realistic standards for what constitutes "clearly established law" that would preclude qualified immunity, both to maintain the continuity of its decisions and to protect the rights of litigants.

The issue on appeal is not whether Los Angeles Police Officer Edward Agdeppa should be held liable for shooting an unarmed and outnumbered Albert Dorsey without warning after a violent four-minute locker-room struggle, but to whom the Constitution and Rules give the responsibility to decide the issue where the feasibility of a warning presents a genuine dispute of material fact. The Seventh Amendment and Rule 56 assign that task to the jury. Judges should not usurp the constitutional right to a jury trial by searching for "clearly established" law at a microscopically granular level that could never find an exact match to the facts of a Supreme Court or Circuit case previously decided—a process, as this Court previously recognized, that can be manipulated to dismiss almost any case.

The manipulation of the "clearly-established" standard magnifies the unfairness of qualified immunity generally, a judge-fashioned doctrine that recent research has demonstrated to be directly contrary to the language of the Ku Klux Klan Act as enacted by Congress and signed by President Ulysses S. Grant on April 20, 1871. When setting out the now familiar elements of a § 1983 claim for damages, the Bill included the critical passage that liability attaches, "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." *See* Exhibit A at 2. Due to a scrivener's error when compiling § 1983 into the United States Code, however, this critical language was erroneously omitted. Accordingly, the foundation of qualified immunity, that Congress supposedly had not "meant to abolish wholesale all common-law immunities" to § 1983 liability, *Pierson v. Ray*, 386 U.S. 547, 554 (1967), is misplaced, directly contrary to the clear Congressional intent as derived from a literal reading of the actual bill passed into law. The process of correcting this unjust error should begin with this petition.

Accordingly, the Court should grant the petition for rehearing en banc. The Second Panel decision should be vacated. The Court should make clear that a police officer, prior to shooting and killing someone, should give a warning, and that any genuine dispute regarding whether a warning was feasible or adequate should be resolved by a jury, like any other material fact. In doing so, the Court should make clear that an expansive reading of qualified immunity contradicts rather than promotes Congressional intent.

ARGUMENT

I. By Defining the Deadly Force Warning Requirement to Apply Only Under Highly Particularized Facts from Previous Cases, the Second Panel "Defined Away" This Important, Clearly Established Fourth-Amendment Requirement.

According to the Supreme Court, the "'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims against government officials [will] be resolved prior to discovery,'" while allowing credible claims to proceed to trial. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)). That purpose cannot be fulfilled if individual judges, or panels, can define the "clearly established" right at issue at too particularized a level.

The Supreme Court has made clear that requiring previous cases "materially similar" to the case at issue is a "rigid gloss on the qualified immunity standard" and "not consistent with [its] cases." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).[1]

This Court recently condemned manipulating the "clearly-established" prong of qualified immunity "to define away all potential claims":

> "[T]he right allegedly violated must be defined at the appropriate level of specificity *before* a court can determine if it was clearly established." *Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009) (quoting *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)) (emphasis supplied). "Our goal is to define the contours of the right allegedly violated in a way that expresses what is really being litigated."

[1] The Supreme Court continues to follow and apply *Hope v. Pelzer*. *See, e.g., Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014).

> *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1158 (9th Cir. 2000). The right should be defined in a way that is neither "too general" nor "too particularized." *Id.* Qualified immunity is not meant to be analyzed in terms of a "general constitutional guarantee," but rather the application of general constitutional principles "in a particular context." *Id.* (quoting *Todd v. United States*, 849 F.2d 365, 370 (9th Cir. 1988)). On the other hand, **casting an allegedly violated right too particularly, "would be to allow [the instant defendants], and future defendants, to define away all potential claims."** *Id.* (quoting *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)); *see also Simon v. City of New York*, 893 F.3d 83, 96-97 (2d Cir. 2018) ("This task involves striking a balance between defining the right specifically enough that officers can fairly be said to be on notice that their conduct was forbidden, but with a sufficient measure of abstraction **to avoid a regime under which rights are deemed clearly established only if the precise fact pattern has already been condemned.**").

Gordon v. Cnty. of Orange, 6 F.4th 961, 969 (9th Cir. 2021) (bolding added).

This Court, sitting en banc, explained it is "particularly mindful of this principle in the context of Fourth Amendment cases, where the constitutional standard—reasonableness—is always a very fact-specific inquiry. If qualified immunity provided a shield in all novel factual circumstances, officials would rarely, if ever, be held accountable for their unreasonable violations of the Fourth Amendment." *Mattos v. Agarano*, 661 F.3d 433, 442 (2011). "That result would not properly balance the competing goals to 'hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Id*. (quoting *Pearson*, 555 U.S. at 231).

En banc review should be granted because, under the guise of a highly "particularized" search for clearly established law, the second panel majority decision would undermine the clearly established Fourth Amendment requirement

that a warning must be given before the use of deadly force where "feasible" or "practical." *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). Only where the evidence is so one-sided that no genuine dispute exists under Rule 56(a) should summary judgment take that determination from the jury.

The Supreme Court clearly established almost forty years ago that "deadly force may be used," but only "where feasible, some warning has been given." *Garner*, 471 U.S. at 11-12. The Ninth Circuit has, at least until last month, consistently applied this basic principle. "[W]henever practicable, a warning must be given before deadly force is employed." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997). Rather than eclipse the warning requirement, as the second panel majority decision would do, over the last two score years this Court has clarified and strengthened it. The warning must be explicit about the consequences of a person's failure to comply. *Nelson v. City of Davis*, 685 F.3d 867, 882-83 (9th Cir. 2012). To pass constitutional muster a warning must tell the suspect (1) immediately preceding the use of force; (2) that the law enforcement officer will use a particular type of force; and (3) what the suspect must do to avoid the use of that force. *Id.; see also, e.g., Glenn v. Washington County*, 673 F.3d 864, 876 (9th Cir. 2011) (warning must be clear, describe consequences, and be close in time to deployment of force); *Estate of Lopez ex rel. Lopez v. Gelhaus*, 871 F.3d 998, 1011 (9th Cir. 2017) (deadly force unreasonable because officer "indisputably had time to issue a warning, but never notified [the decedent] that he would be fired upon if he either turned or failed to drop the gun"); *Nehad v. Browder*, 929 F.3d 1125, 1138 (9th Cir. 2019) ("Even assuming [the officer] did command [the decedent] to 'Stop,

drop it,' there is no dispute that [the officer] never warned [the decedent] that a failure to comply would result in the use of force, let alone deadly force.").

The Ninth Circuit has a model jury instruction directly on point, listing among the factors for a jury to consider when returning a Fourth-Amendment excessive-force verdict, "whether it was practical for the officer[s] to give warning of the imminent use of force, and whether such warning was given." Ninth Cir. Model Jury Inst. No. 9.25(11) (Rev. Mar. 2023). Instead of allowing a jury to make that determination, and to give that factor its appropriate weight relative to the other listed factors in the case being tried, the second panel majority would essentially disestablish the *Tennessee v. Garner* rule, writing: "Existing precedent does not clearly establish in every context when such a warning is 'practicable,' what form the warning must take, or how specific it must be," and "That officers may be constitutionally required to provide a warning before using deadly force in some cases does not mean it is clearly established that such a warning was required in this case." *Smith v. Agdeppa*, No. 20-56254, 2023 WL 5600294 at *10, 2023 U.S. App. LEXIS 22954 at *29 (9th Cir. Aug. 30, 2023) (on rehearing).

The first panel majority correctly affirmed the district court's finding of a genuine dispute regarding the failure to warn. Officer "Agdeppa never claimed that it was not practicable to give a deadly force warning." *Smith v. Agdeppa*, 56 F.4th 1193, 1204 (9th Cir. 2022) (vacated on rehearing). Instead, he testified at deposition that he recalled he "yelled something" before shooting. Officer Agdeppa later filed an inconsistent declaration in support of summary judgment that he "gave Dorsey a verbal warning, stating words to the effect that Dorsey needed to

stop." *Id*. Although Officer Agdeppa may or may not have yelled "stop" before shooting Albert Dorsey, he did not warn of deadly consequences, at minimum establishing a genuine dispute for the jury to resolve.

The second panel *sua sponte* vacated this sound reasoning, positing an unrealistically granular analysis that would effectively transfer factfinding from the jury to the bench while obliterating the requirement that qualified immunity be analyzed by considering the facts in the light most favorable to the plaintiff. The second panel majority would impose an impossible burden on Plaintiff, Mr. Dorsey's survivor, and on all other civil-rights plaintiffs who will come before this Court and its constituent judicial districts, by ruling, contrary to the clear Supreme Court and Circuit precedents cited above, that a jury could not determine whether a warning should have been given because there was not a case already in existence holding "a warning was required in this case." *Smith*, 2023 WL 5600294 at *10, 2023 U.S. App. LEXIS 22954 at *29.

En banc review should be granted to affirm that under our democratic system juries, not judges, decide whether a warning was "feasible or "practicable" when the evidence establishes a genuine issue under Rule 56.

II. This Court Should Address the Scrivener's Error On Which Qualified Immunity is Based.

Qualified immunity dates to 1967, when the Supreme Court first made a "good faith" defense available to individual § 1983 defendants, writing that Congress had not "meant to abolish wholesale all common-law immunities." *Pierson*, 386 U.S. at 554.[2] Fifteen years later, in *Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982), the Supreme Court removed the "subjective" element, and then purported to make the affirmative defense solely "objective" by having it turn on whether the defendant official's conduct violated "clearly established" law. The Supreme Court, however, continued to "read § 1983 in harmony with general principles of tort immunities and defenses," proceeding "on the assumption" that common-law principles of immunity "should not be abrogated absent clear legislative intent to do so." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012).

Compelling evidence of that "clear legislative intent" now exists. Research by Professor Alexander A. Reinert of the Benjamin N. Cardozo School of Law demonstrates that the underpinnings for *Pierson*'s holding, the font of the qualified-immunity defense, is based on a scrivener's error that omitted a critical 16-word clause from the Ku Klux Klan Act of 1871 when § 1983 was first compiled in the United States Code. As compiled, § 1983 states, in relevant part:

---

[2] Some scholars dispute whether the common law recognized a good-faith defense in 1871. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 55 (2018) ("[L]awsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the republic."); Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801-02 (2018) ("When the Civil Rights Act of 1871 was passed, government officials could not assert a good faith defense to liability.").

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured . . . .

42 U.S.C. § 1983 (emphasis added). The bill passed by Congress and signed into law by President Grant, however, included, between "shall" and "be liable," the expansive phrase: "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 235 (2023); Exhibit A at 2 (certified copy of Ku Klux Klan Act from the National Archives with the omitted passage highlighted).

The meaning of the omitted passage, which is part of the text of the law as enacted, could not be more clear: any then-existing common-law immunity such as "good faith" does not apply to § 1983 actions. *Rogers v. Jarrett*, 63 F.4th 971, 979-80 (5th Cir. 2023) (Willett, J., concurring). Yet, because of the scrivener's error omitting this explicit repudiation of common-law immunities from the U.S. Code, the Supreme Court presumed their availability and later fortified them with qualified immunity—a doctrine which, as demonstrated by the second panel majority decision here, can result in the arbitrary deprivation of the Seventh-Amendment right to trial by jury in a civil case.

Qualified immunity's infringement on § 1983 plaintiffs' rights is magnified by the frequent resort to interlocutory appeals, like the one taken here. 28 U.S.C. § 1291 generally limits appellate jurisdiction to final judgments to promote

efficiency for circuit courts, docket control for district courts, and fairness to litigants. *See* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3907, at 270 & n.2, 273-74 (2d ed. 1991); *Johnson v. Jones*, 515 U.S. 304, 309 (1995) ("An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence."). Nevertheless, the collateral order doctrine permits interlocutory appeals in a "small class of decisions," *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009), including certain district court orders denying qualified immunity to government officials, *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014).

Denials of qualified immunity only fall within the "collateral order" exception if they turn on an issue of law, rather than fact. *Mitchell*, 472 U.S. at 528; *Plumhoff*, 572 U.S. at 772. A district court's factual determination that the evidence is sufficient to warrant a jury trial should be beyond the purview of appellate jurisdiction. *Johnson*, 515 U.S. at 314-15. "[A]ppellate courts have 'no comparative expertise' over trial courts in making . . . determinations [of evidence sufficiency] and . . . forcing appellate courts to entertain appeals from such orders would impose an undue burden." *Plumhoff*, 572 U.S. at 773 (quoting *Johnson*, 515 U.S at 316). Moreover, whether a genuine fact issue exists usually overlaps with issues that are raised later at trial, so interlocutory appeals of fact-based decisions creates a risk of duplicative, overlapping appeals of similar issues. *Johnson*, 515 U.S at 316.

Nevertheless, the Circuit's (following the Supreme Court's) jurisprudence has evolved to the stage that individual § 1983 defendants are encouraged to appeal pretrial denials of Rule 56 motions based on qualified immunity claims, even when the denials are based on disputes of fact. These appeals are not often successful by legal measure—one survey found that although more than one out of five summary-judgment orders denying qualified immunity are appealed, only 12.2% were reversed in whole, and another 7.3% reversed in part. Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 40 (2017). That low success rate does not deter certain defendants, however, because the interlocutory appeal delays resolution while increasing settlement leverage. Karen Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1891-92 n.23 (2018); Joanna Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1121 (2020) (describing attorney observations about strategic use of interlocutory appeals of qualified immunity denials); *Stewart v. Donges*, 915 F.2d 572, 576-78 (10th Cir. 1990) (analogizing an interlocutory appeal to a unilateral continuance).

Most disturbing, as this case illustrates, interlocutory appeals give defendants a spin of the wheel to perhaps draw a panel willing to reverse the district judge and dismiss a § 1983 claim short of a jury trial under the "clearly established" prong, based on the syllogism that a constitutional right established "in some cases does not mean it is clearly established . . . in this case." *Smith*, 2023 WL 5600294 at *10, 2023 U.S. App. LEXIS 22954 at *29. Under such a standard, any civil-rights plaintiff can be denied a jury because, as Mark Twain observed, history may not repeat itself, but it rhymes.

Those who come before the federal judiciary to remedy an alleged constitutional deprivation as severe as the death of a loved one should not then be face a deprivation of their Seventh Amendment right to trial by jury. Survivors of people killed by law enforcement, and all civil-rights plaintiffs, should not be treated like roulette chips. Professor Miller lists qualified immunity among "the great growth in challenges" impacting the procedural rights of civil plaintiffs:

> [T]here is no secret about what is happening, or frankly why, and whom it all benefits. To use a sports metaphor, these cumulative procedural changes feel like judicial piling on. The consequences of the procedural movements of the last twenty-five years are seismic. Previously, we had a commitment to trial and, when appropriate, jury trial—all in public view.

Arthur R. Miller, *Simplified Pleading, Meaningful Days In Court, And Trials On The Merits: Reflections On The Deformation Of Federal Procedure*, 88 N.Y. UNIV. L. REV. 286, 357 (2013).

Because of the obvious injustices that arise from the arbitrary and inconsistent pretrial application of qualified immunity—epitomized by the opposing outcomes of the two panel decisions here—a "strange-bedfellows alliance of leading scholars and advocacy groups of every ideological stripe—perhaps the most diverse amici ever assembled—had joined forces" along with "a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). On this Court, Judge Hurwitz has noted how courts "struggle" to apply the "ill conceived" and "judge made doctrine of qualified immunity, which is found nowhere in the

text of § 1983." *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part).

Supreme Court justices from different ideological wings have urged reform of the qualified-immunity doctrine. *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); *Ziglar v. Abassi*, 582 U.S. 120, 160 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

Given qualified immunity's flawed foundation, which contradicts the language of the statute passed by Congress and signed into law, and the increasing recognition throughout society that the doctrine leads to waste and injustice, the Court should grant en banc rehearing to address these questions of exceptional importance.

CONCLUSION

The decision of the second panel should be vacated, and this case reheard en banc.

Dated: September 22, 2023

Respectfully submitted,
THE LAW OFFICES OF JOHN BURTON

/s/ John Burton
John Burton

HADDAD AND SHERWIN LLP

/s/ Michael J. Haddad
Michael J. Haddad

Attorneys for *Amicus Curiae* NPAP

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1(e), I certify that this brief: (i) complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because it contains about 3,720 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (ii), and that it complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.75, set in Times Roman 14 point type.

THE LAW OFFICES OF JOHN BURTON

/s/ John Burton
John Burton

CERTIFICATE OF SERVICE

I certify that on September 22, 2023, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

THE LAW OFFICES OF JOHN BURTON

/s/ John Burton

John Burton

EXHIBIT A

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

To all to whom these presents shall come. Greeting:

By virtue of the authority vested in me by the Archivist of the United States, I certify on his behalf, under the seal of the National Archives of the United States, that the attached reproduction(s) is a true and correct copy of documents in his custody.

SIGNATURE	D Edelin
NAME: DENNIS MICHAEL EDELIN	DATE: 8/19/22
TITLE: CHIEF, ARCHIVES 1 RESEARCH ROOM	
NAME AND ADDRESS OF DEPOSITORY: National Archives and Records Administration, 700 Pennsylvania Avenue, NW, Washington, DC 20408	

NA FORM 14007 (10-86)

...y law, statute, ordinance, regulation, custom, or usage of ...y State, shall subject, or cause to be subjected, any person ...hin the jurisdiction of the United States to the deprivation of ...hts, privileges, or immunities secured by the Constitution ...the United States, shall, any such law, statute, ordinance, ...lation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at ...w, suit in equity, or other proper proceeding for redress; which ...ceedings to be prosecuted in the several district or circuit courts ...the United States, with and subject to the same rights of appeal, ...view upon error, and other remedies provided in like cases in ...such courts, under the provisions of the acts of the ninth of ...April, eighteen hundred and sixty-six, entitled "An act to protect ...all persons in the United States in their civil rights, and to furnish the means of their vindication," and the other remedial laws ...of the United States which are in their nature applicable in such ...cases.

Sec. 2. That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force,

H R 320

Forty-second

Congress of the United States, At the First Session,

Begun and held at the CITY OF WASHINGTON, in the DISTRICT OF COLUMBIA, on Saturday, the Fourth day of March, eighteen hundred and Seventy-one.

AN ACT

to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes.

Be it Enacted, by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several districts or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication," and the other remedial laws of the United States which are in their nature applicable in such cases.

SEC. 2. That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force,

intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws,

as to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards, or in favor of the election of any lawfully qualified person as an elector of President or Vice President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy; each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offenses, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy, shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the

persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April, ninth, Eighteen hundred and sixty six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

Sec. 3. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities or protection named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.

Sec. 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be

organized and armed, and so numerous and powerful as to be able by force to either overthrow or set at defiance the constituted authorities of such State and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders, and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be declared by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privilege of the writ of habeas corpus in the case of such rebellion: Provided, That all the provisions of the second section of an act entitled "An act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March third, eighteen hundred and sixty-three, which relate to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section: Provided, further, That the President shall first have made proclamation, as now provided by law, commanding such insurgents to disperse: And provided also, That the provisions of this section shall not be in force after the end of the next regular session of Congress.

~~Sec. 5. That nothing herein contained shall be construed to supersede or repeal any former act of law except so far as the same may be expressly hereby; and any offence hereby committed against the laws of any former act shall be prosecuted and any proceeding already commenced for the prosecution thereof shall be continued and completed, the~~

~~same as if this act had not been passed, except as far as the provisions of this act may go to sustain and validate such proceedings.~~

Sec 5. That no person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act who shall, in the judgment of the court, be in complicity with any such combination or conspiracy, and every such juror shall before entering upon any such inquiry, hearing or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy; and each and every person who shall take this oath, and shall therein swear falsely, shall be guilty of perjury, and shall be subject to the pains and penalties declared against that crime, and the first section of the act Entitled "An act affixing additional causes of challenge and prescribing an additional oath for grand and petit jurors in the United States courts," approved June Seventeenth, Eighteen Hundred and Sixty-two (c.), and the same is hereby repealed.

Sec. 6 That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent, or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives for all damages caused by any such wrongful act which such first named person or persons by reasonable diligence could have prevented; and such damages may be recovered in an action on the case in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action. Provided, That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person.

Sec. 7. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant hereto; and any offences committed against the terms of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed except so far as the provisions of this act may go to sustain and validate such proceedings.

J. G. Blaine
Speaker of the House of Representatives

Approved April 20th 1871
U. S. Grant

Henry B. Anthony
President of the Senate pro tempore