No. 20-659

IN THE

Supreme Court of the United States

LARRY THOMPSON

Petitioner,

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472;
POLICE OFFICER PAUL MONTEFUSCO, SHIELD #10580
POLICE OFFICER PHILLIP ROMANO, SHIELD #6295
POLICE OFFICER GERARD BOUWMANS, SHIELD #2102,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE CURRENT AND FORMER PROSECUTORS, DEPARTMENT OF JUSTICE OFFICIALS, AND JUDGES IN SUPPORT OF PETITIONER

MARY B. MCCORD
Counsel of Record
AMY L. MARSHAK
SETH WAYNE
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6607
mbm7@georgetown.edu

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INTEREST OF AMICI CURIAE

Amici are current and former federal, state, and local prosecutors, Department of Justice officials, and judges with experience prosecuting and establishing policy for prosecuting crimes at various levels of the criminal justice system.[1] Amici recognize that prosecutors must always conduct their duties in the interests of justice. Prosecutors therefore exercise their discretion to seek dismissal of criminal charges—and judges grant dismissal—where there is insufficient evidence to prove the case beyond a reasonable doubt or when other compelling circumstances call for dismissal. Amici have an interest in ensuring that prosecutors' decisions whether to pursue criminal charges are not affected by the impact of a dismissal on future civil claims. Moreover, amici have an interest in promoting public trust in the justice system, which is furthered by individuals' ability to invoke appropriate mechanisms to deter police misconduct.

SUMMARY OF ARGUMENT

Under *Heck v. Humphrey*, a person alleging an unreasonable seizure pursuant to legal process may not bring a claim under 42 U.S.C. § 1983 unless and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund this brief's preparation or submission. Counsel of record for all parties received notice of the filing of this brief and consented to its filing.

until there has been a "termination of the prior criminal proceeding in [his] favor." 512 U.S. 477, 484 (1994). The Courts of Appeals have reached contradictory conclusions as to how to apply this requirement when the charges against a defendant are dismissed before trial. Although some of the Courts of Appeals, including the Second Circuit below, have concluded that to qualify as a "favorable termination" the plaintiff must prove "affirmative indications of innocence," Pet. App. 5a—something often difficult to demonstrate in the context of a dismissal—the Eleventh Circuit has held that the favorable-termination requirement demands only that criminal proceedings resolve "in a manner not inconsistent with" the defendant's innocence. *Laskar v. Hurd*, 972 F.3d 1278, 1295 (11th Cir. 2020).

The rule of the Second Circuit and the majority of the Courts of Appeals intrudes on impartial prosecutorial decision-making by attaching a consequence to dismissals that creates a perverse incentive to the exercise of prosecutorial discretion. Amici believe that prosecutors' decisions about whether to dismiss or pursue a criminal case to trial should not be affected by considerations about whether the defendant may, in the future, seek to vindicate his constitutional rights through civil litigation. It serves no prosecutorial interest to deny the availability of a civil claim absent an affirmative indication of innocence by the prosecutor at the time of dismissal. The majority rule also ignores the practical circumstances surrounding most prosecutorial dismissals and poses an unrealistic burden on defendants with meritorious claims. Moreover, the majority rule creates arbitrary

inequities between the claims of similarly situated defendants whose cases are dismissed before trial and those who are acquitted at trial or whose convictions are reversed on appeal or called into question on habeas corpus review or through executive expungement. Finally, trust in the justice system is undermined when a decision to dismiss a case effectively thwarts a valid claim of police misconduct.

Amici accordingly urge the Court to grant certiorari on the first question presented in the petition for certiorari.[2]

ARGUMENT

At issue in this case is the interpretation of the rule set forth by this Court in *Heck v. Humphrey*: that a person who seeks to challenge an unreasonable seizure pursuant to legal process may not assert a claim under 42 U.S.C. § 1983 unless and until there has been a "termination of the prior criminal proceeding in [his] favor." 512 U.S. at 484; *see also McDonough v. Smith*, 139 S. Ct. 2149, 2157 (2019) ("[The] favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments."). For a § 1983 claim under the Fourth Amendment, like that of Petitioner Thompson, alleging the unlawful institution of legal process—commonly known as a "malicious prosecution" claim based on the common-law tort—the "favorable

[2] Amici take no position on the second question presented.

termination" requirement functions as an element of the claim. *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017). Although *Heck* addressed application of the favorable termination requirement in post-conviction circumstances, this Court has not addressed how it applies when charges are dismissed before or during trial.

As interpreted by the Second Circuit and several other circuits, the "favorable termination" requirement means that, in the case of a dismissal of criminal charges, there must be "affirmative indications of innocence" of the defendant to permit a § 1983 suit for damages. *Lanning v. City of Glens Falls*, 908 F.3d 19, 25 (2d Cir. 2018); *see also Jordan v. Town of Waldoboro*, 943 F.3d 532, 545 (1st Cir. 2019) ("[T]o satisfy the favorable termination element, a plaintiff must show that the prosecution was terminated in such a way as to imply the plaintiff's innocence."); *Kossler v. Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009) (en banc) ("[U]pon examination of the entire criminal proceeding, the judgment must indicate the plaintiff's innocence of the alleged misconduct underlying the offenses charged."); *Salley v. Myers*, 971 F.3d 308, 313 (4th Cir. 2020) (favorable termination requires that the "'criminal case against the plaintiff has been disposed of in a way that indicates the plaintiff's innocence'") (citation omitted); *Jones v. Clark Cty.*, 959 F.3d 748, 763 (6th Cir. 2020) ("[T]he termination [of proceedings] must go to the merits of the accused's professed innocence for the dismissal to be 'favorable' to him.") (citation omitted); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004) (dismissal satisfies the favorable termination

requirement "if it reflects the opinion of the prosecuting party or the court that the action lacked merit or would result in a decision in favor of the defendant"); *Cordova v. City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016) (termination by dismissal must "'indicate the innocence of the accused'") (citation omitted).

The Eleventh Circuit has concluded otherwise. After intensively examining the common-law history of the favorable-termination rule, that court rejected the other circuits' approach, concluding that "the favorable-termination element of malicious prosecution is not limited to terminations that affirmatively support the plaintiff's innocence." *Laskar*, 972 F.3d at 1295. "Instead, the favorable-termination element requires only that criminal proceedings against the plaintiff formally end in a manner not inconsistent with his innocence on at least one charge that authorized his confinement." *Id.*

Amici urge this Court to grant certiorari and make clear that the favorable-termination requirement does not require "affirmative indications of innocence." The majority rule creates unhelpful incentives for prosecutors in deciding whether to dismiss criminal charges—and, for defendants, whether to dispute dismissal of charges and pursue acquittal; it does not serve prosecutorial interests; and it leads to inequitable results, thereby undermining confidence in the justice system.

I. DISMISSAL DECISIONS SHOULD BE INDEPENDENT OF CONSIDERATIONS REGARDING CIVIL LIABILITY

Regardless of the outcome of a case, pursuing a criminal prosecution to completion can be an onerous affair. Criminal defendants suffer stigma, deprivations, and losses of liberty associated with pending criminal charges. Victims and witnesses often have their lives disrupted by the prosecutorial process, and their required participation may be burdensome or result in re-traumatization. Even prosecutions of low-level offenses require the expenditure of limited resources by law enforcement, prosecuting agencies, courts, and, where needed, court-appointed defense attorneys. Accordingly, among the most important duties of a prosecutor is the determination of whether to prosecute at all, and whether, during the course of a prosecution, it becomes necessary to seek dismissal.

Prosecutorial decisions about whether to pursue criminal charges are grounded in whether the admissible evidence likely will be sufficient to prove every element of the crime beyond a reasonable doubt. *See* U.S. Dep't of Justice, Justice Manual § 9-27.220 cmt., *available at* https://perma.cc/95FM-SNLC (directing prosecutors not to initiate criminal charges unless they believe "that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact"). This focus is both "a matter of fundamental fairness and in the interest of the efficient administration of justice." *Id.* The prosecutorial obligation to seek dismissal of charges if the evidence is insufficient persists throughout the

life of a criminal case as new evidence emerges, further investigation puts evidence in a new light, or witnesses become unavailable to testify.

Prosecutors also appropriately have discretion to consider other factors in determining whether to pursue charges or seek dismissal. These include concerns about the purpose and efficacy of criminal punishment in a given case, public confidence in the justice system, and the avoidance of waste of government resources on purposeless or even harmful prosecutions. Accordingly, a prosecutor may decline to charge a criminal case or may seek dismissal of pending charges even when she has sufficient evidence to prove guilt. For example, in New York, a court may dismiss criminal charges on motion of the prosecutor where compelling circumstances demonstrate that prosecution of the defendant "would constitute or result in injustice." N.Y. Crim. Proc. Law §§ 170.40, 210.40 (establishing as factors, *inter alia*, "the seriousness and circumstances of the offense," "the evidence of guilt," "the impact of a dismissal upon the confidence of the public in the criminal justice system," and, where appropriate, "the attitude of the complainant or victim" as to dismissal).[3]

It is these considerations—not whether a defendant may later file a civil lawsuit, or, for that matter, whether a crime victim might later file her

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[3] The prosecutor stated in Petitioner Thompson's criminal case that the dismissal was "in the interest of justice," Pet. App 19a, but no law was cited and no reasons were put on the record.

own suit—that should inform a prosecutor's decision whether to pursue or maintain charges against a given defendant. The possibility of future civil claims should play no role in impartial prosecutorial decision-making about whether a case should be brought to trial.

The majority rule violates these principles by attaching a consequence to prosecutorial decisions that creates a perverse incentive to the exercise of prosecutorial discretion. As the district court explained in this case, if dismissals in the "interest of justice" effectively "bar malicious prosecution claims," prosecutors would have "almost unlimited power to bar such claims, regardless of the strength or weakness of the underlying accusations." Pet. App. 46a. Amici do not believe that an ethical prosecutor would make a dismissal decision in order to deliberately deny a civil cause of action to an individual. *Cf. McDonough*, 139 S. Ct. at 2160 (suggesting this incentive structure). But an unscrupulous prosecutor could be motivated to seek dismissal of charges in such a way as to shield himself or police officers with whom he works from facing civil liability—knowing that most criminal defendants will have no realistic choice but to accept the dismissal. The majority rule could even place pressure on a prosecutor to dismiss a *meritorious* criminal charge against a defendant in order to avoid the uncertainty of trial and the attendant possibility of acquittal and subsequent civil liability.

Moreover, to the extent that defendants have the ability to oppose dismissal,[4] it makes little sense to force them to do so in order to preserve their ability to file a civil claim later. Forcing a case to trial in order to obtain an acquittal—treated categorically as a favorable termination, *see McDonough*, 139 S. Ct. at 2160 n.10—would needlessly burden prosecutors, victims, witnesses, and the judiciary.

In short, potential civil liability should play no role in prosecutorial decision-making. By imposing a heightened standard of innocence on the dismissal decision—as opposed to the "not inconsistent with innocence" standard adopted by the Eleventh Circuit—the majority rule injects an unwarranted consideration into the exercise of prosecutorial discretion.

II. THE MAJORITY RULE POSES AN UNREALISTIC BURDEN ON § 1983 CLAIMS AND CREATES ARBITRARY DISTINCTIONS BETWEEN SIMILARLY SITUATED DEFENDANTS

A. A Prosecutor's Decision to Dismiss Is Often Not an Affirmative Indication of Innocence.

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[4] In a number of jurisdictions, prosecutors have discretion to dismiss at least some categories of criminal cases before trial without leave of the court or the defendant. *See, e.g.*, Alaska R. Crim. P. 43(a)(1); Del. Super. Ct. Crim. R. 48(a); D.C. Super. Ct. Crim. R. 48(a)(1); La. Code Crim. Proc. art. 691.

Because dismissal may be based on a number of considerations, a dismissal alone is generally not an "affirmative indication[] of innocence" sufficient to meet the high bar of the majority test for favorable termination. Pet. App. 5a. In amici's experience, a prosecutor's determination that she is unlikely to be able to prove a case beyond a reasonable doubt based on admissible evidence is often not probative of innocence or guilt. And even where the prosecutor gives a reason for the dismissal, that reason may not be sufficient to establish "affirmative indications of innocence."

Moreover, the realities of handling cases in high-volume jurisdictions may make it impracticable to give a full accounting of the reasons for dismissal in every case, especially for misdemeanors and low-level crimes. As Thompson's criminal defense lawyer testified at trial:

> The nature of criminal court as it's practiced in New York City is that there is an assigned attorney in each courtroom who just has a stack of files and [] stands up on every case [] that's in front of them and their files aren't always detailed they're just reading from whatever notes the actual assigned district attorney assigned to particular cases has left for them. . . . So the assistant speaking in court is not necessarily the person who has reviewed the case and made a decision about it.

Pet. App. 32a.

The majority rule ignores the practical circumstances in which prosecutorial decisions to dismiss are made, imposing an unrealistic and unwarranted burden on a criminal defendant with a valid claim of unreasonable seizure pursuant to legal process. As the Eleventh Circuit noted, "limiting favorable terminations to those that affirmatively support a plaintiff's innocence redirects the focus to whether the entire prosecution was justified" by considering "the wrong body of information." *Laskar*, 972 F.3d at 1292.

The majority rule also arbitrarily favors defendants in jurisdictions where prosecutors or courts are required to put reasons for dismissal on the record, while disfavoring those in jurisdictions where prosecutors may unilaterally dismiss with no reasons at all, or where the rules requiring reasons on the record are largely ignored in practice (as appears to have been the case for Petitioner Thompson).

The facts of *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), illustrate the potential for unjust results. According to Manuel's allegations, he was accosted by police officers who beat him and unlawfully searched him. They found a bottle of vitamins on his body, and field drug tests came back negative. They nevertheless fabricated a positive result and arrested the petitioner for drug possession. He was jailed pretrial based on the false evidence. Two weeks later a police laboratory re-examined the seized pills and determined that they contained no controlled substances, though the prosecutor did not dismiss the case for another month, during which time Manuel remained in jail. *Id.* at 915. Subsequently, Manuel

sued the city and several police officers under § 1983 for violations of the Fourth Amendment. *Id.* at 916.

The district court did not determine whether or how the favorable termination rule should be applied to Manuel's claim because it dismissed the claim on other grounds, which were affirmed by the Seventh Circuit but reversed by this Court. *Id.* Nevertheless, the facts of that case illustrate the unfairness and perverse incentives of the majority rule. Were that rule applied to the facts of *Manuel* in a jurisdiction that requires a prosecutor to give reasons for dismissal and obtain the court's approval, it appears self-evident that dismissal based on a conclusive laboratory test showing no illicit substances would be indicative of innocence, and Manuel's claim would be cognizable. But were the majority rule applied to the same facts in a jurisdiction that does not require court approval, the prosecutor could simply enter a *nolle prosequi* without providing a reason or disclosing the test results—indeed, she would have little incentive to divulge the results, which might subject her to criticism for delay. And even in a jurisdiction that requires court approval, but not reasons for dismissal, she may simply move the court for dismissal "in the interests of justice," as the prosecutor did in Petitioner Thompson's case, without providing additional details. In either of these circumstances, the dismissal would be insufficient to show favorable termination under the majority rule, and Manuel's claim would be rejected.

The Eleventh Circuit's rule—deeming a formal end to a prosecution to be "favorable termination" if it is "not inconsistent with . . . innocence," *Laskar*, 972

F.3d at 1295—creates none of this inequity. By removing a prosecutor's reasons for dismissal from determinations about civil liability for unreasonable seizures pursuant to legal process, the Eleventh Circuit's rule not only protects prosecutorial decision-making from undue outside influence, it also reflects the practical circumstances surrounding prosecutorial decisions to dismiss.

B. The Majority Rule Favors Defendants Whose Cases are Terminated by Acquittal or Post-Conviction Remedies

In contrast to the Eleventh Circuit's rule, the majority rule imposes an arbitrary heightened innocence requirement on dismissals in comparison to other forms of "favorable termination" of criminal charges. This differential treatment illustrates how far the majority rule has strayed from the favorable-termination requirement's goal of avoiding "'a collateral attack on the conviction through the vehicle of a civil suit.'" *Heck*, 512 U.S. at 484 (citation omitted). Moreover, it creates a strange imbalance in the justice system, in which a defendant whose charges are dismissed before trial may not sue, but a defendant who is acquitted at trial—or succeeds in overturning his conviction on appeal or collateral attack—may obtain damages.

This Court has made clear that a defendant who is acquitted after trial "unquestionably" has met the favorable-termination requirement to permit a § 1983 suit. *McDonough*, 139 S. Ct. at 2160 n.10 (2019). But were the majority rule imposed, an acquittal after trial might not meet the heightened "affirmative

indication of innocence" standard. As this Court has noted, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to guilt." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984). In other words, a finding of "not guilty" is required where the evidence of guilt does not reach the high standard of "beyond a reasonable doubt" for a particular jury, even if the jurors generally do not believe the defendant is innocent. As one commentator has explained:

> A "Not Guilty" verdict can result from either of two states of mind on the part of the jury: that they believe the defendant is factually innocent and did not commit the crime; or, although they do not necessarily believe he is innocent, and even "tend" to believe he did commit the crime, the prosecution's case was not sufficiently strong to convince them of his guilt beyond a reasonable doubt. . . .
>
> Since a "Not Guilty" verdict can be predicated on that "gray zone" of uncertainty somewhere between a belief in innocence and the required proof of guilt, it would be incorrect to state that a conclusion of "Not Guilty" means that the jury believes the defendant is innocent.

Vincent Bugliosi, *Not Guilty and Innocent—The Problem Children of Reasonable Doubt*, 4 Miss. C. L. Rev. 47, 51, 53 (1983).

As discussed above, prosecutors are obligated to seek dismissal where they believe that a jury would

find there is a reasonable doubt as to guilt. Indeed, in the experience of amici, cases dismissed by prosecutors before trial—including where no reasons are placed on the record that support the defendant's innocence—typically feature weaker evidence of guilt than those that proceed to trial but end in acquittal. In such cases, the majority rule precludes a § 1983 claim based on an unreasonable seizure pursuant to legal process. But if a jury applies the exact same standard and reaches the same conclusion, even where there is greater evidence of guilt, then a civil cause of action may proceed.

Indeed, in cases of jury nullification, juries have returned "not guilty" verdicts because of a disagreement with the law or with the severity of punishment, despite believing that the prosecutor has proved each element of the offense. *See Woodson v. North Carolina*, 428 U.S. 280, 294 n.29 (1976) (citing evidence that jurors refused to convict in death penalty cases to avoid the imposition of capital punishment); Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine 278 (Cato Inst., 2014), *available at* https://perma.cc/VH26-JYBE (noting that, in some parts of the country, federal juries have engaged in nullification with "some frequency" as a result of disagreements with sentencing guidelines). Because juries are rarely required to explain the reasoning behind their decisions, it is entirely possible under the majority rule that a civil cause of action would be available to a guilty defendant acquitted by jury nullification, but denied to a similarly situated individual whose case was dismissed before trial.

The disparate treatment of dismissals and trial acquittals is not the only inequitable outcome of the majority rule. In *Heck*, this Court held that a criminal defendant who has been convicted satisfies the "favorable termination" requirement if the conviction was "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486–87. Thus, despite the fact that the defendant was actually convicted of a crime in each of these scenarios, the favorable termination of the proceedings necessary to bring a § 1983 claim ordinarily can be established without "affirmative indications of innocence."

Reversal on direct appeal, for example, could be based on evidentiary error determined not to be harmless, but that does not affirmatively indicate innocence. Indeed, on retrial, the prosecutor might introduce other evidence that she learned of after the first trial or that she did not introduce at the first trial, which would support a conviction. But the prosecutor might decide not to retry the case for many reasons, including a determination that any sentence already served by the defendant was sufficient to achieve justice, a desire not to re-burden victims and witnesses with a retrial, or a need to conserve prosecutorial resources. Yet under *Heck*, the reversal on appeal would be considered a favorable termination, while a defendant whose charges were dismissed without reasons pretrial would be left with no way to establish "affirmative indications of innocence."

Not even habeas corpus review requires an *affirmative* showing of innocence. Rather, on collateral review, a conviction may be overturned based on a trial error if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). Requiring a higher standard where criminal charges were dismissed before trial makes little sense.

III. BARRING CIVIL RIGHTS CLAIMS WHERE CRIMINAL CHARGES ARE DISMISSED UNDERMINES FAITH IN THE JUSTICE SYSTEM

As current and former prosecutors and former Department of Justice officials and judges, amici have a special interest in "preserving public confidence in the fairness of the criminal justice system." *Lockhart v. McCree*, 476 U.S. 162, 174–75 (1986) (internal quotations and citation omitted). Without the public's trust and cooperation, the justice system cannot effectively protect public safety. When community members do not perceive the justice system as fair, they are less inclined to faithfully fulfill their essential roles reporting crime, testifying as witnesses, and serving as jurors. Yet trust between prosecutors and community members is disserved when a prosecutor's decision to dismiss a case based on lack of evidence effectively thwarts a valid civil claim based on police misconduct.

Amici recognize that a great deal of public discourse about dissatisfaction with the justice system focuses on a lack of accountability for law

enforcement officers who infringe on individual rights. This concern is particularly acute at a time when a mass movement against law enforcement misconduct has resulted in protests across the United States. *See, e.g.*, Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020), https://perma.cc/H9AL-2FV6. It is essential to the work of amici that the justice system be perceived as providing an adequate remedy for constitutional violations by law enforcement. Additionally, effective prosecutions require constitutional police work. The majority rule adversely affects prosecutors by providing an unnecessary obstacle to police accountability that undermines trust in the criminal justice system and fails to adequately deter police misconduct.

Amici urge this Court to grant certiorari in order to make clear that, in cases where charges were dismissed before or during trial, a defendant need not establish that the dismissal bore "affirmative indications of innocence" to meet the favorable termination requirement of *Heck* for § 1983 claims based on unreasonable seizure pursuant to legal process. Dismissals instead should be considered to constitute favorable termination where they are not inconsistent with innocence.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to grant the petition as to the first question presented.

Respectfully submitted,

MARY B. MCCORD
Counsel of Record
AMY L. MARSHAK
SETH WAYNE
INSTITUTE FOR
CONSTITUTIONAL
ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Ave., N.W.
Washington, DC 20001
(202) 661-6607
mbm7@georgetown.edu

January 4, 2021

APPENDIX: LIST OF AMICI CURIAE

Donald B. Ayer, former Deputy Attorney General of the United States; former U.S. Attorney for the Eastern District of California.

Chesa Boudin, District Attorney, San Francisco, California.

Bobbe J. Bridge, former Justice, Supreme Court of Washington State.

Michael R. Bromwich, former Inspector General, U.S. Department of Justice; Former Chief, Narcotics Unit, U.S. Attorney's Office for the Southern District of New York.

A. Bates Butler III, former U.S. Attorney for the District of Arizona.

Bonnie Campbell, former Attorney General, State of Iowa.

Kimberly B. Cheney, former Attorney General, State of Vermont.

James M. Cole, former Deputy Attorney General of the United States.

Alexis Collins, former Deputy Chief of the Counterterrorism Section in the National Security Division and Counsel to the Assistant Attorney General for National Security, U.S. Department of Justice; former Assistant U.S. Attorney, U.S. Attorney's Office for the Eastern District of New York.

Michael Cotter, former U.S. Attorney for the District of Montana.

Margaret E. Curran, former U.S. Attorney for the District of Rhode Island.

Parisa Dehghani-Tafti, Commonwealth's Attorney for Arlington County and the City of Falls Church, Virginia.

Walter Dellinger, former Acting Solicitor General, U.S. Department of Justice; Former Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice.

Michael H. Dettmer, former U.S. Attorney for the Western District of Michigan.

Michael Dougherty, District Attorney, 20th Judicial District (Boulder County), Colorado.

Mark Earley, former Attorney General, Commonwealth of Virginia.

George Eskin, former Assistant District Attorney, Ventura County and Santa Barbara County, California; former Chief Assistant City Attorney, Criminal Division, City of Los Angeles, California; former California Superior Court Judge.

Noel Fidel, former Chief Judge, Arizona Court of Appeals, Division One; former Presiding Civil Judge, Superior Court of Maricopa County, Arizona.

John P. Flannery II, former Assistant U.S. Attorney, U.S. Attorney's Office for the Southern District of New York.

Kimberly M. Foxx, State's Attorney, Cook County, Illinois.

Gil Garcetti, former District Attorney, Los Angeles County, California.

Stanley Garnett, former District Attorney, Boulder County, Colorado.

John Geise, former Chief of the Professional Misconduct Review Unit, U.S. Department of Justice; former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia; former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Maryland.

Nancy Gertner, former Judge, U.S. District Court for the District of Massachusetts.

John Gleeson, former Judge, U.S. District Court for the Eastern District of New York; former Assistant U.S. Attorney, U.S. Attorney's Office for the Eastern District of New York.

Gary G. Grindler, former Acting Deputy Attorney General of the United States; former Deputy Assistant Attorney General for the Criminal Division, Principal Associate Deputy Attorney General, Chief of Staff to the Attorney General, and Deputy Assistant Attorney General for the Civil Division, U.S. Department of Justice; former Assistant U.S. Attorney, U.S. Attorney's Office for the Southern District of New York; former Assistant U.S. Attorney, U.S. Attorney's Office for the Northern District of Georgia.

Nancy Guthrie, former Judge, Ninth Judicial District, Wyoming.

Andrea Harrington, District Attorney, Berkshire County, Massachusetts.

Peter Harvey, former Attorney General, State of New Jersey.

Bruce Jacob, former Assistant Attorney General, State of Florida.

Peter Keisler, former Acting Attorney General of the United States; former Assistant Attorney General for the Civil Division and Acting Associate Attorney General, U.S. Department of Justice.

William C. Killian, former U.S. Attorney, Eastern District of Tennessee.

Lawrence S. Krasner, District Attorney, Philadelphia, Pennsylvania.

Steven H. Levin, former Assistant U.S. Attorney and Deputy Chief, Criminal Division, U.S. Attorney's Office for the District of Maryland; former Assistant U.S. Attorney, U.S. Attorney's Office for the Middle District of North Carolina.

J. Alex Little, former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia; former Assistant U.S. Attorney, U.S. Attorney's Office for the Middle District of Tennessee.

Beth McCann, District Attorney, 2nd Judicial District (Denver County), Colorado.

Mary B. McCord, former Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for National Security, U.S. Department of Justice; former Assistant U.S. Attorney and Chief, Criminal Division, U.S. Attorney's Office for the District of Columbia.

Marilyn Mosby, State's Attorney, Baltimore, Maryland.

Jerome O'Neill, former Acting U.S. Attorney, District of Vermont; former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Vermont.

Wendy Olson, former U.S. Attorney for the District of Idaho.

Stephen M. Orlofsky, former Judge, U.S. District Court for the District of New Jersey.

Terry L. Pechota, former U.S. Attorney for the District of South Dakota.

Titus D. Peterson, former Lead Felony Prosecutor, Fifth Judicial District Attorney's Office, Colorado.

Jim Petro, former Attorney General, State of Ohio.

Channing Phillips, former U.S. Attorney for the District of Columbia; former Senior Counselor to the Attorney General and Deputy Associate Attorney General, U.S. Department of Justice.

J. Bradley Pigott, former U.S. Attorney for the Southern District of Mississippi.

Karl A. Racine, Attorney General for the District of Columbia.

Ira Reiner, former District Attorney, Los Angeles County, California; former City Attorney, City of Los Angeles, California.

James Reynolds, former U.S. Attorney for the Northern District of Iowa.

Rachael Rollins, District Attorney, Suffolk County, Massachusetts.

Barry Schneider, former Judge, Maricopa County Superior Court, Arizona.

Carol A. Siemon, former Prosecuting Attorney, Ingham County, Michigan.

Marsha Ternus, former Chief Justice, Supreme Court of Iowa.

Raúl Torrez, District Attorney, Bernalillo County, New Mexico.

Atlee W. Wampler III, former U.S. Attorney for the Southern District of Florida; former Attorney-In-Charge, Miami Organized Crime Strike Force, Criminal Division, U.S. Department of Justice.

Lynneice O. Washington, District Attorney, 10th Judicial Circuit (Jefferson County), Alabama.

Grant Woods, former Attorney General, State of Arizona.