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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JAMES E. JOHNSON
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov
Counsel for Respondents

RICHARD DEARING*
DEVIN SLACK
KEVIN OSOWSKI
**Counsel of Record*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

A family member of petitioner Larry Thompson called 911 reporting ongoing sexual abuse of an infant in his apartment. Thompson prevented police officers from confirming the infant was safe, leading to a struggle and then the officers' entry into the apartment to ensure the infant's safety. After Thompson's arrest, a prosecutor initiated but then dismissed charges against him for obstructing governmental administration and resisting arrest. In Thompson's ensuing § 1983 action against the police officers, a civil jury rejected his claims alleging false arrest, fabricated evidence, and unlawful entry. The court dismissed his malicious prosecution claim pre-verdict on favorable termination grounds. The questions presented are:

1. Assuming that a Fourth Amendment claim against police officers for pre-trial "malicious prosecution" even exists, does the claim's favorable termination element require an indication that the plaintiff was innocent of the criminal charges?

2. For a Fourth Amendment claim alleging an unlawful warrantless entry, does the risk of nonpersuasion where the evidence is in equipoise rest with the plaintiff, provided that a defendant satisfies its burden of producing evidence that an exception to the warrant requirement applies?

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INTRODUCTION

Petitioner Larry Thompson sued the defendant police officers under § 1983 after he was arrested and charged following a family member's report that an infant was being abused in his apartment, leading to a confrontation where he struggled with officers in an effort to prevent them from ensuring the infant's safety. He was released on his own recognizance at arraignment and made two criminal court appearances before the criminal court granted the prosecutor's motion to dismiss the charges—for obstructing governmental administration and resisting arrest—in the interest of justice.

In this civil action, a jury rejected Thompson's theory that the officers acted improperly, returning defense verdicts on claims alleging that the officers (a) arrested him without probable cause; (b) fabricated evidence contributing to his prosecution; and (c) unlawfully entered his home without a warrant. Pre-verdict, the civil court dismissed Thompson's separately pleaded "malicious prosecution" claim against the officers, holding that he failed to show a favorable termination of his criminal case.

Thompson asks this Court to decide two unrelated questions to revive his suit for a new trial. The first, the only one he presented to the Second Circuit in a petition for rehearing en banc, invites the Court to upset the near-universal view that the

favorable termination element of a § 1983 "malicious prosecution" claim requires an indication of innocence. The second question implores the Court to address the allocation of burden for § 1983 unlawful entry claims. The Court need not step in to resolve either question, and, regardless, Thompson's case is a poor vehicle for resolving them.

The Court's intervention is not warranted to assess what is, at most, an incipient question about malicious prosecution's favorable termination element, especially as the sole decision deviating from the otherwise universal view arose just months ago, in a separate case, and its reasoning has yet to be aired in the courts of appeals. Nor would it make sense to answer the subsidiary issue of what favorable termination means before confronting more important and antecedent questions that the petition does not raise, such as whether a "malicious prosecution" claim in this vein should be recognized at all. This case is also a poor vehicle for resolving broader questions about malicious prosecution's place in § 1983 litigation, where (a) Thompson does not challenge the defense verdict on his false arrest and fabricated evidence claims, and it remains unclear whether those claims differ from his malicious prosecution claim; and (b) the malicious prosecution claim fails no matter what based on the existence of probable cause and the officers' entitlement to qualified immunity.

The question of burden allocation for unlawful warrantless entry claims is no more cert-worthy. The Second Circuit has long placed a meaningful burden on a defendant to produce evidence that an exception to the warrant requirement applies, while keeping the risk of non-persuasion with the plaintiff, should the jury find the evidence in equipoise. That approach appropriately accommodates both the ordinary rule in civil litigation and the criminal-law principle that warrantless entries are presumptively unreasonable. Regardless, the abstract question of burden had no bearing here, considering the specific instructions given to the jury and the nature of the factual record, as well as the officers' independent entitlement to qualified immunity. Certiorari should be denied.

STATEMENT

1. One night in early 2014, the defendant officers received a radio report of child sexual assault in progress at Thompson's address in New York City. The officers proceeded to the address, where they encountered two EMTs who had unsuccessfully attempted to examine the baby but were thwarted by an aggressive Thompson. Pet. App. 13a–14a. The officers then learned that Thompson was still in the apartment with the baby and family members, including a sister-in-law who was believed to be the person who had reported the ongoing abuse. *Id.*

The officers knocked on the apartment door and told Thompson that they needed to check on the baby and speak to the 911 caller. Pet. App. 14a–15a. Thompson responded by yelling at the officers and blocking their path. J. App'x 46, 151, *Thompson v. Clark*, No. 19-580 (2d Cir. July 22, 2019), ECF No. 34. The officers could hear crying but could not see the infant from the hallway. J. App'x 94, 105, 162. When one officer attempted to enter, Thompson shoved him, and a struggle ensued until Thompson was placed under arrest. Pet. App. 15a. Officers and EMTs then entered the apartment and located the baby, who was brought to a hospital with the mother for a medical examination that revealed no evidence of abuse. *Id.*

An independent district attorney's office charged Thompson with obstructing government administration and resisting arrest. Pet. App. 16a. At arraignment, the criminal court released Thompson on his own recognizance. Pet. App. 18a. Thompson's motion to dismiss the indictment as facially insufficient was also denied without prejudice, never to be renewed. J. App'x 72–73, 76.

At his first court appearance following arraignment, Thompson rejected the district attorney's office offer an adjournment in contemplation of dismissal. Pet. App. 18a. The case was dismissed at the next court appearance, less than four months after arrest. Pet. App. 18a–19a. Thompson's defense attorney told the court that the People "agreed to dismiss," and the assistant district attorney covering the appearance confirmed that the "People are dismissing the case in the interest of justice." Pet. App. 19a. Later, Thompson's attorney could not recall why the case had been dismissed and her notes did not reflect that she had argued for an interest-of-justice dismissal. Pet. App. 20a–23a, 25a–33a. The attorney also conceded that nothing in the certificate of disposition indicated that Thompson was innocent of the charges. Pet. App. 29a.

2. Thompson brought this § 1983 action against the defendant officers in the United States District Court for the Eastern District of New York, asserting claims for false arrest, malicious prosecution, fabricated evidence,[1] and unlawful entry. Compl. 3–12, *Thompson v. Clark*, No. 14-cv-07349 (E.D.N.Y. Dec. 17, 2014), ECF No. 1. The case went to trial, at which point the district court confronted two issues raised in the petition: (i) whether Thompson could show that his criminal case terminated in his favor for the purpose of his malicious prosecution claim; and (ii) which party would bear the burden of persuasion on the question of whether exigent circumstances existed for the purpose of the unlawful entry claim. J. App'x 14–15, 23–25, 71–77, 129–33.

The district court granted judgment as a matter of law to the officers on Thompson's malicious prosecution claim. J. App'x 201. Pointing to *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018), the court concluded that Thompson could not establish favorable termination because his criminal case did

[1] In the Second Circuit, the labels "fabricated evidence" and "denial of fair of trial" are often used interchangeably to refer to claims alleging that criminal proceedings were tainted by the use of false evidence, even where, as here, those proceedings were dismissed well before trial.

not end with an indication of innocence. J. App'x 192–93. On the contrary, the "evidence of criminality by [Thompson] was very high." *Id.*

The district court allowed the unlawful entry claim to go to the jury (along with claims for false arrest and fabricated evidence). Citing *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991), the court assigned the burden of persuasion on the exigency question to Thompson. J. App'x 192. As part of the jury charge, the court informed the jury that "[w]arrantless searches of a person's home are assumed under law to be unreasonable, unless an exception occurs." J. App'x 239. The court first explained that Thompson had "the burden of proving that exigency did not authorize the police officer to enter his apartment without a warrant," but then described the jury's task as follows: "[i]f you find that it was reasonable under the circumstances for a defendant officer to believe that there was an urgent need to prevent possible ongoing harm to the child or to provide immediate aid to the child, then the defendant's entry was lawful and you must find for the defendant," however "[i]f you find that exigent circumstances did not exist, then the defendant's entry was [un]lawful and you must find for the plaintiff on this issue." *Id.*

The jury returned a defense verdict on Thompson's claims for false arrest, fabricated evidence,

and unlawful entry. J. App'x 250–51. A month after judgment was entered, the district court issued a freestanding memorandum opinion on the favorable termination requirement for malicious prosecution claims and the burden allocation for unlawful warrantless entry claims. Pet. App. 8a–49a.

The United States Court of Appeals for the Second Circuit affirmed in a summary order. Pet. App 4a–7a. On the malicious prosecution claim, the court of appeals agreed that its precedent in *Lanning* required an indication of innocence to show favorable termination. Pet. App. 5a–7a. On the unlawful entry claim, the court found no error with the district court's assignment of the ultimate burden to Thompson, citing its longstanding precedent in *Ruggiero*. Pet. App. 7a.

Thompson sought rehearing en banc on the favorable termination question, but not the burden allocation question. Pet. for Rehearing 1–3, *Thompson v. Clark*, No. 19-580 (2d Cir. May 1, 2020), ECF No. 92. The petition was denied. Pet. App. 1a–2a.

REASONS TO DENY THE PETITION

I. The "favorable termination" question does not warrant certiorari.

Thompson first asks the Court to decide whether, to satisfy the substantive favorable termination element of a § 1983 malicious prosecution claim, a plaintiff must show that the underlying criminal proceedings terminated (a) with some indication of the plaintiff's innocence, as the court below has held; or (b) in a manner not inconsistent with the plaintiff's innocence, as Thompson argues. There is no warrant for the Court to resolve that question now. Nor does this case present a suitable vehicle for its resolution.

A. This Court should allow the identified issue and other related questions to percolate.

1. The circuit split identified in the petition is both lopsided and inchoate. Eight courts of appeals have asked what a plaintiff must show to satisfy the favorable termination element of a claim for malicious prosecution under § 1983. Until recently, all of them—the First, Second, Third, Fourth, Sixth, Ninth, and Tenth Circuits—held that the indication-of-innocence standard governs. *See Jordan v. Town of Waldoboro*, 943 F.3d 532, 545 (1st Cir. 2019); *Lanning v. City of Glens Falls*, 908 F.3d 19,

22 (2d Cir. 2018); *Kossler v. Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009) (en banc); *Salley v. Myers*, 971 F.3d 308, 313 (4th Cir. 2020); *Jones v. Clark Cty., Ky.*, 959 F.3d 748, 763–65 (6th Cir. 2020); *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1201–02 (9th Cir. 2020); *Cordova v. City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016).

Shortly before Thompson filed his petition, the Eleventh Circuit expressly departed from this "consensus view" to become the first court of appeals to hold that a favorable termination requires only a disposition that is "not inconsistent with innocence." *Laskar v. Hurd*, 972 F.3d 1278, 1294–95 (11th Cir. 2020). Not only was this outlier position met with a strenuous dissent in the case in which it was announced, *see id.* at 1298–1307 (Moore, J., dissenting), it also stands in some tension with the Eleventh Circuit's own prior pronouncements in this area, *see Uboh v. Reno*, 141 F.3d 1000, 1004–06 (11th Cir. 1998) (citing the indication-of-innocence standard with approval).

In the scarcely six months since the panel decision in *Laskar*, no court has meaningfully grappled with its reasoning. While the Eleventh Circuit denied en banc review, the lead question posed by the petition for rehearing was not whether the panel properly defined favorable termination, but the antecedent question of whether a § 1983 malicious

prosecution claim even exists.[2] The Eleventh Circuit has otherwise applied *Laskar* only once, in an opinion by the same judge who authored *Laskar*. *See Luke v. Gulley*, 975 F.3d 1140, 1144 (11th Cir. 2020). Meanwhile, no other court of appeals has confronted that court's outlier position—including the Second Circuit, which resolved Thompson's case on the merits and denied rehearing before *Laskar* had been decided.

Considering the shallowness and recency of the split, the Court should await further percolation in the lower courts before weighing in. With time, the issue may resolve itself. But at a minimum, any future review by this Court would benefit from allowing the courts of appeals to first confront *Laskar* head on and air the difference in views.

2. Any review of the question posed by Thompson would also benefit from affording the lower courts time to wrestle with neighboring questions occasioned by the Court's significant § 1983 rulings in recent years. The courts of appeals are only now beginning to navigate these questions. The Court should allow that project to continue.

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[2] The proper standard was presented as a secondary question. *See* Pet. for Rehearing En Banc, *Laskar v. Hurd*, No. 19-11719 (11th Cir. Sept. 18, 2020).

In *McDonough v. Smith*, 139 S. Ct. 2149 (2019), for instance, the Court used an extended analogy to common-law favorable termination principles to guide the accrual of § 1983 fabricated evidence claims. To be sure, there are differences between what favorable termination requires as a substantive element of malicious prosecution claims and the work it performs for accrual purposes (*see infra* I.C). But waiting to see the results of lower courts' efforts to apply *McDonough*'s "context-specific" approach in the accrual context, 139 S. Ct. at 2160 n.10, may illuminate the pros and cons of alternative approaches to the substantive element too.

At the same time, courts continue to grapple with *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), where the Court announced a "constitutional division of labor" between the Fourth and Fourteenth Amendments for claims alleging pre-trial deprivations of liberty. 137 S. Ct. at 920 n.8. These efforts include defining where one claim ends and another begins[3]—an exercise that may be crucial in cases like this one, when a plaintiff pursues a trio of claims with poorly defined if not illusory bounda-

[3] *See, e.g.*, *Frost v. NYPD*, 980 F.3d 231 (2d Cir. 2020) (divided ruling on whether *Manuel* locates pre-trial fabricated evidence claims under Fourth Amendment).

ries: false arrest, malicious prosecution, and fabricated evidence.

B. This case is a poor vehicle to explore malicious prosecution waters.

1. This case illustrates the problem with probing the far corners of one of these three claims when their boundaries remain unclear. Though Thompson put false arrest and fabricated evidence claims to the jury and lost on both, he has never sought to change that outcome. Yet he has also not explained how those claims differ from his malicious prosecution claim—in terms of the challenged conduct, claimed injury, and constitutional basis. *Cf. McDonough*, 139 S. Ct. at 2162 (Thomas, J., dissenting, joined by Kagan, Gorsuch, J.J.) (opining that petition should be dismissed as improvidently granted, and faulting plaintiff for not explaining difference between claims for malicious prosecution and fabricated evidence).

Compounding the problem, Thompson situates his "malicious prosecution" claim under the Fourth Amendment. Pet. 17. But he was released on his own recognizance after arraignment, and it is far from clear whether his two post-arraignment appearances reflect a constitutionally significant seizure separate and apart from his arrest. And his preferred favorable termination standard would

blur, if not erase, the line between claims for malicious prosecution and false arrest—both rooted in the Fourth Amendment—where criminal proceedings are dismissed before trial. *See Laskar*, 972 F.3d at 1304–05 (Moore, J., dissenting) (noting not-inconsistent-with-innocence standard "would reduce the malicious prosecution inquiry to a mere determination of probable cause" blending into false arrest). So while Thompson is right that his other claims may no longer be "at issue" here, Pet. 5 n.3, that is an argument against certiorari, as the Court would benefit from a broader lens. Indeed, the blurring he proposes makes more acute the question of why the jury's verdict against him on the claim for false arrest (as well as the claim for fabricated evidence) is not determinative all around.

Granting Thompson's narrow petition would also require the Court to dive into the deep end of malicious prosecution before testing the water. Thompson posits that his allegations attacking pretrial criminal proceedings are properly understood as a Fourth Amendment "malicious prosecution" claim, importing elements of the common-law tort such as favorable termination. Pet. 11–12, 17. But the Court has not addressed this question, which is antecedent to what favorable termination means, and multiple justices have expressed doubt about whether this type of claim exists. *See Manuel*, 137

S. Ct. at 923 (Alito, J., dissenting, joined by Thomas, J.) ("[T]he Fourth Amendment cannot house any such claim."); *Cordova v. City of Albuquerque*, 816 F.3d 645, 663 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (finding it "hard to see how you might squeeze anything that looks quite like the common law tort of malicious prosecution into the Fourth Amendment").

For his part, Thompson argued below that the very question he asks this Court to review is irrelevant. Attacking the idea of importing common-law elements into § 1983, Thompson then maintained that "the Fourth Amendment has no substantive 'favorable termination' requirement and there is no basis for grafting one onto it." Appellant's Br. at 14, *Thompson v. Clark*, No. 19-580 (2d Cir. July 23, 2019), ECF No. 36. But the petition abandons that argument. It presents none of the threshold questions that this Court would be better off asking before delving into a subordinate point that may end up having no relevance. *See Manuel*, 137 S. Ct. at 929 (Alito, J., dissenting, joined by Thomas, J.) (warning that reaching an "unnecessary and tricky issue" risked "inject[ing] much confusion into Fourth Amendment law"); *McDonough*, 139 S. Ct. at 2161 (Thomas, J., dissenting, joined by Kagan, Gorsuch, J.J.) (noting, in supporting dismissal as improvidently granted, that "it would be both logical and prudent to address [the] antecedent ques-

tion" of whether claim exists before subsidiary question of accrual).

Meanwhile, other subsidiary questions about the contours of malicious prosecution are at least as important as the one Thompson identifies. For example, his claim here rests on an overly broad interpretation of what it means to "initiate" a prosecution, sweeping in seemingly every act of police officers attesting to allegations in a criminal instrument. *See Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting, joined by Thomas, J.) (noting that law enforcement officers "lack the authority to initiate or dismiss a prosecution"). Likewise, Thompson seems to assume that a heightened probable cause standard applies to the initiation of a prosecution, as compared with the standard that applies at arrest, but it would be anomalous to use the heightened standard to judge the conduct of actors who do not make the decision to prosecute. Because the interaction between these subsidiary points is key to understanding the claim as a whole, it would also be prudent to await a petition that does not ask the Court to address one point in isolation.

2. Setting aside the petition's dangerously narrow focus, this case is an undesirable vehicle for probing the depths of the favorable termination element because the point is not outcome determinative. Assuming that a § 1983 malicious prosecution

claim challenging pre-trial proceedings exists, and exists independently of the false arrest and fabricated evidence claims that Thompson lost on, the claim still fails for two independent reasons: (i) the existence of probable cause; and (ii) the officers' entitlement to qualified immunity.

On probable cause, a jury rejected Thompson's false arrest claim, a powerful signal that it did not believe that probable cause was lacking at arrest. J. App'x. 250. There is no argument that probable cause dissipated between arrest and the initiation of the prosecution. Regardless, Thompson's physical efforts to prevent officers from entering the apartment to check on a baby that a family member had reported to be the victim of ongoing abuse, and his verbal intimidation of the officers, was an adequate basis to believe he obstructed governmental administration.[4] *See* N.Y. Penal Law § 195.05. Indeed, even in agreeing with Thompson on what favorable

[4] The legitimacy of the second charge, for resisting arrest, follows from the jury's finding that there was probable cause to arrest. *See* N.Y. Penal Law § 205.30. As that alone shows there was probable cause for the prosecution as a general matter, for the question presented to have any bearing in this case, the Court would have to assume that a malicious prosecution claim challenging pre-trial proceedings requires probable cause for each and every charge—yet another question the petition does not ask.

termination should ideally mean, the district court underscored that the proof of criminality was "very high," citing "substantial evidence that … [Thompson] pushed, or at minimum physically interfered with, a governmental official." J. App'x 192–93, 286.

On qualified immunity, at the very least, reasonable officers could disagree about whether probable cause existed. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). And on a more basic level, the nature of the abuse report, the heated confrontation outside the apartment, and other factors made this, in the district court's words, an "unusual case." J. App'x 286. That itself is an "important indication" that the officers did not violate clearly established law. *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017).

C. The nearly universal application of the indication-of-innocence standard is sound.

1. Setting all these problems aside, Thompson is wrong on the merits. At the heart of the petition is an unstated and uncritical extension of this Court's accrual jurisprudence, reflected in cases like *Heck v. Humphrey*, 512 U.S. 477 (1994), and *McDonough v. Smith*, 139 S. Ct. 2149 (2019). Thompson relies heavily on this body of law, Pet. 11–12, but he fails to acknowledge that there is a difference between

(a) adapting favorable termination principles to guide accrual for an array of claims, and (b) defining favorable termination as a substantive element of a malicious prosecution claim. "What constitutes a 'favorable termination' may turn out to be the same in each context, but not necessarily so." *Spak v. Phillips*, 857 F.3d 458, 463 (2d Cir. 2017), *overruled in part by Lanning*, 908 F.3d at 22, 25–28 (2d Cir. 2018). After all, the *Heck* rule emerged from an analogy to the substantive favorable termination element. *Heck*, 512 U.S. at 484–87. It was not until *McDonough* that the Court even described the rule as requiring "favorable termination," and then still did so based on analogy. 139 S. Ct. at 2156, 2160.

In any event, Thompson misreads the Court's accrual precedent—*McDonough* in particular. He paints that decision (which involved a claim for fabricated evidence, not malicious prosecution) as supporting a rule so relaxed that anything short of an outstanding conviction would qualify as a favorable termination. Pet. 18–19. But if the Court intended to endorse such a rule, it could have done so in terms far plainer than those it actually used.

After specifying that an acquittal was "unquestionably a favorable termination," the Court went on to opine that "prosecutors' broad discretion" over the "range of ways a criminal prosecution (as op-

posed to a conviction) might end favorably to the accused" may influence a "context-specific" approach to favorable termination. *McDonough*, 139 S. Ct. at 2160 n.10. It is unclear what purpose this passage would serve under Thompson's reading. With his preferred approach, where everything except an outstanding conviction would count as favorable, there would be no need for further analysis—context-specific or otherwise—before a plaintiff could proceed with litigation. The Court clearly did not think it was announcing such a rule.

McDonough was also a fabricated evidence case where the defendant was the prosecutor who controlled the prosecution itself. The Court observed that prosecutors' broad discretion might support a "more capacious" understanding of favorable termination for fabricated evidence claims specifically, *id.*—an observation suggesting that favorable termination is more narrowly defined in its native context of malicious prosecution. But this observation, too, would appear to be meaningless under Thompson's reading, where the most capacious understanding of favorable understanding would apply across the board.

2. Thompson also gives short shrift to the deep roots of the indication-of-innocence standard, both in this Court's precedent and the common law. Just a decade before § 1983's enactment, this Court ob-

served that "well-settled rules of law upon the subject" required that a plaintiff "prove … that [the prosecution] finally terminated in his acquittal … [and] that the charge preferred against him was unfounded." *Wheeler v. Nesbit*, 65 U.S. 544, 549 (1860); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) (citing *Wheeler* as reflecting the common-law elements of malicious prosecution in 1871).

The Court was not wrong. The practice of requiring an indication of innocence had a firm foundation in the common law leading up to § 1983.[5] There certainly was no nationwide consensus in favor of Thompson's proposed rule. *See generally Laskar*, 972 F.3d at 1302 (Moore, J., dissenting). Consider New York, where this case has its origins: as the Second Circuit observed in another case, it was barely two decades ago that the State deviated

[5] *See, e.g.*, *Cardival v. Smith*, 109 Mass. 158 (1872); *Rounds v. Humes*, 7 R.I. 535 (1863); *Fortman v. Rottier*, 8 Ohio St. 548 (1858); *Jones v. Kirksey*, 10 Ala. 839 (1846); *see also* Restatement (Second) of Torts § 660 cmt. a ("Proceedings are 'terminated in favor of the accused' … only when their final disposition is such as to indicate the innocence of the accused."); W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 119, at 874 (5th ed. 1984) (termination is favorable if it "reflect[s] the merits and [is] not merely a procedural victory").

"from the traditional common-law of torts" by abandoning the indication-of-innocence standard in favor of a looser standard. *Lanning*, 908 F.3d at 27.

3. As its pedigree suggests, the indication-of-innocence standard has a solid foundation in policy too. Lost in the petition is the fact that malicious prosecution claims were (and are) "heavily disfavored" because they deter resort to the criminal justice system and promote "harassment, waste, and endless litigation." *Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980). Courts have long set a high bar for these claims, recognizing that our criminal justice system works best when people feel free to come forward with accusations for the protection of victims and the general public—a step that sets in motion a panoply of procedural protections designed to fairly adjudicate guilt. *See* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1220 (1979); Jacques Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine*, 97 Nw. U. L. Rev. 439, 443 (2002).

By serving an evidentiary and filtering function, the indication-of-innocence standard helps strike the right balance. Since creating a factual dispute on probable cause can often be as simple as asserting that "Plaintiff was not doing what the arresting

officer said Plaintiff was doing," *Laskar*, 972 F.3d at 1306 (Moore, J., dissenting), requiring some indication of innocence ensures that there was no "reasonable ground" for prosecution, *Halberstadt v. New York Life Ins. Co.*, 194 N.Y. 1, 11 (1909); *see also* Br. for United States at 24–25, *McDonough v. Smith*, No 18-485 (U.S. Mar. 4, 2019) (explaining how favorable termination requirement exists in part for what it shows about probable cause). And by weeding out claims that "have not already demonstrated some likelihood of success," *Cordova*, 816 F.3d at 654, the rule reserves civil litigation for those cases that are most likely to have some merit.

4. Thompson and amici raise the specter of prosecutors abusing their discretion to limit third parties' civil liability by dismissing cases on unspecified grounds when they otherwise would not.[6] Even though the indication-of-innocence standard has long been the norm (*see supra* I.A), Thompson and amici offer no evidence that such prosecutorial abuse occurs on a significant scale. If anything, they suggest the opposite. *See* Br. of Amici Curiae Current and Former Prosecutors at 9, *Thompson v. Clark*, No. 20-659 (U.S. Jan. 4, 2021) ("Amici do not

[6] Only third parties face liability because prosecutors "enjoy absolute immunity for their decisions to prosecute." *Reichle v. Howards*, 566 U.S. 658, 668 (2012).

believe that an ethical prosecutor would make a dismissal decision in order to deliberately deny a civil cause of action to an individual.").

Even as a matter of theory, Thompson does not explain why, if prosecutors resolve prosecutions to cabin others' hypothetical liability, his preferred rule would not lead to the result he fears. Opening the courthouse doors to everyone whose prosecution ends short of a conviction would, under his theory, seemingly incentivize prosecutors to take more cases to trial to secure convictions. As some amici argued in a similar context, that could "encourage prosecutors to resist dismissals" and "make them more insistent on guilty pleas." Br. of Criminal Defense Organizations at 9, *McDonough v. Smith*, No. 18-485 (U.S. Nov. 15, 2018).

At a time when public action has galvanized government around criminal justice reform and efforts to reduce the collateral consequences of interactions with the justice system, prosecutorial discretion and pre-trial dismissals are as important as ever. But even if one credits Thompson's assumptions about prosecutorial abuse, it is easy to see how his preferred rule could hinder efforts to reduce the footprint of the criminal justice system.

Nor does the difference between the two standards have nearly the significance Thompson claims. Regardless of which one applies in the § 1983 context, plaintiffs can resort to evolving state-law malicious prosecution claims, and with many states relaxing the favorable termination element in the century-plus since § 1983's enactment, take advantage of the lesser showing Thompson prefers. While New York law has recently shifted to that relaxed standard, Thompson seemingly opted not to assert a state-law claim. In any case, interest-of-justice dismissals under New York law that are the origin of Thompson's grievance are by his own account "rare." Reply Br. 11–12, *Thompson v. Clark*, No. 19-580 (2d Cir. Nov. 15, 2019), ECF No. 65.

II. There is no reason for the Court to weigh in on the allocation of the burdens for warrantless entry claims.

Thompson asks the Court to resolve a second and unrelated question that he did not even present for en banc review: whether, for a § 1983 claim alleging an unlawful warrantless entry, (a) the defendant has a burden of production while the plaintiff bears the risk of non-persuasion, as the court below has held; or (b) a defendant bears the entire burden, as Thompson proposes. There is no need for the Court to resolve that question either.

1. To begin, Thompson is on the wrong side of a split between courts that have approached the issue with rigor and those that have uncritically imported principles from a distinct context. On the right side are three courts of appeals—the Second, Seventh, and Eighth Circuits—that have adopted the approach endorsed below, putting a burden to produce evidence of exigent circumstances (or another exception to the warrant requirement) on the defendant, while keeping with the plaintiff the ultimate burden to persuade the fact-finder that the entry was unreasonable. *See Ruggiero v. Krzeminski*, 928 F.2d 558, 559–60 (2d Cir. 1991); *Bogan v. City of Chicago*, 644 F.3d 563, 569–70 (7th Cir. 2011); *Der v. Connolly*, 666 F.3d 1120, 1128 (8th Cir. 2012). All three courts reached this result only after scrutinizing the interplay between the ordinary civil litigation rule that the plaintiff bears the ultimate burden and the criminal-law presumption that warrantless entries are unreasonable. *See Ruggiero*, 928 F.2d at 562–63; *Bogan*, 644 F.3d at 568–71; *Der*, 666 F.3d at 1127–29.

To be sure, on the other side of the split are four courts of appeals—the Third, Sixth, Ninth, and Tenth Circuits—that put the full burden on a defendant, requiring a defendant to persuade the fact-finder that entry was reasonable in light of exigent circumstances (or another exception). *See Parkhurst v. Trapp*¸77 F.3d 707, 711 (3d Cir. 1996);

Hardesty v. Hamburg Twp., 461 F.3d 646, 655 (6th Cir. 2006); *Hopkins v. Bonvicino*, 573 F.3d 752, 764 (9th Cir. 2009); *Armijo v. Peterson*, 601 F.3d 1065, 1070 (10th Cir. 2010). But these courts, in contrast, have acted on scant analysis, skipping over the intersection between core civil- and criminal-law principles to uncritically import the presumption of unreasonableness from the criminal arena where the government obviously bears the entire burden. *See Armijo*, 601 F.3d at 1070 (citing *United States v. Reeves*, 524 F.3d 1161 (10th Cir. 2008)); *Hopkins*, 573 F.3d at 764 (citing *United States v. Stafford*, 416 F.3d 1068 (9th Cir. 2005)); *Hardesty*, 461 F.3d at 655 (citing *United States v. Bates*, 84 F.3d 790 (1996)); *Parkhurst*¸ 77 F.3d at 711 (citing *Vale v. Louisiana*, 399 U.S. 30 (1970)). None of those cases turned on the assignment of burdens; they simply offered boilerplate statements that the defendant bore the burden. And none of the cases considered—let alone analyzed—the more nuanced rule adopted by the Second, Seventh, and Eighth Circuits.

2. The considered approach is the sounder one, because it honors both the normal allocation of burden in civil litigation and the criminal-law presumption concerning warrantless searches. *See generally Ruggiero,* 928 F.2d at 563. Thompson argues that assigning the ultimate burden to the plaintiff ignores the value that the Constitution places on the sanctity of the home. Pet. 28–29. But that value is zealously guarded by the application of powerful exclusionary rules in criminal cases,

where liberty is at stake. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). And it is further promoted by assigning the burden of production in civil litigation to the defendant. After all, by Thompson's account, the burden of production "is a meaningful one." Reply Br. 23.[7]

3. Thompson's admission that the burden of production is meaningful also raises the question how significant the difference between the two approaches really is. Consider this case. Thompson's first-order contention below was that defendants "never provided any evidence from which one could conclude that [his] daughter was in immediate danger." Appellant's Br. 18. But if that were an accurate description of the record (it is not), defendants would not have satisfied their burden of production, and Thompson would have prevailed under either approach.

A more basic point arises from the disconnect between the abstract question of how burdens should be allocated and the actual course of litigation here. To be sure, the district court told the jury that Thompson had "the burden of proving that exigency did not authorize the police officers to

[7] Thompson's analogy to common-law trespass ignores that the tort pits a landowner's rights against a private interloper. That analogy does not map to the warrantless entry context, where there is a competing public safety interest served by officers' actions.

enter his apartment without a warrant." J. App'x 239. But the court's bottom-line message to the jury was this: "[i]f you find that it was reasonable under the circumstances for a defendant officer to believe that there was an urgent need to prevent possible ongoing harm to the child or to provide immediate aid to the child, then the defendant's entry was lawful and you must find for the defendant," while "[i]f you find that the exigent circumstances did not exist, then the defendant's entry was [un]lawful and you must find for the plaintiff on the issue." *Id.*; *see also Emamian v. Rockefeller Univ.*, 971 F.3d 380, 389 (2d Cir. 2020) ("It is axiomatic … that a jury charge should be examined in its entirety.").

The district court's note about burden would bear weight only if the evidence was in equipoise, and neither side has claimed that was so. On the contrary, at trial there was not even a serious dispute about the facts known to the officers: the officers arrived on the scene on the heels of a 911 call by a family member who was in the home reporting ongoing child sexual abuse—an unquestionably urgent concern—and shortly before the officers arrived at the door to hear a crying baby, an aggressive Thompson had denied EMTs access to examine the baby and sequestered

himself, with the infant, behind a closed door.[8] In cases like this, where the historical facts relevant to exigency are not seriously disputed, the risk of non-persuasion plays no real role. If the Court were inclined to consider the burden allocation, it should await a case where the answer matters, should one arise.

4. The burden question also does not matter here because the officers are entitled to qualified immunity on this claim as well. While Thompson tries to shade the case by excavating facts unknown to the officers at the time, Pet. 2–3, 33 n.8, based on what the officers did know the question of exigency was at the very least debatable, and that is enough to entitle them to qualified immunity.

[8] *Parkhurst v. Trapp*, 77 F.3d 707, 710–12 (3d Cir. 1996), on which Thompson relies, was radically different. There, officers returned to the home 18 hours after arresting the plaintiff and searching the home for weapons, only to conduct another warrantless search of the home and plaintiff's documents. The absence of exigency in *Parkhurst* was obvious.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JAMES E. JOHNSON
Corporation Counsel of the City of New York

Counsel for Respondents

RICHARD DEARING*
DEVIN SLACK
KEVIN OSOWSKI
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

**Counsel of Record*