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
U.S. Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

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I. The First Question Satisfies The Court's Certiorari Criteria.

A. Respondents Concede The Circuits Are Split 7-1.

Respondents confirm the "circuit split identified in the petition" involving "[e]ight courts of appeal." *See* BIO 9-10. They admit that in seven circuits "the indication-of-innocence standard governs" Fourth Amendment claims alleging unreasonable seizures pursuant to legal process, while the Eleventh Circuit finds favorable termination satisfied by a disposition "not inconsistent with innocence." BIO 9-10.

Respondents contend the conflict must "percolate." BIO 9. They say eight circuits reflects "shallowness"

and the conflict "may resolve itself." *Id.* Hogwash. By respondents' own account, the Eleventh Circuit "expressly departed" from the "consensus view" and declined *en banc* reconsideration. BIO 10-11.[1] In Judge Pryor's words, the Eleventh Circuit will not "count noses" and has exercised "independent judgment" to reject "the justification [its] sister circuits offered for the consensus view." *Laskar v. Hurd*, 972 F.3d 1278, 1294 (11th Cir. 2020).

It is also implausible the seven circuits in the majority will switch sides. The Second Circuit, for instance, said it will apply the affirmative-indications-of-innocence requirement until it is "overruled either by an *en banc* panel . . . or by the Supreme Court." Pet.App. 6a. It then denied rehearing *en banc*, too. Pet.App. 1a-2a. Only this Court can resolve the conflict.[2]

B. The Majority Rule Is Wrong.

Petitioner's argument on the question presented is clear: A § 1983 claim under the Fourth Amendment "alleging unreasonable seizure pursuant to legal process" does not require that prior criminal proceedings "'ended in a manner that affirmatively indicates [the

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[1] The Eleventh Circuit denied rehearing *en banc* again in *Luke v. Gulley*, 975 F.3d 1140 (11th Cir. 2020), despite amicus support. No judge voted for rehearing in either case.

[2] A circuit breaking from consensus is perhaps the most routine basis for certiorari. At least a dozen cases argued by this February recess involved a circuit breaking from others, all involving fewer than eight circuits (*e.g.*, Nos. 19-309, 20-297, 20-520, 19-1257, 19-351, 19-563, 19-416, 20-107, 18-1447, 19-1258, 19-1155, 19-511). In *McDonough*, one circuit broke from five; in *Manuel*, one broke from ten. "On cue," this Court granted certiorari. *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017).

accused's] innocence.'" Pet. i (quoting *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018)). Under this Court's precedent and the common law, this claim requires only that the proceeding "ended in a manner not inconsistent with his innocence." *Id*. (quoting *Laskar*, 972 F.3d at 1293); *see also* Pet. 17-21 (arguing the Eleventh Circuit is correct based on precedent, history, and the Fourth Amendment); *Laskar*, 972 F.3d at 1286-95 (same).

Respondents' principal defense of the Second Circuit's rule is the same one they made below: They win because there are *two different* favorable termination requirements—one "guide[s] accrual" and one is "a substantive element" of the Fourth Amendment itself. BIO 19. All of this Court's favorable-termination caselaw, respondents say, can be dismissed as merely "accrual jurisprudence." BIO 18. This is absurd.

First, this Court has *never* suggested the Fourth Amendment has a "substantive element" of indicating innocence. The inquiry is whether a person was subject to "unreasonable . . . seizure," U.S. Const. amend. IV—namely, whether the person was seized without "probable cause to believe [he] committed a crime." *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017). Thus, as Judge Pryor explained, "nothing in the Fourth Amendment" supports an affirmative-indications-of-innocence element. *Laskar*, 972 F.3d at 1292. "[T]he favorable-termination requirement functions as a rule of accrual, not as a criterion for determining whether a constitutional violation occurred." *Id*. This Court rejects attempts to create "§ 1983-specific" versions of the Constitution. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (holding that a § 1983 takings claim is defined "as the Takings Clause says").

Second, even assuming there is some dual inquiry into favorable termination—one for accrual and one that is a "substantive element"—why would the meaning of a "favorable termination" change? By respondents' own terms, both are derived from the common-law tort of malicious prosecution. *See* BIO 20-22. Why does consulting the common law yield the definition "not inconsistent with innocence" for accrual, but yield "affirmatively indicates innocence" at the merits? Respondents never say.

Respondents' remaining arguments track the Second Circuit and dissent in *Laskar*. BIO 20-23; *Laskar*, 973 F.3d at 1298-1307 (Moore, J., dissenting). This reinforces that the arguments are fully aired and this Court should decide who is right.

C. The BIO Confirms This Is A Clean Vehicle To Resolve The Split.

Respondents do not contend the record contains any formal obstacle to resolving the conflict. They concede petitioner preserved the question presented. *See* Pet. 6-7, 9-10; BIO 6-7, 8. They agree that the district court and Second Circuit resolved this claim solely on the basis that petitioner was "unable to point to any affirmative indication of innocence." Pet.App. 6a; BIO 6-7, 8. And they do not contest that the conflict is determinative of that question: under the Eleventh Circuit rule—whether petitioner's criminal proceedings "ended in a manner not inconsistent with his innocence," *Laskar*, 972 F.3d at 1293—the dismissal of all charges against petitioner would be a favorable termination. These concessions establish this is a suitable vehicle to resolve the conflict.

The BIO spends pages pontificating about "neighboring" or "subsidiary" questions that it thinks are "as important" as the one here. BIO 11-18. It observes that courts recognize distinct Fourth Amendment claims depending on whether the challenged seizure arises from the arrest itself (often labeled "false arrest" or "false imprisonment" based on the most analogous tort) or from detention pursuant to legal process (often labeled "malicious prosecution" based on the most analogous tort). BIO 6, 13. The BIO also points to a claim available under the Fourteenth Amendment for violations of the right to a fair trial, sometimes based on the knowing use of fabricated evidence. *Id*. Respondents argue that the Court's certiorari criteria favor a future petition that tries to amalgamate all these claims and questions raised in the BIO, rather than one that presents a "narrow" conflict about "one of these three claims." BIO 13, 16. Talk about backwards. The clean presentation of a "narrow" question that actually divides the circuits—not a hodgepodge of "neighboring" claims and issues—articulates an argument *for* certiorari, not against it.[3]

The various questions respondents raise are distraction. First, respondents suggest that petitioner's Fourth Amendment claim of being seized pursuant to legal process does not "differ from" his false arrest and Fourteenth Amendment fair-trial claims that are not at issue. BIO 2. Respondents appear to have lifted this argument from the BIO in *McDonough*. *See* BIO at 8-

[3] This is not foreign to the NYC Law Department, whose own certiorari petitions emphasize when they involve "the sole claim still at issue," even embedding that into the QP. *See* Petition for Certiorari at i, 3, *City of New York v. Covington*, 528 U.S. 946 (1999) (No. 98-2007), 1999 WL 33640199.

12, *McDonough v. Smith*, 139 S. Ct. 2149 (2019) (No. 18-485), 2018 WL 6523954 (claiming the petitioner's malicious prosecution claim was "subsumed" by his fair-trial claim and "abandoned" when the latter was not appealed). This Court did not buy it then, and should not now. Petitioner pressed these as three separate claims in the district court, BIO 6 (acknowledging this), and the district court analyzed them as such, BIO 6-7 (acknowledging this); *see also generally* Dist. Ct. Dkt. 77. The Second Circuit analyzed the present claim separately from the two that had been dismissed, Pet.App. 5a-6a, consistent with its caselaw, *see Galgano v. Cty. of Putnam*, No. 16-CV-3572, 2020 WL 3618512, at *9 (S.D.N.Y. July 2, 2020) (collecting cases).

Here, respondents' argument is borderline frivolous. In *McDonough*, the BIO's failed contention was premised on the petitioner's reliance on due process for *both* malicious prosecution and his fabricated-evidence-fair-trial claim. Here, it is undisputed the present claim challenging post-legal-process seizure is brought under the Fourth Amendment, and petitioner asserted his fair-trial claim under the Fourteenth Amendment. Respondents' suggestion that two claims under distinct constitutional provisions do not "differ" is absurd. Moreover, this Court has squarely recognized that the claim here—challenge to seizure "after the start of 'legal process'"—is properly asserted under the Fourth Amendment. *Manuel*, 137 S. Ct. at 914. This case thus also avoids the complication that triggered the dissent in *McDonough*—whether there is a malicious prosecution claim "arising under the Due Process Clause," 139 S. Ct. at 2155, and the petitioner's corresponding reluctance "to specify which

constitutional right the respondent allegedly violated," *id.* at 2161 (Thomas, J., dissenting).

In any event, respondents long ago forfeited this argument. Respondents have never previously argued that petitioners' claims were the same and have not filed a cross-petition challenging the Second Circuit's precedent saying otherwise.

Next, respondents argue for the first time that no seizure took place after legal process. For instance, they now say it is "far from clear" whether petitioner's compelled post-arraignment appearances constitute a seizure. BIO 13. Respondents long ago forfeited this challenge too. The district court held at summary judgment that petitioner suffered a seizure pursuant to legal process, consistent with longstanding Second Circuit precedent. Dist. Ct. Dkt. 77 at 26-27; *See Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013) (recognizing the Second Circuit has "consistently" recognized such seizures). Respondents never challenged this then or thereafter in the district court or Second Circuit.

Finally, respondents say certiorari should be denied because they had probable cause or are entitled to qualified immunity. Notably, these arguments require respondents construe a host of disputed facts in their favor—that the charges resulted after petitioner "shoved" an officer and engaged in "verbal intimidation" creating a "heated confrontation" and from fear of "ongoing abuse." BIO 4, 16-18. Yet respondents do not contest that the facts must be viewed in petitioner's favor. Under those facts, respondents got angry when petitioner exercised his constitutional rights at his front door, and after confirming no child abuse

occurred, submitted false statements to support criminal charges. *See* Pet. 3-4 & n.1; JA172, 199 (petitioner testifying that he did not yell or shove any officer). Indeed, respondents *testified* they could charge petitioner with a crime simply for asserting his constitutional rights. JA65, 68, 105, 162-63. Respondents do not even try to argue they had probable cause or would be immune on those facts.[4]

Respondents also waived qualified immunity long ago. In the district court, they asserted qualified immunity as a defense to some claims, *see, e.g.*, Dist. Ct. Dkt. 59 at 6-7, but never to petitioner's Fourth Amendment malicious prosecution claim, *id*. at 10-13. *See Wood v. Milyard*, 566 U.S. 463, 466 (2012) (when a party "intelligently chooses" to forgo an affirmative defense it is "deliberate waiver" that courts do not "bypass, override, or excuse").

That respondents discuss a series of "issues" not considered or even raised below shows the depths they had to reach to manufacture vehicle arguments. This is not rocket science: The Court has recognized a Fourth Amendment claim for seizures "after the start of 'legal process' in a criminal case," *Manuel*, 137 S. Ct. at 914, eight circuits are split on a "narrow" ques-

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[4] Respondents' attempt to equate probable cause to arrest with probable cause to charge, BIO 17, is baseless. Courts uniformly reject attempts "to conflate" them. *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 417 (2d Cir. 1999). Here, petitioner was charged after EMTs and doctors confirmed no child abuse took place. Moreover, the jury was instructed that probable cause to arrest could be for *entirely different offenses* than what petitioner was charged with. JA240. Respondents appear to acknowledge the distinct inquiries, calling it only a "powerful signal." BIO 17.

tion about that claim, and all agree that split is outcome determinative of the issue actually decided below. This is thus a good vehicle to resolve the conflict.

D. This Issue Is Important.

After the BIO, the consequence of this issue could not be clearer. Respondents *never* contest that the rule below "essentially wipes this cause of action off the books." Pet.App. 52a-53a; Pet. 21-22. Indeed, they literally tell victims of Fourth Amendment violations to forget about § 1983 and just resort to state law remedies, if they exist. BIO 25.

Respondents *never* contest that their position leads to the "insane" result in which a person accused of bogus charges must object if the prosecution tries to dismiss the charges against him and insist on a criminal trial in order to establish a Fourth Amendment violation. Pet. 22-23 (quoting Pet.App. 56a).

Respondents doubt, "as a matter of theory," the perverse incentives of their position for government actors. BIO 24. Respondents seem to be alone in those doubts. A remarkable consensus of stakeholders on both sides of the "v." have expressed serious concern. Fifty-seven current and former prosecutors, government officials, and judges from all levels of government urge that the rule below "creates a perverse incentive to the exercise of prosecutorial discretion" and "undermines faith in the justice system." Br. of Prosecutors, DOJ Officials, and Judges 2, 17. And a cross-ideological coalition of civil-liberties and defense organizations that practice at all levels of government

urge that the decision below "ignores the practical reality" of criminal proceedings and "harms our system of justice." Br. of National, State and Local Orgs. 9.

The Court should grant certiorari.

II. The Second Question Satisfies The Court's Certiorari Criteria.

A. Respondents Concede The Circuits Are Split 3-4.

Respondents concede the circuits are split on the second question: "three courts of appeals" assign "the plaintiff the ultimate burden" to prove exigency and "four courts of appeals" place "the full burden on a defendant." BIO 26.

Respondents say that the split should persist because circuits adopting their preferred rule have analyzed "with rigor," while the other side has analyzed "uncritically." BIO 26. The district court reviewed the same cases and described them more accurately. Circuits adopting respondents' rule have done so based on "foggy" and "often-confusing" analysis about "presumptions." Pet.App. 34a-43a. And what respondents call uncritical analysis, the district court viewed as the "simple," "clean and clear burden of proof analysis." *Id*. Far from "skipping over" their work, circuits assigning the civil burden to the defendant recognize that sanctity of the home is "rightfully understood in the criminal context" and "[t]here is no sound basis in law for this principle not to extend to civil matters." Pet.App. 45a.

Respondents' gloss aside, they do not dispute the split is entrenched. Circuits adopting petitioner's rule have adhered to it many times over. *See* BIO 27 (citing cases); Pet. 26-27 (collecting more).

B. The Decision Below Is Wrong.

Respondents' inability to defend the Second Circuit's rule should be deafening. They do not contest that "defining the contours of a claim under § 1983" requires examination of "common-law principles that were well settled at the time of its enactment." Pet. 30 (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019)). And they do not contest that *every go-to common-law authority*—Blackstone, Lord Camden, the Restatement—recognizes that in trespass actions, the defendant bore the burden to prove justifications. Pet. 30-31.

Respondents all but concede there is *zero* support for their rule in the common law. In an obscure footnote, they try to dismiss the canonical authorities altogether, saying common-law trespass is inapposite because it was "against a private interloper" and "does not map to the warrantless entry context." BIO 28 n.7. *Huh?* This Court has explicitly relied on "common-law trespass" and petitioner's authorities to interpret the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 406 (2012). Lord Camden's preeminent opinion in *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765), for instance, did not concern a "private interloper," it involved trespass of a home by agents of the King. Surely if common-law trespass maps to attaching devices to cars, *Jones*, 565 U.S. at 406, it still maps to entering a home, *see Kyllo v. United States*, 533 U.S. 27, 31-32 (2001) (relying on common-law authorities, including *Entick*, for intrusion of the home).

Respondents' only defense of the rule below is their policy view: that sanctity of the home can be "zealously guarded" in criminal cases, but merely "promoted" in the civil context. BIO 27-28.

C. This Issue Is Important.

Respondents do not contest that unlawful entry claims recur frequently, or that this issue concerns the "archetype" protection under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 587 (1980). As the district court explained, misallocation of burdens is "exactly the type of silent approach that leads to the 'gradual depreciation of the right.'" Pet.App. 42a.

Respondents' attempt to downplay the significance of misallocating the burden is belied by the fact that courts treat such errors as *per se* prejudicial. Pet. 32-33. It is also belied by the record here, in which the parties relitigated the issue several times throughout trial, and the trial court saw it necessary to author a post-trial opinion expressing concern for the "repeated injustice" caused by the rule below. Pet.App. 49a.

D. This Is A Suitable Vehicle

Respondents concede petitioner preserved this issue at each stage. BIO 6, 8. And they do not dispute that misallocation of the burden of proof is "deemed 'prejudicial and require[s] reversal.'" Pet. 33 (quoting *Terra Firma Investments (GP) 2 Ltd. v. Citigroup Inc.*, 716 F.3d 296, 298 (2d Cir. 2013)).[5] Proper allocation is

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[5] Respondents' attempt to misconstrue facts in their favor, *see* BIO 29, is thus beside the point, as is qualified immunity. On petitioner's facts, EMTs immediately knew the 911 caller was "not all there," had seen the baby healthy minutes earlier, and respondents' only suspect was with them, handcuffed, when they entered his home. Pet. 33 & n.8. The district court held that qualified immunity could not be resolved as a matter of law, without trial, *see* Dist. Ct. Dkt. 77 at 25, and respondents never appealed that decision.

thus outcome determinative and this case provides a good vehicle to resolve the circuit conflict.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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