No. 20-659

IN THE

Supreme Court of the United States

LARRY THOMPSON,

Petitioner,

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has an interest in this case and in the proper interpretation of 42 U.S.C. § 1983, a landmark law enacted to vindicate the rights guaranteed by the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Police officers, including Respondent Pagiel Clark, showed up at Petitioner Larry Thompson's home one night and demanded entry as his family was preparing for bed. When Thompson insisted that the officers needed a warrant, they forced their way in, tackling, pinning, and injuring Thompson. Later, Clark falsely claimed that Thompson had violently resisted arrest, leading Thompson to be jailed and charged with two crimes—charges that the state soon dropped. Pet. Br. 6-10. Thompson then sued the officers under 42 U.S.C. § 1983 for violating his Fourth Amendment rights, seeking compensation for, among other things, the

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

deprivations of liberty he suffered as a result of the baseless charges Clark instigated.

According to the court below, however, Section 1983 plaintiffs with claims like Thompson's must do more than show a "deprivation of [their] rights . . . secured by the Constitution." 42 U.S.C. § 1983. Such plaintiffs must *also* satisfy each element of the common law tort of malicious prosecution. *Lanning v. City of Glens Falls*, 908 F.3d 19, 24 (2d Cir. 2018). The court below further maintains that one of those elements—favorable termination of the criminal prosecution—requires a Section 1983 plaintiff to show that the prosecution "ended in a manner that affirmatively indicates his innocence." *Id.* at 22. Because "neither the prosecution nor the court provided any specific reasons about the dismissal on the record" in Thompson's case, the court below ruled that he was barred from pursuing his Section 1983 claim. Pet. App. 6a.

That decision is wrong on multiple levels. To start, the "indications of innocence" standard is at odds with the overwhelming weight of common law authority in place at the time Congress enacted Section 1983, and it may not even reflect the prevailing standards today. *See* Pet. Br. 25-31; *Laskar v. Hurd*, 972 F.3d 1278 (11th Cir. 2020). But the decision is also wrong for a more fundamental reason: There is no basis for reflexively grafting all the elements of common law malicious prosecution onto a Fourth Amendment claim of unreasonable seizure pursuant to legal process. The elements of these two claims differ, and some aspects of a malicious prosecution claim are incompatible with a claim under the Fourth Amendment. Melding these disparate claims, as the lower court has done, fails to heed "the values and purposes of the constitutional right at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017). It also denies redress to victims of

constitutional violations merely because those violations do not also happen to qualify as a common law tort—a result plainly at odds with the text, history, and purpose of Section 1983.

Thus, while there may be compelling reasons to adopt some version of a favorable termination rule for unreasonable seizure claims like this one—indeed, doing so could advance the remedial aims of Section 1983 by delaying accrual of these claims until the threat of prosecution is over—courts should not reflexively impose such a rule, or any other element of malicious prosecution, based solely on tort analogies and without further consideration of the constitutional right at stake. And there is no basis whatsoever for insisting that the manner of termination must provide "indications of innocence," a standard that serves no legitimate purpose, clashes with the Fourth Amendment, and diminishes the ability to vindicate constitutional rights under Section 1983.

The court below has never offered a sound justification for its approach or seriously attempted to reconcile it with Section 1983 or the Fourth Amendment. Nor have other courts that have followed the same path. Their misguided adherence to an "indications of innocence" standard, making relief all but impossible for many victims of constitutional violations, exacerbates the harm of what is already an indefensible method of construing Section 1983. This Court should reject that standard and reverse.

ARGUMENT

I. The Court Below Wrongly Requires Section 1983 Plaintiffs to Satisfy the Elements of a Common Law Tort in Addition to the Elements of a Fourth Amendment Violation.

The text of Section 1983 provides a cause of action when, under color of state law, a person is "depriv[ed] of any rights . . . secured by the Constitution." 42 U.S.C. § 1983. But when plaintiffs allege that they were subjected to unreasonable seizures pursuant to legal process, in violation of the Fourth Amendment, the court below requires them to show *more* than a deprivation of their constitutional rights. Such plaintiffs must not only show that a defendant's conduct violated the Fourth Amendment, they must *also* show that it satisfied the elements of the common law tort of malicious prosecution. *See Lanning*, 908 F.3d at 24.

As a result, it is not enough to show that a defendant caused a plaintiff to be seized without probable cause, in violation of the Fourth Amendment. A plaintiff must *also* demonstrate "that the proceeding was instituted with malice," *Mitchell v. City of New York*, 841 F.3d 72, 79 (2d Cir. 2016) (quoting *Kinzer v. Jackson*, 316 F.3d 139, 143 (2d Cir. 2003)), and that it terminated "in her favor," *id.*

Heightening the barriers even further, the court below has decided that a prosecution terminates in a plaintiff's favor only if it "ended in a manner that affirmatively indicates his innocence," *Lanning*, 908 F.3d at 22—a rule for which the court has never offered a cogent rationale, *see infra* Part IV, and which contravenes the common law as it stood when Section 1983 was enacted, *see* Pet. Br. 22-30. If a baseless prosecution caused a plaintiff's seizure without probable cause but was dismissed in any manner that

"leaves the question of guilt or innocence unanswered," *Lanning*, 908 F.3d at 28 (quoting *Hygh v. Jacobs*, 961 F.2d 359, 368 (2d Cir. 1992)), the victim is forever barred from seeking redress under Section 1983 for that deprivation of her constitutional rights. *See* Pet. App. 6a (rejecting claim because the dismissal of Thompson's prosecution "was likely based on factors other than the merits").

In short, the court below and others like it require plaintiffs not only to show that a defendant "depriv[ed] [them] of . . . rights . . . secured by the Constitution," 42 U.S.C. § 1983, but also to "establish the elements of a malicious prosecution claim" under the common law, *Fulton v. Robinson*, 289 F.3d 188, 195 (2d Cir. 2002). District courts, therefore, "must engage in *two inquiries*: whether the defendant's conduct was tortious; *and* whether the plaintiff's injuries were caused by the deprivation of liberty guaranteed by the Fourth Amendment." *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995); *accord Lanning*, 908 F.3d at 24 ("[A plaintiff is] required to show a seizure or other perversion of proper legal procedures implicating [his] . . . interests under the Fourth Amendment. *He also ha[s] to show* that criminal proceedings were initiated or continued against him, with malice . . . and were terminated in his favor." (emphasis added) (citation and quotation marks omitted)); *Swartz v. Insogna*, 704 F.3d 105, 111-12 (2d Cir. 2013) ("The elements of a malicious prosecution claim under section 1983" include "institution of the proceedings with actual malice" and "favorable termination of the proceeding . . . . *Additionally*, . . . there must be a post-arraignment seizure [that violates] the Fourth Amendment's prohibition of unreasonable seizures." (emphasis added)); *Murphy v. Lynn*, 118 F.3d 938, 953 (2d Cir. 1997) (Jacobs, J., dissenting) ("The law of this Circuit requires that a § 1983

plaintiff allege and prove, *in addition to the elements of the state malicious prosecution tort action*, some post-arraignment deprivation of liberty that rises to the level of a constitutional violation." (emphasis added) (quotation marks omitted)).

Under this scheme, victims who are deprived of rights secured by the Constitution under color of state law, 42 U.S.C. § 1983, are unable to seek redress merely because the defendant's conduct did not also qualify as malicious prosecution under the common law. That is contrary to the text, history, and purpose of Section 1983—as well as this Court's precedent—as explained below. And this overlay of common law requirements on top of constitutional standards is what allowed the court below to embrace an ahistorical variant on those requirements demanding "indications of innocence."

II. Because Section 1983 Addresses Violations of the Constitution, Common Law Rules May Be Borrowed Only When They Advance That Purpose and Are Compatible with the Constitutional Right at Stake.

Section 1983 is not a mechanism for adjudicating common law torts. Rather, it exists to provide redress for violations of the federal Constitution. It began, after all, as the first section of "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes," 17 Stat. 13 (Apr. 20, 1871). As this Court has recognized, therefore, Section 1983 is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, [and] malicious prosecution." *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012). Instead, it furnishes "a uniquely federal remedy" for state and local incursions on

"rights secured by the Constitution." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

Enacted during Reconstruction as part of "extraordinary legislation," Cong. Globe, 42d Cong., 1st Sess. 322 (1871), that "alter[ed] the relationship between the States and the Nation with respect to the protection of federally created rights," *Mitchum*, 407 U.S. at 242, Section 1983 was designed to provide "further safeguards" to "life, liberty, and property," Cong. Globe, 42d Cong., 1st Sess. 374 (1871), beyond the protections afforded by state courts—protections all too often *not* afforded by those courts. *See id.* at 692 (the law will "secure to the individual, in spite of the State, . . . precisely the rights that the Constitution gave him"). By "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights," Section 1983, "along with the Fourteenth Amendment it was enacted to enforce," was one of the "crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era." *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quotation marks omitted).

Accordingly, "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). The statute "was designed to expose state and local officials to *a new form of liability*," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981) (emphasis added), that would be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963). Regardless of what protections state tort law might offer, "[p]roponents of the measure repeatedly argued that . . . an independent federal remedy was necessary." *Briscoe v. LaHue*, 460 U.S. 325, 338 (1983); *see* Cong. Globe, 42d Cong., 1st Sess. 370

(1871) ("life, liberty, and property require *new guarantees* for their security" (emphasis added)).

"The coverage of the statute is thus broader than the pre-existing common law of torts," despite Congress's expectation that its gaps would be construed in light of "well settled" common law principles. *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). Indeed, it is "the purest coincidence" when a constitutional safeguard redressable under Section 1983 resembles a right recognized at common law. *Rehberg*, 566 U.S. at 366 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)). And because Section 1983 reaches constitutional violations "that do not correspond to any previously known tort," *id.*, "any analogies to those causes of action are bound to be imperfect," *Owens v. Okure*, 488 U.S. 235, 248-49 (1989) (quotation marks omitted).

Common law principles, therefore, "are meant to guide rather than to control the definition of § 1983 claims, serving more as a source of inspired examples than of prefabricated components." *Manuel*, 137 S. Ct. at 921 (quotation marks omitted). The "precise contours" of a Section 1983 claim should not be "slavishly derived from the often arcane rules of the common law," *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), but rather "should be tailored to the interests protected by the particular right in question," *Carey v. Piphus*, 435 U.S. 247, 259 (1978). When "applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

This Court has modelled that approach in addressing claims similar to Thompson's, drawing on tort analogies to flesh out the rules or elements of a Section 1983 claim only when doing so is consistent with the

statute's purpose and the nature of the constitutional right at stake.

In *Heck v. Humphrey*, for instance, where a prisoner with an outstanding criminal conviction alleged constitutional violations in his arrest, trial, and conviction, 512 U.S. 477, 479 (1994), this Court had to reconcile Section 1983 damages actions with the federal habeas corpus statute, *id.* at 480-81. Analogizing the prisoner's claim to the tort of malicious prosecution, this Court borrowed one element of that tort—favorable termination of the criminal proceedings—as a requirement when the success of a prisoner's Section 1983 claim "would necessarily imply the invalidity of his conviction." *Id.* at 487.

Importantly, this Court did not borrow that common law element without considering its appropriateness under Section 1983. Acknowledging that tort law is an "appropriate *starting point* for the inquiry under § 1983," *id.* at 483 (emphasis added) (quoting *Carey*, 435 U.S. at 257-58), this Court reasoned that applying the favorable termination rule in this context would serve the purposes of federal law by precluding "collateral attack[s] on the conviction through the vehicle of a civil suit." *Id.* at 484 (citation and quotation marks omitted). By examining "the common-law principle barring tort plaintiffs from mounting collateral attacks on their outstanding criminal convictions," this Court confirmed its understanding that Section 1983 "was not meant to permit such collateral attack." *Id.* at 484 n.4.

Likewise, in *Wallace v. Kato*, a plaintiff sought damages for an unconstitutional arrest without a warrant, and the timing of his suit required this Court to resolve one of the procedural questions that Section 1983 does not answer: when the statute of limitations on such a claim begins running. 549 U.S. 384, 386-88

(2007). Analogizing this claim to the tort of false arrest—because the gist of both claims is "detention without legal process," *id.* at 389—the Court borrowed that tort's "distinctive rule" of accrual, which delays the onset of the statute of limitations until the false imprisonment ends. *Id.*

Crucially, that choice rested on a determination that the borrowed tort rule promoted the values of the constitutional right at issue. The tort of false imprisonment protects similar interests as the Fourth Amendment's ban on unreasonable warrantless seizures, *see id.*, and in both contexts postponing accrual responds to "the reality that the victim may not be able to sue while he is still imprisoned," *id*. Adopting that rule, therefore, was in harmony with the Fourth Amendment and served the compensatory and deterrent aims of Section 1983.

In *McDonough v. Smith*, this Court again addressed a question of accrual, this time for a claim that fabricated evidence was used against a plaintiff in prior criminal proceedings. 139 S. Ct. 2149 (2019). Treating this claim as arising under the Due Process Clause, *id.* at 2155, the Court analogized it to malicious prosecution, which similarly requires showing "that a defendant instigated a criminal proceeding with improper purpose and without probable cause." *Id.* at 2156. Borrowing the favorable termination element from malicious prosecution, this Court held that "a fabricated-evidence challenge to criminal proceedings" cannot be brought "while those criminal proceedings are ongoing," but only once they have "ended in the defendant's favor." *Id.* at 2158.

As before, this Court ensured that its decision to import a common law rule was consistent with the purpose of Section 1983. If the normal accrual rules applied to a fabricated-evidence claim, this Court

explained, it would "impose a ticking limitations clock on criminal defendants as soon as they become aware that fabricated evidence has been used against them," forcing many victims into "an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them." *Id.* Moreover, the considerations that motivated *Heck*—avoiding "parallel litigation and conflicting judgments," *id.* at 2160—also applied to "an ongoing prosecution" where "a plaintiff's claim 'necessarily' questions the validity of a state proceeding," *id.* at 2160, 2158. Any risk of foreclosing some valid claims was outweighed by "the greater danger that plaintiffs will be deterred . . . from suing for redress of egregious misconduct." *Id.* at 2161.

III. A Favorable Termination Rule that Demands "Indications of Innocence" Is Incompatible with the Fourth Amendment and Section 1983.

A. As this Court's precedent confirms, Section 1983 is meant to vindicate constitutional rights "that do not correspond to any previously known tort." *Rehberg*, 566 U.S. at 366. Thus, distorting constitutional claims by forcing them into the mold of a common law tort would run counter to the statute's purpose: protecting "rights . . . secured by the Constitution." 42 U.S.C. § 1983. Tort analogies offer "a source of inspired examples," not "prefabricated components," and must never be allowed to override "the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921 (quotation marks omitted).

Even if malicious prosecution is the closest tort analogy to a Fourth Amendment claim of unreasonable seizure pursuant to legal process, the differences between these claims make it a mistake to automatically graft all the requirements of the former onto the

latter. There may be good reasons to adopt a favorable termination rule in the Fourth Amendment context, but the analysis must "closely attend" to the nature of Fourth Amendment rights. *Id.*

That framework calls for a rejection of any favorable termination rule demanding "affirmative indications of innocence." Pet. App. 5a. If a plaintiff's prior criminal prosecution ended without a conviction or admission of guilt, no further showing of "favorable" termination should be required.

B. The Fourth Amendment protects against "unreasonable . . . seizures," U.S. Const. amend. IV, including detention carried out pursuant to legal process but unsupported by probable cause. *See Manuel*, 137 S. Ct. at 919 (the Fourth Amendment is violated when "a form of legal process result[s] in pretrial detention unsupported by probable cause"); *see also Fernandez v. California*, 571 U.S. 292, 298 (2014) (issuance of a warrant requires probable cause); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (extended detention after warrantless arrest requires probable cause). Because the Fourth Amendment "prohibits government officials from detaining a person in the absence of probable cause," *Manuel*, 137 S. Ct. at 918, a victim of that conduct has been deprived of a constitutional right.

Section 1983, in turn, permits civil actions against "[e]very person" who, under color of state law, "subjects, or causes to be subjected . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution." 42 U.S.C. § 1983. Thus, when a state officer acting under color of law "causes [a person] to be subjected" to an unconstitutional seizure pursuant to legal process, the officer "shall be liable to the party injured in an action at law." *Id.*

That result is a straightforward application of the Fourth Amendment and the text of Section 1983. Dubious comparisons to common law torts are unnecessary.

Indeed, conceptualizing this type of claim as a cousin of malicious prosecution generates more confusion than clarity. Although both claims involve a probable cause standard and the use of legal process, the resemblance ends there. Despite their partial overlap, each claim has elements that are foreign to the other. And some elements of malicious prosecution are incompatible with the Fourth Amendment. There is no basis, therefore, for conflating these disparate claims and forcing victims of a Fourth Amendment violation to show that they were simultaneously the victims of common law malicious prosecution.

C. The most basic element of a claim for unreasonable Fourth Amendment seizure—the existence of a "seizure"—immediately highlights the gulf between this claim and a claim for malicious prosecution. While a "seizure" is the core element of a constitutional claim for unreasonable seizure pursuant to legal process, it is not even required for a claim of malicious prosecution. *See* 1 Francis Hilliard, *The Law of Torts or Private Wrongs* 416 (1866) ("the plaintiff must allege and prove that he *has been prosecuted by the defendant*," "that *the prosecution is at an end*," and "that it was instituted *maliciously*, *and without probable cause*"); *accord* Thomas Cooley, *A Treatise on the Law of Torts* 180-81 (1879).

Simply put, malicious prosecution is not about detention or seizure. Although imprisonment can be a harmful consequence resulting from a malicious prosecution, for which a plaintiff may recover damages, the tort historically has been regarded "primarily" as "a wrong to *character* or *reputation*" and thus "analogous

to the action for libel and slander." Hilliard, *supra*, at 412; *see* Cooley, *supra*, at 180 ("groundless proceedings may possibly cause a very serious injury to the defendant; the mere assertion of a serious claim at law being capable . . . of affecting materially one's standing and credit").

To guard against that threat, the common law afforded a substantive right not to be subjected to legal proceedings without a sufficient cause: "it is a duty which every man owes to every other not to institute proceedings maliciously, which he has no good reason to believe are justified by the facts and the law." Cooley, *supra*, at 180; Melville M. Bigelow, *Leading Cases on the Law of Torts* 193 (1875) ("from the very twilight of the English law, it has been unlawful for men to harass each other with vexatious suits"). Accordingly, the harm on which this tort focused was the prosecution itself. *See Herman v. Brookerhoff*, 8 Watts 240, 241 (Pa. 1839) ("The gist of the action . . . is the origination of a malicious and groundless prosecution, which *ipso facto* put the party in peril."); Hilliard, *supra*, at 414 (a victim can recover for "the expenses of his defen[s]e" and "the injury to his fame and reputation").

In short, these two claims address fundamentally different interests. An unjustified seizure is merely one possible harm resulting from the core wrong of malicious prosecution: initiating a baseless proceeding. Conversely, initiating a baseless proceeding is merely one means of inflicting the core wrong under the Fourth Amendment: an unjustified seizure.[2]

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[2] Importantly, detention is not the only type of restraint on free movement pending trial that is regulated as a seizure by the Fourth Amendment, as the court below has recognized. *See Murphy*, 118 F.3d at 945. The Framers "drafted the Fourth

A claim of malicious prosecution, moreover, involves numerous elements that are not required for a claim under the Fourth Amendment. To start, the tort demands that a "suit or proceeding has been instituted" against the plaintiff. Cooley, *supra*, at 181. Not so for a Fourth Amendment claim. As noted, in a case like this one, the instigation of a prosecution is simply the means by which the defendant "causes [the plaintiff] to be subjected" to a seizure. 42 U.S.C. § 1983.

Another required element of malicious prosecution, as its name implies, is that the defendant acted with malice. Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 13 (1892). Not only is that element absent under the Fourth Amendment, but considering it is generally forbidden: "In the Fourth Amendment context," this Court has "almost uniformly rejected invitations to probe subjective intent." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019) (quotation marks omitted). The question is "whether the circumstances, viewed objectively, justify [the challenged] action. . . . *whatever* the subjective intent motivating the relevant officials." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (quotation marks omitted).

Amendment to address . . . the matter of *pretrial deprivations of liberty*," and other liberty deprivations besides incarceration can "go hand in hand with criminal prosecutions." *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality op.) (emphasis added). Just as "the seizure of a person . . . can take the form of . . . a show of authority that in some way restrain[s] the liberty of the person," *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021) (quotation marks omitted) (citing *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968)), a seizure pending trial can involve restraining a person's liberty through means other than the bars of a jail cell. That principle is rooted in the common law that influenced the original public meaning of the Fourth Amendment. *See, e.g.*, *Albright*, 510 U.S. at 277-78 (Ginsburg, J., concurring).

Unlike malicious prosecution, in other words, "the Fourth Amendment regulates conduct rather than thoughts." *Id.* (quoting *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000)). Thus, any standard requiring "consideration of whether the individual officers acted in 'good faith' or 'maliciously and sadistically for the very purpose of causing harm,' is incompatible with a proper Fourth Amendment analysis." *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see id.* (rejecting suggestion "that the 'malicious and sadistic' inquiry is merely another way of describing conduct that is objectively unreasonable").

Finally, the favorable termination element of malicious prosecution is meant to guard against risks of inconsistent judgments and parallel litigation that do not inevitably arise in the Fourth Amendment seizure context.

The favorable termination rule is based on the premise that "a conviction is conclusive evidence of probable cause, so as to bar an action for malicious prosecution." Bigelow, *supra*, at 196; *see* Newell, *supra*, at 331 (a conviction "show[s] conclusively that the plaintiff had probable cause for commencing the action"); *id.* at 327 ("The new action must not be brought before the first is determined, *because till then it cannot appear that the first was unjust*." (emphasis added)). According to some authorities, a conviction remined "conclusive evidence of probable cause" even if it were later set aside based on newly discovered evidence, Hilliard, *supra*, at 458, or otherwise reversed on appeal, *see* Cooley, *supra*, at 185. But the rule that "a conviction of a party, by a jury, is conclusive evidence of probable cause *for the prosecution*," *Parker v. Huntington*, 73 Mass. 36, 37 (1856) (emphasis added), does not readily translate to a Fourth Amendment claim that probable cause was lacking *for a seizure*.

Seizures lacking probable cause can deprive victims of their Fourth Amendment rights no matter what decision is reached in any later criminal proceedings. A probable cause inquiry depends on "the facts known . . . at the time," *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004), and whether those facts supported "a reasonable ground for belief of guilt," *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)); *see Maryland v. Macon*, 472 U.S. 463, 470-71 (1985). Because a seizure's lawfulness hinges on the legitimacy of the defendant's conduct at the time it occurred, based on the facts then known, an unreasonable seizure violates the Fourth Amendment regardless of how the victim's prosecution terminates. Even if the government musters enough evidence to obtain a conviction at trial, "the defendant still has a right for there to have been a constitutionally valid basis for the pre-trial detention that he endured." *Pagán-González v. Moreno*, 919 F.3d 582, 609 (1st Cir. 2019) (Barron, J., concurring).

In other words, this type of Fourth Amendment violation, much like an unreasonable seizure conducted *without* legal process, generally "has a life independent of an ongoing trial or putative future conviction—it attacks the [seizure] only to the extent it was without [constitutionally valid] legal process." *McDonough*, 139 S. Ct. at 2159. "It [does not] directly challenge[]—and thus [does not] necessarily threaten[] to impugn—the prosecution itself." *Id.*; *see Heck*, 512 U.S. at 486-87.

The favorable termination rule, therefore, is rooted in a presumed correlation between the result of a prosecution and the validity of its initial steps that does not apply under the Fourth Amendment, at least not always. Mechanically importing this rule to the Fourth Amendment context without further analysis

represents a failure to attend to the constitutional right at issue.

Instead, if this requirement is to be borrowed from the common law, it should be imposed only to the extent that it is truly needed to prevent inconsistent judgments in a Fourth Amendment context, and only if its use promotes the policies of Section 1983. As explained below, a termination rule demanding "indications of innocence" fails both tests.

D. Recognizing that a favorable termination rule is not *compelled* by analogies to malicious prosecution does not mean that it would be wrong to impose some version of that rule here. Tort law provides "a source of inspired examples" when construing Section 1983, *Manuel*, 137 S. Ct. at 921, "not a one-to-one matching exercise," *McDonough*, 139 S. Ct. at 2156 n.5. If an example furnished by common law would promote the aims of Section 1983 and is consistent with the constitutional right at stake, it may prove useful and appropriate in "defining the contours and prerequisites" of the constitutional claim. *Manuel*, 137 S. Ct. at 920.

There are good reasons to think those conditions are met here, as long as "favorable" termination requires no more than the termination of a plaintiff's prosecution without conviction or admission of guilt. Such a rule could promote the remedial goals of Section 1983 in a Fourth Amendment context like this one, as it did in *McDonough*, by delaying accrual of the claim until the threat of criminal prosecution is over. That would shield potential Section 1983 plaintiffs from the "untenable choice" between "letting their claims expire" and filing suit against the state's officers in the midst of one's prosecution. 139 S. Ct. at 2158.

And although cases like this one concern the legitimacy of a person's initial seizure, not the ultimate question of guilt or innocence addressed in her prosecution, a risk of "parallel litigation and conflicting judgments," *id.* at 2160, might still arise. For instance, if differing accounts of a plaintiff's conduct must be resolved based on credibility determinations, a criminal prosecution and civil action could reach opposite conclusions. Or if probable cause is said to have been lacking because a plaintiff's admitted conduct did not qualify as a crime, a civil verdict for the plaintiff on that basis would seem incompatible with a conviction for the offense.

These considerations, however, would support only a requirement that a plaintiff's prosecution ended without a conviction or guilty plea. It would not support a rule demanding "affirmative indications of innocence." Pet. App. 5a. So long as the prosecution is over, there is no risk of inconsistent judgments or parallel litigation.

Furthermore, the practical ramifications of an "innocence" rule frustrate Sections 1983's goals of "compensation and deterrence." *Hardin v. Straub*, 490 U.S. 536, 539 (1989). The need to assess whether a termination "is indicative of innocence" requires wasteful, burdensome fact-finding about "the nature and circumstances of the termination" and whether it "implies a lack of reasonable grounds for the prosecution," *Murphy*, 118 F.3d at 948 (brackets and quotation marks omitted), an inquiry that may require live testimony in which witnesses try to recall conversations and events surrounding the ending of a prosecution (and even their own state of mind). *See, e.g.*, Pet. App. 20a-33a (excerpts from evidentiary hearing in Thompson's case). Such "uncertainty and time-consuming

litigation . . . is foreign to the central purposes of § 1983." *Wilson*, 471 U.S. at 272.

Worse, the "indications of innocence" rule allows state officials to shield unconstitutional wrongdoing in the criminal justice system from accountability "by the simple expedient of ending [unjustified] legal actions." *Russo v. State of New York*, 672 F.2d 1014, 1024 (2d Cir. 1982) (Feinberg, J., concurring). As the district court observed, this rule can "give prosecutors almost unlimited power to bar [claims like Thompson's], regardless of the strength or weakness of the underlying accusations," and to "insulate police officers and district attorneys . . . in all cases they sought to discontinue for any reason." Pet. App. 46a.

That result is hard to square with Congress's plan in passing Section 1983 and the Fourteenth Amendment it was designed to enforce, both of which took aim at malfeasance in state criminal justice systems. One significant problem during Reconstruction was the instigation throughout the South of "baseless civil and criminal prosecutions to punish and intimidate those who had been loyal to the Union during the Civil War or who tried to enforce national policy." David Achtenberg, *With Malice Toward Some:* United States v. Kirby*, Malicious Prosecution, and the Fourteenth Amendment*, 26 Rutgers L.J. 273, 275 (1995); *see* Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., at xvii (1866) ("prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere"). These groundless suits "had proved potent instruments of harassment" due to the detention they triggered, and by 1871 Congress had enacted multiple new laws attempting to combat the problem by expanding habeas corpus and the ability to remove state prosecutions to

federal court. Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 829 (1965). Section 1983's civil remedy for state deprivations of federal rights was also part of that effort. *Id.*

Given this history, it would be perverse to construe Section 1983—enacted in part because "state courts were being used to harass and injure individuals," *Mitchum*, 407 U.S. at 240—as giving state officials a ready-made means of averting liability for similar abuses today.

E. Finally, apart from its incompatibility with Section 1983 and the Fourth Amendment, a favorable termination rule requiring "indications of innocence" is not even supported by the common law from which it is purportedly drawn.

As Thompson has shown, the overwhelming majority of states rejected any such requirement in 1871. Pet. Br. 25-30; *see also Laskar*, 972 F.3d at 1286-92. Although it was sometimes suggested that a *nolle prosequi* was not a favorable termination, the rationale was that the prosecution had not actually terminated, *see* Newell, *supra*, at 342; *id.* at 328 ("another indictment may still be found on the same complaint"), not that the mode of termination was insufficiently "favorable."

An "innocence" standard would also have been inconsistent with other aspects of the favorable termination rule. Notably, a showing of favorable termination was required "only when the course of the prosecution has been such that the accused had the opportunity to controvert the facts alleged against him, and to secure a determination in his favor." *Swensgaard v. Davis*, 33 Minn. 368, 369 (1885); *see* 2 C.G. Addison,

A Treatise on the Law of Torts 87 (1881) (pleadings must "aver that the proceedings terminated in favor of the plaintiff, *if from their nature they be capable of such a termination*" (emphasis added)); Hilliard, *supra*, at 451 ("the plaintiff need not aver or prove the termination of the suit, unless the question of probable cause is involved in the trial and judgment"); *Bump v. Betts*, 19 Wend. 421, 422 (N.Y. Sup. Ct. 1838) (a prior judgment against the plaintiff "in which no opportunity [was] afforded him to defend the suit . . . cannot be deemed conclusive evidence of probable cause").

For example, favorable termination was not required when the proceeding being challenged was *ex parte*, because there "the accused party ha[d] no opportunity to disprove the case made against him." Cooley, *supra*, at 186; *accord* Bigelow, *supra*, at 197; Hilliard, *supra*, at 450 n.(b). For similar reasons, if a complainant simply abandoned the original suit, a malicious prosecution claim could proceed. *See, e.g.*, *Fay v. O'Neill*, 36 N.Y. 11, 13 (1867) ("It was sufficiently shown that the prosecution was *at an end*. The complaint was dismissed by the magistrate 'in consequence of the complainant not appearing to prosecute at the time to which the case was adjourned.' This was a sufficient termination of the prosecution.").

Those rules are in stark contrast to how the "indications of innocence" standard works in the court below. Under that standard, all manner of terminations foreclose potentially valid Section 1983 claims for unreasonable seizure, *see Murphy*, 118 F.3d at 948-49, even when the accused had no opportunity to contest the issue of probable cause. There is simply no basis for that standard, which arbitrarily curtails the ability to vindicate Fourth Amendment rights under Section 1983.

IV. Courts that Have Adopted an "Indications of Innocence" Rule Have Not Provided Any Sound Justification.

Given the disparity between the elements of malicious prosecution and those of a Fourth Amendment claim for unreasonable seizure pursuant to legal process, not to mention the many flaws of a termination rule that demands "indications of innocence," how has the court below explained its embrace of that rule? The answer is—it hasn't. Like other courts that have imposed this rule, the Second Circuit has never offered a cogent rationale for it.

As discussed, the Second Circuit requires plaintiffs to demonstrate more than a violation of their Fourth Amendment rights: they must *also* show that a defendant committed the common law tort of malicious prosecution. *See supra* Part I. The Circuit adopted this approach in the days when the Due Process Clause of the Fourteenth Amendment was thought by some to contain a prohibition akin to the tort of malicious prosecution. Based on that premise, the Second Circuit simply conflated "malicious prosecution" under Section 1983 with malicious prosecution under the common law. *See, e.g.*, *Raysor v. Port Auth. of N.Y. & N.J.*, 768 F.2d 34, 39 (2d Cir. 1985) ("the same four elements must be proved for both the tort of malicious prosecution and the related section 1983 violation" because "the claims are virtually identical").

In the "seminal decision," *Lanning*, 908 F.3d at 26, establishing this approach, the Circuit also considered whether such claims require "proving that the prosecution terminated in some manner indicating that the person was not guilty of the offense charged." *Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980). Answering yes, with nothing more than a citation to a comment in the *Restatement (Second) of Torts*,

the Circuit pronounced that "[u]nder the common law," it is "well-settled" that malicious prosecution requires favorable termination, and that proceedings are favorably terminated "only when their final disposition is such as to indicate the accused is not guilty." *Id.* at 193.

The Circuit has never offered a convincing justification for this rule. In *Singleton*, for example, it reasoned that "the jury's inability to reach a verdict" in the plaintiff's prior criminal prosecution "confirm[s] that there *surely* was probable cause for his prosecution." *Id.* (emphasis added). That inference, questionable on its own terms, is untenable when the "malicious prosecution" claim is properly recognized as a Fourth Amendment seizure claim. *See supra* at 16-18.

Elsewhere, the Circuit reasoned that it was *required* to impose the elements of malicious prosecution as defined by specific states. *See Conway v. Vill. of Mount Kisco*, 750 F.2d 205, 214 (2d Cir. 1984) ("Because there are no federal rules of decision for adjudicating § 1983 actions that are based upon claims of malicious prosecution, we are required by 42 U.S.C. § 1988 to turn to state law—in this case, New York state law—for such rules."); *Swartz*, 704 F.3d at 111 ("The elements of a malicious prosecution claim under section 1983 are derived from applicable state law."). But the Circuit later disavowed this rationale. *Lanning*, 908 F.3d at 25-27.

Apart from failing to justify its approach, the Circuit has also failed to seriously assess its compatibility with the aims of Section 1983. When it first imported the elements of malicious prosecution, which it understood to include an "innocence" rule of favorable termination, the court simply declared, without elaboration: "We see nothing in the common law which undermines

the federal policies fostered by [Section] 1983." *Singleton*, 632 F.2d at 195.

After *Albright v. Oliver*, 510 U.S. 266 (1994), the Circuit acknowledged the Fourth Amendment basis of a "malicious prosecution" claim under Section 1983. *See Murphy*, 118 F.3d at 944-47. Nevertheless, it persisted in requiring plaintiffs to satisfy all the same elements of common law malicious prosecution—in addition to showing a deprivation of their Fourth Amendment rights. *Id.* at 947-51. The Circuit noted that a favorable termination rule avoids inconsistent judgments and parallel litigation, *id.* at 948, but it failed to appreciate that those risks arise only when a prosecution is still ongoing, *McDonough*, 139 S. Ct. at 2160, or has ended in a conviction, *Heck*, 512 U.S. at 484-86.

After *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), the Second Circuit also acknowledged "that federal law defines the elements of a § 1983 malicious prosecution claim," with state tort law serving "only as a source of persuasive authority." *Lanning*, 908 F.3d at 25. Yet the court *still* maintained—without explaining why—that its "prior decisions requiring affirmative indications of innocence . . . continue to govern § 1983 malicious prosecution claims." *Id.*

This time around, the Circuit purported to consider "the values and purposes of the [federal] constitutional right at issue." *Id.* at 28 (quoting *Manuel*, 137 S. Ct. at 921). But it offered only this perplexing passage:

> The touchstone of the Fourth Amendment is reasonableness, which is measured in objective terms by examining the totality of the circumstances. When a person has been arrested and indicted, absent an affirmative indication that the person is innocent of the offense

> charged, the government's failure to proceed does not necessarily imply a lack of reasonable grounds for the prosecution.

Id. at 28 (citations, brackets, and quotation marks omitted); *accord* Pet. App. 6a. True enough, but what does that have to do with a Fourth Amendment seizure claim? To show a lack of probable cause at the time he was seized, a Section 1983 plaintiff does not need to rely on presumptions arising from the manner in which his prosecution ended.

In sum, the Second Circuit continues to treat Section 1983 claims like Thompson's as "substantially the same" as claims for common law malicious prosecution. *Lanning*, 908 F.3d at 25 (quoting *Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003)). That is why Thompson, beyond showing a deprivation of his constitutional rights, also had to establish "the elements of a malicious prosecution claim," *Fulton*, 289 F.3d at 195, including that Respondent Clark acted "with malice" and that the criminal case "ended in a manner that affirmatively indicates his innocence," *Lanning*, 908 F.3d at 24, 22. The Circuit has never offered a convincing rationale for these requirements, much less squared them with the Fourth Amendment and Section 1983.

The story is similar in other circuits that have imposed a favorable termination rule requiring "indications of innocence." Like the Second Circuit, these courts began by lifting the elements of the Section 1983 claim, including favorable termination, from the common law tort. *See, e.g.*, *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988); *Dunn v. Tennessee*, 697 F.2d 121, 127 (6th Cir. 1982); *Cline v. Brusett*, 661 F.2d 108, 112 (9th Cir. 1981); *Morrison v. Jones*, 551 F.2d 939, 940 (4th Cir. 1977). They retained those elements even after the constitutional footing shifted to recognize the

Fourth Amendment source of these claims. *See, e.g.*, *Mills v. City of Covina*, 921 F.3d 1161, 1169 (9th Cir. 2019); *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007); *Donahue v. Gavin*, 280 F.3d 371, 383 (3d Cir. 2002). As the Second Circuit did, they simply added the elements of a Fourth Amendment claim on top of the elements of malicious prosecution. *See Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000); *Donahue*, 280 F.3d at 383. And in explaining their gloss on favorable termination as requiring "indications of innocence," these circuits have generally cited the *Restatement* with little further analysis. *See, e.g.*, *Jordan v. Town of Waldoboro*, 943 F.3d 532, 545 (1st Cir. 2019); *Snider v. Seung Lee*, 584 F.3d 193, 202 (4th Cir. 2009); *Wilkins v. DeReyes*, 528 F.3d 790, 802-03 (10th Cir. 2008); *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir. 2000).

By mechanically adhering to a rule that allows Fourth Amendment violations to go unredressed, merely because they do not also satisfy the (perceived) elements of a common law tort, these courts have veered from the text and purpose of Section 1983 and have failed to attend to "the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921. That their rule does not even accurately reflect the common law, *see* Pet. Br. 22-31, should be the nail in the coffin of this wayward doctrine.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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