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 *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent Black people from realizing their basic civil and human rights.

For more than 80 years, LDF has been committed to ensuring that victims of unconstitutional policing policies and practices—policies that disproportionately harm Black people and other people of color—can seek redress for violations of their rights in court. To that end, LDF has served as lead counsel in numerous cases challenging the scope of immunities enjoyed by state actors. *See, e.g., Howse v. Hodous*, 953 F.3d 402 (6th Cir. 2020), *reh'g denied*, 960 F.3d 905 (6th Cir. 2020), *and cert. denied* 141 S. Ct. 1515 (2021); *Vette v. Sanders*, 989 F.3d 1154 (10th Cir. 2021); *Callwood v. Jones*, 727 F. App'x 552 (11th

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[1] Pursuant to Supreme Court Rule 37.3, the Petitioner has consented to the filing of this brief, and the Respondent has granted blanket consent for the filing of amicus curiae briefs. Pursuant to Supreme Court Rule 37.6, counsel for LDF states that no counsel for a party authored this amicus brief in whole or in part and that no person other than LDF, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Cir. 2018); *Stevens-Rucker v. City of Columbus*, 739 F. App'x 834 (6th Cir. 2018), *cert. denied*, *Stevens-Rucker v. Frenz*, 139 S. Ct. 1291 (2019). LDF has also submitted amicus curiae briefs to this Court and others to ensure the availability of remedies to victims of police misconduct. *See, e.g.*, *Torres v. Madrid*, 141 S. Ct. 989, *on remand to* 845 F. App'x. 803 (2021); *Tolan v. Cotton*, 572 U.S. 650 (2014).

LDF submits this brief in support of Petitioner to discuss the harms the ruling below could work on Black communities and other communities of color, which are disproportionately likely to be victims of unreasonable seizures pursuant to legal process.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018), the Second Circuit held that an individual subjected to arrest and prosecution without probable cause has no civil remedy unless the termination of the criminal proceedings affirmatively indicates the individual's innocence. Applying that rule, the court below held that Larry Thompson has no federal remedy for Officer Pagiel Clark's attempt to cover up an egregious use of force by swearing to a criminal complaint falsely accusing Mr. Thompson of physically assaulting a police officer, which Mr. Thompson had never done. *Thompson v. Clark*, 794 F. App'x 140 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 1513

(2021), *amended*, 209 L. Ed. 2d 263 (Mar. 11, 2021), *and cert. granted in part*, 209 L. Ed. 2d 263 (Mar. 11, 2021). Mr. Thompson spent two days in police custody, and faced criminal prosecution for three months thereafter, before the criminal charges against him were summarily dismissed. The Second Circuit held that this falsified complaint, and the attendant loss of liberty it caused Mr. Thompson, did not violate Mr. Thompson's Fourth Amendment rights because neither the prosecutor nor the trial court provided any specific explanation for dismissing the charging instrument against him. *Id.* at 141–42.

The Second Circuit's rule sharply curtails the Fourth Amendment's protections against unjustified seizures pursuant to legal process—a limitation that disproportionately burdens Black communities and is inconsistent with Congress's objectives in enacting 42 U.S.C. § 1983. In that seminal statute, Congress sought to ensure that all people would have a broad civil remedy for violations of their federal rights by state officials. Section 1983's remedial mandate is equally if not especially pressing today, as state officials continue to use the legal process to oppress Black people and other people of color. Police officers commonly engage in aggressive and unjustified arrests of Black people at rates far higher than similarly situated white people. Because of the legal infirmity of many of these arrests, Black defendants across the country are more likely to have their charging instruments dismissed at every stage of the

pretrial process. Pretrial dismissal of legally infirm charges should, under this Court's precedent, trigger a Fourth Amendment claim for unlawful seizure pursuant to legal process. *See, e.g.*, *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019). But under the Second Circuit's rule, where the dismissal takes place with little or no discussion of the reasons for the dismissal on the record, Section 1983 does not provide redress for arrests unsupported by probable cause or charges that lead to severe deprivations of liberty.

The private right of action for Fourth Amendment violations authorized by Section 1983 is not so narrow. Indeed, a broad interpretation of the Fourth Amendment's protections is "the very essence of constitutional liberty." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971), *holding modified by Horton v. California*, 496 U.S. 128 (1990) (quoting *Gouled v. United States*, 255 U.S. 298, 303–04 (1921)). And Section 1983 ensures that all Americans have a meaningful remedy for violations of their fundamental right to be free from unreasonable seizures—a right that has long been denied many Black people in this country.

This Court should confirm that a Fourth Amendment claim for unreasonable seizure under Section 1983 lies when criminal proceedings are terminated in any way that is not inconsistent with the innocence of the accused. A contrary holding risks perverse outcomes and threatens to strip prospective

unreasonable seizure claimants of a civil remedy for unconstitutional losses of liberty. The decision below should be reversed.

ARGUMENT

The history of Section 1 of the Ku Klux Klan Act, currently codified at 42 U.S.C. § 1983, and the practical realities of criminal proceedings in courtrooms across the country counsel in favor of broad remedies for Fourth Amendment violations. Eliminating the Fourth Amendment's protections in all cases but those in which the termination of criminal proceedings affirmatively indicates the innocence of the accused ignores both.

I. SECTION 1983 SERVES AS AN IMPORTANT CHECK ON UNCONSTITUTIONAL SEIZURES MADE PURSUANT TO LEGAL PROCESS.

Section 1983 provides a remedy for all deprivations of rights secured by federal law. 42 U.S.C. § 1983. The law contemplated, and was passed in part to provide, federal recourse for state officials' abuses of the criminal legal process. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of [Section] 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from

unconstitutional action under color of state law.") (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1879)).

In the aftermath of the Civil War, there was a "campaign of violence and deception in the South, fomented by the Ku Klux Klan . . . denying decent citizens their civil and political rights."[2] This problem was exacerbated by state officials who themselves participated in the violence and not only failed to punish the perpetrators, but also used the power of their offices to launch criminal prosecutions against Black people and their supporters. *See Briscoe v. Lahue*, 460 U.S. 325, 337 (1983) ("[A]cts of lawlessness went unpunished . . . because Klan members and sympathizers controlled or influenced the administration of state criminal justice.").[3]

In 1871, Congress passed the Ku Klux Klan Act, with the primary goal of "overrid[ing] the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the

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[2] Esther M. Schonfeld, *Malicious Prosecution as a Constitutional Tort: Continued Confusion and Uncertainty,* 15 Touro L. Rev. 1, 7 (1999).

[3] *See also* Robert J. Kaczorowski, *Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary, The Review Essay and Comments: Reconstructing Reconstruction*, 98 Yale L.J. 565, 580 (1988) (discussing how state officials initiated civil actions and criminal prosecutions against Black people and their white supporters in the years immediately following the Civil War).

Southern States." *Allen v. McCurry*, 449 U.S. 90, 98 (1980). Thus, Section 1983 provided individuals deprived of their federal rights by state actors with a private right of action in federal court to seek redress for their injuries, including the loss of liberty pursuant to criminal legal process.[4]

Today, claims for unreasonable seizure pursuant to legal process—commonly known as malicious prosecution claims—flow from the kinds of official abuses of power and the legal process by state actors that Section 1983 was passed to address. The specific official actions underlying these claims are wide-ranging. Examples include situations in which law enforcement officers initiate an unsupported criminal prosecution by giving false testimony, *see, e.g.*, *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010); arrest and charge an individual solely to cover up police misconduct, *see, e.g.*, *Thompson v. Clark*, 794 F. App'x 140 (2d Cir. 2020), (alleging officers used excessive force in course of arrest and filed frivolous charges to cover up physical abuse of arrestee); or use criminal proceedings to harass or retaliate against a person, *see, e.g.*, *Smith v. Campbell*, 782 F.3d 93 (2d Cir. 2015) (involving allegation that officer harassed motorist during traffic stop and issued traffic tickets after the motorist complained of the officer's conduct).

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[4] *See id.* at 581 (discussing that provision for federal remedies for violations of federal law was intended, in part, to eliminate racial and political prejudice in the administration of criminal justice).

Regardless of the specific official conduct at issue, Section 1983's broad remedial purpose is to address the problem of unjustified seizure by state officials.

Federal remedies for unlawful seizure pursuant to legal process seek to redress significant harms. Fundamentally, the underlying abuses and indignities interfere with individuals' "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by Berger v. State of N.Y.*, 388 U.S. 41 (1967), *and overruled in part by Katz v. United States*, 389 U.S. 347 (1967), an interference that has the effect of "crushing the spirit of the individual and putting terror in every heart." *Brinegar v. United States*, 338 U.S. 160, 180, *and reh'g denied* 338 U.S. 839 (1949); *cf. Utah v. Strieff*, 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting) (discussing the myriad indignities visited upon individuals—and disproportionate[ly] Black people and other people of color—who are subject to unlawful seizures).

In practice, unwarranted seizures by police can result in criminal arrest records and pretrial detention that disrupts housing, employment, and myriad other aspects of life—especially for Black people and other people of color.[5] In the worst cases,

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[5] *See, e.g.*, Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, Prison Pol'y Initiative: Blog (Oct. 9, 2019),

unreasonable seizure pursuant to legal process can result in wrongful convictions and long prison sentences. Constitutional claims for unreasonable seizure pursuant to legal process seek to remedy the harms that flow from these unique abuses of the legal process—harms for which there are often no other federal remedies.

II. BLACK AMERICANS ARE DISPROPORTIONATELY LIKELY TO NEED PROTECTIONS AGAINST UNSUPPORTED CRIMINAL CHARGES.

Section 1983's core purpose of protecting Black people from abuses at the hands of state actors is particularly implicated in the context of seizures pursuant to legal process. Police arrest and file baseless charges against Black people at rates far higher than their white counterparts; as a result, Black defendants are more likely to have charges dismissed at every stage of the pretrial process. And most of these dismissals will take place without any

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https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ (explaining that in urban areas, Black felony defendants are more than 25 percent more likely than white defendants to be held pretrial); Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201 (2018) (describing the effect of pretrial detention on employment and employment benefits); *see also infra* Part II.

explanation. Thus, under the Second Circuit's rule, these seizures can never be scrutinized for constitutional compliance.

A. Black Americans are More Likely to Face Infirm Legal Charges That are Dismissed Before Trial.

Time and again, federal investigations and courts have found that police departments in metropolitan regions across the country disproportionately target Black communities for seizures—including arrests. An investigation by the United States Department of Justice (DOJ), for example, found that police officers in the Newark Police Department were nearly three times as likely to arrest Black residents than white residents, regardless of the type of charge and the supporting evidence.[6] In Baltimore, DOJ found even starker disparities: Black residents were up to five times more likely to be arrested and charged for drug-related offenses—and even more likely to be arrested and charged for other common misdemeanors—without any race-neutral explanation.[7] And in New York, a federal court found that the New York City

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[6] DOJ, *Investigation of the Newark Police Department* 20– 21 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

[7] DOJ, *Investigation of the Baltimore City Police Department* 55–56, 59 (2016) [hereinafter DOJ Baltimore findings], https://www.justice.gov/crt/file/883296/download.

Police Department was 30 percent more likely to arrest Black people than white people, even controlling for all other relevant variables. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013).

These results are not atypical. An analysis of data reported to the Federal Bureau of Investigations revealed that between 2015 and 2018, Black people were arrested and charged at a rate five times higher than white people in 800 jurisdictions across the country.[8] In still other jurisdictions, the disparity was even greater.[9]

Many of these charges are unsupported by probable cause and are either never prosecuted or are dismissed before trial. In larger urban areas, for example, just 50 percent of felony arrests are charged.[10] In the few instances in which charges are brought, nearly half are dropped by prosecutors before trial.[11] The charges against Black arrestees are

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[8] Anagha Srikanth, *Black people 5 times more likely to be arrested than whites, according to new analysis*, The Hill (June 11, 2020), https://thehill.com/changing-america/respect/equality/502277-black-people-5-times-more-likely-to-be-arrested-than-whites.

[9] *Id*.

[10] Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 Md. L. Rev. 1, 39–40 (2000).

[11] *See, e.g.*, N.Y. Div. of Crim. Justice Servs., *Dispositions of Adult Arrests* 2–3 (2020), https://www.criminaljustice.ny.gov/crimnet/ojsa/dispositions-adult-arrest-demographics/2019/NYS.pdf.

particularly likely to be dismissed. In a national survey of fifty-four of the nation's largest jurisdictions, researchers found that Black defendants were 9 percent more likely to have their charges dismissed than white defendants.[12] The disparity was even starker when researchers limited their inquiry to charges that involved greater officer discretion, such as drug-related offenses, traffic infractions, and child welfare violations.[13]

In some cities the problem is particularly acute. In Baltimore, for example, the DOJ cited the extraordinarily high rate with which prosecutors dismissed charges against Black arrestees at initial review and found that "arrests of African Americans for [misdemeanor] offenses are significantly more likely to lack probable cause or otherwise not merit prosecution."[14] The same is true in in New York, where Black arrestees are more likely to have charges against them dismissed, chiefly due to "the

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[12] Aleksander Tomic, et al., *Case Dismissed: Police Discretion and Racial Differences in Dismissals of Felony Charges*, 10 Am. L. & Econ. Rev. 110, 127 (2008), https://www.jstor.org/stable/42705528?seq=1.
[13] *See, e.g., id.* at 129, tbl. 4.
[14] DOJ Baltimore findings, *supra* note 6, at 58.

prosecution's inability to establish the elements of the crime [charged]."[15]

The frequency with which Black arrestees have charges dismissed is not an indication of favoritism in the criminal legal system; rather, "cases against [B]lack defendants are more likely to be dismissed . . . [because they] are arising from a higher rate of wrongful arrests of [B]lacks relative to whites, and a very likely reason for that higher false arrest rate is police bias."[16] These disparities underscore an unfortunate reality of the criminal legal system: "people of color are disproportionately victims" of Fourth Amendment violations. *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting). Fourth Amendment claims for unlawful seizure pursuant to legal process are sometimes the only vehicle by which those baselessly arrested and charged may vindicate their rights and bring important issues of unconstitutional and discriminatory policing to light.

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[15] Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County Technical Report*, Nat'l Instit. of Justice, Office of Justice Programs, DOJ (Doc. No. 247227) viii (2014), https://www.ojp.gov/pdffiles1/nij/grants/247227.pdf.

[16] Tomic, et al., *supra* note 12, at 123.

B. Unexplained Dismissals May Disproportionately Affect Black Arrestees.

It is cases involving unjustified criminal charges, which disproportionately involve Black arrestees, in which the *Lanning* rule will regularly foreclose any subsequent civil remedy. Decisions to not bring a charge, or to later dismiss a charging instrument, are often made with little if any explanation. As this Court has recognized, "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Thus, prosecutors are under no obligation to explain their decision not to charge an offense, or to seek dismissal of the charging instrument.[17] And research shows that many prosecutors are influenced by a desire to preserve relationships with police departments in making such decisions;[18] rather than admitting the official misconduct that may underlie a dismissal, a prosecutor is more likely to dismiss charges without opining on the merits of the case.

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[17] Wesley McNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 Harv. Negot. L. Rev. 61, 83 (2015).
[18] Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision-Making – Summary Report,* Vera Inst. of Justice, 16 (2012), https://www.ojp.gov/pdffiles1/nij/grants/240335.pdf.

Courts "overwhelmingly defer to prosecutorial preferences about whether cases should proceed or be dismissed."[19] Thus, some people arrested and prosecuted for an offense will never know why their case was dismissed.[20] Even fewer would realize the consequences of the prosecutor's dismissal decision on their ability to seek redress for harms caused by dropped prosecutions. Defendants would thus not know to insist on prosecution in hopes of obtaining a not-guilty verdict, one of few ways of overcoming the *Lanning* limitation. These ramifications disproportionately burden Black arrestees, who, as explained above, are more likely than similarly situated white people to face unsupported charges that are subsequently dropped.[21]

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[19] Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 Hofstra L. Rev. 63, 71 (2018); *accord* Brady, *supra* note 10, at 24.

[20] It is true that some instruments are dismissed *sua sponte* by judges, rather than on the prosecution's motion. But those dismissals often take place without any explanation. Most states do not require the court to make any particular findings on the record—or even create a record—prior to dismissing a case; even in those that do require some record, the orders are frequently perfunctory—or the requirement is ignored altogether. Linda M. Keller, *Comparing the "Interests of Justice": What the International Criminal Court Can Learn From New York Law*, 12 Wash. U. Global Stud. L. Rev. 1, 23 (2013).

[21] *See supra*, Part II(A).

III. THE RULE BELOW LEAVES THOSE SUBJECT TO THE MOST EGREGIOUS CHARGES WITHOUT REMEDY.

The *Lanning* rule requires that individuals suing for seizures pursuant to legal process that lack probable cause point to evidence that the resolution of criminal proceedings affirmatively indicate their innocence of the offenses charged. *See Lanning*, 908 F.3d at 28. But dismissals and decisions not to prosecute are rarely explained at all, let alone in ways that indicate the innocence of the person accused. The decision of what form a dismissal or non-prosecution decision takes rests wholly with a prosecutor, leaving constitutional rights inconsistently and inadequately protected. Already, the *Lanning* rule has left individuals subjected to egregious police misconduct without remedy.

A. *Lanning* Leaves Prosecutors with Exclusive Control Over the Remedies for Unconstitutional Policing, Leading to Inconsistent and Absurd Outcomes.

The *Lanning* rule provides prosecutors virtually unilateral authority to foreclose civil remedies to the wrongfully charged, leaving constitutional rights and criminal defendants under-protected in three important ways.

First, the rule creates a unique roadblock to litigants seeking to vindicate their civil rights. An

unlawful seizure can occur based on a police officer's unsupported decision to arrest and charge an individual, depriving them of their liberty pursuant to a formal legal process. A prosecutor may seek and obtain an order to hold the individual in pretrial detention for many months and may continue to prosecute the unsupported charges for many more. The individual's loss of liberty will be complete. And yet, under *Lanning*, the prosecutor's subsequent decision to dismiss the charging instrument without affirmatively stating the individual's innocence will immunize that officer from liability, and the wrongfully prosecuted individual's injury will be left unremedied.

Second, the power that *Lanning* gives prosecutors to foreclose civil remedies to unlawfully charged people risks inconsistent outcomes on important questions of constitutional rights. Consider two identically situated individuals, both in jurisdictions covered by the *Lanning* rule. Both individuals are arrested without any cause or evidence, by police officers who swear to equally false criminal complaints against them. Both individuals are subjected to pretrial detention for 30 days until the falsity of the officers' complaints are brought to the prosecutors' attention. The prosecutor handling the first individual's case, who is in the rare jurisdiction that requires him to state his reasons for dismissal on the record, moves to dismiss the charges and explains that he has reason to question the arresting officer's

credibility. The prosecutor handling the second case, who is in a more typical jurisdiction that allows him to dismiss criminal charges without explanation, simply moves to dismiss the charges in the interests of justice. Under *Lanning*, the first individual could bring a Fourth Amendment claim against the arresting officer, while the second would likely be left with no remedy—despite the fact that both individuals were victims of the same misconduct and suffered the same harm.

Third, the *Lanning* rule leaves those subjected to the most egregious charges with the least amount of protection. Prosecutors regularly report that the strength of the evidence supporting a charge, including the arresting officer's credibility, is the main consideration in determining whether to drop charges or proceed to trial.[22] Thus, the charges that are least supported are most likely to be dismissed—and thus risk becoming immunized from scrutiny under *Lanning*.

B. *Lanning* Leaves Egregious Police Misconduct Unremedied.

Concerns over *Lanning*'s impact on civil rights litigation are far from abstract. Even in the three short years since it was issued, *Lanning* has led to the

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[22] Frederick & Stemen, *supra* note 18, at 6.

dismissal of Fourth Amendment claims involving egregious instances of police misconduct.

For example, applying *Lanning*, a court dismissed a Fourth Amendment claim brought because a police officer tackled and arrested the wife and minor daughter of a mentally ill man after they complained the officer was using too much force on the man, who lay prone on the hospital floor. The woman and her daughter were held in custody overnight and forced to attend monthly hearings for nearly two years before charges were dismissed in the interests of justice. While the court expressed concern over the officer's conduct and the impact it had on the woman and child, it found *Lanning* dispositive and dismissed the family's malicious prosecution claims. *See Moore v. Keller*, 498 F. Supp. 3d 335 (N.D.N.Y. 2020). Thus, while the woman and child may be able to recover for the physical injuries sustained when they were tackled, they will have no remedy for the losses of liberty they suffered after a night in jail, or during twenty-two subsequent court hearings they had to attend over two years before their charges were dismissed. Another court dismissed claims that an officer falsified three criminal summonses against a woman to cover up his decision to fatally shoot her dog from a distance. *Matteson v. Hall*, No. 6:18-cv-6772, 2019 WL 2192502, at *1 (W.D.N.Y. May 21, 2019). The woman alleged that the charges were filed solely as retaliation after the woman threatened to file a complaint about the officer's conduct. *See* Complaint

¶34, *Matteson v. Hall*, No. 18-6772 (W.D.N.Y. Oct. 24, 2018), ECF No. 1. Although the prosecution continued for three months and required the woman to attend four separate court hearings, *Lanning* foreclosed civil remedies. *Matteson*, 2019 WL 2192502, at *5.

If adopted by this Court, the *Lanning* rule could result in the dismissal of additional cases involving unreasonable seizures. Mass arrests at protests, for example, are an increasingly—and concerningly—common law enforcement response to protected First Amendment activity. Unreasonable seizure claims can serve as a key remedy for those wrongfully arrested at such demonstrations. For example, law enforcement arrested protesters who participated in the Occupy Wall Street Movement between 2011 and 2012—as well as the reporters who covered those protests—on flimsy charges that were later dismissed.[23] Many of those subjected to more egregious arrests brought unreasonable seizure claims to challenge police overreach. [24]

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[23] *See, e.g.*, Christopher Robbins, *93% of Occupy Protesters Arrested on Brooklyn Bridge Had Their Charges Dismissed*, Gothamist (Oct. 21, 2013), https://gothamist.com/news/93-of-occupy-protesters-arrested-on-brooklyn-bridge-had-their-cases-dismissed.

[24] *See, e.g.*, Maryclaire Dale, *Occupy Philly Protesters Can Sue Over Arrests: Judge*, NBC Phila. (May 23, 2014), https://www.nbcphiladelphia.com/news/local/occupy-philly-

Similar patterns have played out in cities across the country since Black Lives Matters protesters first began demonstrations in 2015: following mass arrests of protesters, prosecutors dropped charges against protesters and, in some cases, unjustified arrests and prosecutions were subsequently remedied through federal challenges to the unlawful seizures pursuant to legal process.[25] Fourth Amendment claims for unlawful seizure pursuant to legal process may also flow from mass arrests during last summer's protests that followed the killings of George Floyd in Minneapolis and Breonna Taylor in Louisville. Many law enforcement agencies responded by engaging in mass arrests of large groups of people, charging them with misdemeanors and felonies unjustified under the circumstances.[26] Early data suggest that police

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lawsuits/1990463/ (peaceful protesters who marched through downtown were charged with conspiracy, failure to disperse, and blocking a roadway; prosecutors dismissed those chose charges, and protesters brought unlawful seizure claims stemming from the charges); Jennifer Peltz, *NYC Settles with 14 Occupy protesters for $538K*, Associated Press (June 10, 2014), https://apnews.com/article/be72ebee564d41f1b5105f8d08ac3c97.

[25] *See, e.g.*, Nick Pinto, *Two NYPD Officers Lied In Court About Their Arrest Of A Black Lives Matter Protester. The Manhattan DA Cleared Them*, Gothamist (Dec. 10, 2020), https://gothamist.com/news/two-nypd-officers-lied-court-about-their-arrest-black-lives-matter-protester-district-attorney-cleared-them.

[26] *See* Sydney Pereira & Gwynne Hogan, *NYPD's Historic Mass Arrest Campaign During George Floyd Protests Was Mostly for Low-Level Offenses*, Gothamist (June 10, 2020),

disproportionately targeted Black protesters for arrest and prosecution.[27] In many cases, charges continue to be dismissed either "in the interest of justice" or without any explanation at all.[28] Under *Lanning*, none of these people will have any remedy, even when there was no probable cause for the initial arrest, despite having spent months in the custody or under the supervision of the criminal legal system.

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https://gothamist.com/news/nypds-historic-mass-arrest-campaign-during-george-floyd-protests-was-mostly-low-level-offenses (discussing the thousands of arrests and charges in New York City stemming from the summer 2020 racial justice protests); Tom Perkins, *Most charges against George Floyd protests dropped*, *analysis showed,* Guardian (Apr. 17, 2021), https://amp.theguardian.com/us-news/2021/apr/17/george-floyd-protesters-charges-citations-analysis (discussing that law enforcement "carried out mass arrests" during last summer's racial justice protests, and the vast majority of resulting charges were dropped by prosecutors).

[27] Kiran Misra, *Most of the people arrested at the protests were Black*, Chi. Reader (June 30, 2020), https://www.chicagoreader.com/chicago/protest-arrests-racial-disparity/Content?oid=81018291.

[28] *See, e.g.*, Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. Times (Nov. 19, 2020, updated Feb. 11, 2021), https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html; Billy Kobin & Kala Kachmar, *Jefferson County attorney to dismiss felony charges for protesters at Daniel Cameron's home*, Louisville Courier J. (July 17, 2020, updated July 18, 2020), https://www.courier-journal.com/story/news/local/2020/07/17/daniel-cameron-protesters-felony-charges-dropped-jefferson-co-attorney/5459821002/; Perkins, *supra* note 26.

CONCLUSION

The *Lanning* rule grants prosecutors unfettered discretion to unilaterally foreclose Fourth Amendment claims by those subject to baseless criminal charges. And despite its relative recency, *Lanning* has already begun to close the courthouse doors in even the most egregious cases of unjustified arrests and charges. This weakening of constitutional protections will disproportionately harm Black people, who are most likely to be subject to unreasonable seizures and unsupported charges. This result cannot be squared with Congress's broad remedial goals in passing Section 1983: to protect Black people from abuse in the criminal legal system. The decision below should be reversed.

Respectfully submitted,

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