No. 20-659

In the Supreme Court of the United States

LARRY THOMPSON, PETITIONER

v.

PAGIEL CLARK, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the favorable-termination element of a claim under 42 U.S.C. 1983 alleging an unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him ended in a manner that affirmatively indicates his innocence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rule:

Miscellaneous: Page

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the requirements to establish a claim under 42 U.S.C. 1983 against local law-enforcement officers based on an unreasonable seizure in violation of the Fourth Amendment. The United States has a substantial interest in ensuring that constitutional rights are carefully safeguarded. The government prosecutes individuals—mostly state and local law-enforcement officers—who willfully violate individuals' rights under color of law, in violation of 18 U.S.C. 241 and 242. And the government brings civil actions against state and local law-enforcement agencies under 34 U.S.C. 12601, which authorizes the Attorney General to seek appropriate relief to remedy a pattern or practice of law-enforcement officers' violations of constitutional rights.

In addition, this Court has often invoked its Section 1983 jurisprudence in cases involving implied causes of action against federal officers for the deprivation of constitutional rights under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See, *e.g.*, *Hartman* v. *Moore*, 547 U.S. 250 (2006). The United States therefore has a substantial interest in the circumstances in which federal officers may be held liable for damages in civil actions for alleged violations of constitutional rights, to the extent that such a claim (including one like petitioner's) remains viable after *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017).

STATEMENT

1. On the evening of January 15, 2014, petitioner was at home in his Brooklyn apartment with his fiancée (now wife), their one-week-old daughter, and petitioner's sister-in-law. Pet. App. 13a; see Pet. Br. 6. Unbeknownst to petitioner, his sister-in-law—who has cognitive delays—had called 911 to report that petitioner was sexually abusing his daughter, citing a red rash on her buttocks that was later determined to be a diaper rash. Pet. App. 13a, 15a. Emergency medical technicians (EMTs) immediately responded, and the sister-in-law let them in to the apartment, but they left after being confronted by petitioner. *Id.* at 13a-14a.

Respondents are four New York City police officers who were subsequently dispatched to petitioner's home to investigate the report of child abuse. Pet. App. 14a; see J.A. 26-27. When they arrived, petitioner refused them entry without a warrant. Pet. App. 14a-15a. By petitioner's account, respondents then pushed him to the ground, choked, kicked, and punched him. *Id.* at 15a. According to respondents, by contrast, when one of the officers attempted to cross the apartment's

threshold, petitioner shoved the officer and, during the ensuing scuffle, flailed his arms in an attempt to avoid being handcuffed and arrested. *Ibid.* The parties agree that, following the scuffle, petitioner was arrested. *Ibid.* After petitioner's arrest, the EMTs again entered the apartment and examined the baby, finding "no evidence of abuse." *Ibid.*

Later that evening, respondent Clark swore, under penalty of perjury, a New York criminal complaint against petitioner, charging him with obstructing governmental administration, in violation of N.Y. Penal Law § 195.05 (McKinney 2010); and resisting arrest, in violation of N.Y. Penal Law § 205.30 (McKinney 2010). Pet. App. 16a; Trial Tr. 530-532; Pl. Trial Ex. 1 (criminal complaint). The complaint appears to have been filed with the Criminal Court for the City of New York, County of Kings, the following day. See Pl. Trial Ex. 1.

In the meantime, petitioner was held in custody from his arrest on January 15, 2014, until his arraignment on January 17. Pet. App. 18a; Trial Tr. 641-642. Following his arraignment, petitioner was released on his own recognizance pending trial. Pet. App. 18a.

Petitioner appeared in court two more times in connection with the charges. At a hearing two months after his arraignment, petitioner declined the State's offer of an adjournment in contemplation of dismissal—a New York procedure that would have led to the automatic dismissal of the charges "in furtherance of justice," unless the State moved to restore the case within six months of the adjournment. N.Y. Crim. Proc. Law § 170.55(2) (McKinney 2007); see Pet. App. 18a. One month later, petitioner appeared at a second hearing, where the court granted the prosecution's motion to dismiss the charges "in the interest of justice." Pet. App.

19a (citation omitted). No further reason was given for the dismissal. *Ibid.*

2. Petitioner subsequently filed this Section 1983 action against respondents. Pet. App. 12a; D. Ct. Doc. 1 (Dec. 17, 2014). In the operative complaint, petitioner alleges several constitutional torts stemming from his arrest and abandoned prosecution, including unlawful entry into his home, false arrest, malicious prosecution, and fabrication of evidence. J.A. 29-40. The question presented in this Court concerns what has been referred to as petitioner's malicious-prosecution claim. In that claim, petitioner alleges that respondents, "with malicious intent, arrested [him] and initiated a criminal proceeding," which ultimately terminated in his favor, even though "there was no probable cause for the arrest and criminal proceeding" and respondents knew he "had committed no crime." J.A. 33. He alleges that respondents "deprived [him] of his liberty when they maliciously prosecuted him and subjected him to an unlawful, illegal and excessive detention, in violation of his rights pursuant to the Fourth and Fourteenth Amendments of the United States Constitution." J.A. 33-34. Several claims, including the malicious-prosecution claim, survived summary judgment and proceeded to trial. See D. Ct. Doc. 7 (June 26, 2018).

At the close of evidence, the district court granted judgment as a matter of law to respondents on the malicious-prosecution claim. J.A. 127-128. In a post-verdict opinion, the court explained that, under Second Circuit precedent, "[a] plaintiff asserting a malicious prosecution claim under [Section] 1983 must . . . show that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence." Pet. App. 43a (quoting *Lanning* v. *City of Glens Falls*,

908 F.3d 19, 22 (2d Cir. 2018)). To determine whether petitioner could make that showing, the court had held an evidentiary hearing in which petitioner's "former defense counsel[] testified regarding her recollections of [his] criminal prosecution." *Id.* at 20a. In its post-verdict opinion, the court explained that, although "evidence was presented suggesting [petitioner's] innocence," it was insufficient to carry petitioner's burden under the affirmative-indications-of-innocence standard. *Id.* at 47a-48a. The court observed that "[n]either the prosecution nor the [criminal] court provided any specific reasons on the record for the dismissal" of petitioner's prosecution and petitioner's defense counsel "did not remember why the District Attorney [had] moved to dismiss the case" against petitioner. *Id.* at 19a, 48a. The court also noted that substantial evidence had been introduced that "plaintiff pushed, or at a minimum physically interfered with, a government official" attempting to enter his home. *Id.* at 46a, 48a.

The district court expressed concern that few Section 1983 plaintiffs whose criminal proceedings are dismissed would be able to meet the Second Circuit's requirement. See Pet. App. 54a ("In effect, it sweeps this cause of action off the books because almost every dismissal by the district attorney is going to be on th[e] basis that was used here[.]"); see *id.* at 49a ("An ambiguous state dismissal should be accepted as being based on non-guilt, in part because of the assumption of innocence before conviction."). But the court concluded that Second Circuit precedent nevertheless required applying the affirmative-indications-of-innocence standard. *Id.* at 56a.

The remaining claims were submitted to the jury, which returned verdicts for respondents on each of them. Pet. App. 5a.

3. The court of appeals affirmed in a summary order. Pet. App. 3a-7a. Relying on its decision in *Lanning*, the court explained that "[S]ection 1983 malicious prosecution claims require 'affirmative indications of innocence to establish favorable termination,'" *id.* at 5a (citation omitted), and it found no affirmative indications here, *id.* at 6a-7a. The court reasoned that a dismissal of criminal charges in the interest of justice "is by itself insufficient to satisfy the favorable termination requirement as a matter of law," because "'the government's failure to proceed does not necessarily "impl[y] a lack of reasonable grounds for the prosecution."'" *Id.* at 6a (quoting *Lanning*, 908 F.3d at 28) (brackets in original). The court observed that, in this case, "neither the prosecution nor the [criminal] court provided any specific reasons about the dismissal on the record." *Ibid.* And the court of appeals interpreted the district court's post-verdict opinion as finding "the evidence of [petitioner's] guilt of the crime of obstruction of governmental administration and resisting arrest [to be] substantial," and as determining "that dismissal was likely based on factors other than the merits." *Ibid.*

SUMMARY OF ARGUMENT

Under this Court's precedents, defining the contours of a claim for damages under 42 U.S.C. 1983 requires identifying the common-law tort that provides the closest analogy to the asserted constitutional claim, and then incorporating the elements of that common-law tort at the time of Section 1983's enactment to the extent consistent with "the values and purposes of the constitutional right at issue." *Manuel* v. *City of Joliet*,

137 S. Ct. 911, 921 (2017). Under that approach, a Section 1983 plaintiff alleging an unreasonable seizure pursuant to legal process should be required to show that the underlying criminal proceeding terminated in his favor, but not that it terminated in a way that affirmatively indicates his innocence.

A. The most analogous common-law tort to petitioner's Fourth Amendment claim is malicious prosecution. At common law, a person who caused the institution of criminal proceedings "against another from wrongful or improper motives, and without probable cause to sustain it," was liable for the tort of malicious prosecution. Martin L. Newell, *A Treatise on the Law of Malicious Prosecution* 6 (1892) (Newell). And such a claim permitted the plaintiff to recover, as petitioner seeks here, damages for deprivations of his liberty "imposed pursuant to [that] legal process." *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994).

B. A Section 1983 claim alleging an unreasonable seizure pursuant to legal process should incorporate the favorable-termination requirement of a common-law malicious-prosecution claim. This Court has identified three related interests served by the favorable-termination element at common law: (1) avoiding parallel litigation in civil and criminal proceedings over the issues of probable cause and guilt; (2) precluding inconsistent judgments in the tort action and criminal prosecution; and (3) preventing civil suits from being used as collateral attacks against criminal prosecutions. In *Heck*, and again in *McDonough* v. *Smith*, 139 S. Ct. 2149 (2019), the Court determined that the same interests would be properly served by incorporating the

common law's favorable-termination element into Section 1983 claims that challenged the validity of criminal prosecutions.

C. Contrary to the decision below, however, a termination may be favorable to the plaintiff, for purposes of a Section 1983 claim, even if it lacks affirmative indications of innocence.

1. An affirmative-indications-of-innocence requirement is not supported by common-law principles from the time of Section 1983's enactment. Despite some variations in courts' descriptions of the favorable-termination element during that period, decisions from numerous state courts of last resort demonstrate that, as a general rule, it was sufficient for the underlying proceedings to have terminated in such a manner that the accused could not be tried without the initiation of a new proceeding—whether or not the termination indicated innocence.

2. An affirmative-indications-of-innocence requirement is inconsistent with the constitutional values and the purposes served by the favorable-termination element. None of the purposes this Court has attributed to the favorable-termination element requires adopting such a requirement—as demonstrated by the Court's identification in *Heck* and *McDonough* of dispositions that are sufficiently favorable to satisfy the element but do not indicate innocence. It would undermine, rather than serve, Fourth Amendment values to deny redress to an individual who was wrongly detained on the basis of criminal proceedings that were *initiated* without probable cause because he failed to obtain a declaration of innocence when those proceedings *terminated* without a conviction. And it would have detrimental effects on prosecutorial discretion and independence to foster

the sort of judicial inquiry that occurred in this case into a prosecutor's reasons for dismissing criminal charges.

3. Reasonable concerns about frivolous Section 1983 claims do not justify an affirmative-indications-of-innocence requirement. Regardless of the Court's resolution of the question presented, a Section 1983 plaintiff must allege and prove, at a minimum, the absence of probable cause and must overcome qualified immunity to obtain damages based on an unreasonable seizure pursuant to legal process. Even assuming that an affirmative-indications-of-innocence requirement would provide some additional protections against frivolous Fourth Amendment claims, that policy concern cannot overcome the requirement's inconsistency with the common law at the time of Section 1983's enactment and with the constitutional values and purposes that the favorable-termination element serves.

ARGUMENT

Section 1 of the Civil Rights Act of 1871, which has been codified at 42 U.S.C. 1983, "creates a species of tort liability" for vindicating federal constitutional rights. *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (citation omitted); see *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997). Section 1983 provides a cause of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. 1983. This case concerns the contours of the favorable-termination element for a claim under Section 1983 alleging an unreasonable seizure pursuant to legal process.

Under this Court's approach to defining constitutional torts under Section 1983, resolution of the question here "begins with identifying '"the specific constitutional right"' alleged to have been infringed." *McDonough* v. *Smith*, 139 S. Ct. 2149, 2155 (2019) (citation omitted); see *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). To determine the elements of the Section 1983 claim based on that constitutional right, the Court's precedents then require identifying the common-law cause of action that provides "the closest analogy" to the type of constitutional claim at issue, *Heck*, 512 U.S. at 484, and incorporating (or adapting) the elements of that common-law cause of action at the time of Section 1983's enactment into the Section 1983 claim to the extent they are consistent with "the values and purposes of the constitutional right at issue." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 921 (2017); see *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1726-1727 (2019).

Under that approach, the court of appeals' judgment should be reversed. Petitioner asserts a Fourth Amendment claim that is most analogous to the common-law tort of malicious prosecution. As this Court has done on two occasions when considering Section 1983 claims analogous to malicious prosecution, the Court should incorporate that tort's favorable-termination element into petitioner's Section 1983 claim. But neither common-law principles at the time of Section 1983's enactment, nor the constitutional values and purposes they serve, nor any practical concerns support a requirement that the criminal proceeding terminate in a way that gives affirmative indications of innocence.

A. Petitioner Asserts A Fourth Amendment Claim Most Analogous To The Common-Law Tort Of Malicious Prosecution

1. Petitioner's Section 1983 claim alleges that respondents violated his Fourth Amendment rights. Specifically, he asserts that respondents "deprived [him] of his liberty when they maliciously prosecuted him and subjected him to an unlawful, illegal and excessive detention, in violation of his rights pursuant to the Fourth and Fourteenth Amendments." J.A. 34. In the proceedings below, the parties and courts referred to this claim as a "[Section] 1983 claim for malicious prosecution," Pet. App. 5a, but that description was imprecise. "While the Court has looked to the common law in determining the scope" of Section 1983 claims, Section 1983 provides a mechanism for vindicating an individual's constitutional rights. *Rehberg* v. *Paulk*, 566 U.S. 356, 366 (2012). It is not "simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more." *Ibid.*; see *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979) ("[S]ection [1983] is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred[.]"). Petitioner thus more accurately describes his claim in this Court as alleging that respondent Clark—who swore out the criminal complaint against him, p. 3, *supra*—"violated the Fourth Amendment by unreasonably seizing him pursuant to legal process." Pet. Br. 9; see Pet. 5.

In opposing certiorari, respondents contended (Br. in Opp. 13) that it is uncertain whether petitioner actually suffered a deprivation of liberty pursuant to legal process sufficient to invoke the protections of the

Fourth Amendment. Respondents observed (*ibid.*) that, after arraignment, petitioner was released on his own recognizance, and "it is far from clear whether his two post-arraignment appearances reflect a constitutionally significant seizure separate and apart from his arrest." As the government has previously noted, it shares respondents' doubts that merely being subject to the judicial process constitutes a "seizure" within the meaning of the Fourth Amendment. See U.S. Amicus Br. at 15-16, *McDonough*, *supra* (No. 18-485). Here, however, in addition to being subjected to a judicial process, some period of petitioner's detention appears to have occurred after the criminal complaint, which initiated the criminal proceeding against him, was filed. See p. 3, *supra*. To the extent that petitioner's detention from that point was based on that pending proceeding, *Manuel* suggests that it qualified as a seizure pursuant to legal process for Fourth Amendment purposes. See 137 S. Ct. at 918-919.

In any event, the Court need not resolve whether petitioner adequately established a seizure. The resolution of the question presented does not depend on whether petitioner ultimately established a violation of the constitutional right that is "alleged to have been infringed." *McDonough*, 139 S. Ct. at 2155. And respondents forfeited any argument that petitioner was not seized pursuant to legal process by failing to raise the issue below. Thus, similar to the approach in *McDonough*, the Court may "assume without deciding" that petitioner's "articulations of the right at issue and its contours are sound" for purposes of this case. *Ibid.*

2. In *Manuel*, the Court declined to decide which common-law tort is most analogous to a Section 1983 claim alleging a Fourth Amendment violation in similar

circumstances. See 137 S. Ct. at 921-922. In this Court, petitioner contends (Pet. Br. 9) that malicious prosecution is the "most analogous common law tort." We agree with that characterization.

At common law, a person who instituted or caused the institution of criminal proceedings "against another from wrongful or improper motives, and without probable cause to sustain it," was liable for the tort of malicious prosecution. Newell 6; see 1 Francis Hilliard, *The Law of Torts or Private Wrongs* 413-414 (1866) (Hilliard) ("[A]n action lies for maliciously causing one to be indicted, whereby he is damnified either in person, reputation, or property."); *Nieves*, 139 S. Ct. at 1726; cf. Restatement (Second) of Torts § 653, at 406 (1977) (Restatement). The elements are generally described as (1) "[a] suit or proceeding has been instituted without any probable cause therefor"; (2) "[t]he motive in instituting [that proceeding] was malicious"; and (3) "[t]he prosecution has terminated in the acquittal or discharge of the accused." Thomas M. Cooley, *A Treatise on the Law of Torts* 181 (1880) (Cooley); see Newell 10 (same); Melville M. Bigelow, *Elements of the Law of Torts* 70 (1878) (Bigelow) (adding to the foregoing an element that the plaintiff sustained actual damage); cf. Restatement § 653, at 406; W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 871 (5th ed. 1984) (Keeton). The "gravamen" of such a claim is that "the plaintiff has improperly been made the subject of legal process to his damage." 2 Simon Greenleaf, *A Treatise on the Law of Evidence* 498 (7th ed. 1858) (emphasis omitted).

Among the harms that the common law sought to redress through a claim of malicious prosecution was "an injury to the person, as connected with false imprisonment." Hilliard 412; see George W. Field, *A Treatise on*

The Law of Damages 543 (1876) ("[W]henever a person sustains damages to his reputation, life, limb, liberty, or property, by reason of a malicious prosecution, he may recover therefor."). The common law thus permitted such a plaintiff to "recover * * * for the unlawful arrest and imprisonment." Hilliard 414; see *Heck*, 512 U.S. at 484 (recognizing that malicious prosecution "permits damages for confinement imposed pursuant to legal process"). Where, as here, a Section 1983 plaintiff similarly seeks redress for a seizure on the basis of a criminal proceeding allegedly instituted without probable cause, see J.A. 33-34, malicious prosecution is the most analogous common-law tort.

B. A Section 1983 Claim Challenging A Seizure Pursuant To Legal Process Should Include A Favorable-Termination Requirement

As described above, common-law malicious prosecution included as an element that the criminal proceedings had terminated in the plaintiff's favor. The next step in the analysis is to determine whether the favorable-termination element of the common-law tort should be incorporated into the Section 1983 claim. See *Manuel*, 137 S. Ct. at 921-922 (remanding for consideration of a similar question in the first instance by the court of appeals). On two previous occasions when the Court identified malicious prosecution as the common-law tort most analogous to a Section 1983 claim, it incorporated that tort's favorable-termination element. See *McDonough*, 139 S. Ct. at 2156-2158 (incorporating a favorable-termination requirement into a due process claim based on fabrication of evidence); *Heck*, 512 U.S. at 484-487 (incorporating a favorable-termination requirement into a claim that the defendants unconstitutionally procured the plaintiff's conviction). The Court

should again "follow the analogy where it leads" and incorporate a favorable-termination element into petitioner's Section 1983 claim. *McDonough*, 139 S. Ct. at 2156.[1]

1. In *Heck* and *McDonough*, this Court identified three interests served by the favorable-termination element of malicious prosecution at common law. First, the requirement "avoids parallel litigation over the issues of probable cause and guilt." *Heck*, 512 U.S. at 484 (citation omitted); see *McDonough*, 139 S. Ct. at 2157. Second, it "precludes the possibility of the claimant * * * succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Heck*, 512 U.S. at 484 (citation omitted); see *McDonough*, 139 S. Ct. at 2157; see also *Page* v. *Cushing*, 38 Me. 523, 527-528 (1854) (explaining that, absent a favorable-termination requirement, "the plaintiff might recover damages, when by a subsequent disposal of the prosecution, it might appear, that it was not malicious and without probable cause, and thus the results would be inconsistent"). Third, the requirement prevents a criminal defendant from bringing a "collateral attack on [his] conviction through the vehicle of a civil suit." *Heck*, 512 U.S. at 484 (citation omitted); see *McDonough*, 139 S. Ct. at 2157; see also *Jones* v. *Kirksey*, 10 Ala. 839, 841 (1846) ("[I]t is impossible to say that one shall have the right to question and

[1] Because favorable termination is an element of a damages action under Section 1983, rather than a limitation on the scope of the constitutional right, it does not affect the United States' ability to prosecute those who willfully violate individuals' constitutional rights. See 18 U.S.C. 241, 242.

re-examine, in the action for a malicious prosecution, the very matter which has been decided otherwise in the principal suit.").

In *Heck*, the Court reasoned that "similar concerns for finality and consistency" are implicated by any Section 1983 claims that "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." 512 U.S. at 485-486. And in *McDonough*, the Court recognized that the same "pragmatic considerations" also apply to Section 1983 claims "challeng[ing] the validity of the criminal *proceedings*," not only those claims challenging *convictions*. 139 S. Ct. at 2158 (emphasis added); see *id.* at 2157.

2. The same considerations that supported a favorable-termination requirement in *Heck* and *McDonough* are applicable here. No less than in *Heck* and *McDonough*, precluding a Section 1983 plaintiff from challenging a seizure pursuant to legal process unless and until the criminal proceeding has ended in the plaintiff's favor prevents parallel criminal and civil litigation "over the issues of probable cause and guilt," *Heck*, 512 U.S. at 484 (citation omitted); it avoids the possibility that a Section 1983 plaintiff who was convicted could succeed in a tort action premised on a lack of probable cause to initiate the criminal proceeding; and it prevents the civil action from becoming a collateral attack on the validity of an ongoing criminal proceeding. Because such a Section 1983 claim "implicates the same concerns" presented in *Heck* and *McDonough*, "it makes sense to adopt the same rule." *McDonough*, 139 S. Ct. at 2157.

C. A Termination May Be "Favorable" To The Plaintiff Even If It Lacks Affirmative Indications Of Innocence

The court of appeals reasoned that the favorable-termination requirement is satisfied only when the resolution of the criminal case indicated the plaintiff's innocence. But in order to determine whether the favorable-termination requirement is a "bar to the present suit," this Court "look[s] first to the common law of torts," *Heck*, 512 U.S. at 483, and then "attend[s] to the values and purposes of the constitutional right at issue," *Manuel*, 137 S. Ct. at 921. Neither common-law principles at the time of Section 1983's enactment, the constitutional values and purposes those principles serve, nor any practical concerns support requiring a Section 1983 plaintiff in this context to show that the termination of the underlying criminal proceeding involved affirmative indications of innocence.

1. The common law did not require a termination that affirmatively indicated innocence

At the time of Section 1983's enactment, it was well established that a plaintiff claiming malicious prosecution was required to "allege and prove," as an element of the claim, "[t]he legal *termination* of the suit or prosecution complained of." Hilliard 416, 450; see *Stewart* v. *Sonneborn*, 98 U.S. 187, 195 (1879) ("In every case of an action for a malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed[.]"); Bigelow 70 (listing favorable termination among the facts that "it devolves upon the plaintiff to prove"); Newell 10 (including favorable termination among the "elements" of the tort). The decisions were not "altogether consistent" in the manner in which they articulated the substance of that element. Bigelow 75; see Hilliard 453 ("[T]he authorities

are not perfectly reconcilable."). But as a general rule, it was sufficient for the underlying proceedings to have terminated in a manner that the accused could not be tried without the initiation of a new proceeding. An affirmative-indications-of-innocence requirement finds little support in the common law of 1871.[2]

a. Numerous common-law decisions are inconsistent with a rule requiring affirmative indications of innocence. Before 1871, for example, the highest courts of several States—including Indiana, Kentucky, and Vermont—had held that the favorable-termination requirement was satisfied by a prosecutor's entry of *nolle prosequi* (a formal notice of abandonment of the prosecution) followed by a discharge of the accused. The Supreme Court of Indiana observed that, in such a case, the discharge by the court "puts an end to further proceedings against the defendant" on the indictment. *Chapman* v. *Woods*, 6 Blackf. 504, 506 (1843). And "[i]f it be shown that the original prosecution, wherever instituted, is at an end, it will be sufficient." *Ibid.*; see *Driggs* v. *Burton*,

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[2] Respondents previously suggested (Br. in Opp. 18-19) that a favorable termination for accrual purposes may be different from a favorable termination that satisfies the "substantive element of a malicious prosecution claim." That suggestion is misplaced. While it was sometimes said that the statute of limitations for a malicious-prosecution claim would not begin to run until the challenged "prosecution [wa]s ended or abandoned," 2 H. G. Wood, *Limitations of Actions at Law and in Equity* 878 (4th ed. 1916), such statements did not reflect a distinct favorable-termination rule solely for accrual purposes. Rather, because all of the other elements of the claim concerned the *initiation* of those same proceedings, see p. 13, *supra*, the substantive favorable-termination element would always be the last element to be met. Only then would the plaintiff have a "complete and present cause of action," at which point the limitations period would being to run. *McDonough*, 139 S. Ct. at 2158.

44 Vt. 124, 143 (1871); *Yocum* v. *Polly*, 40 Ky. (1 B. Mon.) 358, 359 (1841).

Several other courts—including the highest courts of Connecticut, Massachusetts, New York, and Maine—held that, as a general rule, any abandonment of a prosecution, whether or not formally noticed, followed by a discharge was sufficient. The Supreme Court of Tennessee explained that, while such a discharge "cannot be regarded as an acquittal, so as to have the force of raising the presumption of want of probable cause," it was "proper evidence to show * * * that the prosecution was *at an end*." *Pharis* v. *Lambert*, 33 Tenn. (1 Sneed) 228, 232 (1853); see *Brown* v. *Randall*, 36 Conn. 56, 62-63 (1869); *Fay* v. *O'Neill*, 36 N.Y. 11, 13 (1867); *Cushing*, 38 Me. at 527; *Sayles* v. *Briggs*, 45 Mass. (4 Met.) 421, 425-426 (1842).

Other courts—including in Alabama, Iowa, North Carolina, and South Carolina—recognized more broadly that any discharge of the prosecution by the court was sufficiently favorable. As the Supreme Court of Iowa explained, "we cannot say that in the actual position of this cause, the plaintiff must prove, or the jury must find, that the justice adjudged, specifically, that there was no ground to suspect the accused guilty of this or any other crime." *Paukett* v. *Livermore*, 5 Iowa 277, 283 (1857). It was enough that the plaintiff "alleged that [he] was discharged." *Ibid.*; see *Long* v. *Rogers*, 17 Ala. 540, 546 (1850); *Thomas* v. *De Graffenreid*, 11 S.C.L. (2 Nott & McC.) 143, 145 (1819); *Murray* v. *Lackey*, 6 N.C. (2 Mur.) 368, 369 (1818).

In the years immediately following the enactment of Section 1983, courts continued to adopt similar understandings of the favorable-termination requirement. In *Casebeer* v. *Rice*, 24 N.W. 693 (1885), for example, the

Nebraska Supreme Court found it "well settled by the great weight of authority" that a discharge "by reason of the failure of the prosecution to give security for costs" was "such a final termination of the prosecution." *Id.* at 694. In *Swensgaard* v. *Davis*, 23 N.W. 543 (1885), the Minnesota Supreme Court found the favorable-termination requirement was satisfied where the complainant had failed to appear in the criminal proceeding and the court discharged the accused. *Id.* at 543. And in *Stanton* v. *Hart*, 27 Mich. 539 (1873), the Michigan Supreme Court determined that a *nolle prosequi* followed by a discharge before trial met the requirement. *Id.* at 539-540; see *Murphy* v. *Moore*, 11 A. 665, 667 (Pa. 1887) (per curiam) (finding it "unexceptional" that an entry of *nolle prosequi* by the district attorney constituted a favorable termination).

b. As noted, the courts were not entirely uniform in the manner in which they described the favorable-termination requirement or in its application to various pre-trial dismissals.

Most prominently, some courts limited the circumstances when an entry of *nolle prosequi* would carry the tort plaintiff's burden of demonstrating a favorable termination. "These cases * * * would seem to hold that the entering of a *nolle prosequi* by the district attorney, with the consent and leave of the court, upon the indictment or information for a crime, is not a final determination of such criminal action, and therefore no action for malicious prosecution can be maintained[.]" *Woodworth* v. *Mills*, 20 N.W. 728, 730 (Wis. 1884). But those limitations were driven by concerns that an entry of *nolle prosequi* did not sufficiently indicate *finality*, not that it did not sufficiently indicate *innocence*. See *ibid.* ("[I]t is urged that the defendant may be again arrested

upon such indictment or information, and tried[.]"); *Garing* v. *Fraser*, 76 Me. 37, 42 (1884) ("[T]here is no allegation that the prosecution has been determined in favor of the plaintiff or has been finally abandoned[.]"); *Cardival* v. *Smith*, 109 Mass. 158, 158-159 (1872) ("[T]he finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint[.]"); *Teague* v. *Wilks*, 14 S.C.L. (3 McCord) 461, 463 (S.C. Ct. App. & S.C. Eq. 1826) (explaining that a *nolle prosequi* does not "necessarily put an end to the prosecution").

Courts, including this one, also sometimes stated that an "acquittal" was required to maintain an action for malicious prosecution. See, *e.g.*, *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 549 (1861); *Jones*, 10 Ala. at 840-841. But common-law courts' use of that term was not limited to the technical sense of a jury's verdict after trial. The Massachusetts Supreme Judicial Court, for example, noted that a malicious-prosecution plaintiff must "give evidence, by the production of the record, or a true copy of it, of the proceedings and an acquittal of the charge," but it allowed the plaintiff to rely on proof of discharge by a magistrate *before trial* "as evidence to sustain the allegation * * * of his being acquitted of the charge against him." *Sayles*, 45 Mass. (4 Met.) at 422, 426. And in *Wheeler* itself, this Court similarly described the plaintiffs as being "fully acquitted and discharged" by the magistrate. 65 U.S. (24 How.) at 548.

For purposes of malicious-prosecution claims, a discharge was treated as "equivalent to an acquittal." *Cardival*, 109 Mass. at 158-159; see *Kelley* v. *Sage*, 12 Kan. 109, 111 (1873) (same); see also Bigelow 76 (discussing "actual or virtual" acquittals). At least where the accused had no opportunity to contest the merits, a

true acquittal was not required. See, *e.g.*, *West* v. *Hayes*, 3 N.E. 932, note 934 (Ind. 1885) ("The general rule that an action for a malicious criminal prosecution cannot be maintained unless the prosecution has terminated in an acquittal of the accused, is not applicable where the prosecution has terminated under such circumstances that the accused had no opportunity to controvert the facts alleged against him, and to secure a determination thereon in his favor."); see also *Swensgaard*, 23 N.W. at 543; *Kirkpatrick* v. *Kirkpatrick*, 39 Pa. 288, 291, 299 (1861); *Long*, 17 Ala. at 546.

Finally, some courts recognized exceptions to the general approach in circumstances where the prosecution was ended due to a settlement or compromise with the accused. See, *e.g.*, *Langford* v. *Boston & A. R. Co.*, 11 N.E. 697, 699 (Mass. 1887) ("[W]here a nolle prosequi is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution.") (emphasis omitted); see also *Woodman* v. *Prescott*, 22 A. 456, 457 (N.H. 1891); *Bell* v. *Matthews*, 16 P. 97, 97 n.1 (Kan. 1887). Those courts reasoned that it would be unfair for the accused to induce the withdrawal of a prosecution—say, by paying restitution to the victim or admitting guilt—and then rely on that withdrawal to sue. See *Russell* v. *Morgan*, 52 A. 809, 811 (R.I. 1902) ("[T]o now allow the plaintiff to maintain his action would be, in effect, to permit him to violate his written agreement after accepting the benefit arising therefrom.").

c. Despite those variations, the general rule that emerged from the common law was not that a favorable termination required any affirmative indications of innocence, but—in the words of an influential New York decision—"only that the particular prosecution be

disposed of in such a manner that this cannot be revived, and the prosecutor must be put to a new one." *Clark* v. *Cleveland*, 6 Hill 344, 347 (N.Y. Sup. Ct. 1844).

Numerous courts endorsed that focus on finality. See *Stanton*, 27 Mich. at 540 ("The doctrine is very well explained in *Clark*[.]"); *Casebeer*, 24 N.W. at 694; *Long*, 17 Ala. at 546. Other courts' descriptions were similar. See *Woodman*, 22 A. at 457 ("The rule supported by reason and authority seems to be that if the proceeding has been terminated in the plaintiff's favor, without procurement or compromise on his part, in such a manner that it cannot be revived, it is a sufficient termination to enable him to bring an action for a malicious prosecution."); *Woodworth*, 20 N.W. at 732 (similar); *Chapman*, 6 Blackf. at 506 (similar). And contemporaneous treatises, while acknowledging some level of disuniformity in the case law, largely agreed. See Cooley 186 ("[T]he reasonable rule seems to be, that the technical prerequisite is only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one."); Newell 343 (describing the same rule as a "better and more equitable rule of law"); Hilliard 453 & n.5 (recognizing the *Clark* rule).

d. Only Rhode Island appears to have adopted an approach that resembles the one applied by the court of appeals here. In a pre-1871 case, *Rounds* v. *Humes*, 7 R.I. 535 (1863), the Supreme Court of Rhode Island stated that, to permit a malicious-prosecution action to proceed, "the termination must be such as to furnish prima facie evidence that the action was without foundation." *Id.* at 537 (quoting *Wilkinson* v. *Howell*, 1 Moody & Malkin 495, 496 (K.B. 1830)) (emphasis omitted). *Rounds* involved a prosecution that had been

ended by settlement, *ibid.*; and the case it cited, *Wilkinson*, involved a "*stet processus*" (a halt of the proceeding) with "the consent of the parties," 1 Moody & Malkin at 495. Those terminations would not have qualified as favorable to the malicious-prosecution plaintiff in numerous other States. See p. 22, *supra*. Several decades later, however, the same court extracted from *Rounds* the more general proposition that a malicious-prosecution action could not proceed where a dismissal of criminal charges "furnishe[d] no evidence of the innocence of the accused." *Tyler* v. *Smith*, 56 A. 683, 683 (R.I. 1903) (per curiam). But even if *Tyler*'s reading of *Rounds* is considered relevant to the meaning of Section 1983, as the discussion above illustrates, that position was an outlier among the States at the time of Section 1983's enactment. It plainly did not reflect a "well settled" principle of common law. *Nieves*, 139 S. Ct. at 1726 (citation omitted).

e. When the Second Circuit adopted a rule requiring affirmative indications of innocence, it principally relied not on the common law circa 1871, but on a comment in the 1977 Restatement (Second) of Torts and on one sentence from the 1984 edition of *Prosser and Keeton on the Law of Torts*. See *Lanning* v. *City of Glens Falls*, 908 F.3d 19, 26 (2018). The Restatement comment elaborated on specifically enumerated categories of "Indecisive Termination[s]" that were insufficient to support a malicious-prosecution action. Restatement § 660, at 419. The comment read in its entirety as follows:

> *Termination inconsistent with guilt.* Proceedings are 'terminated in favor of the accused,' as that phrase is used in § 653 and throughout this Topic, only when their final disposition is such as to indicate

> the innocence of the accused. Consequently a termination that is sufficiently favorable to the accused to prevent any further prosecution of the proceedings will not support a cause of action under the rules stated in § 653 if made under any of the circumstances stated in this Section.

Restatement § 660 cmt. a, at 420. The sentence from Keeton stated that "it has been said that the termination must not only be favorable to the accused, but must also reflect the merits and not merely a procedural victory." Keeton 874. Neither of those modern descriptions justifies an affirmative-indications-of-innocence requirement.

Most importantly, neither the Restatement (Second) nor the 1984 edition of *Prosser and Keeton* purported to describe the state of the common law at the time of Section 1983's enactment. The Restatement cited no authority in support of Comment a to Section 660, and the cases in the corresponding Reporter's Notes were keyed to the specific categories of inadequate terminations (such as settlements or requests for mercy) rather than the generalized description contained in Comment a. See generally Restatement § 660(a)-(d), at 419-420; 5 Restatement (Second) of Torts App. 368-369 (1981). *Prosser and Keeton* cites only a 1979 decision from the California Supreme Court. See Keeton 874 n.46 (citing *Lackner* v. *LaCroix*, 602 P.2d 393 (Cal. 1979)). While this Court has relied on modern treatises in Section 1983 cases to state the basic contours of the common law, the Court has been clear that the common-law principles that ultimately inform the rules and requirements for Section 1983 claims are those that were well settled at the time of the statute's enactment in 1871, not those that subsequently evolved. See *Nieves*, 139 S. Ct.

at 1726; *Kalina*, 522 U.S. at 123; *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983).

In any event, when read in context, neither source supports an affirmative-indications-of-innocence requirement. The Restatement's black-letter rules are broadly consistent with the 19th-century cases discussed above. Section 659 of the Restatement provides that "[c]riminal proceedings are terminated in favor of the accused by," among other dispositions, "a discharge by a magistrate at a preliminary hearing" or "the formal abandonment of the proceedings by the public prosecutor." Restatement § 659(a) and (c), at 417. And while Section 660 identifies limitations on those principles for "Indecisive Termination[s]," it merely lists certain specific circumstances that were largely consistent with the common law—*e.g.*, where a charge is withdrawn "pursuant to an agreement of compromise with the accused" or a request for "mercy," Restatement § 660(a) and (c), at 419-420. None of those specific circumstances extended to all dismissals lacking affirmative indications of innocence. Cf. Restatement (Third) of Torts: Liability for Economic Harm § 23, at 217 (2020) (stating that a "criminal proceeding terminates in favor of the accused when the final disposition is not inconsistent with the innocence of the accused").

As for *Prosser and Keeton*, the cited passage merely describes what "has been said" about procedural dismissals under modern law, Keeton 874, and the rest of the passage makes clear that the authors were not endorsing a blanket requirement for affirmative indications of innocence. To the contrary, the treatise explains—consistent with the bulk of the cases discussed above—that it is "enough that the proceeding is terminated in such a manner that it cannot be revived,

and the prosecutor, if he proceeds further, will be put to a new one." *Ibid.*

2. Requiring affirmative indications of innocence is inconsistent with the constitutional values and the purposes served by the favorable-termination element

a. As discussed, this Court has attributed three purposes to the favorable-termination requirement drawn from the common law: avoiding parallel litigation, preventing inconsistent judgments, and precluding collateral attacks on criminal proceedings or judgments. See pp. 15-16, *supra*. None of those interests would be served by adopting an affirmative-indications-of-innocence requirement. Two of the rationales require only that the termination be sufficiently final. No indications of innocence are needed to preclude parallel litigation over probable cause and guilt on the charges; all that matters to that interest is that the prior proceeding is at an end. Nor are affirmative indications of innocence necessary to prevent inconsistent judgments between the criminal and civil proceedings; a determination in the tort action that a criminal proceeding was initiated without probable cause is not inconsistent with the dismissal of that proceeding, regardless of whether the dismissal affirmatively indicated the defendant's innocence. And finally, at least as long as the criminal proceeding ends in a manner that is not *inconsistent* with innocence, a malicious-prosecution claim is not an impermissible collateral attack on an ongoing proceeding or a final judgment.

This Court's decision in *Heck* reinforces those conclusions. Having identified the interests served by the common law's favorable-termination element, the Court observed that "similar concerns for finality and con-

sistency" are reflected in the Court's reluctance to permit civil tort actions to challenge the validity of outstanding criminal convictions or sentences. *Heck*, 512 U.S. at 485-486. The Court thus incorporated the favorable-termination element into any Section 1983 damages claims that "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* at 486. In such circumstances, the Court held that the Section 1983 "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-487.

Among those dispositions that the Court in *Heck* specified would satisfy the favorable-termination requirement for a Section 1983 claim, "none require[s] an affirmative finding of innocence." *Savory* v. *Cannon*, 947 F.3d 409, 429 (7th Cir.) (en banc), cert. denied, 141 S. Ct. 251 (2020). A conviction may be reversed on numerous grounds that do not indicate the defendant's innocence of the crimes charged—*e.g.*, the exclusionary rule, see *Stone* v. *Powell*, 428 U.S. 465 (1976); double jeopardy, see *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863 (2016); or violations of the right to a speedy trial, see *Doggett* v. *United States*, 505 U.S. 647 (1992). And habeas relief is often granted without affirmatively indicating the prisoner's innocence. See *Bousley* v. *United States*, 523 U.S. 614, 623 (1998) (requiring a showing of "actual innocence" only in certain cases of procedural default) (citation omitted).

Similarly, in *McDonough*, the Court found it "unquestionabl[e]" that an acquittal constitutes a "favorable termination" for purposes of a Section 1983 claim

based on fabrication of evidence. 139 S. Ct. at 2160 n.10. But it is axiomatic that "an acquittal on criminal charges does not prove that the defendant is innocent." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984). At most, it "proves the existence of a reasonable doubt as to his guilt." *Ibid.* And indeed, this Court recently observed that a jury may also acquit for other reasons that have no relationship to guilt or innocence, such as "compromise, compassion, lenity, or misunderstanding of the governing law." *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352, 358 (2016).

b. Nor is a requirement of affirmative indications of innocence in the underlying proceeding supported by the "values and purposes" of the Fourth Amendment right that petitioner's constitutional claim seeks to vindicate. *Manuel*, 137 S. Ct. at 921. The relevant Fourth Amendment inquiry in a case in which the plaintiff contends that he was unreasonably seized pursuant to legal process is whether the legal process that resulted in a seizure was *initiated* without probable cause, not whether the proceeding *ended* in a determination of his innocence. And while the determination of the criminal proceeding, or the record compiled during it, may inform a court's determination about whether the plaintiff can establish a lack of probable cause, the ultimate constitutional inquiry must focus on the facts that the defendants knew at the time of institution, not the circumstances surrounding a later dismissal. Requiring that any such dismissal be accompanied by affirmative indications of innocence therefore "considers the wrong body of information." *Laskar* v. *Hurd*, 972 F.3d 1278, 1292 (11th Cir. 2020), petition for cert. pending, No. 20-1351 (filed Mar. 22, 2021).

The problem is only exacerbated by the fortuity that is generally needed for the accused to obtain a dismissal that affirmatively indicates innocence. In the federal system, for example, few pre-trial dispositions of criminal cases result in any finding or suggestion of innocence. Federal prosecutors have wide discretion to seek dismissal of charges before a conviction based on various reasons that may or may not include the prosecutor's evaluation of the defendant's guilt. See *Wayte* v. *United States,* 470 U.S. 598, 607-608 (1985). In seeking dismissals, prosecutors rarely announce whether, or to what extent, the request is based on the prosecutor's view of the defendant's guilt. Courts are nevertheless generally obliged to grant such requests without any inquiry into whether the defendant is innocent of the dismissed charges. See *Rinaldi* v. *United States*, 434 U.S. 22, 29-32 & n.15 (1977) (per curiam); Fed. R. Crim. P. 48(a). It is impractical to expect a criminal defendant who has been detained on false charges to insist upon an explanation before regaining his liberty. And it would undermine Fourth Amendment values to deprive such an individual of the opportunity to pursue his Section 1983 claim because he failed to obtain such a declaration when his criminal proceeding was finally terminated without any conviction.

c. Finally, requiring affirmative indications of innocence from the underlying proceeding would be likely to have detrimental effects on prosecutorial discretion and independence—important constitutional values in their own right. Cf. *McDonough*, 139 S. Ct. at 2160 n.10. "Decisions to initiate charges, or to dismiss charges once brought, 'lie[] at the core of the Executive's duty to see to the faithful execution of the laws.'" *United States* v. *Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir.

2016) (citation omitted; brackets in original). Prosecutors' actions in dismissing criminal cases are protected by absolute immunity in part to protect that independence and discretion. See *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976); see also, *e.g.*, *Brooks* v. *George Cnty.*, 84 F.3d 157, 168 (5th Cir.) (prosecutor's activities related to entry of *nolle prosequi* "are all prosecutorial activities 'intimately associated with the judicial phase of the criminal process'") (citation and emphasis omitted), cert. denied, 519 U.S. 948 (1996). Yet the affirmative-indications-of-innocence requirement invites the same after-the-fact judicial scrutiny of a prosecutor's decision. "[R]espect for the principles of prosecutorial independence which support such immunity, coupled with sensitivity to separation of powers concerns and the reluctance of federal courts to interfere with state criminal process, counsel against" judicial scrutiny of decisions not to prosecute. *Harrington* v. *Almy*, 977 F.2d 37, 42 (1st Cir. 1992).

This case illustrates how an affirmative-indications-of-innocence requirement could foster such inappropriate inquiries. In the Second Circuit, "when 'a termination is indecisive because it does not address the merits of the charge, the facts surrounding the termination must be examined to determine "whether the failure to proceed implies a lack of reasonable grounds for the prosecution."'" *Rounseville* v. *Zahl*, 13 F.3d 625, 629 (2d Cir. 1994) (citation omitted). In petitioner's criminal case, "[n]either the prosecution nor the court provided any specific reasons on the record for the dismissal." Pet. App. 19a. Thus, to evaluate petitioner's Section 1983 claim, the district court held an evidentiary hearing at which petitioner's "former defense counsel * * * testified regarding her recollections of [his] criminal

prosecution." *Id.* at 20a. At the hearing, counsel and the judge questioned petitioner's former counsel about her conversations with prosecutors in an attempt to divine the reasons behind the dismissal decision. *Id.* at 21a, 30a-31a, 33a. What the court sought to do in this case through hearsay or speculation from defense counsel, another court may seek to do through discovery from the prosecution or the prosecutor's own testimony. Routine inquiries of this type would present serious concerns about prosecutorial independence.

3. Reasonable concerns about frivolous Section 1983 claims do not justify an affirmative-indications-of-innocence requirement

The principal rationale offered in support of an affirmative-indications-of-innocence requirement is that it "serves as a useful filtering mechanism, barring actions that have not already demonstrated some likelihood of success." *Cordova* v. *City of Albuquerque*, 816 F.3d 645, 654 (10th Cir. 2016); see *id.* at 653 (explaining that the requirement is "a reflection of the idea that malicious prosecution actions are disfavored at common law"); Br. in Opp. 22. In other words, "[t]he favorable termination element provides an additional opportunity for courts to stop false claims short" before discovery. *Laskar*, 972 F.3d at 1306 (Moore, J., dissenting); see also *Lanning*, 908 F.3d at 26 (reasoning that the requirement diminishes "the prospect of harassment, waste and endless litigation, contrary to principles of federalism") (citation omitted). While such concerns are reasonable, they cannot justify an affirmative-indications-of-innocence requirement.

The favorable-termination requirement is not the only check on frivolous Section 1983 claims. This Court has yet to determine—and this case presents no opportunity

to articulate—every element of a Section 1983 claim alleging an unreasonable seizure on the basis of legal process. But, at a minimum, a plaintiff bringing such a claim must allege and ultimately prove the absence of probable cause. Moreover, qualified immunity—which must be resolved "at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam)—requires a Section 1983 plaintiff to establish not only a lack of probable cause, but that it was objectively unreasonable for the defendant to believe (even mistakenly) that probable cause existed. See *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 591 (2018); see also *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) ("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable."). That deferential standard "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

As petitioner acknowledges (Pet. Br. 11 n.4), issues of probable cause and qualified immunity both "remain unresolved" in this case, in which the jury has already rejected petitioner's claims that respondents "unlawfully entered [his] apartment," that they deprived him of his "right to a fair trial" by "creat[ing] false evidence," or that petitioner "was falsely arrested by any of [respondents]." J.A. 141-144 (capitalization and emphasis omitted). Even assuming that an affirmative-indications-of-innocence requirement would provide additional protections against frivolous Fourth Amend-

ment claims by Section 1983 plaintiffs, that policy concern does not overcome the requirement's inconsistency with the common law at the time of Section 1983's enactment and with the constitutional values and purposes that the favorable-termination element serves.

CONCLUSION

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

Respectfully submitted.

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JUNE 2021