No. 20-659

IN THE
Supreme Court of the United States

LARRY THOMPSON,
Petitioner,
v.
PAGIEL CLARK, ET. AL.,
Respondents.

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

BRIEF FOR THE DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The District Attorneys Association of the State of New York (DAASNY) is a state-wide organization comprised of elected District Attorneys from

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the *amicus* and their counsel, made a monetary contribution intended to fund this brief's preparation or submission. Counsel of record for all parties consented to the filing of this brief.

throughout the State, the Special Narcotics Prosecutor of the City of New York, the state Attorney General, and the Justice Center for the Protection of People with Special Needs, and their nearly 2,900 assistants. Under state law, members of the Association are responsible for the investigation and prosecution of crimes in their respective jurisdictions. In exercising those duties, they enjoy "broad discretion in determining when and in what manner to prosecute a suspected offender," which is not subject to review under state law. *People v. Di Falco*, 377 N.E.2d 732, 735 (N.Y. 1978). DAASNY is thus uniquely well positioned to explain why and how those discretionary decisions are made by New York prosecutors.

As public prosecutors, the interest of the members of the Association is to pursue justice in all circumstances and in all its forms. This means prosecutors have a special duty to make sure the innocent do not suffer. But it also means, in individual cases, that prosecutors will choose not to pursue cases against some of the guilty when the public interest is better served otherwise. For justice to prevail, prosecutors must be free to exercise their discretion without fear or favor. We believe that the outcome of this case could have consequences for criminal practice in New York State. Any rule of law that touches the routine exercise of a prosecutor's discretion is of concern to us.

SUMMARY OF ARGUMENT

Seven of the eight circuits that have reached the question have found that, in the context of a section 1983 action sounding in malicious prosecution, a "favorable termination" requires an affirmative

indication of innocence. Only the Eleventh Circuit dissents from this view, holding instead that the necessity of a favorable-termination requires merely that criminal proceedings resolve "in a manner not inconsistent with" the defendant's innocence. *Laskar v. Hurd,* 972 F.3d 1278, 1295 (11th Cir. 2020).

The Eleventh Circuit's alternative rule ignores the reality of how broadly a prosecutor's discretion to dismiss charges is exercised in order to "do justice." Under the current rules, prosecutors make decisions about dismissal without any particular regard to potential malicious prosecution claims, routinely dismissing cases for a variety of reasons, mostly unrelated to innocence. Under the Eleventh Circuit's rule, any discretionary dismissal by the prosecutor would swing open the door to a great deal of meritless litigation. Setting up vexatious litigation in that way may potentially conflict with the prosecutor's "primary responsibility" of seeking justice, which "can only be achieved by the representation and presentation of the truth." NDAA Standard 1-1.1 (3d ed. 2009).

ARGUMENT

I. A PROSECUTOR'S DISCRETION TO DO JUSTICE IS BROAD AND KALEIDOSCOPIC

A. The Underpinnings of Prosecutorial Discretion

At English Common Law, there was no office of public prosecutor. Jack M. Kress, *Progress and Prosecution*, 423 Annals Am. Acad. Poli. & Soc. Sci. 99, 100 (1976). Crime was viewed "not as an act against the state, but rather as a wrong inflicted

upon a victim." *Id.*; *see also* 4 William Blackstone, Commentaries on the Laws of England 5 (1769). And so, as with any other private wrong, the "practice of allowing crime victims to initiate private prosecutions" was "based on the common belief that the surest method of bringing a criminal to justice [was] to leave the prosecution in the hands of the victim and his family." Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol'y 357, 359 (1986). The chief distinction between private civil actions and criminal actions was simply the "character of the damages ultimately awarded"—in one case extracting money, in the other extracting life or liberty. Philip B. Kurland & D. W. M. Waters, *Public Prosecution in England, 1854-79: An Essay in English Legislative History*, 1 Duke L. J. 493, 493 (1959).

Over time, American practice diverged on this point. To this day, the precise origins of the public prosecutor are still a subject of some debate. Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 Pepperdine L. Rev. 117, 127 (1984) (calling this an "historical enigma"); s*ee* Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 J. Const. L. 659, 675 (2010); W. Scott Van Alstyne, *The District Attorney A Historical Puzzle*, 1952 Wis. L. Rev. 125 (1952); Joan E. Jacoby, *The American Prosecutor: A Search for Identity* (1980).

What is clear is that the "distinctive and uniquely American" system of public prosecution only began to take hold during the nineteenth century. Kress, *supra*, at 100. Initially, these local public prosecutors were appointed, sometimes by executives and

sometimes by courts. Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 Yale L. J. 1528, 1537 (2012). In 1832, Mississippi became the first state to make local prosecutors elected officials. *Id.* at 1540. New York followed suit in 1846. Robert M. Pitler, *Superseding the District Attorneys in New York City*, 41 Fordham L. Rev. 517, 520 (1973). Today all but four states elect their prosecutors. Ellis, *supra.* at 1520 n3.

Despite the proliferation of public prosecutors, the "practice of private prosecution extended well into the nineteenth century," Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 486 (2005), and continued to be "a significant element of the state criminal justice system" throughout it, Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Legal Hist. 43, 43 (1995). It was not until the latter part of the century that public prosecutors began to displace private ones. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 519 (1994). By the turn of the twentieth century public prosecutors had mostly won out—though pockets of private prosecutions persisted here and there. Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 Am. Crim. L. Rev. 1309, 1391 (2002); Richard F. Hamm, *Shaping The 18th Amendment: Temperance Reform, Legal Culture, and Polity, 1820-1920* 145 (1995) (finding that in 1900, approximately three-quarters of liquor law prosecutions were conducted by private attorneys hired by the Ohio Anti-Saloon League).

The gradual shift to elected, state-funded prosecutors made two things perfectly clear. First, as "public," not private, prosecutors, they were accountable to the people and represented their interests, not merely the interests of the victims of crime. O'Neill, *supra*, at 681–82; *see also* Walter M. Pickett, *The Office of Prosecutor in Connecticut*, 17 Am. Inst. Crim. L. & Criminology 348, 356–57 (1926). Second, as elected officers, public prosecutors were now firmly members of the executive branch. *The Changing Role of the American Prosecutor* 7–9 (John L. Worrall and M. Elaine Nugent-Borakove eds., 2008).

Two important principles flowed naturally from these developments. First and foremost was that as a member of the executive branch, a district attorney's decisions to prosecute or not to prosecute were imbued with the character of that office. Thus, as a matter of separation of powers, those decisions were typically not reviewable. In *United States v. Cox*, the Fifth Circuit explained that when a federal prosecutor "exercises a discretion as to whether or not there shall be a prosecution in a particular case" he does so as "an officer of the executive department." *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965). It followed that "as an incident of the constitutional separation of powers" courts could not "interfere with the free exercise of the discretionary powers of" federal prosecutors. *Id.* This Court, too, has recognized that charging decisions "have long been regarded as the special province of the Executive Branch." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). State courts, under their own state constitutions, have recognized the same principle. *See, e.g., Soares v. Carter*, 32 N.E.3d 390, 392 (N.Y. 2015). Thus, the general rule throughout the states is that

"[a] prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings; he is protected from judicial oversight by the doctrine of separation of powers." *Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So. 2d 907, 910 (Ala. 1992), *quoting* 63A Am.Jur.2d *Prosecuting Attorneys* § 24 (1984).

Nowhere is that power more complete than when a prosecutor chooses not to charge a crime or simply to dismiss one. Whereas in certain limited circumstances courts may review a prosecutor's decision to charge a crime, *see United States v. Armstrong*, 517 U.S. 456, 464 (1996) (describing high standard for selective-prosecution claims), when a prosecutor declines to bring a charge or dismisses it his decision is practically unreviewable. Over the years lower courts have sometimes tried to force prosecutors to initiate prosecutions but have always failed. *See, e.g., Soares*, 32 N.E.3d at *392*; *State ex rel. Brown v. Nusbaum,* 95 N.E.3d 365, 368 (Ohio 2017); *Davis v. State*, 210 So. 3d 101, 103 (Fla. Dist. Ct. App. 2016); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) ("The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine.").

The other important result of the shift to public (and mostly elected) district attorneys was the recognition that prosecutors' first duty was to seek justice as a matter of the public good. This idea took hold early on. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 792 (2000) ("[C]ourts and commentators from the earliest days of the American legal system to the present have viewed pursuit of the public interest as

a critical function of the public prosecutor."). In an 1854 essay (on which the American Bar Association would later base its first code of ethics) then-professor George Sharswood wrote that the office of a prosecutor was "a public trust" and although a defense attorney "should exert all his ability, learning, and ingenuity" in defense of a man he knew was guilty, a prosecutor should never move forward with a case against "a man whom he knows or believes to be innocent." Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L. J. 607, 612 (1999); *see* Canons of Ethics, 33 ABA Rep. 575, 576 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.").

Courts quickly affirmed that notion. "The prosecuting officer," one contemporary court noted, "represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice…." *Hurd v. People,* 25 Mich. 405, 416 (1872), *superseded by statute on other grounds People v. Koonce*, 466 Mich. 515, 518–19 (2002). Similar expressions of the principle can be found throughout the caselaw from the late nineteenth century onward. *See* Green, *supra*, at 613–14 (collecting cases). These expressions found their apogee in this Court's famous phrase in *Berger v. United States* that the United States Attorney was the "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88

(1935). In other words, prosecutors endowed with the "tremendous" discretion afforded to them by their office also bear the weighty responsibility of justice on their shoulders. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology, 4 (1940).

B. How Prosecutors Seek to "Do Justice" Through Dismissals

Prosecutors generally, and the members of DAASNY in particular, take our obligation to do justice seriously. Classically, this has been understood to mean that the prosecutor's goal was "that guilt shall not escape or innocence suffer." *Berger*, 295 U.S. at 88; *see* Green, *supra*, at 634. This means that prosecutors are not permitted to bring charges when they know they lack probable cause. Model Rules of Prof'l Conduct, R 3.8(a) (2013); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).[2] It also means that the prosecutor has a duty of fairness to

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[2] We note that an *Amicus* Brief filed in this matter by a group of current and former prosecutors, department of justice officials, and judges incorrectly states that a prosecutor cannot seek charges unless the evidence is sufficient to obtain a guilty verdict at trial. Brief for Amicus Curiae Current and Former Prosecutors, Department of Justice Officials, and Judges in Support of Petitioner at 5, *Thompson v. Clark* (No. 20-659) (hereinafter "Brief for Former Prosecutors"). For this proposition they cite to a regulation contained within the U.S. Attorneys' Manual. *See* U.S. Dep't of Justice, Justice Manual § 9-27.220 cmt., *available at* https://perma.cc/95FM-SNLC. While this is undoubtedly best practice, it is not required by law or ethics. Instead, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). *Bordenkircher*, 434 U.S. at 364.

the defendant and a "positive obligation" to ensure that "the rights of all—defendants included—are safeguarded." *People v. Lombard*, 168 N.Y.S.2d 419, 424 (N.Y. App. Div. 1957). Their ethics thus requires them "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons." Model Rules of Prof'l Conduct, R 3.8 cmt. [1] (2013). Many of these ethical duties are found in various state ethical rules, others are found in caselaw.

Yet the obligation to do justice extends beyond matters of professional ethics and serves as an aspirational goal addressed to the conscience of the prosecutor. Adam N. Stern, *Plea Bargaining, Innocence, & the Prosecutor's Duty to "Do Justice"*, 25 Geo. J. Legal Ethics 1027, 1040 (2012). The National District Attorneys Association's National Prosecution Standards begin by stating that a prosecutor is an "independent administrator of justice" whose "primary responsibility" is to "seek justice," a goal that can only be achieved by representing the truth. *See* National District Attorneys Ass'n, National Prosecution Standards, Standard 1-1.1 (3d ed. 2009) (NDAA); *see also* ABA Criminal Justice Standards: Prosecution Function, § 3-1.2(a) (4th ed. 2017) (ABA Standards) ("The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court."). Part of pursuing justice is putting "the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases." NDAA Standard 1-1.2. Importantly, the ABA Criminal Justice Standards for the Prosecution Function recognizes that this can include "exercising

discretion to not pursue criminal charges in appropriate circumstances." ABA Standards § 3-1.2(b); s*ee also* ABA Standards § 3-4.4(a). These aspirational guidelines represent the modern understanding that "the prosecutor's duty is to seek the fairest rather than necessarily the most severe outcome." *See, e.g., United States v. Jones*, 983 F.2d 1425, 1433 (7th Cir. 1993). "Full enforcement of the law," it has been noted, "would not only be impractical, but also unwise." Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. Rev. 1243, 1244 (2011). Instead, prosecutors seek to treat lawbreakers "with proportionality." Green, *supra*, at 634.

Prosecutors do this in a number of ways. One way is through plea bargaining. Plea bargain offers allow prosecutors flexibility to serve "the ends of justice" by factoring in the "infinitely variable circumstances" of each defendant and the mitigating features unique to each case, in effect taking the sting out of the harshest penalties. *See People v. Selikoff*, 318 N.E.2d 784, 789 (N.Y. 1974). Most of the time, prosecutors are able to negotiate a penalty that he "deems necessary to serve the interests of the People" in the exercise of sound prosecutorial discretion. *People v. Farrar*, 419 N.E.2d 864, 866 (N.Y. 1981). The prosecutor's discretion to offer a plea has been recognized as providing the "selectivity needed in criminal law enforcement." *Selikoff*, N.E.2d at 789. The fact is that "notwithstanding a defendant's criminal liability for the crime charged," a prosecutor may reasonably be convinced that a "harsh minimum penalty… is unwarranted in light of the then known background of the defendant or his or her role in the crime." *Farrar*, 419 N.E.2d at 866.

Those same considerations apply when a prosecutor declines to pursue charges or simply dismisses them. Prosecutors take these steps for a number of reasons. To be sure, a prosecutor might decline a case because his own view of the facts leads him to believe there is no probable cause to pursue it, triggering his ethical duties. Model Rules of Prof'l Conduct, R 3.8(a) (2013). More common in our experience are other considerations. "Any number of factors might influence the prosecutor's discretion in this regard, including resource limitations, law enforcement priorities, needs or wishes of the victim, and the perceived public interest." Fairfax, *supra*, at 1244; ABA Standards § 3-4.4(a) (iii), (iv), (v), & (xiv); NDAA Standard 4-1.3 (c), (h), & (q).

Limited resources are a particularly acute concern, given the "chronically congested" state of local criminal dockets. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 369, 369 (2010). Prosecutors "must be allowed to direct [their] resources to best serve society" because without such discretion their caseloads "would become unworkable" and the entire "administration of justice would collapse." Michael A. Caves, *The Prosecutor's Dilemma: Obligatory Charging Under the Ashcroft Memo*, 9 J. L. & Soc. Challenges 1, 7 (2008). A prosecutor might therefore decline a "meritorious prosecution" where other remedies—like civil, administrative, or private remedies—are available and sufficient to vindicate the state's interest. Fairfax, *supra*, at 1259; ABA Standards § 3-4.4(a) (xvi); NDAA Standard 4-1.3 (d).

The character, history, or circumstances of the accused may also weigh in favor of dismissal or

declination. ABA Standards § 3-4.4(a) (v); NDAA Standard 4-1.3 (j) & (o). As one author pointed out, a "technically guilty but morally sympathetic mentally [challenged] defendant should not have to endure prosecution in the first place for a nonviolent crime." Bibas, *supra*, at 372; *see also* NDAA Standard 4-1.3 (j). Such an extreme example is hardly the norm, of course, but that does not mean a declination to prosecute makes any less sense; a young, first time offender who gets in with the wrong crowd and grafittis a park may warrant the same treatment even though he could theoretically be charged with a felony under New York law. N.Y. Penal Law § 145.05 (2). Similarly, an adult with no criminal history who breaks a window in the heat of an argument might be charged with the same felony, but if he makes restitution society's interest in further punishment might well be nil, justifying dismissal. *See* ABA Standards § 3-4.4(a) (v); *see also* NDAA Standard 4-1.3 (f). "[T]hese hypothetical situations track the popular moral intuition that we generally want to pursue justice tempered by mercy." Bibas, *supra*, at 372. They also challenge the prosecutor to consider "[w]hether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction," another important factor in a charging decision. NDAA Standard 4-1.3(q); ABA Standards § 3-4.4(a) (iii).

These general concerns are given heightened significance by the fact that a criminal charge can seriously impact the accused. "Merely being charged with a crime can jeopardize a suspect's standing within the community, severely degrade a suspect's economic security, inflict emotional and psychological damage on the suspect and the suspect's family, and is at the

very least a tremendous disruption of her daily life." Caves, *supra*, at 11. Perhaps because of this, ABA standards encourage prosecutors to consider "formal or informal" noncriminal dispositions in every case. ABA Standards § 3-4.4(f). More specifically, prosecutors are encouraged to consider "whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender," ABA Standards § 3-4.4(a)(vi), and the NDAA standards encourage him to consider any "[u]ndue hardship" prosecution could cause a defendant, NDAA Standard 4-1.3 (k); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 599 (2001) ("prosecutors have the discretion not to enforce when the laws are too harsh."). The United States Attorneys' Manual makes similar observations. *See* U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-27.001 Preface. Such undue hardships can take many forms. Prosecutors might be faced with a medical doctor charged with a DWI who could lose his license to practice if convicted. *See* Gary Muldoon, *Collateral Effects of A Criminal Conviction*, N.Y. St. B.J., August 1998, at 26, 28 (1998). They may encounter immigrant defendants with children who could face deportation for relatively minor crimes. *Id.* They might meet a young man who wishes to join the military and whom a recruiter wants, but the military cannot take him unless his pending charge is dismissed. *Id.* The list goes on and on.

Sometimes, the wishes of or protection of a victim weighs in favor of dropping a meritorious case. Fairfax, *supra*, at 1258; ABA Standards § 3-4.4(a)(vii); NDAA Standard 4-1.3 (c). This is particularly common in cases of domestic violence. While prose-

cutors rightfully seek a resolution that assures the safety of the victim and the public, "[a] domestic violence victim may be less interested in justice and more interested in survival." Njeri Mathis Rutledge, T*urning A Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. Rev. 149, 181 (2009). Ultimately, a victim's level of cooperation, safety concerns, or interest in the case sometimes necessitates dismissal.

Finally, as elected representatives of the People, prosecutors reflect the views of the communities they represent in determining both law enforcement priorities and the public's interest in any particular crime or class of crime. *See* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 Wash. L. Rev. 69, 71 (2011) ("Because prosecutors act on the public's behalf, their decisions should reflect their constituents' preferences."); *see also* Darryl K. Brown, *Democracy & Decriminalization*, 86 Tex. L. Rev. 223, 261 (2007). Where an "antiquated" statute serves no useful "deterrent or protective purpose in today's society," prosecutors may well find their resources more needed elsewhere. *Id.* Thus, if a criminal statute is out of step with the prevailing morals of the day they may decline to enforce it in a sort of passive desuetude—as with New York's statute against adultery, a crime which still occasionally makes its way in to a charging document. Fairfax, 52 B.C. L. Rev. at 1260 n.64; N.Y. Penal Law § 255.17; WBTA News, *Adultery charge against Suzanne Corona dropped*, The Batavian (Aug. 11, 2010, 3:06 PM), https://perma.cc/9E7W-LX8K. In other words, "[p]rosecutors can, and often do, make such decisions based on their judgments as to how wise and important certain laws may be." *United States v.*

Navarro-Vargas, 408 F.3d 1184, 1213 (9th Cir. 2005) (Hawkins, J., dissenting). By tracking the "widely shared moral intuitions" of their constituents, prosecutors give the decisions they make in the name of the 'People' democratic legitimacy. *See* Bibas, *supra*, at 372–73. As Justice Robert Jackson put it, "each locality has the right under our system of government to fix its own standards of law enforcement and of morals." Jackson, *supra*, at 6. One important way our system does that is through the local elected public prosecutor.

That general authority has been invoked by prosecutors across the United States, including in New York, to announce policies that discontinue prosecutions of minor crimes and re-focus on major ones. In New York, the District Attorneys in Manhattan, Brooklyn, and Albany all announced policies discontinuing prosecution for possession of small amounts of marijuana well before the state legislature legalized it earlier this year. Press Release, Manhattan District Attorney's Office, Tomorrow: D.A. Vance Ends Prosecution of Marijuana Possession and Smoking Cases (July 31, 2018), https://perma.cc/5ZD2-MNUZ; Press Release, Brooklyn District Attorney's Office, Low-Level Marijuana Prosecutions in Brooklyn Plunged by over 91% This Year as District Attorney's Office Expanded Declination Policy, https://perma.cc/SB8S-R2GN; Press Release, Marijuana Laws in Albany County, Albany County District Attorney's Office, https://perma.cc/37FL-NSSW. In Los Angeles, the District Attorney adopted a policy to discontinue prosecution of an array of minor crimes. Memorandum from DA Gascon to All Deputy District Attorneys, Misdemeanor Case Management (Dec. 7, 2020),

https://perma.cc/Y9BP-5KTN. In Boston, the District Attorney directed her staff to decline prosecutions of a number of low-level, non-violent crimes, resulting in her office dismissing, declining to prosecute, or diverting fully 57% of their cases in 2019. Ally Jarmanning, *Not Prosecuting Low-Level Crimes Leads to Less Crime in Suffolk County, Research Finds*, WBUR (updated March 29, 2021), https://perma.cc/3PW2-Y99X. She explained her actions as a question of priorities and resources. "What I choose to do is work on the over 1,300 unsolved homicides in Boston," she told an interviewer, "That's where I want my time and attention. Not on a trespass in a park in a neighborhood in Roxbury that's been gentrified." *Id.* This is not shocking. As one set of commentators pointed out, the "conventional wisdom" that arson is a more serious crime than graffiti should be expected to "lead a prosecutor to prioritize arson cases" over graffiti. Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 Am. U.L. Rev. 805, 839–40 (2020).

In short, whether to file or continue criminal charges "with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest." *United States v. Lovasco*, 431 U.S. 783, 794 (1977). "Not every potential crime can (or should) be investigated or prosecuted, and an important part of the prosecutorial function is deciding which potential defendants to select for criminal prosecution…." *Navarro-Vargas*, 408 F.3d at 1213 (Hawkings, J., dissenting). The modern trend has been to take a broad approach to this project. Logan

Sawyer, *Reform Prosecutors & Separation of Powers*, 72 Okla. L. Rev. 603, 605 (2020).

Each case, each defendant, and each jurisdiction is different—but the system gives prosecutors the discretion they need to take account of the "infinitely variable circumstances" attendant to all three. *Selikoff*, 318 N.E.2d at 789. These decisions—to charge or not to charge, to continue charges or to dismiss—are the very core of a prosecutor's function. *See Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 976 (D.C. Cir. 2005). They are also routine and continuing; they must occur as early as practicable in every case, and the prosecutor must reconsider his initial charging decision as he learns new information. NDAA Standards 4-1.1 & 4-1.6. Given the frequency with which these decisions are made and the myriad of reasons why prosecutors make them it is difficult to generalize beyond this simple observation: prosecutors dismiss or decline to prosecute cases for many reasons, most of them wholly unrelated to the guilt or innocence of the accused.

II. ELIMINATING THE "INDICATIONS OF INNOCENCE" RULE WOULD DENY THE REALITY OF PROSECUTORIAL PRACTICE AND MAY NEGATIVELY IMPACT THE CAUSE OF JUSTICE

Eight of the circuit courts have now considered what constitutes a favorable termination in the context of a pre-trial dismissal. Seven have held that a dismissal alone is not a favorable termination but that some further "indication of innocence" is required. *See Laskar v. Hurd*, 972 F.3d 1278, 1303–04 (11th Cir. 2020) (Moore, J., dissenting) (collecting cases). Of the circuits that have reached the merits

of this issue, the Eleventh Circuit is the sole dissenter. *Id.* at 1303–04 (Moore, J., dissenting). It ruled that the favorable-termination element "requires only that the criminal proceedings against the plaintiff formally end in a manner not inconsistent with his innocence on at least one charge that authorized his confinement." *Id.* at 1295. Thus, any "formal end" to a proceeding satisfies this standard "unless it precludes a finding that the plaintiff was innocent of the charges that justified his seizure, which occurs only when the prosecution ends in the plaintiff's conviction on or admission of guilt to each charge that justified his seizure." *Id.* If adopted by this Court, such a rule would apply to thousands of routine dismissals by district attorneys in New York State each year, opening the courthouse gates to a flood of meritless claims.

A. The Realities of New York Criminal Practice

To understand why, a review of New York practice as it relates to a prosecutor's decision not to go forward with a case is illustrative. In New York, a prosecutor can dismiss a case that has been filed in one of three ways.

The first way, by far the most common, is an Adjournment in Contemplation of Dismissal (commonly referred to as an "ACD"). A court can only grant an ACD with the consent of both the prosecutor and the defendant. N.Y. Crim. Proc. Law § 170.55(1) (McKinney). Once granted, the charges are adjourned without date with the understanding that they will be dismissed in six months' time unless the prosecutor moves to restore the case to the calendar. N.Y. Crim. Proc. Law § 170.55(2) (McKinney). As a

condition of this munificence, a court can impose a temporary restraining order for the duration of the ACD, can require the defendant to participate in dispute resolution and pay restitution, or it can require community service. N.Y. Crim. Proc. Law § 170.55(3), (5), & (6) (McKinney). No statutory standard or criteria exists for granting an ACD, nor must any reason be placed on the record, but as a practical matter prosecutors typically agree to them when the charged crime is a low-level or technical offense and when they believe the crime is "not likely to be repeated and constituted only a *de minimus* threat to the public peace." N.Y. Crim. Proc. Law § 170.55 (McKinney) (Preiser Practice Commentaries). Importantly, as it relates to the issue at hand, the statute affirms that an ACD is not "a conviction or an admission of guilt." N.Y. Crim. Proc. Law § 170.55(8) (McKinney).

The second way a dismissal may be granted by a prosecutor in New York is through a mechanism outlined in section 170.40 of the Criminal Procedure Law.[3] This was the method used in this case. Under this section of law, the prosecutor, defendant, or the court *sua sponte* may move to dismiss a case in the "interest of justice" when some "compelling factor, situation, or circumstance" exists that renders further prosecution unjust. N.Y. Crim. Proc. Law § 170.40 (McKinney).[4] In deciding whether or not to

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[3] Section 170.40 applies to misdemeanors. A parallel provision of law, otherwise identical, applies to dismissals of indictments. *See* N.Y. Crim. Proc. Law § 210.40 (McKinney).

[4] Technically, dismissal pursuant to this section of law can be granted without the prosecutor's consent. But for purposes of

grant such a motion, the court must consider a number of factors, which largely track the standards prosecutors consider in making their own determination about whether or not to pursue a case. *Compare* N.Y. Crim. Proc. Law § 170.40(1)(a)-(j) (McKinney) *with* NDAA Standard 4-1.3 (a)-(q) *and* ABA Standards § 3-4.4(a)(i)-(xvi). Specifically, the court must weigh: the seriousness of the offense, the harm it caused, the evidence of guilt, the history and character of the defendant, any misconduct by police, the purpose and effect of punishment, the impact of dismissal on the welfare of the community, the impact of dismissal on public confidence in justice, and any victim's views. N.Y. Crim. Proc. Law § 170.40(1)(a)–(i). Finally, there is a catch-all provision to include "any other relevant fact indicating that a… conviction would serve no useful purpose." N.Y. Crim. Proc. Law § 170.40(1)–(j).

Notably, the statute requires a court to set forth on the record its reasons for granting such a motion. N.Y. Crim. Proc. Law § 170.40(2). This requirement is intended to allow for meaningful appellate review if it is required. *People v. Rickert*, 58 N.Y.2d 122, 128 (1983). But, as a practical matter, the court's reasoning is often not required. New York courts have suggested that it would be a "rare" case indeed where a court should not grant a motion to dismiss brought by both parties. *Soares v. Carter*, 979 N.Y.S.2d 201, 205 (N.Y. App. Div. 2014), *aff'd*, 32 N.E.3d 390 (N.Y. 2015). And where both parties consented to the motion, like in this case, neither would have standing to appeal, making the necessity for the court to

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this case, our focus is on dismissals initiated or consented to by the prosecution.

place its reasoning on the record less compelling. While a defendant could insist upon strict adherence to the statute, his acquiesce to a relaxed procedure is his choice. *People v. Lawrence*, 474 N.E.2d 593, 597 (N.Y. 1984) (noting that generally "the parties to a litigation may adopt their own rules by the simple expedient of failing to object").

Finally, even if a court refuses to grant a motion to dismiss that the prosecutor supports, he can always end the case in another way: by taking a knee. Because a district attorney in New York has "broad discretion in determining when and in what manner to prosecute a suspected offender," *People v. Di Falco*, 377 N.E.2d 732, 735 (N.Y. 1978), it follows that he can choose not to contest a suppression hearing, resulting in a dismissal. *Soares*, 979 N.Y.S.2d at 206). Such a course would not be a mere power play: when a prosecutor has determined dismissal is required to do justice (for whatever reason), it becomes an ethical imperative for him not to go forward as an "independent administrator of justice" NDAA Standard 1-1.1; *see* Point I-B, *supra*. For obvious reasons, this method of dismissal is rare.

As explained above, *see* Point I, *supra*, dismissals under each of these methods are seldom due to a problem with the case. Instead, prosecutors seek dismissal pursuant to their duty to do justice for a myriad of reasons that have nothing to do with the strength of the evidence.

Sometimes the reasons for dismissal will appear on the record, other times they will not. Defendants themselves have a role to play in this. ACDs require no opportunity to make a record of why they are offered, but even when a prosecutor offers one a

defendant is never obliged to accept it. N.Y. Crim. Proc. Law § 170.55(2) (McKinney). Instead, the defendant can make a motion to dismiss in the interests of justice—a motion which requires making a record of the reasons for dismissal. N.Y. Crim. Proc. Law § 170.40(2). The decision to grant such a motion necessarily "hinges on the production of facts in the possession of the prosecution and the defendant." *People v. Banks*, 954 N.Y.S.2d 255, 257 (N.Y. App. Div. 2012) (internal quotations and alterations omitted). The defendant could make such a motion alleging a lack of evidence or police misconduct. N.Y. Crim. Proc. Law § 170.55(1)(c) & (e) (McKinney). If the prosecutor joins the motion, the defendant will have made his record. If the prosecutor opposes, the court will resolve the motion and make a record for him. Even if the prosecution makes the motion to dismiss, the defendant can always force a record to be made simply by insisting on strict adherence to the procedure laid out in statute. Finally, if the prosecution takes the third route and forces a dismissal at a suppression hearing or an acquittal at trial, this would count as a "favorable termination" of the case under the majority rule. In all circumstances, the defendant's rights would be preserved.

In our view, this common sense rule respects the reality that most of a prosecutor's discretionary decisions to drop a case have nothing to do with the evidence of a defendant's guilt. It also places the burden of making and preserving the record firmly where it belongs: on the soon-to-be plaintiff. This rule thus "best reflects the need to balance an individual's right to be free from unreasonable criminal prosecutions with the public policy which favors the

exposure of crime." *Swick v. Liautaud*, 662 N.E.2d 1238, 1243 (Ill. 1996).

B. Negative Impact on the Cause of Justice

The Eleventh Circuit's rule would turn reality on its head. Any dismissal for any reason would automatically count as a "favorable termination," thereby converting all dismissals into potential § 1983 claims. *See Laskar*, 972 F.3d at 1295. This could cause significant negative downstream consequences.

First, it would open the courthouse gates to a veritable flood of new claims. Data from the New York State Division of Criminal Justice Services illustrates the potential scale of this deluge. In 2019, 237,437 adult arrests where the top charge was a misdemeanor were disposed of in New York courts. N.Y. Div. Crim. Justice Services, (Adult Arrests (18 and Older) Disposed) (2021), https://perma.cc/M7VM-8F8V. Approximately 55% of those arrests resulted in a conviction, whether by trial or a plea bargain. *Id.* Only 362—0.2%—of those cases resulted in an acquittal. *Id.* Dismissals dominated the bulk of the remaining cases: just over 20% of cases ended in an ACD (over 47,000 cases) and another 18.4% (over 43,000) were dismissed for other reasons, including procedural defects, merit, and the interests of justice. *Id.*

Felony data tells the same story. In 2019, a total of 124,104 adult arrests where the top charge was a felony were disposed of in New York courts. *Id.* Just under 67% of those ended in a conviction. *Id.* A mere 378, or 0.3%, were acquitted. *Id.* ACDs accounted for 6.8% of disposals (nearly 8,500 cases) and other dismissals constituted over 20% of cases (near-

ly 25,000). *Id.* These numbers are, again, from only one state.

Traditionally, "[a]ctions for malicious prosecution [have been] regarded by law with jealousy" and courts have recognized that "they ought not to be favored but managed with great caution." *Roblyer v. Hoyt*, 72 N.W.2d 126, 128 (Mich. 1955) (*quoting Van Sant v. Am. Express Co.*, 158 F.2d 924, 931 (3d Cir. 1946)). By dispensing with the indications of innocence rule, the Eleventh Circuit's approach would abandon that intuition and significantly ease the path for would-be plaintiffs. Without the "useful filtering mechanism" afforded by the indications of innocence rule, *Cordova v. City of Albuquerque*, 816 F.3d 645, 654 (10th Cir. 2016), all a defendant would realistically have to do to make out a *prima facie* claim would be to plead a lack of probable cause, *see Laskar*, 972 F.3d at 1306 (Moore, J., dissenting). This could allow a guilty defendant to repurpose a prosecutor's mercy in dismissing his case into "a bonus for a failure of justice," *See Gedratis v. Carroll*, 225 N.W. 625, 629 (Mich. 1929).

Most of those newly-minted claims would be, in reality, meritless, as the prosecutor considering a discretionary dismissal would doubtless know. But he would also know that any dismissal—whether for scarcity of resources, sympathy for the defendant, or policy reasons—could easily turn into a federal case. This would place prosecutors in an unfortunate and awkward position. Should they dismiss the case anyway, consequences be damned? Or should they seek to avoid a flood of frivolous, vexatious litigation that could tie police up in court and stymie law

enforcement response to crime? What would Justice require of them?

We do not know the answer to that question. But, like our colleagues, a group of current and former prosecutors as *Amici* in support of the petitioner, we are concerned with the "perverse incentives" the wrong rule might create. Brief for Former Prosecutors at 7. But, contrary to their assertion, it is the Eleventh Circuit's novel rule that would create perverse incentives by "attaching a consequence to prosecutorial decisions" to dismiss a case, not the Second Circuit's adherence to the majority rule. *Id.* Under the current rules, prosecutors can make decisions about dismissal without any particular regard to potential malicious prosecution claims. In our view, it is best to keep it that way.

But the Eleventh Circuit's rule would make prosecutors bit-players in every future malicious prosecution claim. This ethically fraught eventuality—regular involvement in either starting or preventing meritless civil claims—is precisely what both we and our colleagues seek to avoid. This Court can escape that new reality by adopting the majority rule and requiring some "indication of innocence" in order to bring a malicious prosecution claim under § 1983.

* * *

Each day, prosecutors are called upon to decide whether to continue or dismiss charges against defendants. When they do dismiss, most of the time it has precious little to do with the strength of the evidence. "The life of the law," Justice Oliver Wendell Holmes wrote, "has not been logic: it has been experience." O. Holmes, *The Common Law* 1 (1881).

Our experience tells us that any rule of law that touches upon the many thousands of criminal cases that move through our criminal court system each year should respect the on-the-ground realities of criminal practice in this country. In our view, the majority rule does, and the Eleventh Circuit's does not.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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