No. 20-659

In the

Supreme Court of the United States

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LARRY THOMPSON,

*Petitioner,*

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472,

*Respondent.*

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

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# BRIEF OF CHICAGO, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

CELIA MEZA
Corporation Counsel
of the City of Chicago
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
JULIAN N. HENRIQUES, JR.*
Senior Counsel
2 N. LaSalle St., Suite 580
Chicago, IL 60602
(312) 744-6793
julian.henriques@cityofchicago.org
Attorneys for Amicus Curiae City of Chicago
*Counsel of Record

## QUESTION PRESENTED

Whether favorable termination of the plaintiff's prior criminal proceeding plays any role in a section 1983 claim alleging unreasonable seizure pursuant to legal process.

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## INTEREST OF *AMICI CURIAE*[1]

The City of Chicago is the third largest city in the country. It is responsible for defending litigation brought against Chicago police officers, and indemnifying officers for judgments against them arising from actions taken within the scope of their

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief, in whole or in part, and no person other than *amici* contributed monetarily to its preparation or submission. Respondent has provided a blanket letter of consent, and petitioner has consented to the filing of this brief.

employment.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonprofit organization of all United States cities with a population of more than 30,000 people, which includes more than 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local

government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Chicago and its police officers, and the other amici's members and their police officers, are regularly defendants in cases presenting the same or similar issues as this case. Amici have a vital interest in the Court's decision in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner's sole claim before this Court is an alleged violation of his Fourth Amendment right not to be unreasonably seized pursuant to legal process.[2] Nothing about that claim – not its elements, and not its accrual – turns on favorable termination of his criminal case.

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[2] In the district court, petitioner referred to, and framed, this claim as a section 1983 claim for "malicious prosecution," alleging the elements of the common-law tort of malicious prosecution. JA33-35 (operative complaint); *see also* JA74-76 (jury instruction petitioner requested before court entered judgment against him on the claim mid-trial). Consistent with petitioner's framing, the court of appeals considered the claim a "42 U.S.C. § 1983 claim for malicious prosecution." JA20. But in this Court, petitioner has dropped the designation "malicious prosecution" and reframed the claim as one "alleging that respondent violated the Fourth Amendment by unreasonably seizing him pursuant to legal process." Pet. Br. 9; *see also* U.S. Amicus Br. 11 (acknowledging petitioner's reframing).

The common-law tort most analogous to petitioner's Fourth Amendment claim is false imprisonment. It shares a purpose, history, and governing legal principles with the Fourth Amendment. By contrast, the tort of malicious prosecution, which the courts below considered and petitioner advocates, resembles a *due process* claim; and its required showing of malice is foreign to the Fourth Amendment's objective standard.

The court of appeals affirmed the judgment for respondent on the basis that petitioner failed to show favorable termination. Judgment on that basis is flawed. Because petitioner's claim is not rightly considered a malicious prosecution claim at all, inquiry into the proper standard to judge favorable termination – the question petitioner presents – is unnecessary.

The judgment nonetheless can be affirmed on two alternative grounds. First, following arraignment, petitioner was released from custody on his own recognizance, subject only to run-of-the-mill conditions applicable to that status. Those conditions do not constitute a seizure under the Fourth Amendment, so petitioner was not seized at all following legal process. Second, the jury's verdict against petitioner on his so-called "fair trial" claim necessarily means either that respondent did not fabricate evidence or that any such evidence did not undermine the criminal court's probable-cause finding at petitioner's arraignment. Either way, judgment for respondent on his Fourth Amendment

claim for wrongful post-legal-process pretrial detention is required.

## ARGUMENT

In *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) ("*Manuel I*"), the Court instructed that the "threshold inquiry in a § 1983 suit . . . requires courts to identify the specific constitutional right at issue." *Id.* at 920 (quotation marks omitted). There, the Court recognized a right under the Fourth Amendment not to be unreasonably seized *pursuant to legal process*. *Id.* at 918-19 ("Manuel stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention."); *see also id.* at 918 ("The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause," not only "when the police hold someone without any reason before the formal onset of a criminal proceeding," but "also . . . when legal process itself goes wrong – when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements."). Petitioner asserts that Fourth Amendment claim. Pet. Br. 9 (Petitioner "filed this action under 42 U.S.C. § 1983 alleging that respondent violated the Fourth Amendment by unreasonably seizing him pursuant to legal process.").

Petitioner also asserts repeatedly that "Section 1983[ ] [has a] prerequisite of favorable termination" of an accused person's criminal proceedings. Pet. Br.

16, 33; *see also id.* at 1, 12. That is not so. In particular, favorable termination is not a prerequisite of Fourth Amendment claims for either unlawful search, *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994) ("[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction."), or wrongful pre-legal-process arrest, *Wallace v. Kato*, 549 U.S. 384, 389-91 (2007) (such a claim accrues when the arrestee becomes held pursuant to legal process).

In Part I, we explain that favorable termination likewise should not be a prerequisite of Fourth Amendment claims for wrongful post-legal-process pretrial detention. This means the question petitioner presents concerning competing versions of favorable termination does not require decision. And while it also means the ground on which judgment was entered for respondent on that claim – petitioner's failure to show favorable termination, JA185; *see also* JA20-22 – was not a proper basis for that ruling, we explain in Part II that there are alternative grounds on which to affirm that judgment.

## I. FAVORABLE TERMINATION PLAYS NO ROLE IN FOURTH AMENDMENT CLAIMS FOR WRONGFUL POST-LEGAL-PROCESS PRETRIAL DETENTION.

The Court has instructed that after identifying the

constitutional right at issue, courts must "determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel I*, 137 S. Ct. at 920. In making that determination, courts "are to look . . . to the common law of torts," *id.*, which entails identifying "the common law principles governing analogous torts," *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019) (citing *Wallace*, 549 U.S. at 388; *Heck*, 512 U.S. at 483). "Sometimes, that review of the common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort," *Manuel I*, 137 S. Ct. at 920-21, although "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, serving more as a source of inspired examples than of prefabricated components," *id.* at 921 (quotation marks omitted). Thus, "[i]n applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Id.*

*Manuel I* enumerated those principles in framing the issue of when, for limitations purposes, a Fourth Amendment claim for wrongful post-legal-process pretrial detention accrues. 137 S. Ct. at 920-22. The Court observed that Manuel analogized that claim to the tort of malicious prosecution, an element of which is termination of the criminal proceeding in favor of the accused, while the defendants analogized the claim to the tort of false arrest, which does not have a favorable termination element. *Id.* at 921. But the Court did not decide what common-law tort is most analogous to the claim or when it accrues,

expressly leaving that for the Seventh Circuit to decide on remand. *Id.* at 922.[3]

On remand, the Seventh Circuit opined that *Manuel I* "deprecated the analogy to malicious prosecution":

> After *Manuel [I]*, "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim – the absence of probable cause that would justify the detention. 137 S. Ct. at 917-20. The problem is the wrongful custody. "[T]here is no such thing as a constitutional right not to be prosecuted without probable cause." *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013). But there *is* a constitutional right not to be held in custody without probable cause.

*Manuel v. City of Joliet*, 903 F.3d 667, 669 (7th Cir. 2018) ("*Manuel II*") (Easterbrook, J.). Those were among the reasons the Seventh Circuit concluded that Manuel's Fourth Amendment claim for wrongful post-

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[3] Petitioner asserts that *Manuel I* "recogniz[ed] that Section 1983's prerequisite of favorable termination was 'adopt[ed] wholesale' from the common law." Pet. Br. 16 (quoting *Manuel I*, 137 S. Ct. at 920). Not so; *Manuel I* recognized only that favorable termination is an element of the common-law tort of malicious prosecution to which Manuel had *asserted* his claim was analogous. 137 S. Ct. at 921.

legal-process pretrial detention accrued when his detention ended, not when his criminal charges were dismissed. *Id.* at 669, 670; *accord Savory v. Cannon*, 947 F.3d 409, 413 n.2 (7th Cir. 2020) (en banc).

Petitioner nonetheless asserts that malicious prosecution is the "common-law tort" "most analogous" to such a Fourth Amendment claim. Pet. Br. 9. He cites no authority for that assertion; and two Justices have expressed doubt on that score. *Manuel I*, 137 S. Ct. at 923 (Alito, J., joined by Thomas, J., dissenting) ("[T]he Fourth Amendment cannot house" a malicious prosecution claim.); *see also Cordova v. City of Albuquerque*, 816 F.3d 645, 663 (10th Cir. 2016) (Gorsuch, J., concurring) ("hard to see how you might squeeze anything that looks quite like the common law tort of malicious prosecution into the Fourth Amendment"). And as we now explain, the common-law tort most analogous to a Fourth Amendment claim for wrongful post-legal-process pretrial detention is not malicious prosecution, but false imprisonment.[4]

[4] Although the Court compared descriptions of those two common-law torts in *Heck*, 512 U.S. at 484, and *Wallace*, 549 U.S. at 389-90, the comparisons are dicta with respect to what tort is most analogous to a Fourth Amendment claim for wrongful post-legal-process pretrial detention, since such a claim differs from the section 1983 claims at issue in those cases – Heck challenged the constitutionality of his *conviction*, 512 U.S. at 478, and Wallace challenged his *pre*-legal-process arrest, 549 U.S. at 387 & n.1.

### A. The Common-Law Tort Most Analogous To Fourth Amendment Claims For Wrongful Post-Legal-Process Pretrial Detention Is False Imprisonment, Not Malicious Prosecution.

1. The Fourth Amendment guarantees freedom from unlawful physical restraint. *E.g.*, *Manuel I*, 137 S. Ct. 920 (Fourth Amendment protects against "unlawful pretrial detention"); *Brendlin v. California*, 551 U.S. 249, 254 (2007) (individual is seized under the Fourth Amendment when officer's action "terminates or restrains his freedom of movement"). Thus, if there is an analogous common-law tort, it likewise concerns wrongful detention; and remedying such detention was at the heart of the common-law tort of false imprisonment. *E.g.*, *Director General of Railroads v. Kastenbaum*, 263 U.S. 25, 27 (1923) ("gist" of false imprisonment "is an unlawful detention"); *Broughton v. State*, 335 N.E.2d 310, 314 (N.Y. 1975) (false imprisonment "protects the personal interest of freedom from restraint of movement"). At common law, false imprisonment "fell within the action of trespass, as a direct interference with the plaintiff's person." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS 54 (5th ed. 1984); *accord Kastenbaum*, 263 U.S. at 27 ("false imprisonment is in the nature of a trespass"). Similarly, "early Fourth Amendment jurisprudence was tied to common-law trespass." *United States v. Jones*, 565 U.S. 400, 405 (2012); *see also, e.g.*, Cristina Carmody Tilly, *Tort Law*

*Inside Out*, 126 YALE L.J. 1320, 1406 n.223 (2017). English precedent applying the law of trespass to the actions of government officials would have been known to, and therefore "in the minds of[,] those who framed the Fourth Amendment." *Boyd v. United States*, 116 U.S. 616, 626-27 (1886) (citing *Entick v. Carrington*, 19 St. Tr. 1030 (1765)).

The Fourth Amendment and the tort of false imprisonment also have in common that an arrest pursuant to a warrant – a species of legal process – violates the Fourth Amendment in the same circumstances as an arrest constituted false imprisonment at common law. For example, while it is well settled that an officer who executes a seizure pursuant to a warrant does not violate the Fourth Amendment – even if the warrant is later determined to be unsupported by probable cause – so long as the officer acted in good-faith reliance on the warrant, *e.g.*, *United States v. Leon*, 468 U.S. 897, 922 (1984), an officer who supplies false information to obtain the warrant has no such defense, *id.* at 923; *see Franks v. Delaware*, 438 U.S. 154, 164 (1978) (fabricating information in support of warrant is irreconcilable with "good faith").

Executing a warrant obtained based on misrepresentations likewise constituted false imprisonment at common law. By contrast, an arrest without probable cause did not constitute false imprisonment so long as it was effected "under a valid process issued by a court having jurisdiction." RESTATEMENT (SECOND) OF TORTS, § 35, cmt. A

(1965); *accord* Keeton, *supra*, at 54 (false imprisonment characterized by absence of "valid legal authority for the restraint imposed"); *see Kilbourn v. Petitioner*, 103 U.S. 168, 200 (1880) (warrant issued by House of Representatives did not shield executing officer from false imprisonment charge because House was "without authority" to issue it). Thus, whether such an arrest constituted false imprisonment turned on whether the warrant was "facially valid," *Montgomery Ward v. Wilson*, 664 A.2d 916, 927 (Md. 1995) – in other words, whether the executing officer in possession of that warrant could reasonably have believed it was valid, *e.g.*, *Campbell v. Hyde*, 122 S.W. 99, 101 (Ark. 1909) (warrant protects executing officer from false-imprisonment charge if it "contains nothing to notify or fairly apprise the officer that it issued without authority").

Under this rule, "where the facts set out in an affidavit and warrant affirmatively show as a matter of law no violation of any of the criminal laws . . . the warrant is absolutely void, and an arrest upon it would constitute false imprisonment." *Michael v. Bacon*, 63 S.E. 228, 229 (Ga. App. 1908); *accord*, *e.g.*, *Wehmeyer v. Mulvihill*, 130 S.W. 681, 684 (Mo. App. 1910) (officer not protected from claim of false imprisonment "if the warrant on its face appears to be invalid, and the officer may see that no authority is conferred by the warrant"); *Rhodes v. Collins*, 150 S.E. 492, 495 (N.C. 1929) (action for false imprisonment proper despite warrant because "the warrant was void; it charged no criminal offense known to the law"). Similarly, an arrest pursuant to a warrant

constitutes false imprisonment "when an officer 'maliciously arrests and imprisons another by personally serving an arrest warrant issued solely on information deliberately falsified by the arresting officer himself.'" *Blaxland v. Commonwealth Director of Public Prosecutions*, 323 F.3d 1198, 1205 n.4 (9th Cir. 2003) (quoting *McKay v. County of San Diego*, 168 Cal. Rptr. 442, 443 (Cal. App. 1980)); *accord*, *e.g.*, *Ross v. Village of Wappingers Falls*, 406 N.Y.S.2d 506, 509 (App. Div. 1978); *State v. Greenwood*, 8 S.C.L. 420, 210 (S.C. Const. App. 1817) (upholding false imprisonment conviction against officer who arrested defendants based on warrant obtained by means of "basest falsehood, fabricated by the defendant, for the nefarious purpose of enslaving [two freemen] for life"); *see* Keeton, *supra*, at 54 (warrant precludes false imprisonment claim "where the defendant has attempted to comply with legal requirements" when obtaining that warrant, but "failed to do so through no fault of [his] own").

The striking similarities in purpose, history, and governing legal principles between a Fourth Amendment claim for wrongful post-legal-process pretrial detention and the tort of false imprisonment demonstrate that the most analogous common-law tort is false imprisonment. Petitioner's claim – expressly denying the facial validity of the process used to authorize his detention – sounds in false imprisonment.

2. Petitioner's preferred tort of malicious prosecution shares none of these similarities with the

Fourth Amendment. In fact, it goes off track at the first step – identification of "'the specific constitutional right' alleged to have been infringed." *McDonough*, 139 S. Ct. at 2155 (quoting *Manuel I*, 137 S. Ct. at 920). Malicious prosecution is a natural fit for *due process*, which is concerned with ensuring the fundamental fairness of criminal proceedings, *e.g.*, *Lisenba v. California*, 314 U.S. 219, 236 (1941) – fairness that is drastically undermined by the introduction of fabricated evidence, which "will *never* help a jury perform its essential truth-seeking function," *Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017). By contrast, the Fourth Amendment is designed to "guarante[e] citizens the right to be secure in their persons against unreasonable seizures." *Graham v. Conner*, 490 U.S. 386, 394 (1989) (ellipses and quotation marks omitted). That reasonableness standard uniformly authorizes, as a constitutional matter, all seizures supported by objective probable cause, rather than making their legitimacy "vary from place to place and from time to time," as would be the case if they could be challenged on the basis that the officer effecting a seizure engaged in misconduct that did not vitiate probable cause. *E.g.*, *Whren v. United States*, 517 U.S. 815 (1996) (declining invitation to invalidate seizure supported by probable cause based on arresting officer's violation of departmental rules). Thus, the Fourth Amendment and the Due Process Clause advance different purposes, and petitioner's analogy to the tort of malicious prosecution fails for that reason alone. *Cf. Manuel I*, 137 S. Ct. at 923 (Alito, J., joined by Thomas, J., dissenting) ("If a

malicious prosecution claim may be brought under the Constitution, it must find some other home [than the Fourth Amendment], presumably the Due Process Clause.").

Moreover, while the Fourth Amendment was adopted to protect the interest in one's person and property, the tort of malicious prosecution was adopted to protect the entirely different interest against defamation of personal reputation. In early English law, judges viewed a wrongful prosecution as "an aggravated form of defamation." 2 Frederick Pollock & Frederic Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 539 (2d ed. 1968). As Blackstone explained, one

> way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him; which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this however the law has given a very adequate remedy in damages . . . by a special action on the case for a false and malicious prosecution.

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 127 (1769).[5] In addition, while "recompense for the danger" of imprisonment was

[5] For ease of reading, we replace each archaic "long s" in Blackstone's original text with the modern "short s."

available, a plaintiff suing for malicious prosecution could recover even where there was no such danger – such as when charges were rejected by a grand jury or were procedurally deficient – because "it is not the danger of the plaintiff, but the scandal, vexation, and expense upon which this action is founded." *Id.* at 127-28. Recognizing this historical purpose, the Pennsylvania Supreme Court long ago observed, "An action for libel is upon all fours with an action for malicious prosecution. The latter is but an aggravated form of an action for libel, as in it the libel is sworn before a magistrate. The cases make no distinction between them." *Briggs v. Garrett*, 2 A. 513, 521 (Pa. 1886); *accord*, *e.g.*, *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992), *aff'd*, 510 U.S. 266 (1994) ("Malicious prosecution, whether civil or criminal, resembles defamation. It is a deliberate accusation of wrongdoing calculated to embarrass the defendant, disrupt his activities, and put him to the expense of defending himself."); *Walker v. Martin*, 43 Ill. 508, 515-16, 1867 WL 5082 at *5 (1867) ("action of malicious prosecution, is of kin to the action of slander, and as in that, the damage consists in part in injury to character by a criminal charge").

Finally, malicious prosecution was governed by legal principles that differ significantly from those governing a Fourth Amendment claim and serve very different purposes. Most notably, a claim for malicious prosecution could be brought even if the plaintiff was never seized, and could be used to redress the wrongful initiation of criminal charges for "petty traffic offenses such as overtime parking" that

are punishable by only "a minor fine," RESTATEMENT, *supra*, § 654, cmt. a, or the wrongful initiation of civil charges, which pose no threat of a seizure, *see id.* § 674. But a Fourth Amendment claim for wrongful seizure would necessarily fail absent proof that the plaintiff was, in fact, seized.

In addition, the common-law tort of malicious prosecution required proof of malice. *E.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019). As defined at common law, malice meant bringing the case "primarily for a purpose other than that of bringing an offender to justice." RESTATEMENT, *supra*, § 653(a). Leading commentaries in the era of section 1983's enactment, while acknowledging that malice could be inferred from an absence of probable cause, nevertheless stressed that malice was an independent element requiring a separate finding of improper motive. *E.g.*, Melville M. Bigelow, LEADING CASES ON THE LAW OF TORTS 203-04 (1876); Joel Prentiss Bishop, COMMENTARIES ON THE NON-CONTRACT LAW, §§ 231-35 (1889); 1 Francis Hilliard, THE LAW OF TORTS 446-48 (3d Ed. Rev. 1866); Martin L. Newell, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND ABUSE OF LEGAL PROCESS 236-49 (1892). By contrast, subjective mental state is irrelevant to Fourth Amendment claims, *Graham*, 490 U.S. at 397, which are judged by an objective test, *e.g.*, *Kentucky v. King*, 563 U.S. 452, 463-64 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006); *see also*, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (qualified immunity defense to section 1983 claims rejects any

"inquiry into subjective malice so frequently required at common law," replacing it "with an objective inquiry into the legal reasonableness of the official action").[6]

Further, while malicious prosecution required proof that the plaintiff's criminal proceedings terminated in his favor, *e.g.*, *Manuel I*, 137 S. Ct. at 921, even a plaintiff who served the entire sentence for a conviction that was never overturned may bring a Fourth Amendment challenge to his pretrial detention, since "[t]he wrong condemned by the Fourth Amendment is fully accomplished by the unlawful . . . seizure itself," *Leon*, 468 U.S. at 906 (internal quotation and citation omitted); *see also Manuel I*, 137 S. Ct. at 925-25 (Alito, J., joined by Thomas, J., dissenting) ("[Malicious prosecution's favorable-termination element makes no sense when the claim is that a seizure violated the Fourth Amendment. The Fourth Amendment, after all, prohibits *all* unreasonable seizures – regardless of whether the prosecution is ever brought or how a prosecution ends."). Thus, for example, in *Haring v. Prosise*, 462 U.S. 306 (1983), the Court rejected a rule that would require a section 1983 plaintiff to "prevail in state court 'in order to [preserve] the mere possibility' of later bringing a § 1983 claim in federal

[6] The closest Fourth Amendment law comes to the concept of malice is the rule that a warrant can be invalidated when procured by material false statements made recklessly and intentionally. See *Franks*, 438 U.S. at 164-71. This case involves no effort to invalidate a warrant; and even the *Franks* standard stops well short of the malice requirement.

court." *Id.* at 322 (quoting *Brown v. Felson*, 442 U.S. 127, 135 (1979) (brackets in original)).

Also, an arresting officer is not analogous to a private complainant amenable at common law to liability for malicious prosecution. Indeed, the Restatement of Torts does not even contemplate malicious-prosecution actions against public officials, instead stating only that liability can be imposed on "[a] private person who initiates or procures the institution of criminal proceedings against another." RESTATEMENT, *supra*, § 653. Similarly, at the time of section 1983's enactment, "'the generally accepted rule' was that a private complainant who procured an arrest or prosecution could be held liable in an action for malicious prosecution." *Rehberg v. Paulk*, 566 US. 356, 364 (2012) (quoting *Malley v. Briggs*, 475 U.S. 335, 340 (1986)).

It is no accident that the Restatement of Torts refers only to the liability of "private persons" for malicious prosecution. When the tort of malicious prosecution developed, nothing resembling modern police departments with investigative responsibilities existed. Not until the mid-nineteenth century did large cities begin establishing police forces. *E.g.*, David R. Johnson, POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800-1887, 12-40 (1979); Thomas A. Repetto, THE BLUE PARADE 2-23 (1978); James F. Richardson, URBAN POLICE IN THE UNITED STATES 6-15, 19-32 (1974). Even so, by the time of the Civil Rights Act, policing

was still in its infancy: "If we can believe the census figures, there were, all told, in 1880, 1,752 officers and 11,948 patrolmen in cities and towns with inhabitants of 5,000 or more." Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 149 (1993).

Moreover, during the nineteenth century, prosecution by private parties was also predominant because "when § 1983 was enacted . . . there was generally no such thing as the modern public prosecutor." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring). Instead, "it was common for criminal cases to be prosecuted by private parties." *Rehberg*, 566 U.S. at 364. Accordingly, virtually all the cases describing malicious prosecution prior to 1871 considered the liability of private individuals for initiating a prosecution. *See*, *e.g.*, Herbert Stephen, THE LAW RELATING TO ACTIONS FOR MALICIOUS PROSECUTION 16-25 (Horace M. Rumsey ed. 1889); John Townsend, A TREATISE ON THE WRONG CALLED SLANDER AND LIBEL § 432 (3d ed. 1977).

The common-law liability of private parties responsible for initiating a wrongful prosecution made sense in a system of private prosecution: without tort liability, private parties would not be accountable for prosecutions they brought to advance their personal interests. In the contemporary criminal justice system, however, "it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury." *Rehberg*, 566 U.S. at 371. Police officers, in contrast, exercise investigative, not

prosecutorial, responsibilities. *Cf. Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring) ("Albright's reliance on a 'malicious prosecution' theory, rather than a Fourth Amendment theory, is anomalous. The principal player in carrying out a prosecution . . . is not a police officer but prosecutor."). This sharply distinguishes police officers from complainants in a system of private prosecution.

Moreover, unlike workers in the private sector, who, along with their employers, are subject to "marketplace pressures," government employees "work within a system that is responsible through elected officials to voters." *Richardson v. McKnight*, 521 U.S. 399, 410 (1997). *See also* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI. KENT L. REV. 127, 155 (2010) (police and prosecutors "face political accountability once an exoneration occurs"). Indeed, for public officials, the political consequences of wrongful prosecutions may be more significant than the financial consequences, since those usually fall on the taxpayers. Thus, arresting officers are not analogous to complaining witnesses potentially liable at common law for a malicious prosecution. *Cf. Rehberg*, 566 U.S. at 371 ("[A] law enforcement officer who testifies before a grand jury is not at all comparable to a 'complaining witness.'").

As we have observed, petitioner cites no authority for his assertion that malicious prosecution is the common-law tort most analogous to his Fourth Amendment claim for wrongful post-legal-process

pretrial detention. The government agrees with that assertion, U.S. Amicus Br. 13-14; but neither the government nor petitioner explains why the most analogous common-law tort is not instead false imprisonment. Petitioner and the government rightly do not cite *McDonough* for their assertion that it is malicious prosecution; *McDonough* held only that "malicious prosecution is the most analogous common-law tort *here*," 139 S. Ct. at 2156 (emphasis added), meaning most analogous to a claim like the *due process* claim the Court assumed McDonough brought, *id.* at 2155. And *Manuel I* could not have been clearer that a claim, like petitioner's, "alleging that respondent . . . unreasonably seiz[ed] him pursuant to legal process," Pet. Br. 9, is a Fourth Amendment claim and not a due process claim, 137 S. Ct. at 918-19.

For its part, *McDonough* could not have been clearer that it was not addressing Fourth Amendment claims of any kind, but only the accrual date for due process claims involving fabricated evidence. At its outset, *McDonough* reiterated that the "accrual analysis begins with identifying the specific constitutional right alleged to have been infringed." 139 S. Ct. at 2155 (quotation marks omitted); *accord id.* at 2161 (Thomas, J., dissenting) (same). This is necessary because, as *Manuel I* previously explained, a court "must closely attend to the values and purposes of the constitutional right at issue" when "applying, selecting among, or adjusting common-law approaches" analogous to that constitutional right. 137 S. Ct. at 921. And in *McDonough*, the specific

constitutional right at issue was due process, which the Court "assume[ed] without deciding" was violated by the alleged fabrication of incriminating evidence, 139 S. Ct. at 2155, on which the criminal court relied in imposing the bond conditions that allowed McDonough to remain free from detention, subject to less restrictive deprivations of his liberty, *id.* at 2155, 2156 & n.4. Indeed, the Court cautioned that it expressed "no view as to what other constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence." *Id.* at 2155 n.2.

Because *McDonough* did not address Fourth Amendment claims, petitioner erroneously cites it for his assertion that "[a] person who is unreasonably seized pursuant to legal process in violation of the Fourth Amendment must wait until the underlying criminal proceedings have resolved in his favor before bringing a civil action under Section 1983." Pet. Br. 1 (quotation marks and brackets omitted). Petitioner likewise cites *Manuel I* erroneously for his assertion that it "recogniz[ed] a claim under the Fourth Amendment" that "challenge[s] the integrity of *criminal prosecutions* undertaken pursuant to legal process." Pet. Br. 16 (emphasis added) (quotation marks omitted). Neither *Manuel I* nor any other decision of this Court of which we are aware has recognized such a claim under the Fourth Amendment; the Fourth Amendment claim recognized in *Manuel I* challenged instead the integrity of *pretrial detentions* effectuated pursuant to legal process. 137 S. Ct. at 918-19.

Once *McDonough* assumed that the claim at issue was a due process claim, the analogy to malicious prosecution was inevitable. As we note above, malicious prosecution is a natural fit for due process, which was adopted for the specific purpose of providing a "guarantee of fair procedure," *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), and has long been understood to reach defamation by government officials accompanied by a deprivation of liberty, *e.g.*, *Nolen v. Jackson*, 102 F.3d 1187, 1191 (11th Cir. 1997), such as the entirely non-custodial liberty deprivations to which the Court assumed McDonough had been subjected, 139 S. Ct. at 2156 n.4, 2160 & n.9.[7]

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[7] *McDonough* also presented additional, very different facts that made malicious prosecution more analogous. McDonough sued the prosecutor who instigated his prosecution by obtaining process based on allegedly fabricated evidence. 139 S. Ct. at 2154. This was a significant distinction at common law. "One who instigates or participates in a lawful arrest, as for example an arrest made under a properly issued warrant by an officer charged with the duty of enforcing it, may become liable for malicious prosecution . . . or for abuse of process . . . but he is not liable for false imprisonment, since no false imprisonment has occurred." RESTATEMENT, *supra*, § 45A, cmt. b. That the Court thought malicious prosecution the most analogous common-law tort in *McDonough*, where the assumed due process claim closely resembled a malicious prosecution claim, and the facts did not support false imprisonment at common law, does not bear on the determination of the most analogous tort to facts that would support false imprisonment.

termination he prefers, petitioner also refers repeatedly to *McDonough*'s reliance on the Court's expression in *Heck* of "pragmatic concerns with avoiding parallel criminal and civil litigation" and with avoiding "collateral attacks on criminal judgments through civil litigation." Pet Br. 1 (quoting *McDonough*, 139 S. Ct. 2157); *id.* at 12 (same); *id.* at 19 (same); *see also id.* at 24. But *McDonough* makes clear that the Court's conclusion that malicious prosecution, with its favorable termination requirement, was the common-law tort most analogous to the due process claim the Court assumed McDonough brought was not based on those concerns. Rather, the opposite is true. Only *after* it concluded that malicious prosecution was the common-law tort most analogous to McDonough's assumed due process claim, 139 S. Ct. at 2156, did the Court state: "We follow the analogy where it leads," *id.*, and then explain that "malicious prosecution's favorable-termination requirement is rooted in [the specified] pragmatic concerns," *id.* at 2156-57, and that "[b]ecause a civil claim such as McDonough's, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule," *id.* at 2157. In other words, the pragmatic concerns did not prompt, but instead followed from, the Court's conclusion that malicious prosecution was the common-law tort most analogous to McDonough's assumed due process claim. Those pragmatic concerns have no bearing here, where, as we explain, the common-law tort most analogous to petitioner's Fourth Amendment claim for wrongful post-legal-process pretrial detention is not

malicious prosecution, but false imprisonment.

### B. Favorable Termination, Which Is Not An Element Of The Common-Law Tort Of False Imprisonment Or Of Fourth Amendment Claims For Wrongful Pre-Legal Process Arrest, Likewise Is Not An Element Of Fourth Amendment Claims For Wrongful Post-Legal-Process Pretrial Detention.

With the identification of false imprisonment as the common-law tort most analogous to Fourth Amendment claims for wrongful post-legal-process pretrial detention, the next step in the analysis is to determine whether the elements of, and rules associated with actions involving, that common-law tort can be adopted outright, or instead whether they must be modified to reflect the Fourth Amendment's values and purposes. *Manuel I*, 137 S. Ct. at 920-21; *see McDonough*, 139 S. Ct. at 2156. Consideration of those values and purposes requires no modification of the elements of the tort of false imprisonment. To the contrary, since the Fourth Amendment is derived from the common law of trespass, including the tort of false imprisonment, and is governed by substantively identical legal principles, the elements of that common-law tort can be adopted "wholesale." *Manuel I*, 137 S. Ct. at 920. Indeed, *Wallace* necessarily did just that upon holding that Fourth Amendment claims for wrongful pre-legal-process arrest are most-analogous to the common-law tort of

false imprisonment. 549 U.S. 388-97. Thus, just as favorable termination of the plaintiff's criminal proceedings is not an element of that common-law tort or of Fourth Amendment claims for wrongful pre-legal-process arrest, neither is it an element of Fourth Amendment claims for wrongful post-legal-process pretrial detention.[8]

### C. Fourth Amendment Claims For Wrongful Post-Legal-Process Pretrial Detention Accrue, As Do Both Common-Law Actions For False Imprisonment And Fourth Amendment Claims For Wrongful Pre-Legal Process Arrest, When The Applicable Detention Ends, Not Upon Favorable Termination Of The Criminal Proceedings.

Although, as we have explained, favorable termination is not an element of Fourth Amendment claims for wrongful post-legal-process pretrial

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[8] According to petitioner, "[t]he Second Circuit reasons" that "the Fourth Amendment contains [a] favorable-termination element . . . because the right 'to be free from unreasonable seizure' is not violated 'absent an affirmative indication that the person is innocent.'" Pet. Br. 32 (quoting *Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018)). Petitioner distorts *Lanning*. It connected the "absen[ce] [of] an affirmative indication of innocence" not to whether the Fourth Amendment right "to be free from unreasonable seizure" has been violated but instead to whether "'reasonable grounds for the *prosecution*'" exist, 908 F.3d at 28 (quoting *Conway v. Village of Mount Kisco*, 750 F.2d 205, 215 (2d Cir. 1984)) (emphasis added) – a concern extraneous to the Fourth Amendment.

detention, defining favorable termination would still matter if such claims did not accrue, for limitations purposes, until favorable termination of the criminal proceedings. But these claims accrue not when (or if) the prosecution ends favorably, but instead when the detainee's post-legal-process pretrial detention ends – that is, upon his release from custody before, or at the conclusion of, his criminal trial, or, if he is convicted at that trial, then upon his becoming incarcerated on his conviction.

In *Wallace*, the Court identified the common-law accrual rule for false imprisonment claims, holding that they accrue "when the alleged false imprisonment ends." 549 U.S. at 389; *see also*, *e.g.*, *Stafford v. Muster*, 582 S.W.2d 670, 680 (Mo. 1979) ("the authorities overwhelmingly hold that a cause of action for false imprisonment accrues on the discharge from imprisonment"). [9] For the same reasons that the Fourth Amendment's values and purposes require adoption of the elements of the tort of false imprisonment without modification, those values and purposes likewise require adoption of that

[9] A plaintiff's common-law false imprisonment claim accrues earlier than the end of his detention if he becomes held pursuant to legal process, *Wallace*, 549 U.S. at 389, unless the process was invalid on its face, RESTATEMENT, *supra*, § 35, cmt. a; *accord* Keeton, *supra*, at 54, either because no reasonable person could believe the process was supported by probable cause, *Michael*, 63 S.E. at 229; *Wehmeyer*, 130 S.W. at 684; *Rhodes*, 150 S.E. at 495, or because the person who executed the process obtained it by means of material fabrications or omissions, *Blaxland*, 323 F.3d at 1205 n.4; *Ross*, 406 N.Y.S.2d at 509.

tort's straightforward accrual rule, as the Court did in *Wallace* with respect to Fourth Amendment claims for wrongful pre-legal-process arrest. 549 U.S. at 388-90.

This rule of accrual for Fourth Amendment claims for wrongful post-legal-process pretrial detention is also preferable to favorable termination as a matter of sound policy. Limitations periods in civil and criminal matters are crucial to the fairness of a legal proceeding because they "promote justice" by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). The longer the time in which a plaintiff is allowed to bring a claim, the greater the risk that the defendant will suffer serious prejudice in preparing a defense. And that risk can be greatly exacerbated if a claim is deferred until the favorable termination of criminal proceedings. For example, in *Savory*, the criminal proceeding did not terminate favorably until decades after the alleged violation. 947 F.3d at 411. Although *Savory* may be extreme, waiting for the favorable termination of a criminal proceeding will always delay the filing of a civil claim, particularly if the favorable termination occurs, as it often does, as the result of a direct appeal or post-conviction proceeding. And that delay works almost entirely to the plaintiff's benefit and the officers' prejudice, since the plaintiff can be expected to remember the circumstances of his own arrest much better than the

officers will remember one of perhaps hundreds of arrests they have made.

Public employers are also prejudiced by unnecessary delays in the filing of suits against them or their employees. As the Court recognized in *Wallace*, governments "have a strong interest in timely notice of alleged misconduct by their agents," 549 U.S. at 397 (quotation marks omitted), so they can act to prevent future misconduct, whether through disciplinary measures or additional training. Keying the accrual of a Fourth Amendment unlawful-seizure claim to the moment the plaintiff's detention has come to an end strikes a much fairer balance than keying it to favorable termination of the criminal proceedings, by minimizing the prejudice to the defendant of delayed filing and ensuring that public employers receive timely notice of possible misconduct by their employees, while also accommodating "the reality that the victim may not be able to sue while he is still imprisoned." *Id.* at 389.

In concluding in *McDonough* that claims like McDonough's accrue upon favorable termination of the plaintiff's criminal proceedings, the Court said that a rule that such a claim accrues earlier would require the plaintiff to "ris[k] tipping his hand to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context." 139 S. Ct. at 2158. But, again, McDonough's claim was not a Fourth Amendment claim – the Court assumed it was a due process claim, *id.* at 2155 – and

*Wallace* rejected outright the notion that a plaintiff should be allowed to delay the filing of a Fourth Amendment claim because he does not want to litigate it while on trial for a criminal offense, 549 U.S. at 396; *see also id.* at 393-94 ("If a plaintiff files a [Fourth Amendment] false-arrest claim before he has been convicted (*or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial*), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.") (emphasis added) (citations omitted). Delaying accrual based on a concern that the plaintiff might otherwise have to risk tipping his hand to his criminal defense strategy would be particularly misplaced for Fourth Amendment claims because he must disclose that strategy before his criminal trial in any event. Under Federal Rule of Criminal Procedure 12(b)(3)(C), a criminal defendant "must" move to suppress unlawfully seized evidence before trial; if he does not, the court will not consider the motion absent good cause for the delay. *E.g.*, *United States v. Daniels*, 803 F.3d 335, 352 (7th Cir. 2015); *see also United States v. Adams*, 305 F.3d 30, 36 (1st Cir. 2002) (applying rule to *Franks* claims). And the law of some states is to the same effect. *E.g.*, N.Y. Crim. P. Law §§ 255.20(1), 710.40(1); 725 ILCS 5/114-12(c) (Illinois). Moreover, because a Fourth Amendment wrongful-detention claim accrues only

upon the defendant's release from detention, that limitations period would rarely if ever expire before he has moved to suppress, disclosing the nature of his Fourth Amendment arguments.

Accordingly, just as Fourth Amendment claims for wrongful post-legal-process pretrial detention lack an element requiring proof of favorable termination of the criminal case, they accrue not upon such favorable termination, but when the detention ends.

## II. ALTERNATIVE GROUNDS NONETHELESS ENTITLE RESPONDENT TO AFFIRMANCE OF THE JUDGMENT.

Because favorable termination plays no role in Fourth Amendment claims for wrongful post-legal-process pretrial detention, petitioner's failure to show favorable termination of his criminal case – the ground on which judgment for respondent was entered on that claim, JA185; *see also* JA20-22 – was not a proper basis for that ruling. Two separate alternative grounds nonetheless entitle respondent to affirmance.

### A. Petitioner Was Not Seized For Any Period After Legal Process Issued.

Unlike petitioner's Fourth Amendment claim for wrongful post-legal-process pretrial detention, several of his other claims were tried. At trial, petitioner testified, without contradiction, that following his

arrest, he was held in custody for about two days until his arraignment, at which he was released on his own recognizance. C.A. App. 181, 185. [10] That arraignment was held on January 17, 2014, JA157; and there is no evidence that petitioner was taken into custody again at any time before his criminal charges were dismissed less than four months later, on April 9, 2014, JA157. Although in New York a criminal defendant released on his own recognizance "must render himself at all times amendable to the orders and processes of the court," N.Y. Crim. P. Law § 510.40, petitioner made only two more court appearances in his criminal case, JA157. Such minimal post-legal-process restrictions on liberty are not significant enough to constitute a Fourth Amendment seizure. *E.g.*, *Smith v. City of Chicago*, 2021 WL 2643004, *6-*8, No. 19-2725 (7th Cir. 2021); *Cummin v. North*, 731 Fed. Appx. 465, 471-72 (6th Cir. 2018); *Becker v. Kroll*, 494 F.3d 904, 914-15 (10th Cir. 2007); *Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004); *Karam v. City of Burbank*, 352 F.3d 1188, 1191-94 (9th Cir. 2003); *Nieves v. McSweeny*, 241 F.3d 46, 54-55 (1st Cir. 2001). Thus, respondent is entitled to judgment on petitioner's Fourth Amendment claim for wrongful post-legal process pretrial detention.

Second Circuit precedent suggests that the courts below might have ruled otherwise had they addressed this issue. *See Rohman v. New York City Transit*

[10] The joint appendix in the court of appeals is ECF No. 34.

*Authority*, 215 F.3d 208, 215 (2d Cir. 2000).[11] But the better authority is that petitioner's post-legal-process restrictions did not constitute a seizure. As the Seventh Circuit has explained, "pretrial release might be construed as a 'seizure' for Fourth Amendment purposes if the conditions of that release impose significant restrictions on liberty," *Mitchell v. City of Elgin*, 912 F.3d 1012, 1016 (7th Cir. 2019), but "'if the concept of a seizure is regarded as elastic enough to encompass standard conditions of pretrial release, virtually every criminal defendant will be deemed to be seized pending the resolution of the charges against him,'" *Bielanski v. County of Kane*, 550 F.3d 632, 642 (7th Cir. 2008) (quoting *Nieves*, 241 F.3d at 55).

More specifically, the Seventh Circuit has rejected the idea that the obligation to appear in court constitutes a seizure, observing that if that were the rule, "large swaths of compulsory conduct – like jury duty and traffic hearings – would fall within the [Fourth] [A]mendment's scope." *Smith*, 2021 WL 2643004, *8. Similarly, the First Circuit has explained that issuance of a summons does not "constitute a seizure simply because it threatens a citizen with the *possibility* of confinement if he fails to appear in court." *Britton v. Maloney*, 196 F.3d 24, 30 (1st Cir. 1999). And, as now-Justice Gorsuch

[11] Other cases suggesting that restrictions like those to which petitioner was subject might constitute a seizure include *Black v. Montgomery County*, 835 F.3d 358, 367-68 (3d Cir. 2016), and *Evans v. Ball*, 168 F.3d 856, 861 (5th Cir. 1999).

previously explained,

> [I]n light of the [Fourth] Amendment's history and text, we've long conceived of seizures as intentional and effectual restraints on liberty that suffice to lead "a reasonable person to . . . conclude that he is not free to 'leave.'" *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). If we were to amend this understanding at this late date, so that someone free to leave on bond remains "seized" all the same, what about the defendant awaiting trial on his own recognizance? Or someone served only with a petty citation or summons to appear at trial? And what about the victim of maliciously employed civil process? Or the witness served with a subpoena compelling his appearance? No less than the bonded defendant, all these persons are subject to a seizure if they fail to appear at trial. Yet we've never considered any of them "seized" simply by virtue of a *conditional* threat of seizure.

*Cordova*, 816 F.3d at 663 (Gorsuch, J., concurring).

The Seventh Circuit has also rejected the idea that being required to request permission to leave the State constitutes a seizure, explaining that such a requirement is merely "'a precursor to a possible seizure rather than a seizure itself.'" *Smith*, 2021

WL 2643004, *7 (quoting *Bielanski*, 550 F.3d at 642). And the Ninth Circuit agrees that requiring a defendant to "obtain permission from the court if she want[s] to leave the state" is a "de minimis" restriction, not a seizure. *Karam*, 352 F.3d at 1194.

The government "doubts" that an accused who, like petitioner, was released at his arraignment on his own recognizance and thereafter made two court appearances, was "seized" post-arraignment within the meaning of the Fourth Amendment. U.S. Amicus Br. 12 (citing U.S. Amicus Br at 15-16, *McDonough*, *supra* (No. 18-485)). But, the government adds, it "appears" that the criminal complaint against petitioner was filed sometime during the two days the police held him in custody before his arraignment, in which event, the government contends, "*Manuel [I]* suggests" that the brief period petitioner was in custody between the filing of that complaint and his arraignment "qualified as a seizure pursuant to legal process for Fourth Amendment purposes." U.S. Amicus Br. 12. That contention should be rejected. Under *Manuel I*, a detention qualifies as a post-legal-process seizure for Fourth Amendment purposes only if the legal process authorizing the detention entails a *judicial* determination of probable cause, *id.* at 915, 917-20 & ns.5-8; *see also Wallace*, 549 U.S. at 389, which a criminal complaint does not.

Thus, respondent is entitled to judgment on petitioner's Fourth Amendment claim for wrongful post-legal-process pretrial detention because he was

not seized after legal process.

### B. The Jury's Verdict On Petitioner's So-Called "Fair Trial" Claim Entitles Respondent To Judgment.

As we have explained, *Manuel I* held that a Fourth Amendment claim for wrongful post-legal-process pretrial detention lies "when legal process itself goes wrong – when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements." 137 S. Ct. at 918. And that is the only wrongful conduct respondent allegedly committed after petitioner was taken into custody. Specifically, petitioner asserts that respondent "falsely report[ed] that petitioner had violently resisted, slapping an officer, flailing his arms, and engaging in a struggle," and "personally signed a criminal complaint that was produced on the basis of his false account, which was promptly filed to initiate [the] criminal charges against petitioner." Pet. Br. 8. Yet the district court emphasized that "the evidence of criminality by [petitioner] is . . . very high" and also "highly probative." C.A. App. 193; *see also* JA185 ("[T]here was substantial evidence that the officers' warrantless entry was lawful and [petitioner] pushed, or at a minimum, physically interfered with, a governmental official.").

The jury found against petitioner on all five claims that were tried. JA142-46. One of those claims was entitled "Denial of a Right to a Fair Trial,"

JA144-45, which, the Second Circuit has held, is a claim that "a criminal defendant can bring even when no [criminal] trial occurs at all," *Frost v. New York Police Department*, 980 F.3d 231, 249 (2d Cir. 2020). It is a due process claim, *id.* at 244, that allows a criminal defendant to recover for the "deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision [in the criminal case], *were that evidence presented to the jury,*" *id.* at 250; *see also id.* at 250 n.13 (enumerating elements of such claim); JA140-41 (jury instructions on petitioner's "fair trial" claim). Thus, in finding for respondent on petitioner's "fair trial" claim, JA144, the jury below necessarily determined either (1) that the evidence petitioner claimed was fabricated was not in fact fabricated; or (2) that such evidence was fabricated but would not likely have influenced a criminal jury's decision. The jury below did not specify which of those determinations it made in finding against petitioner on his "fair trial" claim. But, either way, that verdict forecloses petitioner's Fourth Amendment claim for wrongful post-legal-process pretrial detention.

If the jury below determined there was no fabrication, then respondent did not commit the wrongful act that, petitioner alleged, had contributed to the court's finding of probable cause at petitioner's arraignment. And if the jury determined instead that evidence was fabricated but would not likely have influenced a criminal jury's decision, then that evidence could not have undermined the arraignment

court's probable-cause finding. Specifically, if the posited fabricated evidence would not likely have influenced a criminal jury, that would mean that a criminal jury was as likely to convict petitioner without the fabricated evidence as with it. And it would likewise mean, given petitioner's failure to identify any inculpatory evidence presented at the trial below that had not also been presented at his arraignment (including orally, based on the prosecutor's pre-arraignment interviews, C.A. App. 156-58, 168), that the arraignment court was as likely to find the existence of probable cause without the fabricated evidence as with it. This is because the judicial probable-cause standard applicable at an arraignment is far less stringent than the guilty-beyond-a-reasonable-doubt standard applicable at a criminal trial.

Thus, respondent is entitled to judgment on petitioner's Fourth Amendment claim for wrongful post-legal-process pretrial detention because the claim is foreclosed by the jury's verdict against petitioner on his "fair trial" claim.

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

Respectfully submitted,

CELIA MEZA
Corporation Counsel
of the City of Chicago
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation
Counsel
JULIAN N. HENRIQUES, JR.*
Senior Counsel
2 N. LaSalle St., Suite 580
Chicago, IL 60602
(312) 744-7764
julian.henriques@
cityofchicago.org
*Attorneys for Amicus Curiae,*
City of Chicago
**Counsel of Record*

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