No. 21-1399

In the
Supreme Court of the United States

ALI AL-MAQABLH,
Petitioner,
v.

CRYSTAL L. HEINZ, INDIVIDUALLY, AND IN HER OFFICIAL CAPACITY AS THE COUNTY ATTORNEY OF TRIMBLE COUNTY, KENTUCKY AND LINDSEY ALLEY, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS JAMES PHELPS AND LINDSEY ALLEY

NATHAN A. LENNON
Counsel of Record
250 Grandview Drive
Suite 550
Ft. Mitchell, KY 41017
M: 513-252-6660
F: 859-283-6074
nlennon@reminger.com

Counsel for Respondent James Phelps

CHRISTOPHER B. RAMBICURE
214 S. 8th Street
Suite 200
Louisville, KY 40202
M: 859-608-8793
F: 859-957-1889
crambicure@merlegal.com

Counsel for Respondent Lindsey Alley

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether this Court's recent opinion in *Thompson v. Clark*, 142 S. Ct. 1332 (2022) is applicable to the facts of this case, when Petitioner, pursuant to a diversion agreement, conceded that probable cause existed as to the charges against him?

Whether *Thompson* is applicable to the facts of this case when Petitioner failed to make out or argue the existence of the other elements necessary to sustain a claim of malicious prosecution?

Whether *Thompson* is applicable to the facts of this case when Respondent Phelps did not violate a then-existing clearly-established right, and is therefore protected by qualified immunity?

Whether this Court's recent ruling in *Thompson* is applicable to Respondent Alley, when the federal claims against her were dismissed because she was not a state actor?

To the extent Petitioner seeks to revive his state law malicious prosecution claims, whether Kentucky's state law standards – which pre-dated the authority reviewed in *Thompson* – are even appropriate for review by this Court?

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INTRODUCTION

As it relates to these Respondents, Trooper James Phelps and Lindsey Jo Alley, the instant matter involves an appeal from a dismissal of Petitioner's claims against them for malicious prosecution under 42 U.S.C. § 1983, and although unclear, perhaps also an appeal of Petitioner's also-dismissed claims for malicious prosecution under Kentucky state law.

Although Petitioner did not clarify the issue in his Petition, he appears to be seeking a Writ of Certiorari only with respect to his § 1983 malicious prosecution claims. With respect to those claims, Petitioner incorrectly analogizes the facts of the instant case to this Court's recent decision in *Thompson v. Clark*, 142 S. Ct. 1332 (2022). Respondents' joint counterstatement of the questions presented provides the proper characterization of the real issues at stake. *Thompson* is not applicable to the facts of this case, because there is no dispute that there was probable cause for the criminal charges brought against Petitioner. This Court recognized repeatedly in *Thompson* that the police acted against the plaintiff in that case in clear violation of his Fourth Amendment rights to be free from unreasonable search and seizure when they entered his dwelling without a warrant or exigent circumstances supported by probable cause. *See id.* at 1335, 1337-38. Here however, Petitioner plainly accepted the existence of probable cause for the underlying state law charges, when he accepted a diversion agreement to have his criminal charges voluntarily dismissed by the state prosecutor, Respondent Crystal Heinz. The diversion agreement

specified that Petitioner agreed he would stop filing false police reports to harass his former partner, Respondent Alley, if the harassment charges stemming from the same prior conduct were dismissed.

Not only does Petitioner misunderstand the important distinction between *Thompson* with respect to the diversion agreement, Petitioner also mistakenly asserts that the trial court below decided the case at the summary judgment stage on only a single element of his malicious prosecution claim. A more accurate review of the record shows that the trial court dismissed the § 1983 malicious prosecution claims against Respondent Alley because she was not a state actor. Moreover, with respect to both Respondents Phelps and Alley, the trial court did not fully analyze all of the remaining elements of Petitioner's malicious prosecution claims one way or the other, because Petitioner could not show a favorable dispensation of the criminal charges against him. There has never been a merits determination on any of the other elements of Petitioner's malicious prosecution claim except for the element of favorable termination.

The remaining elements and defenses that the courts below did not fully address show why this case is a poor vehicle for this Court's consideration on the merits. For instance, Petitioner cannot show that Respondent Phelps participated in the prosecution in any manner which would allow him to sustain a malicious prosecution claim. Instead, Respondent Phelps' participation was limited to an affidavit requested by Prosecutor Heinz, which was made out truthfully with facts stemming from the conduct

informing the charges against Petitioner. Likewise, Petitioner cannot show that Respondent Alley, a private citizen, is a state actor.

Beyond these important factual distinctions, even if Petitioner's view of *Thompson were* correct, Respondent Phelps is still conclusively protected by qualified immunity, because his conduct was not clearly unlawful at the time that the criminal charges were filed against Petitioner, something that allegedly occurred long before *Thompson*. Thus, granting certiorari would fail to change the outcome of this case.

Finally, the Kentucky state law malicious prosecution claims (if Petitioner is seeking to revive them through his Petition) are also not affected by *Thompson*. Petitioner's diversion agreement remains a bar to state law claims for malicious prosecution, against either Respondent Phelps or Respondent Alley.

COUNTERSTATEMENT OF THE CASE

In 2015, Respondent Kentucky State Trooper James Phelps swore an affidavit to support charges against Petitioner for his repeated calls made to the Kentucky State Police ("KSP"), to conduct welfare checks on Petitioner's former partner, Respondent Alley. Petitioner and Respondent Alley were involved in a tense custody dispute over their son. Without evidence to support the suspicion of danger to his child, Petitioner called the KSP on three separate occasions, under false pretenses, to request welfare checks on the

child's behalf.[1] All three welfare checks resulted in no finding of any kind of injury or risk of safety to the child. *See Al-Maqablh v. Heinz*, 2022 U.S. LEXIS 145 (6th Cir. 2022). Distraught by what Respondent Alley perceived to be the strategic use of government agents as a means of harassment, Respondent Alley asked the KSP what could be done.

Absent any competing evidence which could inform why Petitioner was requesting the checks, coupled with the repeated findings of no risk to the child, the prosecutor, Respondent Heinz, decided to draft a criminal complaint against Petitioner and thereafter requested from Respondent Phelps an affidavit to support a complaint of criminal harassment. Heinz proceeded with her complaint against Petitioner. However, upon meeting with Heinz, Petitioner agreed to a bilateral diversion agreement, in order to get the charges dismissed: Petitioner agreed to cease his contact with Respondent Alley, refrain from requesting future wellness checks, and the charges for harassment against him would be dropped by Heinz. *Maqablh v. Heinz*, 2019 U.S. Dist. LEXIS 64155, at **4-5 (W.D. Ky. 2019). The diversion agreement between Petitioner and Heinz resulted in the charges being dismissed, and Petitioner brought his malicious prosecution claim afterwards against Heinz, Alley, and Phelps. *Id.*

The § 1983 claims against Respondent Alley were dismissed on initial screening because as a private citizen, she was not a state actor. *See Maqablh v.*

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[1] Petitioner, while out of state, falsely alleged that Respondent Alley intended to feed their child to dogs.

Heinz, 2016 U.S. Dist. LEXIS 171322, at *13 (W.D. Ky. 2016); *Maqablh v. Heinz*, 2022 U.S. App. LEXIS 145, at **1, 3 (6th Cir. 2022). Following initial screening, the only claims remaining against Alley were state law malicious prosecution claims.

On summary judgment, both courts below found that Petitioner could not show that his criminal proceeding ended favorably, because he had entered into a bilateral agreement with Heinz regarding the dismissal of his charges. Rather than this being a unilateral action taken by Heinz, the diversion agreement was a concession by Petitioner that there was probable cause he had committed the alleged offenses, and the agreement itself required a bargained-for exchange to reach eventual dismissal of the charges. *Id.*; *see also Maqablh v. Heinz*, 2022 U.S. App. LEXIS 145, at **7-8 (6th Cir. 2022). Following the Sixth Circuit's decision affirming the summary judgment against Petitioner, Petitioner filed a Petition for a Writ of Certiorari with this Court, only with respect to the malicious prosecution claims.

REASONS FOR DENYING CERTIORARI

I. THIS CASE IS NOT CONTROLLED BY THE OUTCOME OF *THOMPSON*, BECAUSE PETITIONER'S DIVERSION AGREEMENT IS DISPOSITIVE OF THE ISSUE OF PROBABLE CAUSE

First and foremost, nothing about this Court's decision in *Thompson* displaces the finding by the courts below that Petitioner's diversion agreement was dispositive of the issue of probable cause. Probable cause "deals with probabilities and depends on the totality of the circumstances," and "requires only a probability or substantial chance of criminal activity." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). This Court has acknowledged that probable cause is "not a high bar." *Id.* Moreover, the law is clear that diversion agreements are dispositive of probable cause. *See e.g.*, *Laskar v. Hurd*, 972 F.3d 1278, 1289 (11th Cir. 2020) (collecting cases); *Ohnemus v. Thompson*, 2014 U.S. App. LEXIS 23015, at *8 (6th Cir. 2014). The absence of probable cause is a necessary element for malicious prosecutions claims. *See McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019). This fact was expressly and repeatedly acknowledged by this Court in *Thompson v. Clark*, 142 S. Ct. 1332, 1337-38 (2022). The mere existence of a diversion agreement, accepted by Petitioner, is enough to defeat his malicious prosecution claim. *See Laskar*, 972 F.3d at 1289; *see also Ohnemus*, 2014 U.S. App. LEXIS 23015 at *8. Petitioner endeavors to analogize this case to *Thompson* but fails to realize that the underlying

record shows that probable cause is conspicuously present here, in stark contrast to *Thompson*.

Yet, in *Thompson*, this Court expressly stated that "the gravamen of the Fourth Amendment claim for malicious prosecution, as this Court has recognized it, is the wrongful initiation of charges *without* probable cause." *Thompson*, 142 S. Ct. at 1337 (emphasis added). The narrower question presented in *Thompson* was whether a § 1983 malicious prosecution claim could be sustained in the absence of some affirmative evidence of innocence. *See id.* at 1335. Holding that malicious prosecution cannot constitutionally require affirmative evidence of innocence, this Court took effort to note that "officers are still protected by the requirement that the plaintiff show the *absence of probable cause*," further noting that "[w]e express no view, however, on additional questions that may be relevant on remand, including…whether [Thompson] was charged without probable cause…" *Id.* at 1340 (emphasis added).

In *Thompson*, the plaintiff's mentally ill sister called the police to report sexual abuse to the police, which she believed was being perpetrated by Thompson against his infant daughter. *Id.* at 1335-36. Beyond the fact that the information alleged by Thompson's sister was not corroborated by anyone, Thompson's daughter showed no signs of abuse. *Id.* The police forced entry into Thompson's home with no warrant and only the unfounded allegation by Thompson's mentally ill sister to support their conduct. *Id.* In pursuing his malicious prosecution claim, Thompson presented a real question

about the lack of probable cause in the officers' actions necessary to establish the claim. *Id.* at 1335.

By a plain reading of the very case that Petitioner relies on for his sole issue presented, the instant facts are clearly distinguishable *from Thompson*. Petitioner admits that, pursuant to the bilateral diversion agreement, the charges against him were dismissed. *See* Petition for Writ of Certiorari at 3-4. Thus, there is no proper issue for this Court to consider relative to its recent holding in *Thompson*.

II. THE DISTINCT FACTS OF THIS CASE PRESENT A POOR VEHICLE FOR THE COURT'S CONSIDERATION

This case distinguishes itself from *Thompson* in ways which make certiorari a pointless exercise for this Court. In this case, Petitioner does not point to any evidence in the record below that Respondent Phelps' participation in Petitioner's prosecution was not limited to truthful testimony contained in a single affidavit. *See, generally*, Petition for a Writ of Certiorari. Respondent Phelps did not make the decision to prosecute Petitioner. Neither, of course, did Alley. As admitted by Petitioner, Respondent Phelps was not even involved in any of the wellness checks and had no knowledge of the dispute between Petitioner and Respondent Alley. Rather, he was under the express instruction of Heinz to assist her in the criminal complaint she intended to make out against Petitioner. As such, Respondent could not have participated in the prosecution of Petitioner in a manner which could prove a claim of malicious prosecution. *See* e.g., *Sykes v. Anderson*, 625 F.3d 294,

314 (6th Cir. 2010); *Johnson v. Moseley*, 790 F.3d 649, 655 (6th Cir. 2015); *Wright v. City of Euclid*, 962 F.3d 852, 876 (6th Cir. 2020).

Respondent Alley is also immune to Petitioner's § 1938 malicious prosecution claim, and for an even more basic reason. Alley is a private actor, making her generally immune to liability under 42 U.S.C. § 1983. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991). Even were this Court to decide *Thompson* is applicable to the instant facts, on remand, the lower courts would simply conclude that Respondent Alley's participation, limited to filing a complaint, is not sufficient to sustain a malicious prosecution action. *See Moldowan v. City of Warren*, 578 F.3d 351, 399 (6th Cir. 2009). Had Respondent Alley not levied a complaint against Petitioner, she would have no immediate remedy to his harassment of her. She did not press for prosecution (a decision ultimately made by Heinz), provide false statements to or conspire with law enforcement.

In spite of its legal inapplicability, Petitioner wishes to draw a line between this case and *Thompson*. In *Thompson*, the absence of probable cause was a real issue raised by the plaintiff and one where the officers were directly involved in the arrest and charging of the accused. *See Thompson*, 142 S. Ct. at 1335-36. There was no diversion agreement, let alone one to which the plaintiff agreed. *See id.* Moreover, there were allegations of clear violations of Fourth Amendment rights stemming from the warrantless entry into a dwelling absent probable cause. *See id.* Here, Petitioner weakly analogizes this case to *Thompson* by pointing to

an affidavit truthfully made out by Respondent Phelps, an officer otherwise entirely removed from the events in question, pursuant to orders from a superior, and supported by probable cause, evidenced by Petitioner's acquiescence to Heinz's diversion agreement. *See Maqablh v. Heinz*, 2019 U.S. Dist. LEXIS 64155, at *4 (W.D. Ky. 2019). Thus, these two cases lack the requisite factual similarity as much as they do the requisite legal similarity for meaningful review by this Court.

Although Petitioner wishes to characterize the decisions of the courts below as decisions dismissing his malicious prosecution claims based on a single element, the fact is that the courts below did not even reach the other elements of Petitioner's malicious prosecution claims. *See Al-Maqablh v. Heinz*, 2022 U.S. App. LEXIS 145, at **5-8 (6th Cir. 2022); *See also Maqablh v. Heinz*, 2019 U.S. Dist. LEXIS 64155, at **3-8 (W.D. Ky. 2019). With no merits determinations on any of the other elements in Petitioner's claims, he is now asking this Court to grant cert for the purpose of vacating the lower courts' judgments and remanding for application of *Thompson*. *See* Petition for Writ of Certiorari at 1. This is an utterly futile exercise which will simply result in the same outcome reached by the courts below.

III. GRANTING CERTIORARI WOULD NOT CHANGE THE OUTCOME OF THIS CASE AS TO RESPONDENT PHELPS, BECAUSE RESPONDENT PHELPS WOULD STILL BE PROTECTED BY QUALIFIED IMMUNITY

Even if the Court were inclined to apply *Thompson* to this factually-dissimilar case, Respondent Phelps is still entitled to qualified immunity, because the conduct in this case took place long before this Court's decision in *Thompson* made clearly-established law that Phelps could allegedly have violated. Qualified immunity creates a bar to any litigation against a government officer if the government officer was exercising reasonable discretion within the scope of his or her duties. *See Mullenix v. Luna*, 577 U.S. 7, 11 (2015). Beyond the fact that Petitioner has not even established a single element of his malicious prosecution claim, he has neither identified what conduct by Respondent Phelps would constitute participation in a malicious prosecution, nor has Petitioner identified the clearly established right that Respondent Phelps should have reasonably known he was violating when he made out a truthful affidavit under the direction of Heinz.

Respondent Phelps' mere acquiescence to Heinz's request that he make out an affidavit, supported by probable cause and with truthful statements, cannot abrogate Respondent Phelps' qualified immunity. *Id.*; *see also Sykes*, 625 F.3d at 314. Even assuming Heinz was incorrect about the existence of probable cause pertaining to the harassment charges against Petitioner, Respondent Phelps' reasonable reliance on

that mistaken belief would still entitle him to qualified immunity. *See Novak v. City of Parma*, 33 F.4th 296, 305 (6th Cir. 2022). Petitioner's failure to identify conduct of Respondent Phelps not protected by qualified immunity, which goes to the heart of his claim of malicious prosecution, means he cannot sustain his malicious prosecution claim against Respondent Phelps.

Even if Petitioner's reliance on *Thompson* were congruent with the facts of this case, the retroactive effect of qualified immunity protects Respondent Phelps unless the unlawfulness of his conduct was "clearly established at the time" of his alleged conduct. *Id.* at 303. This Court has previously held that an abrogation of qualified immunity requires the actor's unlawfulness to be "apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Likewise, this Court has previously held, "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Beyond the fact that Respondent Phelps' conduct is entirely distinct from the rule of law at issue in *Thompson*, mere compliance with Heinz's request to make out an affidavit for a criminal complaint supported by probable cause could hardly be said to comprise the sort of conduct that any reasonable police officer should know is unlawful. Yet, this absurd argument is what lies beneath the assertions by Petitioner's arguments once they are fundamentally

reduced. As there is no way for Petitioner to sustain his malicious prosecution claim otherwise, he is impliedly begging this Court to accept the foregoing framing. Respondent Phelps asks this Court to reject this framing and consider the crux of the arguments Petitioner is truly making through his Petition.

IV. GRANTING CERTIORARI WOULD NOT CHANGE THE OUTCOME OF THIS CASE AS TO RESPONDENT ALLEY BECAUSE SHE IS NOT A STATE ACTOR

Even if this Court were inclined to apply *Thompson* to this case, it remains an undisputed fact that Respondent Alley is not a state actor subject to § 1983 liability. Respondent Alley, a private citizen, cannot be held liable under § 1983 "unless: (1) 'the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority'; and (2) 'the private party charged with the deprivation could be described in all fairness as a state actor.'" *Maqablh v. Heinz*, 2016 U.S. Dist. LEXIS 171322, at *12 (W.D. Ky. 2016) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)).

Upon initial review of the Plaintiff's Complaint, the District Court found (correctly) that "[t]he only arguable state action undertaken by Defendant Alley was bringing charges against Plaintiff." *Id.* "[P]roviding information to the police, responding to questions about a crime, and offering witness testimony at a criminal trial does not expose a private individual to liability for actions taken 'under color of law.'" *Moldowan v. City of Warren*, 578 F.3d 351, 399 (6th Cir. 2009) (citing *Briscoe v. Lahue*, 460 U.S. 325, 329 (1983)).

Thus, even if Petitioner's reliance on *Thompson* were otherwise supported, it remains the case that Respondent Alley cannot be subjected to § 1983 liability as a private citizen.

V. TO THE EXTENT PETITIONER SEEKS TO REVIVE HIS STATE LAW CLAIMS, THOSE CLAIMS WERE DECIDED ON INDEPENDENT STATE LAW GROUNDS AND ARE NOT SUBJECT TO REVIEW

It appears that the Petition for a Writ of Certiorari does not separately seek to revive the state court malicious prosecution claims against Respondents. However, out of an abundance of caution, to the extent the Petition does so seek to revive state court causes of action, this Court does "not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996); *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75 (1997) (dismissing writ where resolution of state law claims could moot federal law question); *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535 (1941) ("And the correctness of that conclusion is the only question properly before this Court. All other questions presented involve state law, for the conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the national Constitution."); *Pacific Gas & Elec. Co. v. Police Court of City of Sacramento, Cal.*, 251 U.S. 22 (1919).

Here, it was and remains a matter of settled Kentucky state law, separate and apart from any

principle of federal law, that "[a] termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if … the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused." *Broaddus v. Campbell*, 911 S.W.2d 281, 284 (Ky. App. 1995) (citing Restatement (Second) of Torts § 660(a)). In *Thompson*, this Court found that the Restatement (Second) of Torts could not apply to a § 1983 constitutional claim "because the Restatement did not purport to describe the consensus of American law as of 1871, at least on that question. The status of American law as of 1871 is the relevant inquiry for our purposes." 142 S. Ct. at 1340. The consensus of American law as of 1871 has no bearing on the state common law of Kentucky, and this Court cannot and should not act to overturn Kentucky common law based on principles of constitutional interpretation. Thus, if Petitioner is asking this Court to grant certiorari to revive his Kentucky state law claim for malicious prosecution in light of *Thompson*, the Court should decline Petitioner's request.

CONCLUSION

For all the aforementioned reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

NATHAN A. LENNON
Counsel of Record
250 Grandview Drive
Suite 550
Ft. Mitchell, KY 41017
M: 513-252-6660
F: 859-283-6074
nlennon@reminger.com

Counsel for Respondent
James Phelps

CHRISTOPHER B. RAMBICURE
214 S. 8th Street
Suite 200
Louisville, KY 40202
M: 859-608-8793
F: 859-957-1889
crambicure@merlegal.com

Counsel for Respondent
Lindsey Alley