No. _____

In the
Supreme Court of the United States

JOHN COLANGELO AND ADAM GOMPPER,
Petitioners,

v.

NICOLE CHASE,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

KRISTAN M. MACCINI
Counsel of Record
BEATRICE S. JORDAN
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114
Ph: (860) 249-1361
kmaccini@hl-law.com

Counsel for Petitioners

QUESTIONS PRESENTED

Canton police officers investigated a complaint of alleged sexual misconduct wherein the complainant provided various versions of the incident and, after making a formal written statement, later admitted that her statement was not true in that she knowingly omitted that she did not say "no," and that she performed oral sex on her boss in the absence of any threat or use of physical force. The questions presented are:

1. Whether the Court of Appeals improperly found that the officers were not entitled to qualified immunity where the Court itself acknowledged that the law was not clearly established that a charge of making a false statement pursuant to Connecticut General Statutes § 53a-157b could be predicated upon an omission?

2. Whether the Court of Appeals improperly denied qualified immunity as to the plaintiff's § 1983 malicious prosecution claim in contravention of the Court's own precedent in *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018) and *Thompson v Clark*, 794 Fed. Appx. 140, 141-42 (2d Cir. 2020), *cert. granted in part*, 141 S. Ct. 1682 (2021), which require that a plaintiff establish that the proceeding "ended in a manner that affirmatively indicates … innocence," in order to establish a favorable termination, and where the prosecutor affirmed that the *nolle* of charges was based upon procedural grounds, namely

plaintiff's satisfaction of a specified condition for the *nolle*?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit, whose judgment is sought to be reviewed, are Petitioners, and Defendants below, John Colangelo, and Adam Gompper.

Respondent, and Plaintiff below, is Nicole Chase.

Town of Canton, Mark J. Penney, Christopher Arciero, John Gomper, Calvin Nodine and Nodine's Smokehouse, Inc., Defendants below, are not parties to this Petition.

No corporations are involved in this proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PETITION FOR CERTIORARI

Petitioners, John Colangelo, and Adam Gompper, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Summary Order of the Court of Appeals for the Second Circuit affirming the decision of the District Court, was not selected for publication, but is available at *Chase v. Penney*, No. 20-3234-cv, 2021 WL 4519707 (2d Cir. 2021), and is reproduced at App. 1-9.

The memorandum opinion of the U.S. District Court for the District of Connecticut denying summary judgment to Petitioners is unreported, but is available at *Chase v. Nodine's Smokehouse, Inc.*, No. 3:18-cv-00683 (VLB), 2020 WL 8181655 (D. Conn. Sept. 29, 2020), and is reproduced at App. 10-66.

JURISDICTION

The Second Circuit entered its judgment and summary order on October 4, 2021. The Petitioners have timely filed this Petition for Writ of Certiorari on January 3, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent brought the underlying action pursuant to 42 U.S.C. § 1983, alleging that she was arrested for making a false statement without probable cause. Section 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Connecticut's false statement statute, Conn. Gen. Stat. § 53a-157b, provides:

> (a) A person is guilty of false statement when such person (1) intentionally makes a false written statement that such person does not believe to be true with the intent to mislead a public servant in the performance of such public servant's official function, and (2) makes such statement under oath or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The Plaintiff, Nicole Chase, was an employee at Nodine's Restaurant located in Canton. Connecticut. (App. at 11.) Calvin Nodine managed operations at the restaurant. (*Id.*) According to Chase, Nodine often drank alcohol at work and made crude comments to her, including comments of a sexual nature. (*Id.*)

On May 7, 2017, Chase went to the Canton police station to report that she was subjected to inappropriate sexual conduct by Nodine while they were working at the restaurant the prior evening. (App. at 12.) The interview was conducted by Canton Police Officer Adam Gompper. (*Id.*) The entirety of the interview was recorded. (*See* Video Recording of 5/7/17 Interview of Nicole Chase, Rec. at ECF No. 36, JA173.)[1] Chase began by reporting a dysfunctional

[1] The Canton Police Department videotaped recordings are available in the Record of the Second Circuit, having been copied

workplace, including employee on the job drug use and termination; Nodine having a drinking problem which caused the head chef, to quit two days prior; and Nodine making rude, sexual comments to her including asking her, "Did you get laid last night?" (*Id.* at 00:00-5:30.) Chase went on to report an incident that occurred the prior evening after the restaurant closed for the night. (*Id.* at 5:35-9:27.) Chase stated that Nodine pulled her into the bathroom of the restaurant, exposed his genitals to her, and told her, "I know you must not get it at home so suck it," or something to that effect. (*Id.* at 7:27-7:33.) Chase stated that she then pushed past Nodine, upon which he fell into the wall and hit his head. (*Id.* at 7:34-8:05.) She then exited the bathroom and left the restaurant. (*Id.* at 8:05-8:35.)

Chase went on to state that she was not sure whether or not she wanted to make a formal complaint, and that she wanted to go back to work first to see if Nodine recalled anything. (*Id.* at 14:21-14:50, 16:30-17:00.) Officer Gompper advised Chase, that it was her choice as to whether she wanted to pursue a complaint about the incident, that she could come back to the department if she changed her mind and wanted to pursue a complaint, and he explained the investigative steps that would then occur. (*Id.* at 15:17-16:00, 18:20-19:04, 21:49-22:34.) Officer Gompper also advised Chase that he did not believe

---

onto electronic data storage devices and included in the Joint Appendix. The recordings establish, as a matter of law, the nature and substance of Chase's statements to police pursuant to *Scott v. Harris*, 550 U.S. 372, 378-80 (2007).

what she had described rose to the level of a sexual assault.[2] (*Id.* at 14:26-14:32.) Upon further inquiry by Officer Gompper, Chase indicated that she did not feel as if she was dragged into the bathroom, or as if she was being kidnapped. (*Id.* at 14:32-14:59.) Officer Gompper again advised Chase that if she wanted to file a complaint and document it, she could do so and they would then conduct an investigation. (*Id.* at 16:06-17:06.) Chase expressed continuing

---

[2] The relevant statutory provisions governing sexual assaults under Connecticut law are Conn. Gen. Stat. §§ 53a-70(a)(1) and 53a-72a. Connecticut General Statutes § 53a-70(a)(1) provides in pertinent part:

> (a) A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by use of *force* against such other person or a third person, or by the *threat of use of force* against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . .

(Emphasis added). Connecticut General Statutes § 53a-72a provides in pertinent part,

> "(a) A person is guilty of sexual assault in the third degree when such person (1) *compels* another person to submit to sexual contact (A) by the *use of force* against such other person, or (B) by the *threat of use of force* against such person or against a third person which reasonably causes such other person to fear physical injury to himself or herself or a third person . . . ."

(Emphasis added). The statutory definition of "use of force" is "(A) Use of a dangerous instrument; or (B) use of actual physical force or violence or superior physical strength against the victim." Conn. Gen. Stat. § 53a-65(7).

reservations about making a formal complaint as she was concerned about keeping her job, her living situation and money. (*Id.* at 19:00-19:46.) Officer Gomper again told her she could think about how she wanted to proceed, that if she was in immediate danger after going back to work, or if Nodine did something further, she should report it right away. (*Id.* at 26:40-27:40.)

Chase returned to the police department on May 11, 2017 to make a formal complaint against Nodine. (App. at 15.) In her written statement to Officer Gomper, Chase reiterated that Nodine had allegedly made sexualized comments towards her on May 6th. (*Id.*) She also stated, for the first time, that Nodine had placed his hand on her buttocks earlier that day. (*Id.*) Chase repeated her prior description of the incident, stating that, at the end of the night, Nodine hugged her, after which he pulled her into the bathroom and exposed his erect penis to her. (*Id.* at 16.) She again stated that he said, "suck it cause I know you don't get it at home." (*Id.*) She added that as he said so, he grabbed his testicles and penis and lifted it up towards her. (*Id.*) Chase stated that she then pushed Nodine she unlocked the door and then walked out of the bathroom. (*Id.*)

The Canton Police Department's Voluntary Statement Form, DPS-633-C (Rev. 11/05/13), signed by Chase provides as follows just above the witness' signature block: "By affixing my signature to this statement, I acknowledge that I have read it and / or have had it read to me and it is true to the best of my knowledge & belief." (App. at 16.) Just below the witness' signature block is the police officer's

signature block, which states that the officer administered the witness's oath. (*Id.*)

Thereafter, on May 18, 2017, Detective John Colangelo and Officer Gompper, interviewed Calvin Nodine in the presence of his attorney. (App. at 17.) This interview was also recorded in its entirety and is contained in the appellate record. (*Id.*) Nodine initially denied that anything occurred, that he had been in the bathroom with anyone, or that he even knew where Chase was upon closing. (*Id.*) Detective Colangelo then confronted Nodine with a summary of Chase's statement and her claim that Nodine had pulled her into the bathroom and that he exposed himself to her. (*Id.*) Nodine responded, stating that her allegation was "bullshit." (*Id.*) Nodine went on to speculate that Chase was making a false accusation because she is looking for money. (*Id.*) After speaking privately with his attorney, Nodine changed his story, stating that Chase had pulled him into the bathroom, lowered his pants, and that she spontaneously performed fellatio on him. (*Id.* at 19.) Upon being confronted with his change in story, Nodine stated that he was "trying to protect himself." (*Id.*)

On June 21, 2017, Detective Colangelo interviewed Chase. The entirety of the interview was recorded. (*See* Video Recording of 6/21/17 Interview of Nicole Chase, Rec. at ECF No. 36, JA281.) Chase confirmed that her attorney was filing a civil suit on her behalf and was aware that she was speaking with him. (App. at 24; 6/21/17 Interview at 1:34:24-1:34:44.) As the interview progressed, Detective Colangelo explained that they had spoken with Nodine, and asked Chase whether she had ever had

any prior consensual physical contact with Nodine. (*See* 6/21/17 Interview at 1:03:51-1:04:01.) Chase denied that there had ever been any prior hugging, kissing or "anything sexual" between them. (*Id.* at 1:04:01-1:04:46.) Chase became emotional and stated, "it was just he pulled me in there and he dropped them and as soon as the told me to do it I just did it because I didn't know what to do." (*Id.* at 1:04:48-1:04:57.) Chase then confirmed that she performed oral sex on Nodine. (*Id.* at 1:04:57-1:04:59.) Chase went on to state that she knew her story was a lie, that she was afraid to come back because it would go against her story, that she didn't want her boyfriend to know, and didn't want people asking her why she did it. (*Id.* at 1:05:00-1:05:19.) Chase further stated that she had not told her attorneys, and did not want to come back to speak with the officers because she knew it would make her civil case look bad. (*Id.* at 1:05:36-1:05:51.) Detective Colangelo then begins to review Chase's written statement with her. During the course of the same, Chase stated, "everything is the exact same besides that I didn't say no, I just did it." (*Id.* at 1:07:53-1:07:59.) Chase went on to say that she had told the truth about everything except the part she did not want people to know. (*Id.* at 1:08:03-1:08:09.)

Detective Colangelo then went through the incident sequence with Chase. Upon inquiry about how they entered the bathroom, Chase stated that Nodine had her arm, and pulled her in, but that "he didn't very forcefully" do so. (*Id.* at 1:14:25-1:15:01.) When asked to describe the positioning of Nodine's body and his hands during the encounter, Chase stated that Nodine was leaning back against the

bathroom sink, and that his hands were pulling on his genitals, and she physically demonstrated the same. (*Id.* at 1:18:07-1:18:58.) Detective Colangelo then asked Chase if she wanted to give a new statement changing her prior written statement to police, to which Chase asked whether doing so would "screw up" her civil case. (*Id.* at 1:20:55-1:21:48.) Detective Colangelo explained that it was entirely up to Chase about whether she wanted to give a new statement that contained the truth, that she had given the prior statement under oath attesting that she had told the truth, and that if she hadn't told the truth it would be a false statement, which was a crime. (*Id.* at 1:23:13-1:24:30.) Chase then stated that, "I know it's not the truth and I, but I signed my name," and expressed concern about whether changing her statement would mess up her case. (*Id.* at 1:25:04-1:29:05.) Chase again stated that the prior statement was true "besides the end," and ultimately stated that she wanted to confer with her attorney before deciding how to proceed. (*Id.*) The interview then ended.

Just over two weeks later, on July 7, 2017, Detective Colangelo prepared an affidavit in support of an arrest warrant for Chase, charging her with making a False Statement in the Second Degree. (App. at 28.) The warrant application was received by the State's Attorney's Office on July 11, 2017, and signed by the prosecutor on August 31, 2017. (*Id.* at 30.) Thereafter, Connecticut Superior Court Judge Tammy Nguyen signed and authorized the arrest warrant on September 6, 2017. (*Id.*)

The charge against Chase was nolled on November 8, 2017. (*Id.* at 32.) Senior Assistant State's Attorney

Robert Diaz attested in an affidavit that it was agreed that Miss Chase would receive a diversionary marking or continuance of her criminal case for a period of time and, if she did not have any new arrests during that time period, a *nolle* would be entered. (*Id.*) Attorney John Ritson, who represented Chase in the criminal proceeding, attested that the prosecutor indicated to him that "the case would be continued, and if nothing else happened, the state would enter a *nolle prosequi*," and that he did not object to the continuance. (*Id.*) Attorney Ritson further stated that there had been no negotiations or conditions imposed, that the state unilaterally continued the case, and that there was no agreement between Chase and the State. (*Id.*)

At the subsequent court appearance on November 8, 2017, the prosecutor stated that Chase's case had been diverted, that there had been no further problems, and then requested that a *nolle* enter. (*Id.* at 33.) The *nolle* was then entered by the Court. (*Id.*)

B. District Court Proceedings

Chase brought the instant action by way of a twenty-count complaint alleging, in part, claims of false arrest and malicious prosecution in violation of the Fourth Amendment on the basis that Defendants, Officer Gompper and Detective Colangelo, arrested her without probable cause on the charge of making a false statement. (App. at 3, 10.) After the close of discovery, Officer Gompper and Detective Colangelo moved for summary judgment, arguing in part, that they possessed probable cause for Chase's arrest and,

alternatively, that they were entitled to qualified immunity. (App. at 11, 34-35.)

The District Court denied summary judgment as to the false arrest and malicious prosecution claims, finding that issues of fact existed as to whether probable cause existed for Chase's arrest. (App. at 40.) The District Court stated that it "seriously questions whether probable cause could ever exist for the offense charged under the relevant circumstances, where the claimed falsity of a victim's sworn written statement is the omission of … details …." (*Id.*) The District Court went on to note that the statute made no reference to omissions, nor were there cases establishing that the statute had ever been interpreted to apply to an omission of material facts/details. (*Id.* at 45.)

The District Court, likewise, denied summary judgment as to the favorable termination element of malicious prosecution claims, finding that whether the *nolle* affirmatively indicated Chase's innocence turned on whether it was the result of a bargain or agreement, and whether any post-*nolle* conditions were placed on Chase. (*Id.* at 51-52.)

Finally, the District Court denied the officers qualified immunity, finding that a reasonable jury could find that it was objective unreasonable for the Defendants to proceed with arresting Chase for making a false statement when they knew that the false statement was an omission of a completed sex act, and because the ordinary meaning of the statute applied only to false statements not omissions. (*Id.* at 54-55.)

C. OPINION OF THE COURT OF APPEALS

Officer Gompper and Detective Colangelo brought a timely interlocutory appeal on the basis that they were entitled to qualified immunity as to Chase's federal law claims of false arrest, malicious prosecution, and denial of equal protection. (App. at 3.) In their principal brief, the Defendants argued, in part, that the District Court erred as a charge of false statement in the second degree could be properly based upon a material omission, that no Connecticut appellate authority has addressed the issue of whether a material omission may provide probable cause for a charge of false statement and to the extent it finds the statute is unclear, it was a question yet to be determined by the Connecticut Supreme Court. The Defendants argued that they were, thus entitled to qualified immunity as it was objectively reasonable for them to believe probable cause supported the charge of false statement under the statute. (App. at 5.)

During the course of oral argument of the appeal on September 15, 2021, the Court recognized that the law was not clearly established that an omission was sufficient to support a charge for making a false statement under Connecticut law. In this regard, two of the three Justices questioned whether the law was clearly established such that reasonable officers would have known that omissions fell within Connecticut's false statement statute. *See* Audio Recording of Oral Argument, https://www.ca2.uscourts.gov/decisions/isysquery/88436b57-29f7-4a19-bb30-3793d196e892/181-190/list/

(last visited Dec. 28, 2021), at 9:46–11:30, 30:27–30:47.

Notwithstanding the same, the Second Circuit held "that factual disputes preclude our consideration of the officers' assertion of qualified immunity." (App. at 6.) The Court went on to hold that the Defendants "have not shown that they would be entitled to qualified immunity as a matter of law under Chase's version of the facts, and thus we cannot consider their claim." (*Id.* at 7.)

With regard to qualified immunity on the malicious prosecution claim, the Court reiterated its precedent in *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018) that, "A plaintiff asserting a malicious prosecution claim under § 1983 must . . . show that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence." (App. at 8.) The Court went on to note the District Court's finding that issues of fact existed as to the origin and conditions of the *nolle*. (*Id.*) The Court agreed, concluding that it lacked jurisdiction to consider the claim given the questions about the basis of the *nolle* and whether the *nolle* left open the question of Chase's innocence. (*Id.*)

REASONS FOR GRANTING THE PETITION

Petitioners respectfully request that certification be granted as the Second Circuit's decision is in direct contravention of the clear precedent of this Court, and undermines the very intent and purpose of the doctrine of qualified immunity, thus warranting the exercise of this Court's discretionary power.

I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONTRAVENTION OF PRECEDENT FROM THIS COURT ON QUALIFIED IMMUNITY WHICH REQUIRES THAT THE LAW BE CLEARLY ESTABLISHED IN A PARTICULARIZED SENSE

As a preliminary matter, probable cause to effectuate an arrest exists where the officers "have knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Boyd v. New York*, 336 F.3d 72, 75-76 (2d Cir. 2003). More specifically, in order to establish probable cause for an arrest, an officer need only establish "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983). Thus, "probable cause does not require an officer to be certain that subsequent prosecution of the arrestee will be successful." *Krause v. Bennett*, 887 F.2d 363, 371 (2d Cir. 1989); *Curley v. Suffern*, 268 F.2d 65, 70 (2d Cir. 2001). Once police officers possess facts sufficient to establish the existence of probable cause, they are not required or permitted to

sit as a prosecutor, judge or jury. *See Krause*, 887 F.2d at 372. Rather, "[t]heir function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence." *Id.* Moreover, "[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

This Court has repeatedly made clear that probable cause is not a high bar:

> To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.... Because probable cause deals with probabilities and depends on the totality of the circumstances ... it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules .... It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.... Probable cause is not a high bar.

Dist. of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (internal quotations and citations omitted).

Given the totality of the circumstances in the record, the common-sense conclusions and the reasonable inferences, which the officers were permitted to draw, probable cause existed for Chase's

arrest on the charge of making a false statement. However, even if a jury concluded that probable cause was lacking, the Petitioners are entitled to the protections of qualified immunity as the law was not clearly established such that all reasonable officers would understand that arresting the plaintiff under the circumstances presented violated the law.

It is well established that, "[i]f the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). "Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of legal facts." *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (internal quotations omitted).

Here, the Second Circuit erred in concluding that issues of fact precluded a determination of qualified immunity. In this regard, after concluding that issues of fact existed as to whether there was probable cause for Chase's arrest, the Second Circuit held that it could not consider the Defendants' qualified immunity defense because the Defendants did not show that they were entitled to qualified immunity as a matter of law under Chase's version of the facts. (*See* App. at 7.) However, the issue of whether the law was clearly established presented a question of law for the Court's determination that did not require it to pass upon whether the Defendants violated the Fourth Amendment. *See Elder*, 510 U.S. at 516; *City of Tahlequah, Oklahoma v. Bond*, 142 S. Ct. 9, 11

(2021). The Second Circuit, thus, erred in refusing and or failing to address the issue of whether the law was clearly established that the Defendants' conduct was unlawful.

This Court has repeatedly clarified the heightened specificity required to satisfy the "clearly established" standard for qualified immunity. *See e.g.*, *Dist. of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500 (2019). In *Wesby*, this Court reaffirmed that "clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful . . . . In other words, existing law must have placed the constitutionality of the officer's conduct beyond debate." *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011)). This Court emphasized that, "[t]his demanding standard protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *Bond,* 142 S. Ct. at 11.

In order to be clearly established,

> a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law . . . which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority . . . . It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official

> would interpret it to establish the particular rule the plaintiff seeks to apply. . . . Otherwise, the rule is not one that every reasonable official would know. . . .
>
> The clearly established standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted. . . . This requires a high degree of specificity. . . .

Id. at 589-90 (internal quotations and citations omitted; alteration in original); *see also Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *al-Kidd*, 563 U.S. at 741-42; *Reichle v. Howards*, 566 U.S. 658, 666 (2012); *Mullenix v. Luna*, 136 S. Ct. 309 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014).

Moreover, this Court has stressed that

> the specificity of the rule is especially important in the Fourth Amendment context. . . . Thus, *we have stressed the need to identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment*. . . . While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular arrest beyond debate.

Wesby, 138 S. Ct. at 590 (internal quotations and citations omitted; emphasis added). This is so

because Fourth Amendment claims "[are] an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela*, 138 S. Ct. at 1153.

In the instant matter, Chase was charged with making a false statement in the second degree in violation of Conn. Gen. Stat. § 53a-157b. Section 53a-157b, provides that:

> (a) A person is guilty of false statement when such person (1) intentionally makes a false written statement that such person does not believe to be true with the intent to mislead a public servant in the performance of such public servant's official function, and (2) makes such statement under oath or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

Notably, nothing in the statutory language precludes its application to material omissions in a statement. In fact, the very language of the statute indicates that it applies to a statement that the individual does not believe to be true, and that it was made with the intent to mislead. Additionally, as argued before the Second Circuit, there exists no Connecticut appellate authority considering the issue of whether a material omission may provide probable cause for a charge of false statement in violation of Conn. Gen. Stat. § 53a-157b.

Additionally, the Second Circuit itself expressly acknowledged that the law was not clearly established that an omission was sufficient to support a charge for making a false statement under Connecticut law. Two of the three Justices questioned whether the law was clearly established such that reasonable officers would have known that omissions fell within Connecticut's false statement statute. *See* Audio Recording of Oral Argument, https://www.ca2.uscourts.gov/decisions/isysquery/88436b57-29f7-4a19-bb30-3793d196e892/181-190/list/ (last visited Dec. 28, 2021), at 9:46–11:30, 30:27–30:47. The Court, nevertheless, concluded that it could not determine the Defendants' qualified immunity defense.

It is notable that neither Chase, the Court of Appeals, nor the District Court, cited any case that had found probable cause lacking under similar circumstances, let alone under even remotely analogous facts. Rather, preexisting law in Connecticut supported the existence of probable cause for making a false statement based upon material omissions. For example, Connecticut's Criminal Jury Instructions provide that the elements of the crime of false statement in the second degree in violation of Conn. Gen. Stat. § 53a-157b are as follows:

> 1) the defendant made a written statement (under oath / pursuant to a form bearing notice), 2) the defendant made the statement intentionally, 3) the defendant knew the statement was not true, and 4) the defendant made the false statement with the specific intent to mislead a public servant in the performance of (his/her) official function.

Connecticut Judicial Branch Criminal Jury Instructions § 4.2-2 at 262, http://jud.ct.gov/JI/Criminal/Criminal.pdf. The third element requires only that a criminal defendant did not, at the time he or she made the statement, believe the statement to be true. *Id.* The fourth element requires that the statement was specifically intended to mislead a public servant in the performance of his or her official function. *Id.* Accordingly, under Connecticut law, a charge for making a false statement applies to a written statement given under oath to a police officer that the person did not believe to be true at the time he or she made the statement. It does not require, nor does it depend upon whether the statement is untrue due to an affirmative false statement contained therein or due to omitted information.

Indeed, in *Sate v. Brazzell*, 38 Conn. Supp. 695, 696-97 (App. Sess. 1983), upon which Connecticut's false statement jury charge is predicated, the Court affirmed the defendant's conviction for making a false statement, finding that the relevant facts supporting the charge and conviction were not only his denial of having business dealings with suspects of an arson investigation, but also the fact that he was acquainted

with the suspects and had previously engaged in a land transfer transaction with them, a fact that was known to him and not disclosed. The Court concluded that those facts supported the jury's finding that the defendant had made a false statement. *Id.* Implicit in the Court's decision is that a knowing omission does support a charge of making a false statement.

In light of the foregoing, it cannot be said that reasonable officers would have understood that it was unlawful to arrest Chase on charges of making a false statement under the circumstances presented. In her June 21, 2017 interview, Chase was clear that she had omitted from her written statement that she had performed oral sex on Nodine, that when he told her to do it, she "just did it." (*See* 6/21/17 Interview at 1:04:48-1:04:59.) Chase further expressly stated that she knew the story she gave in her written statement "was a lie." (*Id.* at 1:05:00-1:05:19.) Chase went on to state that "everything [in her written statement] is the exact same besides that I didn't say no, I just did it." (*Id.* at 1:07:53-1:07:59.) Chase further conceded that she had not told her attorneys, and did not want to come back to speak with the officers because she knew it would make her civil case look bad. (*Id.* at 1:05:36-1:05:51.) When asked if she wanted to give a new statement changing her prior written statement to police, Chase expressed concern that doing so would "screw up" her civil case. (*Id.* at 1:20:55-1:21:48.) Given the totality of the foregoing circumstances, reasonable officers could have inferred that Chase had given a statement that she knew not to be true in an effort to support her civil suit and/or omitted material facts that would go against her civil suit with the intent to mislead them in the initiation

and conduct of their investigation of Nodine, thus meeting the elements of a charge of making a false statement in violation of Conn. Gen. Stat. § 53a-157b.

Moreover, in order to establish a violation of clearly established law, Chase was required to identify a case that put Officer Gompper and Detective Colangelo on notice that their specific conduct in applying for an arrest warrant against her on charges of making a false statement in violation of Conn. Gen. Stat. § 53a-157b was unlawful. *See e.g., Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021). Neither Chase nor the Second Circuit Court of Appeals identified any Connecticut authority or federal authority that addresses facts such as those at issue here.

Consistent with the record in this matter, Officers Colangelo and Gompper plainly did not violate any clearly established law. As the Second Circuit opined during oral argument of the appeal, if the law was not clearly established that omissions were not covered under the statute, it cannot be said that it would have been clear to any reasonable officer that charging Chase with making a false statement was unlawful under the circumstances presented, namely in the face of Chase's admitted omission of material facts, that her statement was not true, and that she knew it was not true when she signed it. Accordingly, the Second Circuit erred in failing to find that Officers Colangelo and Gompper were entitled to qualified immunity as the law was not clearly established that an arrest for an admitted material omission was covered under Connecticut's false statement statute. This Court should, therefore, grant certiorari to

correct the error of the Second Circuit as its ruling undermines the very intent and purpose of the doctrine of qualified immunity.

II. THE SECOND CIRCUIT ERRED IN FINDING THAT THE *NOLLE* OF THE CHARGES AGAINST CHASE LEFT OPEN THE QUESTION OF HER INNOCENCE IN DIRECT CONTRAVENTION OF THE CIRCUIT'S OWN PRECEDENT AND WHERE THE PROSECUTOR AFFIRMED THAT THE *NOLLE* OF CHARGES WAS BASED SOLELY UPON PROCEDURAL GROUNDS

The Second Circuit's decision that it lacked jurisdiction to consider the Petitioners' claims that the manner of resolution of Chase's underlying criminal proceedings by entry a *nolle* negates her malicious prosecution claims against them, entitling them each to qualified immunity, is in conflict with the decisions of *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018) and *Thompson v. Clark*, 794 Fed.Appx. 140 (2d Cir. 2020), *cert. granted in part*, 141 S. Ct. 1682 (2021).

Both *Lanning* and *Thompson* hold that a plaintiff who brings a § 1983 malicious prosecution claim must show "affirmative indications of innocence" to establish the favorable termination element of the claim.

In *Lanning* the Second Circuit considered what it takes for a plaintiff to "allege that his criminal proceedings were terminated in his favor under

§ 1983." 908 F.3d at 24. The plaintiff argued that the Second Circuit should interpret the common law the same way as the New York Court of Appeals, under which "the favorable termination element is satisfied so long as 'the final termination of the criminal proceeding is *not inconsistent* with the Plaintiff's innocence.'" *Id.* at 24-25 (emphasis in the original). The defendants responded "that the underlying criminal proceeding must be terminated 'in a manner that is *indicative of* Plaintiff's innocence.'" *Id.* at 25 (emphasis in the original). The Second Circuit agreed with the defendants stating "we write to dispel any confusion among district courts about the favorable termination element of a § 1983 malicious prosecution claim." *Id.* at 25. "Our prior decisions requiring *affirmative indications of innocence* to establish 'favorable termination' . . . continue to govern § 1983 malicious prosecution claims . . . ." *Id.* (emphasis added).

The *Lanning* Court went on to hold that where dismissal of criminal charges is based on procedural or jurisdictional grounds, the "affirmative indications of innocence" requirement is not met. *Lanning*, 908 F.2d at 28. Also, where the reasons stated on the criminal court record for dismissing the criminal charges do not indicate the arrestee's innocence, the requirement is not satisfied. *Id.* at 28. "As we have explained in discussing 'the constitutional tort of malicious prosecution in an action pursuant to § 1983,' where a dismissal in the interest of justice 'leaves the question of guilt or innocence unanswered[,] . . . it cannot provide the favorable termination required as the basis for [that] claim.'"

Id. at 28-29 (citing *Hygh v. Jacobs*, 961 F.2d 359, 367-68 (2d Cir. 1992)).

In *Thompson*, the plaintiff appealed, *inter alia*, from the District Court's granting of judgment as a matter of law in favor of the defendants pursuant to Rule 50 on plaintiff's 42 U.S.C. § 1983 claim for malicious prosecution claim. *Thompson*, 794 Fed. Appx. 141. The District Court granted judgment in favor of the defendants on the basis that the plaintiff did not establish favorable termination of his criminal case. *Id.*

The *Thompson* Court, in rejecting the plaintiff's argument that "he should not be required to prove favorable termination because it is not a substantive element of the claim, relied on the holding in *Lanning* that "affirmative indications of innocence" are required to establish the favorable termination element of a § 1983 claim for malicious prosecution. *Thompson*, 794 Fed. Appx. 141. The Court agreed with the District Court that "it was bound by *Lanning* to enter judgment in favor of the defendants" on the plaintiff's malicious prosecution claim, where neither the prosecution nor the criminal court provided any specific reasons on the record for dismissal of the underlying criminal charge and, at an evidentiary hearing before the District Court, plaintiff's "state-court defense counsel testified that she was unable to point to affirmative indication of innocence." *Id.* at 141-42.

Here, the record unequivocally established that there exists no affirmative indication of innocence. Rather, the prosecutor who entered the *nolle*

expressly affirmed it was entered on procedural grounds when Chase met the State's Attorney's condition of not having any new arrests for a period of time. (App. at 32.) Further, the criminal court record concerning entry of the *nolle* confirms that it was entered on procedural grounds in accordance with Chase's satisfaction of the State's Attorney's required condition. (App. at 33.)

Thus, the Second Circuit's holding finding that it did not have jurisdiction to consider the Petitioners' claim of qualified immunity as to Chase's malicious prosecution claim is in conflict with *Lanning*, *Thompson*, and Second Circuit authority holding that the Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *Thompson*, 794 Fed. Appx. at 142 (citing *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004)).

Further, the Second Circuit's holdings in *Lanning* and *Thompson* are consistent with the First, Third, Fourth, Sixth, Ninth, and Tenth Circuit, which hold that "the mere fact that a prosecutor has chosen to abandon a case [is] insufficient to show favorable termination." *Cordova v. City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016) (citing *Wilkins v. DeReye*s, 528 F.3d 790, 799 (10th Cir. 2008)). "Instead, the termination must in some way 'indicate the innocence of the accused.'" *Id.* Thus, with seven circuits considering the issue requiring affirmative indication of innocence, this is the majority rule.

The Petitioners recognize the Eleventh Circuit, in *Laskar v Hurd*, 972 F.3d 1278 (11th Cir. 2020), has

applied a "variant" of the rule applied by the other seven circuits, *see* Larry Thompson, Petitioner, v. Pagiel Clark, et al., Respondents., 2021 WL 6051144 (U.S.), 84-85 (U.S. Oral. Arg., 2021), holding "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." *Laskar*, 972 F.3d 1295 (emphasis added). The Second Circuit in finding it did not have jurisdiction to consider whether the Defendants were entitled to qualified immunity as to Chase's malicious prosecution claim seemingly adopted this "variant" of the rule. (*See* App. at 8.) The Court's adoption of the "variant" of the rule is in direct conflict with Second Circuit precedent as set forth above and the sound reasons for the indication-of-innocence standard as set forth by the respondent in *Thompson* and not repeated here.

In conclusion, this case presents another vehicle for this Court to resolve an important conflict amongst the federal circuit courts as to whether the favorable termination rule applied to § 1983 claims for malicious prosecution requires "affirmative indications of innocence." The Petitioners respectfully request that the Court grant this petition for the purpose of resolving this ongoing conflict.

CONCLUSION

For the foregoing reasons, the Petitioners, JOHN COLANGELO AND ADAM GOMPPER, respectfully request that the Court grant this petition.

Respectfully Submitted,

KRISTAN M. MACCINI
Counsel of Record
BEATRICE S. JORDAN
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114
Ph: (860) 249-1361
kmaccini@hl-law.com

Counsel for Petitioners