No. 22-____

IN THE

Supreme Court of the United States

ANTHONY HAWORTH,

Petitioner,

v.

CITY OF WALLA WALLA; MARCUS GOODWATER, INDIVIDUALLY, AND IN HIS CAPACITY AS AN EMPLOYEE OF THE CITY OF WALLA WALLA; SCOTT BIEBER, INDIVIDUALLY, AND IN HIS CAPACITY AS AN EMPLOYEE OF THE CITY OF WALLA WALLA; COUNTY OF WALLA WALLA; MICHELLE MORALES, INDIVIDUALLY, AND IN HER CAPACITY AS AN EMPLOYEE OF WALLA WALLA COUNTY; JAMES NAGLE, INDIVIDUALLY, AND IN HIS CAPACITY AS AN EMPLOYEE OF WALLA WALLA COUNTY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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December 28, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

ISSUES PRESENTED

1. Whether this Court should overrule a half-century of precedent that has inaccurately interpreted the intent and purpose of Section 1983 by affirming immunity protection for the very defendants that the Act was originally intended to confront and apply, for the first time, the Notwithstanding Clause of the original law (the Ku Klux Klan Act of 1871) and the 42d Congress's decision to abrogate the common law in civil rights actions, including qualified and absolute immunities.

2. Whether a criminal defendant can allege a Section 1983 claim for a Brady violation for failure to disclose potentially exculpatory evidence when the defendant was not convicted of a crime.

3. Whether a prosecutor is entitled to absolute immunity when the prosecutor inserted herself in an investigative process when modifying a search warrant affidavit and vouched for the modification with her signature even where the wrongful actions were post indictment and related to a judicial proceeding.

PARTIES TO THE PROCEEDING

Petitioner is Anthony Haworth, plaintiff-appellant below.

Respondents, defendants-appellees below, are listed in the caption and are not repeated here.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a natural person.

RELATED PROCEEDINGS

The following proceedings are related:

United States District Court for the Eastern District of Washington: Haworth v. City of Walla Walla, et al., No. 4:19-cv-05254-TOR (May 10, 2021) (judgment)

United States Court of Appeals for the Ninth Circuit: Haworth v. City of Walla Walla, et al., No. 21-35436 (Aug. 2, 2022) (judgment); (Oct. 4, 2022) (order denying petition for panel rehearing)

United States District Court for the Eastern District of Washington: Torrescano v. Goodwater, et al., No. 4:22-cv-5049-TOR (Nov. 9, 2022) (order dismissing action, currently on motion to amend) – Plaintiff was a witness in the underlying state criminal action and brought his own Section 1983 and state law claims.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

COURT FILINGS Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on August 2, 2022. Respondents timely requested panel rehearing, which the Ninth Circuit denied on October 4, 2022. Petitioner timely files this Petition. This Court has jurisdiction under Title 28, United States Code, Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 42, Section 1983 provides:

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1 of the original text of Section 1983, passed in 1871, via the Ku Klux Klan Act, provides (with emphasis added):

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person

within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of the malicious prosecution of Petitioner, Anthony Haworth, and his subsequent claims brought under 42 U.S.C. §§ 1983 and 1988 for violations of his constitutional rights. It has to do with process, not outcome – since, in the end, the charges were dismissed with prejudice, and an outside prosecutor recommended that the case be "regarded as a declined investigation due to insufficient evidence."

But Petitioner's constitutional rights were violated on the road to his vindication, including by (a) the nondisclosure of *Brady*[1] evidence, and (b) a prosecutor's zeal to keep tainted evidence by manipulating resubmission of a failed search warrant affidavit to ensure court deception to retain evidence that was illegally obtained at the outset. It is alleged that Respondents engaged in these constitutional rights violations and thus became defendants in the underlying civil rights action.

Despite the outrageous nature of this prosecution, and Petitioner's vindication in the end, the courts below have determined that Petitioner has no 1983 remedy. They reached that conclusion by, *inter alia*, ruling that (a) the investigators had qualified immunity for their actions, (b) no *Brady*-type violation of rights occurs when there is no prejudice (using criminal law standards), and (c) the prosecutor had absolute immunity post-indictment where she allegedly was

[1] *Brady v. Maryland,* 373 U.S. 83 (1963), is the landmark case establishing that the government must turn over all exculpatory evidence that might exonerate the defendant to the defense.

just fixing an overly broad subpoena request (but did so through manipulation of facts and law while hand-picking an uninformed investigator to resubmit the request so as to avoid obligations to be truthful and complete in search warrant affidavits).

This case raises important questions of federal law that have not been, but should be, settled by this Court, namely:

(a) Whether there should be immunity at all, given the "Notwithstanding Clause" of Section 1983 as originally enacted in 1871;

(b) Whether the innocent and unconvicted have rights, i.e., whether a Section 1983 action is viable in *Brady* violation cases not only where a conviction has been overturned but also where a conviction cannot be obtained once *Brady* violations come to light, measuring prejudice according to civil, not criminal, standards (with a split in the circuits regarding how these cases should be treated); and

(c) Whether a prosecutor should be entitled to absolute immunity when the prosecutor's actions were more investigative than prosecutorial, making any immunity "qualified" at best, rather than absolute (with a split in the circuits on how to approach this question).

A. Factual Background[2]

Petitioner Anthony Haworth was a decorated combat veteran of the Marine Corps and a long-time law enforcement officer with an unblemished record. In

[2] The following allegations are primarily found in the Complaint, excerpts of which are attached as Pet. App. C (17a-71a). Undisputed allegations are also included.

October 2015, after Petitioner initiated divorce proceedings against his then-wife, his 24-year-old stepdaughter, Alix Skaggs, falsely accused him of sexually assaulting her when she was younger, and that she believed he took photos of her while doing so. There is credible evidence that she lied about the assault and photos to paint Petitioner in a negative light in the divorce proceedings, and exact revenge on Petitioner for divorcing her mother. This evidence included her admission that she was with another man at the same date and time of the alleged rape accusation.

Petitioner self-reported Skaggs' allegations to his employer, the City of Pasco Police Department, which investigated and cleared Petitioner of any wrongdoing.

Two years later, as spousal maintenance for her mother was ending, Petitioner's ex-wife made a report to a department of social services agency alleging Petitioner had had sexual relations with her daughter. The agency advised the ex-wife that the stepdaughter, and adult, must report the incident herself, which Skaggs ultimately did. The agency then contacted the Benton County Prosecutor, who conflicted out of the investigation, and passed the case on to the City of Walla Walla. Respondent Goodwater, a Walla Walla police department detective, was in charge of the investigation and Respondent Morales was the Walla Walla County deputy prosecutor. Respondent Goodwater obtained an overly broad search warrant on April 7, 2017, based on his affidavit that Skaggs claimed Petitioner took pornographic images of her as well as engaged in unlawful sexual activity with her as a minor, and watched her via a peep hole from in the house where they lived (claims that differed from her past claims and would differ from her future claims). Though nude images were retrieved via the overly

broad search warrant, they came from the "cloud" belonging to the family, and other evidence showed that pornographic images that could be tracked electronically were taken by Skaggs herself, and a boyfriend at the time; not Petitioner.

On May 25, 2017, based solely on Skaggs' accusations and the cloud images, Respondents charged Petitioner with various sexual crimes allegedly occurring between 2008 and 2013.

During the investigation and prosecution, Respondent Goodwater directed Skaggs to delete a public comment she made on a public website to keep Petitioner's lawyer from reading it because "sometimes the defense attorneys will review those comments and make it an issue."[3] After receiving these instructions to destroy evidence before the defense lawyers could get their hands on said evidence, Skaggs claimed she no longer could find her cell phone, laptop or journal, circumstantial evidence that Respondent Goodwater's instruction to delete evidence had the desired effect on Skaggs – to get rid of other evidence favoring Petitioner.

Also during the investigation and prosecution, Respondent Goodwater failed to disclose exculpatory evidence that Skaggs could not be trusted and is a pathological[4] liar; he disclosed the evidence only after he was pressured to do so, and only after the initial trial date was continued and speedy trial waived.

As to Respondent Morales: A year after initiating this prosecution, Respondent Morales – the prosecutor

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[3] The contents of this text message are undisputed.

[4] The fact Skaggs' grandmother called her a "pathological" liar is undisputed.

– personally involved herself in the investigative and warrant process by working with law enforcement officers in preparing a warrant application to replace the search warrant affidavit from the year before and obtain a less broad search warrant to fit within legal parameters. In completing that process, Respondent Morales

> (a) chose a new investigator to submit the affidavit – one who did not have the knowledge that Respondent Goodwater had on Skaggs' lack of veracity (and that Respondent Morales also had known, but did not share those details with the new investigator and signing officer);
>
> (b) limited the new officer's inquiry to year-old facts only, and
>
> (c) personally verified the contents of the new search warrant affidavit via her own signature, akin to the actions of the prosecutor in *Kalina v. Fletcher*, 522 U.S. 118 (1997) (where the Court held that only qualified, not absolute, immunity applied).

The foregoing conduct of both Respondents unnecessarily lengthened the state court criminal proceedings, with associated harm to Petitioner, including suspension from his employment as a law enforcement officer and grave emotional distress resulting from the baseless charges. All Respondents participated and/or were alleged to have policies and procedures that allowed for, condoned, and/or encouraged such conduct.

Walla Walla County inexplicably withdrew as the assigned special prosecutor one month before the trial date. This prompted the substitute Franklin County Prosecutor to move for dismissal *without* prejudice;

and the assignment of a new special prosecutor to conduct an independent review. After that comprehensive review, charges were dismissed by court order *with* prejudice. The independent prosecutor stated:

> *[W]e have determined that the totality of the evidence available to the State falls well short of any reasonable probability of meeting the State's burden of proof beyond a reasonable doubt. In fact, our analysis suggests that it would likely be impossible to prove the substance of the allegations by a preponderance of the evidence. We further determine that any additional litigation in this matter would not be in the interest of justice, and contrary to the best use of prosecutorial and judicial resources. As such, this office recommends that this matter not be re-filed, and that such be regarded as a declined investigation due to insufficient evidence.*

In turn, the trial court dismissed the matter with prejudice, finding:

> *NOW THEREFORE, THE COURT FINDS: Insufficient evidence exists in this case to support criminal charges, and/or sustain a conviction beyond a reasonable doubt. As such, IT IS HEREBY ORDERED that the case be dismissed with prejudice.*[5]

[5] The language of this order is undisputed.

B. Trial Court Proceedings Below[6]

After the charges were dismissed with prejudice in state court, Petitioner filed suit against the Respondents, alleging deprivation of his constitutional rights actionable under 42 U.S.C. § 1983 and state-law claims (including for malicious prosecution) in the Eastern District of Washington.[7] The district court dismissed the federal claims against all Respondents.[8] For city Respondents and officers, it dismissed the claims pursuant to qualified immunity and *Saucier v. Katz*, 533 U.S. 194 (2001).[9] For the prosecutor Respondents, it initially dismissed almost all the claims on the basis of absolute immunity;[10] it did retain the claim on the second search warrant affidavit in which Respondent Morales was alleged to have engaged in investigative role, but it ultimately dismissed this claim under absolute immunity and due to Respondent Morales' assertion that she directed the amendment and resubmission of the search warrant affidavit only to comply with recent Washington caselaw regarding breadth of

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[6] The three district court rulings and final judgment dismissing this case are not dispositive to the questions presented in this petition (which were resolved by the Ninth Circuit as a matter of law) and so are not included in the Appendix.

[7] Pet. App. C (17a-71a) (factual excerpts only).

[8] United States District Court for the Eastern District of Washington: Haworth v. City of Walla Walla, et al., No. 4:19-cv-05254-TOR (May 10, 2021) (judgment).

[9] United States District Court for the Eastern District of Washington: Haworth v. City of Walla Walla, et al., No. 4:19-cv-05254-TOR (June 11, 2020) (order).

[10] United States District Court for the Eastern District of Washington: Haworth v. City of Walla Walla, et al., No. 4:19-cv-05254-TOR (August 20, 2020) (order).

search warrants.[11] The district court dismissed this claim despite the allegations of Respondent Morales' direct involvement in the investigative process for issuance of this new search warrant affidavit; her affixed signature on that process; and her active disregard to false and/or misleading information in the new affidavit (akin to an investigative, not prosecutorial, role, making absolute immunity inapposite).

C. The Court of Appeals' Decision

The Ninth Circuit affirmed dismissal of the federal claims.[12] Pet. App. A (1a-15a).

For Respondent Goodwater, the Court held, *inter alia,* that qualified immunity applied and also held that, id. at 2a-3a:

> (a) there was no prejudice to Goodwater's instructing Skaggs to delete the online comment because Petitioner knew of it and it was not exculpatory (but the Court did not comment on the circumstantial evidence of additional deleted/"lost" evidence, whose details were unknown to Petitioner), and
>
> (b) although the suppressed evidence regarding Skaggs' lack of credibility was material and favorable to Petitioner, Petitioner could not show he was prejudiced by Goodwater's delay in reporting it. In support, the Ninth Circuit

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[11] United States District Court for the Eastern District of Washington: Haworth v. City of Walla Walla, et al., No. 4:19-cv-05254-TOR (May 10, 2021) (order).

[12] The Ninth Circuit did reverse on the state law malicious prosecution claim. This reversal is not part of this petition for writ of certiorari.

> cited *Raley v. Ylst*, 470 F.3d 792 (9th Cir. 2006). But *Raley*'s ruling regarding prejudice was in the criminal conviction context, not in terms of prejudice in a civil context – nor did it evaluate the prejudice caused by the lengthy delay in receiving this exculpatory evidence from a civil-rights, civil perspective.

For Respondent Morales, the Court held, *inter alia*, that Morales' modification and marshaling of a new search warrant affidavit was done "during the prosecutorial, not investigatory, phase" (i.e., after charges) and was done to comply with a recent Washington appellate case, so absolute immunity applied. Id., 3a-4a. Like the district court, the Court of Appeals did not analyze the investigative acts done by Morales when obtaining this new warrant.

For the remaining Respondents, the Court held that, without liability for Morales or Goodwater, the other Respondents did not have liability. Id., 3a and 4a.[13]

After the Respondents' Petition for Rehearing was denied, id. at 16a, the case was remanded to the Eastern District of Washington due to the remaining state law claim of malicious prosecution. The case is currently stayed.

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[13] It did dismiss the County of Walla Walla outright. Pet. App. A (4a).

REASONS FOR GRANTING THE PETITION

This 1983 case involves a Petitioner who ultimately was vindicated with dismissal of charges but who suffered for years with suspension from his job, financial harm and emotional distress. The Ninth Circuit dismissed his claims due to immunities even while recognizing (at least as to the withheld exculpatory evidence) that constitutional rights were violated. This Court has recently had before it cases that challenge whether any immunities should be allowed in 1983 cases. We file this Petition to challenge application of those immunities, just as the other cases have done.

In addition, this case raises two other salient questions, neither of which have been answered by this Court definitively and both of which are the subject of circuit splits. They are

> (a) whether a defendant who obtains dismissal of charges pretrial can still have a *Brady* violation civil action under Section 1983 when the exculpatory evidence is produced prior to that trial but the delay in discovery of such evidence caused harm, and
>
> (b) whether a prosecutor's actions designed to present a misleading and/or out-of-date version of facts to a court for a second search warrant is given only qualified immunity (if immunity is allowed), even if those actions are post-indictment and/or related to judicial proceedings.

I. This Court Should Reconsider Immunities In Section 1983 Lawsuits.

Despite the clear language Congress used when enacting what is now Section 1983, Petitioner is left without a remedy for his constitutional rights, due to an "unholy trinity of legal doctrines – qualified immunity, absolute prosecutorial immunity, and *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978)" that "frequently conspires to turn winnable [civil rights] claims into losing ones." *Wearry v. Foster*, 33 F.4d 260, 278 (5th Cir. 2022) (Ho, J., *dubitante*).

Under the doctrine of qualified immunity as applied here, Petitioner cannot sue the Respondents for directing a witness to destroy evidence because, *inter alia*, he cannot prove bad faith. Under the doctrine of prosecutorial immunity (which is absolute) he cannot sue prosecutors who helped manipulate evidence for a second search warrant post-indictment, regardless of constitutional violation. The potential violations were not even considered in the Ninth Circuit opinion.

Issues have arisen in this Court about whether there should be immunity in Section 1983 cases. In *Health & Hospital Corp. of Marion County v. Talevski*, U.S. Supreme Court Case No. 21-806, this Court heard argument recently, on November 8, 2022, in which an amicus brief was filed by the Institute for Justice, asking the Court to revisit qualified immunity altogether. This recent scholarship has brought to light the crucial fact that the original 1983 text from 1871 contained a "notwithstanding clause" that was later omitted in what became our modern U.S. code (on a technical, not substantive, basis). The amicus brief explains how the omitted clause still has the force of law and how it contradicts assumptions that grounds the doctrine of

qualified immunity in 1983 cases. If found by this Court to be correct, the precepts in this amicus brief could eradicate qualified immunity in 1983 cases and thus is relevant here.

Certainly "the statute on its face does not provide for any immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The operative language provides that any person acting under state authority who causes the violation of a protected right "shall be liable to the party injured." And the same is true when placed in historical context. Section 1983 was first passed by the Reconstruction Congress as part of the 1871 Ku Klux Klan Act, which have been labelled a "suite of 'Enforcement Acts' designed to help combat lawlessness and civil rights violations in the southern states."[14]

When Congress crafts a new law,[15] it can retain or reject the "long-established and familiar principles" in the common law. *United States v. Texas*, 507 U.S. 529, 534 (1993). Courts assume Congress chose to retain the common law unless the statute says otherwise. *See Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35–36 (1983).

The statute at issue here is Section 1983. Starting in 1967, the Supreme Court has assumed that Congress intended to retain common-law principles in actions under Section 1983. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The assumed-incorporated "good faith" defense

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[14] William Baude, *Is Qualified Immunity Unlawful*?, 106 Calif. L. Rev. 45, 49 (2018).

[15] The next paragraphs rely on Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 101, ___ (2022) (forthcoming), *available at* https://tinyurl.com/QI-Flawed-Fnd ("Reinert"). They also rely on the Institute for Justice's September 23, 2022 amicus brief referenced above.

evolved into the modern doctrine of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 806-807 (1982) ("As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability.") And with each step along the path of qualified immunity, the Supreme Court has relied on the supposed silence of Section 1983 to ground the doctrine.[16]

But the Court erred when it assumed that Congress intended to incorporate the common law in Section 1983. The Court made this error because the version of 1983 reviewed by the Court at U.S. Code omits language originally passed by Congress.

As noted above and in the "relevant statutes" section at the start of this petition, when the 42d Congress passed Section 1983 as part of the Ku Klux Klan Act of 1871, it contained "additional significant text" from the modern-day 1983 statute, and "[i]n between the

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[16] *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (certain "immunities were so well established in 1871" that "Congress would have specifically … provided had it wished to abolish them"); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 67 (1989) (relying on presumption that 42d Congress "likely intended" for common law to apply); *Briscoe v. Lahue*, 460 U.S. 325, 337 (1983) ("[W]e find no evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions"); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (1983 "has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials"); *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (1983 is to be read in harmony with general principles of tort immunities and defenses, rather than in derogation of them). For more detail of the evolution of the doctrine of qualified immunity, *see* Reinert, *supra*, at 115 et seq. (forthcoming).

words 'shall' and 'be liable.'" *See Reinert, supra,* at 166-167 (forthcoming).

Specifically, between "shall" and "liable" was another clause back in 1871, saying government officials "shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable" under the statute. *Ku Klux Klan Act of 1871*, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added).

To determine the meaning of this clause, this Court should look to the "ordinary public meaning" of it "at the time of its enactment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). Accordingly, the Court should evaluate two key phrases: (1) "custom[ ] or usage of the State," and (2) "to the contrary notwithstanding."

As understood by the 42d Congress, a "usage or custom" was the common law. *See Strother v. Lucas*, 37 U.S. 410, 437 (1838). If a rule was established by "usage" or through "custom," it existed by "a common right, which means a right by common law." *Id.*; *see also Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659 (1834) ("The judicial decisions, the usages and customs of the respective states" established the "common law . . . in each [state]"); *Western Union Telegraph Co. v. Call Pub. Co.,* 181 U.S. 92, 102 (1901) (citing Black's Law Dictionary for proposition that common law springs from "usages and customs"). And the ordinary meaning of "notwithstanding" is the same today as it was for the 42d Congress in 1871. *See* Bryan A. Garner, *Garner's Modern English Usage* 635 (4th ed. 2016) ("This usage [of notwithstanding] has been constant from the 1300s to the present day"). "Notwithstanding" means "[w]ithout opposition, prevention, or obstruction from," or "in spite of." *Complete Dictionary of the*

English Language 894 (Webster's 1886)[17]; *NLRB v. SW Gen., Inc*., 137 S. Ct. 929, 939 (2017) (explaining the ordinary meaning of "notwithstanding" is "in spite of" or "without prevention or obstruction from or by").

Taken as a whole, the "Notwithstanding Clause" means that common law does not prevent person from being held liable (and without immunity) under Section 1983. *See Reinert,* 111 Calif. L. Rev. at 167-168 ("Its implications are unambiguous: state law immunity doctrine, however, framed, has no place in Section 1983").

A few years later, the Notwithstanding Clause was dropped from Section 1983 in the Revised Statutes of 1874. Given the evolution of law, we can conclude that this omission did not alter the 42d Congress' decision to abrogate the common law.

Indeed, the Revised Statutes were not designed to make substantive changes to the law. Instead, they were a compilation – putting all existing federal laws in the same place for the first time. Prior to that, the country lacked an official compilation of federal laws. Lawyers would have to rely on newspapers or private compilations to know what the law was. Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes – Their History and Use*, 22 Minn. L. Rev. 1008, 1008–09 (1938). It was President Jackson who "appointed a commission to revise, simplify, arrange, and consolidate all statutes of the United States." Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. Library J. 213, 218 (2020) (internal quotation marks omitted) – a goal of organization, not revision.

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[17] See archive.org/details/websterscomplete00webs/page/894/mode/2up?view=theater

Ultimately, Congress hired a lawyer name Thomas Jefferson Durant, who was not involved in the initial drafting, to go through the proposed revisions. 2 Cong. Rec. 646 (1874). Congress understood it would be impossible to "condense seventeen volumes into one and use precisely the same words that have been used in those seventeen," and that some language would be "necessarily changed" but that it intended "to preserve absolute identity of meaning in the law." Id., 650 (remarks of Rep. Lawrence), 1210 (remark of Rep. Poland), 4220 (Sen. Conkling). One legislator said, "We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense." 2 Cong. Rec. 129 (1873). Changes were made to miniaturize and condense the law. 2 Cong. Rec. 4220 (1874). Because the explicit intent of Congress was not to change the substantive provisions of the law, the omission of the Notwithstanding Clause in 1874 did not alter the 42d Congress' original decision to abrogate the common law from Section 1983. *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (when Congress decides to revise and consolidate laws, it does not change the effect of the law unless Congress explicitly says so.)

This Court has already viewed the omission of two other Notwithstanding Clauses from other statutes as non-substantive changes to the law. *See Jones v. Alfred H. Mayer Co*., 392 U.S. 409, 422 (1968); *The Civil Rights Cases*, 109 U.S. 3, 16–17 (1883). In *Jones*, the Supreme Court viewed the omission of another Notwithstanding Clause (in Section 1982) as a non-substantive change. *Jones,* 392 U.S. at 422 n.29. The Court recognized that the Section 1982 Notwithstanding Clause was "obviously inserted" to "emphasiz[e] the supremacy of the 1866 statute over inconsistent state or local laws." *Id*. And later, when "[i]t was deleted" in

the Revised Statutes, the Court presumed the omission was just a decision to remove perceived "surplusage." *Id*.

So it is with Section 1983. The 1871 Congress explicitly legislated that government officials can be held liable for 1983 violations, despite common law doctrines to the contrary. The omission of that language in 1874 should not change the law's impact.

The doctrine of qualified immunity rests on the presumption that the 1871 statute was silent about common law. But the statute was not silent – it explicitly rejected common law defenses. The original text of the statute shows the presumption was wrong. This Court should grant this petition, hold that there is no common law qualified immunity to apply (given the original language of the Act), and reverse.

As to prosecutorial immunity:[18] This Court has often upheld absolute immunity in a prosecutorial context. *See e.g., Imbler v. Pachtman,* 424 U.S. 409, 430 (1976); *Van de Kamp v. Goldstein,* 129 S. Ct. 855 (2009). But absolute-immunity rules are at odds with the history and purposes of Section 1983, as outlined herein. *See also Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (generally, there was not an "absolute prosecutorial immunity when § 1983 was enacted"). They also are at odds with constitutional tradition. At the time of the Founding, *ultra vires* acts by public officials were remedied through civil damages suits. *See, e.g., Wilkes v. Wood*, 98 Eng. Rep. 439 (C.P. 1763) (successful suit under English common

[18] The next paragraphs rely on the amicus brief filed in the United States Court of Appeals for the Fifth Circuit in *Wearry v. Foster*, Case No. 20-30406, on November 13, 2020, by the Constitutional Accountability Center.

law of trespass for an unlawful search and seizure). If the allegedly trespassing official was found liable, he could be "made to pay compensatory and (in egregious cases) punitive damages (though he might well in turn be indemnified by the government)." See Akhil Reed Amar, *The Bill of Rights*, 70, 70 (1998). And in the first steps toward independence, the First Continental Congress rebuffed parliamentary attempts to immunize from private damages suits government officials accused of wrongdoing. Declaration and Resolves of the First Continental Congress (1774), *reprinted in* Documents of American History 84 (H. Commager 9th ed., 1973). See also Akhil Reed Amar, *The Constitution and Criminal Procedure* 162, 162 (1997) (the preferred "vehicle for litigating the Fourth Amendment was a tort suit brought by a citizen and tried before a Seventh Amendment jury of fellow citizens"); Max R. Rapacz, *Protection of Officers Who Act Under Unconstitutional States*, 11 Minn. L. Rev. 585, 585 (1927) (during 1800s, "there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts"). Thus, if the Court reconsiders issues of qualified immunity in the context of original intent, we ask that it also take up the issue of prosecutorial (absolute) immunity.

II. This Court Should Rule On Civil Damages For *Brady* Violations Under 1983.

There is a circuit split – and no decision from this Court on the issue –whether an innocent person charged with crimes can bring a 1983 civil action for violation of his constitutional rights under *Brady* for civil damages when he/she is exonerated pretrial. This case here (with findings that the suppressed evidence

was material and favorable) is an excellent candidate for this Court to resolve this question.

At issue is whether (a) an innocent person never convicted can seek standard civil damages for *Brady* violations, and (b) what those damages should encompass.

A civil rights suit brought pursuant to 1983[19] can be an effective way for plaintiffs to redress constitutional wrongs that government officials have committed against them. Via potential compensatory and punitive damages, 1983 suits could serve as a deterrent against the withholding of exculpatory evidence to obtain convictions. But this Court has not analyzed *Brady* violations from a civil perspective – only a criminal one. *See* Sunil Bhave, *The Innocent Have Rights Too: Expanding Brady v. Maryland to provide the criminally innocent with a cause of action against police officers who withhold exculpatory evidence*, 45 Creighton L. Rev. 1, 31 (2011) ("*Bhave*") ("At each step in the *Brady* evolution, this Court has analyzed *Brady* in the criminal context, applying prejudicial error review where the relief sought is a new trial, not money damages") (*see also cases cited in Bhave,* 8-12). Thus, the focus in the Supreme Court cases has been on new trials, not money damages. *Id.,* 3

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[19] The next paragraphs rely on the following law review articles:

Andrew J. Burke, *Constitutional Law - Ninth Circuit Effectively Precludes Future Findings of Brady Violations in the Absence of a Conviction - Smith v. Almada, 640 F.3d 931 (9th Cir. 2011),* 45 Suffolk U. L. Rev. 589 (Spring 2012) ("Burke"); and

Sunil Bhave, *The Innocent Have Rights Too: Expanding Brady v. Maryland to provide the criminally innocent with a cause of action against police officers who withhold exculpatory evidence*, 45 Creighton L. Rev. 1 (2011) ("Bhave").

Despite there being no case on point from this Court analyzing 1983 civil lawsuit remedies to *Brady* violations, at least five circuits have applied the *Brady* criminal remedy, requiring an overturned conviction to justify a 1983 lawsuit. *See e.g., Morgan v. Gertz,* 166 F.3d 1307, 1310 (10th Cir. 1999) (finding no *Brady* liability because "a defendant who is acquitted cannot be said to have been deprived of the right to a fair trial"); *Flores v. Satz,* 137 F.3d 1275, 1278 (11th Cir. 1998) ("Plaintiff, however, was never convicted and, therefore, did not suffer the effects of an unfair trial. As such, the facts of this case do not implicate the protections of *Brady*"); *Taylor v. Waters,* 81 F.3d 429, 435-36 (4th Cir. 1996) (holding there is no settled authority establishing illegality of an officer's conduct in withholding exculpatory evidence from unconvicted plaintiffs); *McCune v. City of Grand Rapids,* 842 F.2d 903, 907 (6th Cir. 1988) (holding no *Brady* violation because underlying criminal proceeding terminated in appellant's favor so "he has not been injured by the act of wrongful suppression of exculpatory evidence"); *Rogala v. District of Columbia,* 161 F.3d 44, 55-56 (D.C. Cir. 1998) (adopting district court decision that police officers did not violate due process by failing to preserve witness because plaintiffs were never prosecuted). See *Bhave, supra*, at 14-22 (giving detailed analysis of cases).

The Seventh Circuit has indicated a willingness to consider recovery for exonerated defendants when *Brady* violations have occurred and created damages and harm in the 1983 civil context. In *Mosley v. City of Chicago*, 614 F.3d 391 (7th Cir. 2010), the Court articulated the test as whether evidence showed (1) the government withheld materially favorable evidence from the defendant, and (2) had the government (or officers) disclosed that evidence sooner, it would have

altered the decision to go to trial. *Mosley*, 614 F.3d at 397. It further opined:

> In other words, [the 1983 claimant] must show that if all parties had known of some piece of exculpatory evidence, the prosecution would not have moved forward with charges, the grand jury would not have indicted [the claimant], or the trial court would have granted a motion to dismiss the indictment.

Id.

This is what happened here, to Petitioner: once the suppressed exculpatory evidence was produced, an independent prosecutor was appointed, and he found insufficient evidence; the state trial court dismissed the criminal action with prejudice.

But even the Seventh Circuit has analyzed these kinds of 1983 *Brady* claims under a criminal law framework, relying on a criminal law prejudicial-error analysis and not recognizing that the relief sought by the 1983 Plaintiff is <u>not</u> a new trial but money damages. See e.g., *Christman v. Hanrahan,* 500 F.2d 65, 66 (7th Cir. 1974).

This approach results in the "patently absurd," *Bhave, supra at 25*, outcome that completely innocent defendants have no remedy against rogue actors despite the damage done to their lives – financial, emotional and otherwise – while they fight to prove their innocence and actually succeed (like Petitioner Haworth did here).

> [I]t is patently absurd to allow those who have been criminally convicted to have their due process rights vindicated under *Brady*, while denying that opportunity to those who are

> innocent. The innocent defendants should receive full protection of the Fourteenth Amendment's Due Process Clause. Accordingly, the only reasonable interpretation of due process in the *Brady* context must be that, where the police have withheld exculpatory evidence, a civil *Brady* claim is available, even if the plaintiff is criminally innocent.

Id., at 25-26.

As noted in *Bhave,* a few cases in the Northern District of Illinois have found *Brady* liability where a plaintiff has not been convicted. *See Bhave at 3-4, n.8 (and cases cited therein).* But also as noted there, these cases have little precedential value given the superseding decisions at the Seventh Circuit appellate level. *Id.*

The issue of whether a 1983 claim can be brought before a trial and/or for innocent defendants seems unresolved in the Ninth Circuit. In *Parker v. County of Riverside*, No. 5:2021cv01280, 2022 WL 2204151 (C.D. Cal. Feb. 23, 2022), a California district court found that a plaintiff who was developmentally delayed and the victim of a coerced confession for a murder he did not commit had a viable 1983 claim for *Brady* violations against officials who, *inter alia*, delayed producing DNA exonerating the Plaintiff and failed to timely produce the audiotape of the true killer confessing to the crime. The court made this ruling despite the fact that the defendant (now 1983 claimant) was never tried for the alleged murder. The parties did not dispute that the material was both material and suppressed. The court noted the Plaintiff's damages as including an additional six months to four years of confinement that he otherwise would not have suffered had the exculpatory information been disclosed. *See Parker, at *14.*

The court in *Parker* noted that this Court has yet to rule on this issue, stating:

> [T]he only opportunity the Supreme Court has had "to determine whether procedural due process is violated where non-disclosure of exculpatory evidence leads to something other than conviction after a trial," the Court "did not rule that the 'fair trial' protection afforded by the *Brady* rule has no general application in the pretrial context" – even though ruling so would have resolved the case.

Parker, at *11 (*quoting United States v. Ruiz*, 536 U.S. 622 (2002)).

Parker is currently on interlocutory appeal. See *Parker v. Cty. of Riverside*, No. 22-80041, 2022 U.S. App. LEXIS 17360 (9th Cir. June 23, 2022).

A potential solution to determining the parameters of a 1983 civil damages action where exculpatory and material evidence has been withheld is to apply the procedural due process parameters outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976). See e.g., Andrew J. Burke, *Constitutional Law - Ninth Circuit Effectively Precludes Future Findings of Brady Violations in the Absence of a Conviction - Smith v. Almada, 640 F.3d 931 (9th Cir. 2011),* 45 Suffolk U. L. Rev. 589 (Spring 2012) ("*Burke*").

This would involve the three-part balancing test found in *Mathews*, to wit:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

> safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

As noted in the *Burke* law review article:

> At the outset, *Mathews* is appropriate because the *Brady* doctrine is based on the text of the Fifth and Fourteenth Amendments, which not only implicitly protect the right to a "fair trial," but expressly shelter the individual against any denial of liberty without due process of law. Traditional procedural due process analysis also comports with factual and legal scenarios surrounding *Brady* violations; as the *Mathews* test illuminates, perhaps the greatest likelihood for wrongful deprivation of a criminal defendant's liberty interest occurs when the government suppresses evidence favorable to him.

Burke, at 597.

Whether applying *Mathews* or simply recognizing that there are significant civil (and traditional) 1983 damages not involving whether a conviction is reversed, it is incumbent on this Court to decide whether to recognize the true nature of a 1983 claim for deprivation of constitutional rights because of the withholding of *Brady*-type information in a way that results in damages that can be valued for innocent defendants who are the victims of overzealous government agents.

This case is a good vehicle to consider the question presented on this issue. There are no jurisdictional

problems, no major fact disputes, and the issue highlighting the circuit split involves civil damages for exonerated people, making the scope of the question salient here. In our case, the Ninth Circuit ruled that Respondent Goodwater withheld evidence that was both material and favorable but dismissed the 1983 claim on the ground that Petitioner could not show prejudice – but cited to the resolution of a criminal case for that proposition. If this Court decides to review the 1983 civil liabilities for *Brady* violations to determine whether they should be approached differently from criminal cases, whether damages outside of the trial process (such as attorney fee damages, loss of employment, pain and suffering, and potential punitive damages, etc.) are available in this civil context, then this is an appropriate vehicle for resolution of that issue because Petitioner endured these types of damages while being fully vindicated at the end.

III. This Court Should Clarify When A Prosecutor's Actions Post-Indictment Do Not Warrant Absolute Immunity Protections Because Of Their Investigative Nature.

We have asked this Court in Subsection A above to revisit whether any immunities should exist in 1983 cases. To the extent the Court does not grant that request, we ask for the Court to consider taking this case to clarify that investigative action by a prosecutor should result in only qualified (not absolute) immunity, even if the action is taken after charges are filed and relates to the prosecutorial aspect of the case.

This Court has held that prosecutors are absolutely immune for "activities [that are] intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976). However, this Court has also indicated that "absolute immunity may

not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." *Van de Kamp v. Goldstein,* 555 U.S. 335, 342 (2009); *Imbler*, 424 U.S. at 430 (noting cases that held that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to police officers). "There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial" and "investigative functions normally performed by a detective or police officer." *Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993). In *Buckley*, this Court held that prosecutors were not entitled to absolute immunity when they allegedly "conspired to manufacture false evidence that would link [a plaintiff's] boot with [a] bootprint the murderer left on the front door" by "shopp[ing] for experts until they found one who would provide the opinion they sought." Id. at 272. A prosecutor who performs the function of a complaining witness may be entitled only to qualified, not absolute, immunity. *Kalina v. Fletcher,* 522 U.S. 118, 131 (1997).

The line between prosecutorial and investigative immunities has been a difficult one for lower courts to draw. Currently, the Fifth Circuit appears in the midst of a struggle on this issue. See *Wearry v. Foster*, 33 F.4d 260 (5th Cir. 2022). As spelled out in the *dubitante* opinion by Judge Ho in that case, *Wearry* is a reasonable result (and one which he would like to join, under fairness principles) but one that does not comport with previous Fifth Circuit precedent which, in turn, has worked diligently to apply this Court's precedent. As Judge Ho notes at the beginning of his *dubitante* opinion:

> There are good reasons to believe that the doctrine of absolute prosecutorial immunity is wrong as an original matter. So I am tempted to join the majority and hold that prosecutorial immunity does not foreclose this case from proceeding to the merits.
>
> But I am doubtful that governing precedent permits us to reach that result. The Supreme Court has repeatedly affirmed the doctrine of prosecutorial immunity. And our circuit has dutifully applied it—even in the face of disturbing claims of prosecutorial misconduct.
>
> So I write separately, first, to explain how governing precedent requires us to grant prosecutorial immunity in this case, and second, to note that I reach this conclusion reluctantly, because the doctrine of prosecutorial immunity appears to be mistaken as an original matter.

Wearry, 33 F.4th at 273 (Ho, J., *dubitante*).

Judge Ho notes that, in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), the Fifth Circuit applied absolute immunity for a prosecutor even when the prosecutor's "unique obligations" to only search for the truth were "flagrantly disregarded" by the prosecutor intimidating a third party into giving false testimony to secure a murder conviction and death sentence for the defendant. Id. at 274. "Yet we refused to even hear Cousin's [1983] claims against the prosecutor on the merits" because "we reasoned . . . he was serving as an advocate, not as an investigator. . ." and was thus entitled to absolute immunity. Id.

Judge Ho noted that the *Wearry* case presented nearly identical facts and yet the Fifth Circuit was only allowing for qualified immunity. Id. He noted that

the fact the *Cousin* coercion occurred post-indictment was a significant factor in the earlier decision's ruling in favor of absolute immunity, and argued that *Cousin* held that, as long as the prosecutor intended to present the testimony for trial, he was entitled to absolute immunity – case resolved regardless of facts. Id. He noted this Court's past rulings that focused on pre-indictment versus post-indictment activity. Id.

Judge Ho further noted how the original enactment of 1983 (as explained in the earlier section above) never intended these immunities for 1983 actions, id. at 279, but such true intentions of the actual law cannot help Mr. Wearry in his case:

> [T]he upshot is this: Under an originalist view of § 1983, we should presumably allow Wearry's claim to proceed to the merits. But the doctrine of absolute prosecutorial immunity kills Wearry's suit. And if prosecutorial immunity didn't do the job, then qualified immunity presumably would. (And Wearry didn't even bother to sue the municipality, because *Monell* would have snuffed that claim out in an instant.)
>
> That's wrong. Wearry's complaint plainly alleges a bad faith, malicious violation of his constitutional rights. That should be enough under the text and original understanding of § 1983 to proceed to the merits – even assuming that courts should apply at least those immunities that existed in the common law at the time of enactment.

Id., at 280.

In Petitioner's case here, the Ninth Circuit applied absolute prosecutorial immunity because it was

caught up in the same post-charging aspects of the case like the *Cousin* case was (and just like Judge Ho believed the *Wearry* case should have done, given Supreme Court and Fifth Circuit precedents – despite his personal objections to the state of the law). These are awkward lines to draw, and they do not meet the intent of the law as originally drafted.

Indeed, in Petitioner Haworth's case, the prosecutor was jumping through hoops (finding a new investigator without current knowledge of the case; not allowing the previous investigator – Respondent Goodwater – to opine on it since he now knew of the complaining witness' lack of veracity; instructing the new investigator to recite only pre-charge facts; and affixing her own signature to the affidavit so the search warrant court would have the comfort of knowing that the prosecutor agrees with the new investigator's facts) just to keep infirm evidence that was obtained by a pre-charge overly broad search warrant from the year before. This is the epitome of giving deference to a prosecutor simply because the case is in a post-charge posture. It flies in the face of cases like *Franks v. Delaware*[20] and *Kyles v. Whitley*,[21] which require much more candor on the part of the government. It is allowing government officials to hide evidence. It is creating bad results. Once the activity was disclosed, the charges were dismissed with

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[20] 438 U.S. 154 (1978) (holding that it violates the Constitution for an officer to make a statement in a search warrant affidavit that are deliberately false or are made with a reckless disregard for the truth).

[21] 514 U.S. 419 (1995) (government has an affirmative duty to disclose evidence evidence that is favorable to a defendant, which includes an ongoing duty to learn of any favorable evidence within the law enforcement system and disclose it).

prejudice and the independent prosecutor stated there was insufficient evidence overall. And yet Petitioner Haworth has been left without a viable 1983 claim? In the words of Judge Ho, "That's wrong."

This Court should grant certiorari on this question to assist lower courts in determining how to narrowly (not broadly) apply absolute immunity (if at all).

IV. The Court Should, At A Minimum, Hold This Petition.

This Court should hold this Petition until the Court decides *Health & Hospital Corp. of Marion County v. Talevski*, U.S. Supreme Court Case No. 21-806, for which argument was held on November 8, 2022 and for which the Institute for Justice provided an amicus brief on the issue of immunities in light of the true intention of Congress back in 1871 when first passing what is now 42 U.S.C. § 1983.

This Court "regularly hold[s] cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be [granted, vacated, and remanded] when the case is decided." *Stutson v. United Sta*tes, 526 U.S. 163, 181 (1996) (Scalia, J., dissenting); see also *Williams v. Alabama*, 577 U.S. 1188 (2016) (Thomas, J., concurring) ("[t]he Court has held the petition in this and many other cases pending the decision in" an overlapping case). This case raises two of the same legal issues involving immunity, in a similar procedural posture, based on similar relevant facts as these cases. The Court therefore should hold this Petition until resolution of *Talevski.*

CONCLUSION

We ask for this petition for writ of certiorari to be granted. Alternatively, the Court should hold this Petition until after resolving *Talevski*, and then reverse, vacate, and remand this case in accordance with that outcome.

Respectfully submitted,

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December 28, 2022