No. _____

In The

Supreme Court of the United States

KEITH ALLEN KIEFER,

Petitioner,

v.

ISANTI COUNTY, MINNESOTA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a criminal trial under a county's civil solid waste ordinance specific to solid-waste management operations, the county incarcerated the petitioner Keith Kiefer for 60 days after his conviction. There was no pre-trial detention. On appeal in a subsequent civil case, the state appellate court found the ordinance "obviously" inapplicable to Mr. Kiefer's personal outdoor storage. Then, the state court vacated his criminal conviction. Kiefer then sued the county under 42 U.S.C. § 1983 for Fourth and Fourteenth Amendment violations, but the lower courts granted the county's motion for judgment on the pleadings. The questions presented are:

1. Whether the analytical home for § 1983 unreasonable seizure claims involving only post-conviction incarceration for 'violating' an inapplicable law is the Fourth Amendment's Unreasonable Searches and Seizures Clause or the Fourteenth Amendment's Due Process Clause when the Fourth Amendment Unreasonable Searches and Seizures Clause apparently drops out "once a trial has occurred." *Manuel v. City of Joliet, Ill.,* 580 U.S. 357, 369 n.8 (2017).

2. Whether a plaintiff must prove a mens rea element for county governmental liability for a § 1983 unreasonable seizure claim, an issue reserved in *Thompson v. Clark*, 142 S. Ct. 1332, 1338, n.3, and where a circuit split persists as recently acknowledged in *Armstrong v. Ashley*, 60 F.4th 262, 279 (5th Cir. 2023) ("Following *Thompson*, the circuit split remains in place.").

PARTIES TO THE PROCEEDINGS

The petitioner seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in *Kiefer v. Isanti Cnty., Minnesota*, 71 F.4th 1149 (8th Cir. 2023) is Keith Kiefer. Mr. Kiefer was the plaintiff in federal district court proceedings and appellant in the court of appeals.

Respondent is Isanti County, Minnesota, who was the defendant in the federal district court proceedings and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual. There is no parent company nor subsidiary involved.

RELATED CASES

The citation to the state court criminal case is *State of Minnesota v. Keith Allen Kiefer*, Isanti Cty. Distr. Ct., File No. 30-CR-08-1290. The jury verdict against Kiefer was entered on April 8, 2009. App. 28.

The citations to the state court civil cases are: *County of Isanti vs Keith Allen Kiefer v. City of Ramsey, and City Administrator Kurtis Ulrich, in his official capacity and individually*, Isanti Cty. Distr. Ct., File No. 30-CV-11-5893; *County of Isanti v. Kiefer*, 2016 WL 4068197 (Minn. App. 2016) and *County of Isanti v. Kiefer*, 2017 WL 3469521 (Minn. App. 2017). Judgment was entered on October 26, 2017.

RELATED CASES—Continued

The citation to the state court post-conviction remedy case is: *Kiefer v. State of Minnesota*, Isanti Cty. Distr. Ct., File No. 30-CR-08-1290. The order vacating Kiefer's conviction was entered on October 8, 2018. App. 25–27.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment and decision of the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the U.S. District Court's decision to dismiss the petitioner's federal law claims on a motion for judgment on the pleadings is a published decision, available at *Kiefer v. Isanti Cnty., Minnesota*, 71 F.4th 1149 (8th Cir. 2023) and is reproduced in the Appendix ("App.") at 1–9. The opinion of the United States District Court for the District of Minnesota granting the respondent Isanti County's motion on the pleadings is an unpublished decision reported at *Kiefer v. Isanti Cnty., Minnesota*, 2022 WL 607397 (Mar. 1, 2022) and is reproduced at App. 12–24.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment in *Kiefer v. Isanti Cnty., Minnesota*, 71 F.4th 1149, on June 29, 2023. App. 10–11.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Fourth Amendment, which has been incorporated against the states by the Supreme Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), states, in part:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . .

U.S. Const., Amend. IV.

The Fourteenth Amendment's Due Process Clause applies to state and local governments:

> Section 1 . . . 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.

U.S. Const., Amend. XIV, § 1.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a private cause of action to sue any person who under color of state law violates federal rights:

> 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. . . .

INTRODUCTION

This case presents important questions of federal constitutional law under the Fourth and Fourteenth Amendments concerning relief after the vacatur of a criminal prosecution based on a prosecutor's use of an inapplicable law resulting in post-conviction incarceration. The implication of a prosecutor's use of an inapplicable law suggests the lack of probable cause from the inception of the criminal proceedings and while there is no pretrial detention, post-conviction incarceration occurs.

Isanti County used its criminal process to implicate wrong-doing under an inapplicable law against persons who stored personal property outside claiming the out-side storage as "solid waste." Whatever the asserted violation however, the ordinance explicitly applied to operators of waste management facilities. While violating the civil ordinance would create a criminal complaint under governing county ordinances, it would not trigger a situation for no pretrial detention but, would expose the person to post-conviction incarceration.

Petitioner Keith Kiefer, who did not operate a waste management facility. Yet, he was found "guilty" of violating the inapplicable ordinance and subsequently

incarcerated for 60 days post-conviction. Mr. Kiefer, after successfully challenging the applicability of the civil ordinance in the Minnesota Court of Appeals had his criminal conviction vacated. Seeking monetary relief, since Mr. Kiefer's gainful employment had been lost during his incarceration, he started a § 1983 action in federal court under both the Fourth (unreasonable seizure) and Fourteenth Amendments (due process). Although asserting the criminal process as tainted by the use of the inapplicable civil ordinance to establish probable cause, resulting in Mr. Kiefer's later incarceration, the federal court dismissed the federal claims, while transposing elements of the Fourteenth Amendment's due process clause analysis for the Fourth Amendment's unreasonable search and seizure clause.

Mr. Kiefer's Fourth Amendment claim of unreasonable seizure claim arose from the use of an inapplicable law, wherein no probable cause could have existed at the outset of the criminal trial and resulted with incarceration a continuing constitutional violation of his liberty interests. Because the post-conviction incarceration reached back to the tainted criminal process of using an inapplicable civil ordinance to establish probable cause. The Fourth Amendment would necessarily be implicated regardless of the absence of any pretrial detention. *But see, Manuel v. City of Joliet, Ill.,* 580 U.S. 357, 369 n.8 (2017) (Fourth Amendment unreasonable seizure clause drops out "once a trial has occurred."); *Albright v. Oliver*, 510 U.S. 266, 274 (1994).

STATEMENT OF THE CASE

1. Petitioner Keith Kiefer owned 52.94 acres of real estate in Isanti County, purchased in 1992. App. 2. Mr. Kiefer used about an acre of his land to store personal property outdoors, including unlicensed vehicles, scrap metal, old furniture, building materials, semi-trailer container, old pipes, a mobile home, and other miscellaneous items. *Id.* In 2008, the respondent Isanti County, after receiving a complaint about Mr. Kiefer's property, and apparently disregarding County letters alleging he was violating County law, filed a two-count criminal complaint against Mr. Kiefer. *Id.* The criminal complaint charged Mr. Kiefer with violating Isanti County's Zoning Code governing agricultural districts, Section 6, subdivision 2, and Section IV, subdivision 4 of the County's Code governing solid waste. *Id.* at 3. In particular, Count 2 alleged that Kiefer violated Section IV, subdivision 4 of the County's Solid Waste Ordinance:

> On or about October 28, 2008, within the county of Isanti, the above-named individual did unlawfully store solid waste on public or private property for more than two (2) weeks without the written approval of the Solid Waste Officer.

Id. at 3 n.2. On the eve of the criminal trial, Isanti County dismissed Count 1 regarding an alleged zoning code violation. *Id.* As a result of the criminal proceeding, the jury found Mr. Kiefer guilty of violating the Solid Waste Ordinance. *Id.* at 28. Mr. Kiefer was sentenced to 90 days in jail, 60 days of which he served.

Id. at 3, 13, 29. During the time of incarceration, Mr. Kiefer, an independent contractor, lost his gainful employment.

Three years after obtaining a criminal conviction against Mr. Kiefer, in 2011, Isanti County commenced a state district court civil action against him for allegedly violating the County's zoning code, and again, for violating the Solid Waste Ordinance—under the very same provision for which Mr. Kiefer was previously criminally convicted. *Id.* at 3, 13. Mr. Kiefer counterclaimed, arguing that Isanti County misinterpreted and misapplied the Solid Waste Ordinance. *Id.* at 13. The state district court ruled against Mr. Kiefer. It concluded Mr. Kiefer's conduct violated the Solid Waste Ordinance, relying in part on Mr. Kiefer's previous criminal conviction involving the same conduct. *Id.* Mr. Kiefer appealed.

However, the Minnesota Court of Appeals reversed the state district court. *Id.* The state appellate court concluded that the Solid Waste Ordinance's definition of solid waste was "unworkably broad" and that the ordinance was "'obvious[ly] . . . meant to apply to conventional solid-waste-management operations, and not merely outdoor storage in general.'" *Id.* at 13–14, quoting *County of Isanti v. Kiefer*, A15-1912, 2016 WL 4068197, *3–4 (Minn. App. Aug. 1, 2016).

Two years later, in 2018, Mr. Kiefer petitioned the state district court for post-conviction relief and vacatur of his 2009 conviction. App. 4, 14. The state court granted Mr. Kiefer's petition in 2019. *Id.* at 14, 25–27.

2. One year later, in 2020, Mr. Kiefer filed a Civil Rights action under 42 U.S.C. § 1983 against Isanti County. *Id.* at 14. He advanced five claims. Count I alleged that Isanti County unlawfully seized him in violation of the Fourth Amendment to the United States Constitution for incarcerating him for 60 days under the inapplicable Solid Waste Ordinance, which "obvious[ly] . . . meant to apply to conventional solid-waste-management operations" of which he was not. *Id.* Count II of Mr. Kiefer's complaint alleged that the County violated his procedural due process rights under the Fourteenth Amendment, by prosecuting and incarcerating him for the violation of a law to which he was not subject. *Id.* And, in Counts III through V, Mr. Kiefer alleged the County had falsely imprisoned him, maliciously prosecuted him, and engaged in an abuse of process in violation of Minnesota common law. *Id.*

Isanti County would then file a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. *Id.* Notably, during the subsequent federal court civil proceedings, Isanti County admitted that its criminal prosecutors "represented the [Solid Waste] Ordinance applied to Keith Kiefer and presented evidence Kiefer had violated it."[1]

The federal district court found that Mr. Kiefer's Fourth Amendment claim could not sustain a § 1983 allegation, holding that he did not sufficiently plead

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[1] Isanti Mot. of J. on the Pldings at J. 3. (U.S. Distr. Dkt. No. 14, at 3.) The specific section Kiefer was alleged to have violated was Section IV, subdivision 4 of the County's Solid Waste Ordinance. *See also*, Compl. ¶¶ 19–20 (U.S. Distr. Dkt. No. 1, at 6.).

that officials were inadequately trained or that the County policy or unofficial custom caused a constitutional injury. *Id.* at 16–22. Hence, the district court granted Isanti County's motion. *Id.* at 23–24.

3. Mr. Kiefer appealed. The Court of Appeals for the Eighth Circuit opined that Mr. Kiefer's assertions of Isanti County's use of the inapplicable Solid Waste Ordinance in criminal proceedings appeared "only" as an allegation of "some hypothetical charging policy." *Id.* at 6.

But, the Eighth Circuit agreed that the County's Solid Waste Ordinance indisputably did not apply to Mr. Kiefer's conduct and that he should not have been prosecuted:

> (1) [I]t is indisputable after the ruling of the Minnesota Court of Appeals that Kiefer should not have been prosecuted under the Solid Waste Ordinance. . . .

App. 8.

The appellate court would acknowledge that "[a] plaintiff may not be privy to the facts necessary to accurately describe with specificity the alleged custom which may have caused the deprivation of a constitutional right." *Id.* at 7. However, the court found that Mr. Kiefer's allegations, such as, "'the County made a deliberate choice to use the Solid Waste Ordinance to allege criminal violations against individuals the County knew the statute did not apply to,'" were "threadbare

recitals" of the elements to support a cause of action. *Id.*

And, although Mr. Kiefer also alleged that the County fabricated evidence that led to his wrongful conviction because the County knew the Solid Waste Ordinance did not apply to him, the appellate court concluded that no constitutional violation had occurred. *Id.* at 8. As previously noted, the court recognized that "it is indisputable after the ruling of the Minnesota Court of Appeals that Kiefer should not have been prosecuted under the Solid Waste Ordinance," it concluded that "the doctrine of substantive due process is reserved for truly extraordinary and egregious cases. . . ." *Id.* The Eighth Circuit never analyzed the Fourth Amendment Unreasonable Searches and Seizures Clause claim, choosing to analyze the Fourteenth Amendment Due Process Clause claim instead. *Id.* The appellate court affirmed the lower court. *Id.* at 9.

REASONS FOR GRANTING THE PETITION

I. The questions presented are important because they are fundamental, significant, and recurring.

A. This case presents important and recurring unresolved legal issues regarding unreasonable seizures for § 1983 remedies under either the Fourth or Fourteenth Amendments regarding the lack of probable cause.

This Court has expressed that "deprivations of liberty that go hand in hand with criminal prosecutions" have "Fourth Amendment relevance." *Albright v. Oliver*, 510 U.S. at 274 (plurality opinion) (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)). Indeed, this Court has explained that the Fourth Amendment is "tailored explicitly for the criminal justice system, and its balance between individual and public interests . . . to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). Even so, this Court suggests the Fourth Amendment unreasonable seizure clause drops out "once a trial has occurred." *Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 369 n.8 (2017); *Albright v. Oliver*, 510 U.S. 266, 274 (1994).

However, if a person is not detained prior to the criminal trial, but later is convicted and as a result incarcerated as a result of an inapplicable civil law, the criminal proceedings are tainted. In other words, a

Fourth Amendment claim of unreasonable seizure should not end when the trial begins because post-conviction incarceration can reach back to the tainted criminal process of using an inapplicable civil ordinance to establish probable cause in the first instance.

Thus, this case raises a fundamental and significant legal issue as it relates to the reach of the Fourth Amendment's Unreasonable Searches and Seizures Clause and the Fourteenth Amendment's Due Process Clause. The legal issue arises because the post-trial incarceration, without pretrial detention is based on an inapplicable law so there was no probable cause in the first instance.

This Court established the contours and prerequisites of pre-detention Fourth Amendment claims in *Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 369–70 (2017). This Court held that the Fourth Amendment governs a claim for unlawful pretrial detention beyond the start of the legal process. Yet, when incarceration occurs post-conviction in the absence of pre-trial detention, and the lack of probable cause is later found, this Court suggests the Fourth Amendment drops out as an identified constitutional right for a § 1983 claim. *Id.*

In his dissenting opinion in *Manuel*, Justice Alito noted the unresolved issue of the Fourth Amendment's reach in the post-conviction incarceration context. Justice Alito was dissatisfied with the Court's limitation to pre-trial detentions:

> If a Fourth Amendment seizure continues as long as a person is detained, there is no reason

> why incarceration after conviction cannot be regarded as a continuing seizure. The Court asserts that the Fourth Amendment "drops out of the picture" after trial, *ibid.*, but it does not explain why this is so.

Manuel, 580 U.S. at 382 n.3 (Alito, J., dissenting). Instead, in the battle of the footnotes, the majority rejected Justice Alito's rationale and suggests a claim under the Due Process Clause is sufficient for post-trial incarcerations:

> By contrast (and contrary to the dissent's suggestion, *see post*, at 927, n.3), once a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment. *See Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (invalidating a conviction under the Due Process Clause when "the record evidence could [not] reasonably support a finding of guilt beyond a reasonable doubt").

Id. at 369 n.8.

To the contrary, where there is no probable cause in the first instance, the issue is not about challenging the sufficiency of the evidence to support a conviction. If no probable cause existed because the law is obviously inapplicable as in Mr. Kiefer's case, the only way a criminal prosecution could have occurred would be through the "fabrication" of a "proceeding."

Regardless, the courts must identify the source of the constitutional right. The standards under the Unreasonable Search and Seizure Clause and the Due Process Clause are substantially different and place differing burdens upon plaintiffs seeking remedies under § 1983 for their wrongful post-conviction incarceration:

> After pinpointing that right, courts still must determine the elements of, and rules associated with, an action seeking damages for its violation.

Id. at 370.

And, in defining the contours of a § 1983 claim, courts should first look to the common law of torts. *Id.* In the context of a claim embodied in the Fourth Amendment, the application of a common law tort would certainly differ than if embodied under the Fourteenth Amendment's Due Process Clause. Indeed, as the Eighth Circuit has emphasized, there is a high burden to establish a Fourteenth Amendment violation, "The doctrine of substantive due process is reserved for truly extraordinary and egregious cases; it does not forbid reasonable, through possibly erroneous, legal interpretation." App. 8. But, as the *Albright* plurality stated, there is no substantive right under the Due Process Clause "to be free from criminal prosecution except upon probable cause" and that "it is the Fourth Amendment, and not substantive due process, under which [such a] . . . claim must be judged." 510 U.S. at 268, 271.

On one hand, it appears, in a post-conviction incarceration context, that where no probable cause existed with the absence of pre-trial detention that the Fourth Amendment drops off when a trial occurs, and there is no constitutional violation for § 1983 liability. On the other hand, the *Albright* decision raised doubt as to where an unreasonable seizure claim should lie:

> In light of the various opinions in *Albright* coupled with the absence of an opinion for the Court, it is important to explicate what *Albright did* and did *not* do . . . [W]here there is no adequate state postdeprivation remedy and where there is a substantial deprivation of liberty within the meaning of Justice Souter's concurring opinion, there *could* be a substantive due process violation. Here the two dissenters would be joined by Justices Souter, Kennedy, and Thomas. The use of a Fourth Amendment approach, as suggested by Justice Ginsburg, is a possibility.

1 Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983 § 3:66 (emphasis in original).

In other words, the law of constitutional torts arising from post-conviction incarceration without probable cause, remains unsettled.

Indeed, this Court has repeatedly "noted that 42 U.S.C. § 1983 creates a species of tort liability." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994), quoting *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986) (internal quotation marks omitted). "[O]ver the centuries the common law of torts has developed a set

of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." *Id.* But for Mr. Kiefer's unreasonable seizure claim under § 1983, the basis is the lack of probable cause for a post-conviction incarceration and, so, a constitutional tort is not available.

To be sure, three kinds of § 1983 claims may be brought under the Due Process Clause of the Fourteenth Amendment. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). First, a plaintiff may bring suit under § 1983 for a violation of his specific rights as guaranteed by the Bill of Rights. *Id.* Second, a plaintiff may assert a Fourteenth Amendment claim under the "procedural" aspect of the Due Process Clause, which guarantees fair procedure for the deprivation of a constitutionally protected interest in life, liberty, or property. *Id.* Third, a plaintiff may assert a claim under the "substantive" prong of the Due Process Clause, which bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *Id.*

In summary, the law is unsettled regarding the analytical home for § 1983 claims when post-conviction incarceration, without pretrial detention, is the result of a later finding of the lack of probable cause for the conviction in the first instance.

B. The second question presented is important to resolve circuit splits regarding the constitutional tort of malicious prosecution in the context of § 1983 relief for lack of probable cause.

Mr. Kiefer presented to the lower court a § 1983 complaint asserting certain common law torts as the basis for liability against the government for his post-conviction incarceration without probable cause. Whether analyzed under the Fourth Amendment or analyzed under the Fourteenth Amendment, there exists a split among the circuits regarding its application under the mens rea element of the constitutional tort.

In *Thompson v. Clark*, 142 S.Ct. 1332 (2022) this Court reserved the question of choosing an analytical home for unreasonable seizure claims:

> We need not decide whether a plaintiff bringing a Fourth Amendment claim under § 1983 for malicious prosecution must establish malice (or some other *mens rea*) in addition to the absence of probable cause.

Id. at 1341, n.3.

The consequence of this Court's unsettled law regarding an analytical home for unreasonable seizure claims, particularly as it relates to post-conviction incarceration relief for lack of probable cause, a circuit court split exists. As the Fifth Circuit recently stated: "Following *Thompson*, the circuit split remains in place." *Armstrong v. Ashley*, 60 F.4th 262, 279 (5th Cir. 2023).

In this context, it is not surprising that Mr. Kiefer's § 1983 claim was denied by the lower courts. In the ordinary course, the lower courts, prior to denying Mr. Kiefer's § 1983 claim, would have presumably applied the text of § 1983 and the text of the Unreasonable Searches and Seizures Clause to the record of the case. But, the Supreme Court's decisions in *Albright, McDonough*, and *Thompson* don't require applying § 1983 and the Unreasonable Searches and Seizures Clause to Mr. Kiefer's underlying unreasonable seizure claim. Mr. Kiefer was criminally prosecuted, convicted, and subsequently incarcerated for 60 days under the inapplicable Solid Waste Ordinance. The conviction was later vacated after the Minnesota Court of Appeals in a related civil case appeal held that it was "obvious" that the Solid Waste Ordinance did not apply to Mr. Kiefer's outdoor storage. *Cnty. of Isanti v. Kiefer*, 2016 WL 4068197, at *3 (Minn. App. 2016). Then, Mr. Kiefer timely sued under § 1983 for Fourth Amendment unreasonable seizure, among other claims.

In his Fourth Amendment unreasonable seizure claim, Mr. Kiefer alleged the County used the inapplicable Solid Waste Ordinance to prosecute persons for their outdoor storage even though the Solid Waste Ordinance did not apply. App. 7. The Eighth Circuit agreed the Solid Waste Ordinance was indisputably inapplicable to Kiefer, but affirmed the district court's judgment dismissing the unreasonable seizure claim based on a Fourteenth Amendment substantive due process analysis. *Id.* at 8–9. The Eighth Circuit also

affirmed because Kiefer had failed to show a "knowing violation of law." *Id.* at 8.

This petition claims that the Eighth Circuit erred by transposing elements of the Due Process Clause for elements of the Unreasonable Searches and Seizures Clause and that there is no mens rea element to be applied to Kiefer's unreasonable seizure claim. By granting this petition to review the Eighth Circuit's decision, the Supreme Court can resolve the legal issues presented by choosing one of the two Amendments as an analytical home for unreasonable seizure claims and by determining whether there is a mens rea requirement for unreasonable seizure claims such as Kiefer's unreasonable seizure claim.

The circuit split has been caused because the Supreme Court has not yet decided the analytical home for unreasonable seizure claims—the Unreasonable Searches and Seizures Clause or the Due Process Clause.

On one hand, the Fourth Circuit agrees with Kiefer's position that there is no mens rea requirement for a Fourth Amendment claim:

> Brooks first asserts that Officer Barker violated his rights under the Fourth Amendment by unreasonably seizing his person—allegations that, as noted above, are broad enough to encompass a claim that legal process issued without probable cause. The Fourth Amendment prohibits law enforcement officers from making unreasonable seizures, and seizure of

> an individual effected without probable cause is unreasonable. *See Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 1871–73, 104 L.Ed.2d 443 (1989). Thus, Brooks' allegations that Officer Barker seized him pursuant to legal process that was not supported by probable cause and that the criminal proceedings terminated in his favor are sufficient to state a § 1983 malicious prosecution claim alleging a seizure that was violative of the Fourth Amendment.

Brooks v. City of Winston-Salem, N.C., 85 F.3d 178, 183 (4th Cir. 1996).

On the other hand, in the Fifth Circuit, a plaintiff must show malice for a Fourth Amendment claim involving a seizure. *Armstrong*, 60 F.4th at 279. In a 2023 decision, the Fifth Circuit even stated "the circuit split remains in place" after *Thompson*:

> The circuit courts have divided on identifying the elements of a Fourth Amendment malicious prosecution claim. One fundamental question in each circuit has been whether all common law malicious prosecution elements must be met, or whether, in the Fourth Amendment context, malice is unnecessary given that "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry." *Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 184 (4th Cir. 1996) (quoting *Graham v. Connor*, 490 U.S. 386, 399, 109 S.Ct. 1865, 1873 n.5, 104 L.Ed.2d 443

> (1989)). . . . Following *Thompson*, the circuit split remains in place.

Armstrong, 60 F.4th at 279. The Eighth Circuit's decision below follows the Fifth Circuit in requiring a mens rea element for a Fourth Amendment claim.

So, there is an acknowledged circuit split on interpreting the Fourth and Fourteenth Amendments. How the interpretative questions are resolved differently in one circuit as opposed to another circuit causes real-world consequences for people who are unreasonably incarcerated. In some districts, these wrongfully incarcerated people have § 1983 causes of action and § 1988 remedies. But, in other districts, these wrongfully incarcerated people have no § 1983 cause of action and § 1988 remedies—like in this *Kiefer* case. Instead, there should be one, national, uniform analytical home for unreasonable seizure claims—either the Unreasonable Searches and Seizures Clause or the Due Process Clause. To establish this one, national, uniform analytical home, the Supreme Court should grant this petition under Rule 10(a) to resolve the circuit split.

II. The doctrinal confusion continues, after *Thompson*, as predicted by the three dissenting justices, and as evidenced by the Eighth Circuit decision transposing the Due Process Clause elements with the Fourth Amendment Unreasonable Searches and Seizures Clause elements.

The Supreme Court should grant the petition to address the doctrinal confusion continuing after *Thompson*. Courts, like the Fifth Circuit and Eighth Circuit, are interpreting § 1983 and constitutional provisions to transpose malicious prosecution elements with Fourth Amendment unreasonable seizure elements. This doctrinal confusion after *Thompson* is depriving people like Kiefer, who have been unreasonably incarcerated, from obtaining a § 1988 remedy while the text of § 1983, the text of the Fourth Amendment, and "justice" requires a § 1988 remedy be provided.

The U.S. Supreme Court should make clear pleading requirements under § 1983 for Fourth Amendment unreasonable seizure claims. Kiefer's case involves a state-court-reversed conviction and incarceration based on an obviously inapplicable law. But, the Eighth Circuit won't give Kiefer a § 1988 remedy because it wasn't a "knowing" violation of law. Neither would the Fifth Circuit. But, the Fourth Circuit would. A circuit split on such an important civil rights matter is legally unconscionable.

Plus, the Eighth Circuit's decision begs many questions. Why should a § 1983 plaintiff, in Kiefer's situation, have to show that the state court judge and prosecutor, who are immune from civil lawsuits, 'knowingly' read and applied the obviously inapplicable law? Maybe, the state court judge and prosecutor did not read the law at all. Would that be knowing, malicious, negligent, or none of the above? Constitutionally speaking, should it not be enough for the purposes of Fourth Amendment "unreasonableness" that Kiefer has proven to the state and federal appellate courts that the ordinance under which he was "seized" for 60 days is obviously inapplicable?

As the Supreme Court knows, the court of appeals' uneven application of mens rea requirements for Fourth Amendment claims has been ongoing for decades. *See*, *e.g.*, Actionability of Malicious Prosecution Under 42 U.S.C. § 1983, 79 A.L.R. Fed. 896 (originally published in 1986). This uneven application means the Civil Rights Act of 1871, 42 U.S.C. § 1983, is not providing, as intended, a § 1988 remedy to § 1983 plaintiffs for the deprivation, under color of state law, of rights secured by the Fourth Amendment's prohibition on unreasonable seizure:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated. . . .

U.S. Const., Amend. IV. The Eighth Circuit's decision denied Kiefer the § 1988 remedy that he is entitled to

under the text of § 1983 and the text of the Fourth Amendment.

To be sure, the Supreme Court has recently attempted to address the doctrinal confusion in *McDonough v. Smith*, 139 S.Ct. 2149 (2019) and *Thompson*. There is no doubt of the attempts in the narrow holdings in *Thompson* and *McDonough* to provide building blocks for a future, stable foundation for § 1983 claims. The two cases, collectively, ruled narrowly on how the statute of limitations would apply to § 1983 claims and specified the requirement for a favorable termination of the state court criminal proceeding in order for a § 1983 Fourth Amendment claim to proceed. However, in doing so, unfortunately, the doctrinal confusion persists as explained below.

In 2019, the Supreme Court in *McDonough* acknowledged that a § 1983 Fourth Amendment claim existed by holding that the applicable statute of limitations for a fabrication of evidence civil lawsuit under § 1983 begins to run when the criminal case ends in the plaintiff's favor, but chose not to delineate the elements of such a § 1983 claim. In its decision, the Supreme Court stated that it had not granted certiorari to articulate the specific constitutional rights involved in the § 1983 claim presented in that case:

> Though McDonough's complaint does not ground his fabricated-evidence claim in a particular constitutional provision, the Second Circuit treated his claim as arising under the Due Process Clause. 898 F.3d at 266.

> McDonough's claim, this theory goes, seeks to vindicate a " 'right not to be deprived of liberty as a result of the fabrication of evidence by a government officer.' " *Ibid.* (quoting *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000)); *see also*, *e.g.*, *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). We assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.

139 S.Ct. at 2155 (footnote omitted). Specifically, the Supreme Court in footnote 2 stated that it expressed "no view" as to the delineation of constitutional rights enforceable through such a § 1983 action:

> In accepting the Court of Appeals' treatment of McDonough's claim as one sounding in denial of due process, **we express no view as to what other constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a § 1983 action.**

139 S.Ct. at 2155, n.2 (emphasis added).

Again, in 2022, this Court in *Thompson* acknowledged that a § 1983 Fourth Amendment claim existed by holding that a plaintiff bringing a § 1983 claim for malicious prosecution, need only show that his prosecution ended without a conviction. But, again as in *McDonough*, this Court chose not to delineate the elements of such a § 1983 claim. Hence, *Thompson* did not

address the pre-*Thompson* doctrinal confusion over the elements of a § 1983 unreasonable seizure claim.

Specifically, it appears in *Thompson*, that the elements of malicious prosecution may have been transposed with elements of an unreasonable seizure claim:

> In this case, Thompson sued several police officers under § 1983, alleging that he was "maliciously prosecuted" without probable cause and that he was seized as a result. App. 33–34. **He brought a Fourth Amendment claim under § 1983 for malicious prosecution, sometimes referred to as a claim for unreasonable seizure pursuant to legal process.** . . . Here, as most of the Courts of Appeals to consider the question have determined, the most analogous tort to this Fourth Amendment claim is malicious prosecution . . . That is because the gravamen of the Fourth Amendment claim for malicious prosecution, as this Court has recognized it, is the wrongful initiation of charges without probable cause. And the wrongful initiation of charges without probable cause is likewise the gravamen of the tort of malicious prosecution.

142 S.Ct. at 1337–38 (U.S. 2022) (emphasis added) (citations omitted). But, this Court reserved the question of whether a § 1983 malicious prosecution claim required a plaintiff to show governmental malice or mens rea:

> We need not decide whether a plaintiff bringing a Fourth Amendment claim under § 1983

> for malicious prosecution must establish malice (or some other *mens rea*) in addition to the absence of probable cause.

Id.

The three dissenting justices in *Thompson*, predicted the doctrinal confusion would persist after *Thompson*. 142 S.Ct. at 1341–47. Three dissenting justices warned of the doctrinal confusion of not clearly distinguishing between the elements of the malicious prosecution claim and the elements of the Fourth Amendment unreasonable seizure claim:

> What the Court has done is to recognize a novel hybrid claim of uncertain scope that has no basis in the Constitution and is almost certain to lead to confusion. . . . Instead of clarifying the law regarding § 1983 malicious-prosecution claims, today's decision, I fear, will sow more confusion.

Id. at 1346.

The three dissenting justices also noted that post-*Thompson* doctrinal confusion is unnecessary because malicious prosecution is not even an analogous tort to a Fourth Amendment unreasonable seizure claim. *Id.* at 1341–47. The common-law torts of false arrest and false imprisonment are the analogous torts to a Fourth Amendment unreasonable seizure claim. False arrest and false imprisonment torts protect against "[e]very confinement of the person," including one effected by "forcibly detaining [someone] in the public streets." *Wallace v. Keto*, 549 U.S. 384, 388–89 (internal quotation

marks omitted); *see also* Dobbs, Law of Torts § 41 (describing elements of false imprisonment and false arrest); Restatement (Second) of Torts § 35 (1964) (same).

A comparison of the elements of the malicious-prosecution tort with the elements of a Fourth Amendment unreasonable-seizure claim shows that the elements are incommensurate. A plaintiff suing for unreasonable seizure need not prove any of the elements of common-law malicious prosecution. The Fourth Amendment prohibits "unreasonable searches and seizures," doesn't even require a prosecution, and has two elements: (i) there must have been a "seizure," *i.e.*, an arrest or some other use of " 'physical force' or a 'show of authority' that 'in some way restrain[s] the liberty' of [a] person," *Torres v. Madrid*, 141 S.Ct. 989, 995 (2021); and (ii) the seizure, arrest or incarceration, must have been "unreasonable." *District of Columbia v. Wesby*, 138 S.Ct. 577, 585–86 (2018). Whereas, malicious prosecution does require an arrest or incarceration and has the following elements: (i) the suit or proceeding was "instituted without any probable cause"; (ii) the "motive in instituting" the suit "was malicious . . . "; and (iii) the prosecution "terminated in the acquittal or discharge of the accused." (T. Cooley, Law of Torts 180 (1880)).

Importantly, as a matter of national concern, the circuit splits and doctrinal confusion over pleading requirements results in confusion for plaintiffs and their attorneys who are attempting to follow attorney Abraham Lincoln's admonition:

> In law it is good policy to never *plead* what you *need* not, lest you oblige yourself to *prove* what you *can* not.

The Collected Works of Abraham Lincoln edited by Roy P. Basler, Volume I, "Letter to Usher F. Linder" (February 20, 1848), p. 453 (emphasis in original). For plaintiffs and their attorneys, the text of the Fourth Amendment's prohibition on unreasonable seizures does not expressly require proving the "malice" element of a malicious prosecution tort. Instead, the legal standard for a Fourth Amendment unreasonable seizure claim, based on the text, should be merely showing that the conviction-and-incarceration were "unreasonable."

In Mr. Kiefer's case, the complaint's Fourth Amendment unreasonable seizure allegations were drafted based on an understanding of § 1983 that a claim arose from the text of the Fourth Amendment for an "unreasonable seizure"—not under a "malicious prosecution" constitutional tort. As attorney Abraham Lincoln suggested, a lawyer should only plead what he has to because he might have to prove it. Accordingly, Mr. Kiefer pled an unreasonable seizure claim to avoid having to prove "malice" as required for a malicious prosecution claim. In other words, Mr. Kiefer's complaint would have been substantially different if he had known from this Court's decisions that he was required to prove malice for an unreasonable seizure claim.

Because of this doctrinal confusion, the Eighth Circuit transposed the elements of a malicious prosecution

claim with a Fourth Amendment unreasonable seizure claim. The Eighth Circuit essentially required a "knowing violation of law" for Kiefer's Fourth Amendment unreasonable seizure claim. And, that is why Kiefer lost in the Eighth Circuit despite the text of the Fourth Amendment supporting his claim. And, that is also why Kiefer would have lost if he were in the Fifth Circuit. But, Kiefer would have won if he were in the Fourth Circuit. Go figure.

The petitioner claims that the Eighth Circuit decision is evidence of the persistent doctrinal confusion even in the wake of *Thompson*. In doing so, the petitioner aligns with the three dissenting judges who predicted the doctrinal confusion would continue after *Thompson*, 142 S.Ct. at 1341–47.

III. This Court should grant this petition because it reserved a similar question in *Thompson* which has the same purpose as the questions presented in this petition.

This Court should grant the petition because in *Thompson*, 142 S.Ct. at 1338 n.3, this Court reserved a similar question which has the same purpose as the questions presented in this petition. Conversely, the principal question presented in the petition has essentially the same purpose as that reserved in *Thompson*. The common purpose of the similar questions is delineating the mens rea requirement, if any, by interpreting § 1983, the Fourth Amendment, and other

constitutional provisions to determine the elements of the specific § 1983 claims.

The principal question presented in this petition seeks to delineate the mens rea requirement for a Fourth Amendment unreasonable seizure claim:

> Whether a plaintiff must prove a mens rea element for county governmental liability for a § 1983 unreasonable seizure claim, an issue reserved in *Thompson v. Clark*, 142 S. Ct. 1332, 1338, n.3, and where a circuit split persists as recently acknowledged in *Armstrong v. Ashley*, 60 F.4th 262, 279 (5th Cir. 2023) ("Following *Thompson*, the circuit split remains in place.")

The purpose of the petition's question is to interpret § 1983, the Fourth Amendment and the Fourteenth Amendment, to determine whether a mens rea requirement applies to a specific § 1983 claim. So, the question relates to the mens rea requirement, if any, for both malicious prosecution and unreasonable seizure claims.

In 2022, the Supreme Court in *Thompson* reserved a similar question of whether a § 1983 claim required a plaintiff to show governmental malice or some other mens rea:

> We need not decide whether a plaintiff bringing a Fourth Amendment claim under § 1983 for malicious prosecution must establish malice (or some other *mens rea*) in addition to the absence of probable cause.

Id. The purpose of the question reserved in *Thompson* is to interpret § 1983, the Fourth Amendment and Fourteenth Amendment to determine whether a mens rea requirement applies to a specific § 1983 claim. So, the question relates to the mens rea requirement, if any, for both malicious prosecution and unreasonable seizure claims.

The Eighth Circuit ignored the Supreme Court's yellow light in *Thompson* by applying a mens rea requirement to Kiefer's Fourth Amendment claims. 142 S.Ct. at 1338 n.3. The Eighth Circuit applied "a knowing violation of the law" requirement on Kiefer. The Eighth Circuit held that Kiefer had failed to plead sufficient factual content to support his claim that the County prosecuted him under the ordinance "knowing" it was inapplicable:

> Viewing the complaint in a light favorable to Kiefer, he failed to plead sufficient factual content that would allow a court to draw a reasonable inference that the County . . . prosecuted him **knowing** the Solid Waste Ordinance was inapplicable. We cannot say that the district court erred in rendering judgment on the pleadings.

71 F.4th at 1154 (emphasis added). In response to the Eighth Circuit's decision applying a mens rea requirement to Kiefer's § 1983 claim, a question reserved in *Thompson*, the Supreme Court should grant the petition to answer the mens rea element question reserved, but not answered, in *Thompson*.

IV. Rule 10(c) is triggered because the Eighth Circuit has decided an important question of federal law—whether a mens rea requirement exists for an unreasonable seizure claim—that has not been, but should be, settled by this Court.

Under Rule 10(c), because the Eighth Circuit has decided a fundamental question that the Supreme Court should decide, this Court should grant the petition to consider whether the Eighth Circuit's interpretation of § 1983, requiring a mens rea element for an unreasonable seizure claim, is legally correct. Petitioner identifies Rule 10(c) of the Rules of the Supreme Court as the basis for granting this petition:

> (c) [A] United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . .

In this way, Rule 10(c) is triggered because the Eighth Circuit has decided an important question of federal law that has not been, but should be settled by the U.S. Supreme Court.

First, in Kiefer's appeal, the important question of law that the Eighth Circuit decided for Kiefer was one of federal law. The Eighth Circuit held, under federal law, that there is no § 1983 claim against the county for any person who has been convicted in state court and incarcerated under an obviously inapplicable law unless there is a "knowing" violation of law.

Second, this Court, since *Thompson*, has not decided the important question of federal law that the Eighth Circuit has decided. On one hand, in the *Kiefer* appeal, the Eighth Circuit, like the Fifth Circuit, held that there must be specific allegations showing a mens rea element for a § 1983 unreasonable seizure claim. On the other hand, in *Thompson*, the Supreme Court reserved the question of whether a mens rea element is required for such a § 1983 claim. 139 S.Ct. at 2155.

In hindsight, the Eighth Circuit, in light of the reservation of the legal issue in the *Thompson* case, should have deferred to the Supreme Court. *See* 28 U.S.C. § 1254(2). But, instead, the Eighth Circuit took the reins. The Eighth Circuit required a mens rea element for a § 1983 unreasonable seizure claim. And, then the Eighth Circuit applied its own created legal standard upon Kiefer in affirming the lower court's judgment. Now, the Supreme Court should catch up and decide the important question of federal law that the Eighth Circuit has decided: whether a mens rea element is required for a § 1983 unreasonable seizure claim?

V. This petition is an excellent vehicle for delineating the elements of a § 1983 claim for those persons who have been convicted and then incarcerated under obviously inapplicable laws.

This petition is an excellent vehicle for the Supreme Court to delineate the elements of a § 1983 claim for those persons who have been convicted and then incarcerated under obviously inapplicable laws. Three facts make this petition an excellent vehicle for the Supreme Court to resolve the questions presented. First, Kiefer's incarceration was a substantial deprivation of liberty—60 days. Second, Kiefer obtained a state court order for a post-conviction remedy of vacating the conviction based on the Solid Waste Ordinance being "obviously" inapplicable to Kiefer's conduct. Third, the subject local law, the Solid Waste Ordinance, was held by both the state appellate court and the federal appellate court to be "obviously" inapplicable to Kiefer.

CONCLUSION

This petition should be granted to resolve the circuit splits and doctrinal confusion evident in the Eighth Circuit's opinion in order that Kiefer receives the § 1988 remedy that justice requires. The bottom line is: the County unreasonably seized Kiefer for 60 days of jail time for 'violating' an obviously inapplicable law; as a result, Kiefer has an actionable claim

under § 1983; and, accordingly, Kiefer is entitled to a remedy under § 1988. The Petitioner respectfully petitions the Supreme Court to grant the petition.

Respectfully submitted,

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