No. 23-50

IN THE

# Supreme Court of the United States

JASCHA CHIAVERINI, et al.,

*Petitioners*,

v.

NICHOLAS EVANOFF, et al.,

*Respondents.*

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

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

Below, respondents argued that the Sixth Circuit is governed by the "any-crime" rule: "[S]o long as probable cause exists to one of multiple criminal charges, that is enough to negate" a malicious prosecution claim as to any charge.[1] The court agreed and disposed of petitioner's malicious prosecution claim on that basis.

Respondents now abandon that "any-crime" rule entirely. Perhaps that's because they cannot defend it in the face of the nineteenth-century cases cited in the petition and of Chief Judge Pryor's thorough excavation of the historical record. Or perhaps it's because circuit courts have repeatedly acknowledged a split over the "any-crime" rule.

Whatever the reason, respondents now claim the Sixth Circuit does not, in fact, have the "any-crime" rule they urged it to apply just last year. Their evidence? Dicta in a footnote explicitly framed as a "hypothetical." *See* BIO 13 (discussing *Howse v. Hodous*, 953 F.3d 402, 409 n.3 (6th Cir. 2020)). But the court below did not apply the "hypothetical" footnote. Indeed, no court ever has. And even if the Sixth Circuit were governed by respondents' "hypothetical" footnote rule, there would still be a square split because no other circuit has such a rule.

### I. There is a square and acknowledged split.

The courts of appeals themselves have acknowledged the split identified in the petition. In

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[1] Oral Argument at 16:45, *Chiaverini v. City of Napoleon*, 2023 WL 152477 (6th Cir. 2023) (No. 21-3996) (cleaned up), https://perma.cc/P6FY-RHME; *see also* Resp. C.A. Br. 40-41.

applying the "any-crime" rule to malicious prosecution claims, the Sixth Circuit recognized it was departing from "[t]he contrary conclusions of other circuits." *Howse v. Hodous*, 953 F.3d 402, 409 n.3 (6th Cir. 2020). Right on the Sixth Circuit's heels, the Eleventh Circuit repeated the point: "Our sister circuits have split on the question" of whether "the any-crime rule extends to malicious prosecution." *Williams v. Aguirre*, 965 F.3d 1147, 1159, 1162 (11th Cir. 2020) (joining Second and Third Circuits and siding against Sixth). Courts are thus "unmistakably divided" on the question presented. *Van De Weghe v. Chambers*, 569 Fed. Appx. 617, 620 (10th Cir. 2014) (Gorsuch, J.); Pet. 13-14.

Hoping to get around the acknowledged split, respondents attempt to recharacterize case law on both sides of the split. Their attempts fail.

### A. The Sixth Circuit has adopted the "any-crime" rule.

In *Howse v. Hodous*, the Sixth Circuit applied the "any-crime" rule, holding that "[b]ecause there was probable cause to prosecute Howse for obstructing official business, he cannot proceed on his other malicious-prosecution claims." 953 F.3d at 410. Respondents nonetheless claim *Howse* stands for a "length-of-detention rule" rather than the "any-crime" rule. BIO 13. For that proposition, they rely on dicta in a footnote: "[I]f hypothetically [meritless charges] were to change the length of detention, that would be a different issue." *Howse*, 953 F.3d at 409 n.3; *see* BIO 13. Respondents theorize that by saying a "hypothetical[]" circumstance "would be a different issue," the Sixth Circuit intended for dicta in its

footnote to override the above-the-line "any-crime" rule, not to mention prior Sixth Circuit cases applying the "any-crime" rule, *see, e.g.*, *Voyticky v. Village of Timberlake*, 412 F.3d 669, 675-76 (6th Cir. 2005).

To start, it seems unlikely that the Sixth Circuit has adopted respondents' proposed "hypothetical" footnote rule because that rule would be an odd rule indeed. A change in the length of detention may be relevant to a plaintiff's injury or damages, but respondents don't explain how it could be related to the element at issue here and in *Howse*, namely, the requirement that the legal proceeding "was 'instituted without any probable cause.'" *See Thompson v. Clark*, 142 S. Ct. 1332, 1338 (2022) (citation omitted). And even as to injury and damages, a plaintiff can succeed without showing any detention at all (for instance, by showing his car was seized as a result of a baseless charge), let alone a change in the length of detention.

Moreover, respondents' argument that the Sixth Circuit hasn't adopted an "any-crime" rule but instead a rule from that "hypothetical" footnote would come as a surprise to circuit courts. *See, e.g.*, *Williams*, 965 F.3d at 1159 (characterizing Sixth Circuit as adopting "any-crime" rule). It would come as a surprise to district courts in the Sixth Circuit—counsel could find no case applying the "hypothetical" footnote. And it would come as a surprise to respondents themselves, at least as of last year: "This court's ruling in the *Howse* case . . . holds that so long as probable cause exists to one of multiple criminal charges, that is enough to negate . . . a malicious prosecution claim." Oral Argument at 16:45, *Chiaverini v. City of*

*Napoleon*, 2023 WL 152477 (6th Cir. 2023) (No. 21-3996) (cleaned up), https://perma.cc/P6FY-RHME; *see also* Resp. C.A. Br. 40-41 ("If probable cause existed for just one charge, . . . [the] malicious prosecution claims fail.").

Critically, the court below applied the "any-crime" rule, not the "hypothetical" footnote rule: "[W]e need not decide whether the officers had probable cause for the money-laundering charge because probable cause existed for the other valid charges." Pet. App. 10a n.8 (citing *Howse*, 953 F.3d at 408-09). It did so without mentioning—let alone treating as dispositive—whether the money-laundering charge changed the length of Mr. Chiaverini's detention.

And it would have been particularly strange for the Sixth Circuit to apply the "hypothetical" footnote rule in this case without mentioning it. It's clear that the money-laundering charge affected the length of Mr. Chiaverini's detention; but for that charge, he wouldn't have been detained at all. The arrest warrant explicitly stated that it was issued *because of* the money-laundering charge, the only felony. Pl. Opp. to Mot. for Summ. J., Ex. 13, at 1, ECF No. 102-13 ("A warrant is being requested due to this charge being a felony of third (3rd) degree." (capitalization standardized)). Indeed, police issued Brent Burns—who actually stole the jewelry Mr. Chiaverini was accused of receiving—a summons, instead of arresting and detaining him. *See* Pl. Opp. to Mot. for Summ. J. 13, ECF No. 102. Absent the felony charge, police would have treated Mr. Chiaverini similarly to Burns.

Only by applying the "any-crime" rule could the Sixth Circuit have ruled as it did.

### B. The Second, Third, and Eleventh Circuits have adopted the charge-specific rule.

Everyone agrees that if the Sixth Circuit's rule is the "any-crime" rule, there's a square split, since three circuits have rejected that rule. And even if respondents are right that the Sixth Circuit's rule is the "hypothetical" footnote rule, there would still be a square split, as no other circuit has adopted the "hypothetical" footnote rule. Instead, the Second, Third, and Eleventh Circuits all apply the charge-specific rule. *See Williams*, 965 F.3d at 1159, 1162.

1. Start with the Second Circuit. Respondents claim the Second Circuit's rule is not "substantially different" from the one they pull from the *Howse* "hypothetical" footnote. BIO 19. But that very footnote admits that the Second Circuit has come to a "contrary conclusion[]" by adopting the charge-specific approach: "The Second Circuit has held that each criminal charge must be supported by probable cause." *Howse*, 953 F.3d at 409 n.3 (citing *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991)).

Respondents assert that the Second Circuit requires a plaintiff to show that the unfounded charge caused "higher bail or a lengthier detention" before applying the charge-specific rule. *See* BIO 19. Not so. The very case respondents cite applied the charge-specific rule without analyzing whether the contested charge resulted in higher bail or lengthened the plaintiff's forty-hour detention. *Posr*, 944 F.2d at 94,

100 (courts "need to separately analyze the charges claimed to have been maliciously prosecuted"). The Second Circuit mentioned "high bail or a lengthy detention" only in discussing the policy considerations underlying the charge-specific rule. *Id.* at 100.

2. It's the same story in the Third Circuit, which, like the Second, has adopted the charge-specific rule. *Johnson v. Knorr*, 477 F.3d 75, 85 (3d Cir. 2007) (following Second Circuit's rule). Respondents wrongly claim the Third Circuit's rule is "not in opposition" to respondents' "hypothetical" footnote rule. BIO 17. But one of the judges on the *Howse* panel pointed out that the Sixth Circuit was breaking with the Third in that case. *See Howse*, 953 F.3d at 416 (Cole, C.J., dissenting in part). Respondents claim plaintiffs in the Third Circuit must "show 'an additional burden' stemming from" the unfounded charge. BIO 16. But the very case respondents cite did not analyze whether there was any "additional burden" on the plaintiff. *Johnson*, 477 F.3d at 85; Pet. 25. Again, respondents have plucked language from a discussion of policy considerations and elevated it to a rule.

Respondents cite two additional Third Circuit cases, neither apposite. First, *Kossler v. Crisanti* expressly disclaims any bearing on the question presented: "[W]hether the finding of probable cause on one charge prevent[s] the claim for malicious prosecution with respect to the other charges" is "an entirely different analysis than the one at issue here." 564 F.3d 181, 192-93 (3d Cir. 2009) (en banc). Second, *Wright v. City of Philadelphia* has effectively been cabined to its facts by subsequent Third Circuit case

law: "[W]e do not understand *Wright* to establish legal precedent" of "broad application." *Johnson*, 477 F.3d at 83-84 (discussing *Wright*, 409 F.3d 595 (3d Cir. 2005)); *see* Pet. 15 n.6.

3. Respondents concede a "difference in approach" between the Sixth and Eleventh Circuits. BIO 21. Rightly so. The Eleventh Circuit has adopted the charge-specific rule and rejected the "any-crime" rule. *Williams*, 965 F.3d at 1162. And the Eleventh Circuit also rejects respondents' "hypothetical" footnote rule: "[A] plaintiff's inability to prove" that "'but for that illegitimate charge, he would have been released' earlier or would not have faced detention" is "not determinative of whether he can state a constitutional violation." *Id.* at 1161 (citation omitted).

Respondents claim that a split between the "hypothetical" footnote rule—which, again, is not the Sixth Circuit's actual rule—and the Eleventh Circuit's rule "is implicated only" where a plaintiff could recover "nominal damages at best." BIO 10-11. Even if that were so, this Court has recognized that nominal damages are crucial because they express "the importance to organized society that [constitutional] rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

In any event, more than nominal damages are on the line. Plaintiffs can recover significant damages even if a baseless charge does not increase the length of detention. Imagine a plaintiff charged with both speeding (for which there is probable cause) and drug possession (for which there is none); whose car is seized because of the drug-possession charge; but who

is not detained. Under respondents' "hypothetical" footnote rule, such a plaintiff would lose: Because the baseless charge did not "change the length of detention," the "any-crime" rule would apply. *See* BIO 13. In the Eleventh Circuit, by contrast, the charge-specific rule always applies. The plaintiff's case could proceed as to the baseless charge, and he could recover compensatory damages for the deprivation of his car. *See* Pet. 24.

* * *

In the end, respondents' arguments take us far afield of the question presented. At issue is how a plaintiff proves the lack-of-probable-cause element. The length of detention may be relevant to a different part of the analysis—the Fourth Amendment harm, for instance, or damages. *See Thompson*, 142 S. Ct. at 1337 n.2; *Williams*, 965 F.3d at 1161. Indeed, respondents elsewhere in their brief concede that proving a charge altered the length of detention is an "*other* requirement[]" of a malicious prosecution claim, separate from the lack-of-probable-cause requirement. BIO 24 (emphasis added). Such an "other requirement[]" should be left for remand.[2]

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[2] Remand is also the time to address respondents' suggestion that Mr. Chiaverini waived any argument that the money-laundering charge lengthened his detention (a suggestion never raised below, unlike other waiver arguments, *see* Resp. C.A. Br. 40-41). *See* BIO 14 n.3. The district court bifurcated the issues of liability and damages, and what quantum of detention is attributable to which charges is a damages question. *See* Petr. C.A. Br. 17-18, 27; Petr. C.A. Reply Br. 21; *Williams*, 965 F.3d at 1161 (question whether "'but for that illegitimate charge,

## II. Respondents cannot minimize the importance of the question presented.

Respondents assert that the question presented is rarely implicated. BIO 21. Respondents are wrong. Courts frequently analyze probable cause in malicious prosecution cases involving multiple charges. There were at least forty such cases in the past year in circuit courts alone and many more in district courts. *See* Pet. 26. Courts need to know whether they can stop after finding one charge supported by probable cause (as the Sixth Circuit allows) or whether they must analyze probable cause for every charge (as three other circuits require).

As evidence that the question presented does not frequently recur, respondents claim there are "very few cases" where a court does not "resolve[] whether probable cause exists for *every* charge." BIO 21. But that's no evidence at all. In every circuit to have considered the question except the Sixth, a court *must* "resolve[] whether probable cause exists for *every* charge," so of course there are "very few cases" declining to do so. *See supra* at 5-8.[3]

Regardless, even if cases rarely arise—because police officers rarely fabricate evidence, or because their fabrications rarely come to light—correcting the

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[plaintiff] would have been released' earlier" is a question about damages, not liability (citation omitted)). And in any case, Mr. Chiaverini could recover damages for not only detention but also other harms caused by the baseless charge, such as the seizure of his property. *See* Pet. 24.

[3] Respondents also argue certiorari should be denied because the split involves "only four circuits." BIO 11. But this Term, about half this Court's grants have involved splits among four or fewer circuits.

Sixth Circuit would still be critical. Holding officers accountable and deterring misconduct are vital functions of Section 1983. *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). Under the Sixth Circuit's rule, probable cause for a minor offense allows officers to entirely evade accountability when they lie about other charges. *See* Pet. 26-27.

**III. This case is an ideal vehicle.**

1. This case squarely raises the question presented. The "any-crime" rule was dispositive below: "[W]e need not decide whether the officers had probable cause for the money-laundering charge because probable cause existed for the other valid charges." Pet. App. 10a n.8. Without the "any-crime" rule, the Sixth Circuit would have had to assess probable cause for the money-laundering charge.

2. Respondents contend this Court should await a case where there's a "less serious charge that is supported by probable cause, combined with a much more serious but unfounded charge." BIO 22. But this is just such a case. The licensing and receiving-stolen-property charges were misdemeanors carrying a maximum sentence of 180 days. Ohio Rev. Code §§ 4728.02, 4728.99, 2913.51(c), 2929.24(A)(1). The unfounded money-laundering charge, by contrast, was a felony with a maximum sentence of three years. *Id.* §§ 1315.55(A)(1), 2929.14(A)(3)(b). It was the money-laundering charge that justified issuance of an arrest warrant. *See supra* at 4-5. It was the money-laundering charge that allowed police to seek forfeiture of Mr. Chiaverini's property. Ohio Rev. Code §§ 2981.02(A)(1), 2913.51; *see* Pet. 24. And it was the

money-laundering charge that tarnished Mr. Chiaverini's reputation and decimated his business. *See* Pet. 9-10. The "unfounded" money-laundering charge was thus "much more serious" than the others. *See* BIO 22.

3. Ultimately, respondents resort to theorizing about what the court below *might* have held had it not disposed of the case under the "any-crime" rule. Those theories are best left for remand. In any event, they lack merit:

First, respondents guess that the Sixth Circuit would have found probable cause for the money-laundering charge. BIO 22-24. But it's telling that the court below declined to consider Mr. Chiaverini's arguments that there was no probable cause for that charge, particularly given that it analyzed probable cause for both other charges. *See* Pet. App. 10a n.8; Pet. 29-30. Respondents protest that multiple state-court judges found probable cause, BIO 22-23, but the state-court judges did not know they were relying on fabricated evidence, *see* Pet. 9.

Second, respondents opine that the Sixth Circuit might have found "a reasonable mistake of law," which would "not negate probable cause." BIO 23-24. But fabricating evidence regarding an element of the offense (knowledge at the time of the transaction) is not a reasonable mistake of law. Nor is "sloppy study of the laws" (here, reading out the $1,000 threshold). *See Heien v. North Carolina*, 574 U.S. 54, 67 (2014).

Third, respondents aver that the Sixth Circuit would grant them qualified immunity. BIO 24. Nonsense. This Court and the Sixth Circuit have made clear that fabricating evidence to procure a warrant

violates the Fourth Amendment. Pet. 21-22, 30 n.7. And, on similar facts, the court in *Williams v. Aguirre* denied qualified immunity. 965 F.3d 1147, 1168-69 (11th Cir. 2020). In fact, this case is a particularly good vehicle precisely because the Sixth Circuit ruled on the first prong of qualified immunity (whether a violation occurred), as opposed to the second (whether the law was clearly established). Pet. App. 8a; *see* Pet. 30.

Were there any doubt, consider this Court's cert grant in *Thompson v. Clark*. This Court agreed to resolve a circuit split on one element of a Fourth Amendment malicious prosecution claim (favorable termination), notwithstanding respondents' arguments that petitioner would eventually lose on other elements (i.e., lack of probable cause, Fourth Amendment harm) or on qualified immunity. *See* BIO, at 13-14, 16-18, *Thompson v. Clark*, 142 S. Ct. 1332 (2022) (No. 20-659). This Court should do the same and grant certiorari here.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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