No. 23-50

# In the Supreme Court of the United States

JASCHA CHIAVERINI, ET AL.,
*Petitioners*,
v.
CITY OF NAPOLEON, OHIO, ET AL.,
*Respondents*.

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

## BRIEF OF THE LOCAL GOVERNMENT LEGAL CENTER, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

GREGORY G. GARRE
*Counsel of Record*
JORDAN R. GOLDBERG
JOSEPH E. SITZMANN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

*Counsel for Amici Curiae*

## TABLE OF CONTENTS

**TABLE OF CONTENTS—Continued**

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**FEDERAL CONSTITUIONAL AND STATUTORY PROVISIONS**



**STATE STATUTORY PROVISIONS**



**OTHER AUTHORITIES**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

## INTEREST OF *AMICI CURIAE*[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to educate local governments regarding the Supreme Court and its impact on local governments and local officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for the nation's 3,069 county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC is the voice of over 19,000 American cities, towns, and villages, representing collectively more than 218 million Americans. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no party, counsel for a party, or person or entity other than *amici curiae*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The International Municipal Lawyers Association ("IMLA") is a non-profit organization of more than 2,500 members dedicated to advancing the interests and education of local government lawyers. IMLA is the only national organization devoted exclusively to local government and law. For nearly 90 years, it has been an educator and advocate for its members, which include cities, towns, villages, townships, counties, water and sewer authorities, transit authorities, attorneys focused on local government law, and others. Its mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

*Amici curiae* are national organizations representing a majority of America's local governments. Members of these organizations also employ local law enforcement officers who keep the peace and protect public order and safety. Local governments and local law enforcement officers frequently face claims of malicious prosecution—the vast majority of which are meritless—and know firsthand the costs of litigating such claims. *Amici curiae* respectfully submit this brief to emphasize the legal flaws with the "charge-specific rule" urged by petitioners; the substantial burdens that adopting that rule would place on local governments (especially without significant guardrails on plaintiffs' recoveries of legal fees); and the importance for local governments of affirming the decision below.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners begin, and essentially end, with an exposition on the common law tort of malicious prosecution. But this is not a common law suit. Rather, this case centers on a claim under 42 U.S.C. § 1983 for the "deprivation" of a constitutional right: the Fourth Amendment right to be "secure . . . against unreasonable . . . seizures." U.S. Const. amend. IV.

That matters. As the Solicitor General recognizes, unlike a common law malicious prosecution claim, the Fourth Amendment comes into play only when the lack of probable cause leads a *seizure* to become "unreasonable." The "charge-specific rule" urged by petitioners would unmoor Section 1983 malicious prosecution claims from this core principle by authorizing such claims whenever a single charge lacks probable cause, regardless of whether that charge actually caused or lengthened a detention—that is, resulted in an unreasonable seizure. That is wrong, and embracing petitioners' position would convert Section 1983 from a cause of action for vindicating existing federal rights to a font of new, common law tort actions. Instead, the Court should adopt the "any-crime rule." Under that rule, probable cause for a seizure based on one crime is "reasonable" (and so defeats a Section 1983 malicious prosecution claim), unless a plaintiff shows that the addition of another, baseless charge caused or lengthened his detention—thus making it "unreasonable."

If the Court nevertheless imports the charge-specific rule into Section 1983, it should stress that, without significant Fourth Amendment harms, recoveries—including of attorney's fees—should be

low. Otherwise, Section 1983 malicious prosecution litigation will pose grave risks for local governments that are highly resource-constrained as it is.

## ARGUMENT

### I. PETITIONERS' CHARGE-SPECIFIC RULE IS IRRECONCILABLE WITH SECTION 1983

This is a Section 1983 case. As this Court has "said many times," Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (citation omitted). "The first step in any such claim," therefore, "is to identify the specific *constitutional* right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality op.) (emphasis added).

This fundamental principle refutes petitioners' expansive "charge-specific" rule. That rule would allow plaintiffs to bring *Fourth Amendment* malicious prosecution claims without a showing of any predicate *Fourth Amendment* violation. The Fourth Amendment prohibits only "unreasonable" searches and seizures. Yet petitioners' theory would allow a Section 1983 Fourth Amendment claim without showing any effect on the "nature of [a defendant's] seizure." Pet. Br. 40 n.14; *see* Pet. 24. In other words, petitioners ask this Court to create a freestanding "constitutional" tort of malicious prosecution disconnected from any unreasonable seizure, and thus from any violation of the Fourth Amendment. Whatever pedigree such a rule has at common law, it cannot be right as a matter of constitutional law.

The "any crime" rule, on the other hand, aligns with the Fourth Amendment foundations of a constitutional malicious prosecution claim. Probable

cause for any charged crime should defeat a Section 1983 malicious prosecution claim *unless* (as the Sixth Circuit has recognized, *infra* at 14-15) the plaintiff can prove that the inclusion of a separate, baseless charge caused or lengthened his seizure—i.e., resulted in an "unreasonable" seizure.

### A. A Plaintiff Has No Section 1983 Claim For Malicious Prosecution Without A Fourth Amendment Violation

This Court has long emphasized that any constitutional claim for what is commonly called "malicious prosecution" must be grounded in a violation of the Fourth Amendment. The Court first confronted the issue in *Albright*, 510 U.S. at 269 (plurality op.), where a plaintiff alleged that state officials "deprived him of substantive due process under the Fourteenth Amendment—his 'liberty interest'—to be free from criminal prosecution except upon probable cause." At the "first step" of the Section 1983 analysis, a plurality of the Court rejected that such a claim sounds in substantive due process. *Id.* at 271. Instead, the Court explained, such a claim "must be judged" under the Fourth Amendment. *Id.*; *see also id.* at 281 (Kennedy, J., concurring in the judgment) ("I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process."); *id.* at 290 (Souter, J., concurring in the judgment) (similar). Because the plaintiff had relied solely on the Due Process Clause, the Court "express[ed] no view" on the viability or contours of a claim for malicious prosecution under the Fourth Amendment. *Id.* at 275 (plurality op.).

In *Manuel v. City of Joliet*, 580 U.S. 357 (2017), the Court picked up where it left off in *Albright*. There, the plaintiff alleged that officials had fabricated evidence against him, which a judge relied on to find probable cause for plaintiff's extended detention. *Id.* at 361. This time, the plaintiff rightly framed his claim for an unreasonable seizure without probable cause under the Fourth Amendment. *Id.* at 362. But the Seventh Circuit still rejected the claim, reasoning that the Fourth Amendment applies only to warrantless *arrests*, and so "falls out of the picture" "[o]nce a person is detained pursuant to legal process." *Id.* at 363 (citation omitted). This Court reversed, holding that the plaintiff "stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention." *Id.* at 368. As with unreasonable arrests, "the Fourth Amendment governs a claim for unlawful pretrial detention . . . beyond the start of legal process." *Id.* at 369.

*Manuel* only "pinpoint[ed]" the constitutional right at issue—the right to be free from unreasonable pretrial restraint pursuant to legal process. *Id.* at 370. Beyond that, the Court remanded for the Seventh Circuit to determine, in the first instance, "the elements of, and rules associated with," that claim. *Id.* *Manuel* did set out some guidance for courts undertaking that inquiry. "In defining the contours and prerequisites of a § 1983 claim, . . . courts are to look first to the common law of torts," including by consulting "the most analogous tort." *Id.* As the Court admonished, however, the common law should serve only "to guide rather than control" this analysis. *Id.* And "[i]n applying, selecting among, or *adjusting* common-law approaches, courts must

closely attend to the values and purposes of the constitutional right at issue." *Id.* (emphasis added).

Finally, in *Thompson v. Clark*, 596 U.S. 36 (2022), the Court had its first occasion to apply the *Manuel* framework to a Fourth Amendment claim of this sort. Accepting that the "most analogous tort to [a] Fourth Amendment claim" for "unreasonable seizure pursuant to legal process" is "malicious prosecution," the Court considered one element of that claim: "favorable termination of the underlying criminal prosecution." *Id.* at 43-44. And the Court held that, to satisfy this element, a plaintiff "need only show that the criminal prosecution ended without a conviction"—not with some "affirmative indication of innocence." *Id.* at 49. To reach that conclusion, the Court looked first "to American malicious prosecution tort law as of 1871," and then determined whether those rules were "consistent" with the "'values and purposes' of the Fourth Amendment." *Id.* at 45-49 (citation omitted). Because the Court held that common law courts tended to favor the "without a conviction" rule, and nothing in the Fourth Amendment's "'values and purposes'" conflicted with that rule, the Court adopted it. *Id.* at 48 (citation omitted).

As to the core of a Fourth Amendment "malicious prosecution" claim, each of these cases was clear: The predicate for any such claim is that the charges at issue produced an "unreasonable seizure." *Albright* focused on the "deprivation[] of liberty" that occurred when the plaintiff "submitted himself to an arrest," 510 U.S. at 274 (plurality op.); in *Manuel*, the plaintiff was "'siez[ed]' . . . for 48 days following his arrest," 580 U.S. at 364 (alteration in original) (citation omitted); and the claim in *Thompson* centered on the

plaintiff's alleged "unreasonable seizure pursuant to legal process," 596 U.S. at 43.

### B. The Any-Crime Rule Effectuates The Fourth Amendment Foundation Of A Section 1983 Malicious Prosecution Claim

Under these principles, only the any-crime rule comports with a *Fourth Amendment* claim for malicious prosecution under Section 1983.

1. At common law, the malicious prosecution tort required that "the suit or proceeding was 'instituted without any probable cause.'" *Thompson*, 596 U.S. at 44 (citation omitted). Courts assessing claims for unreasonable seizures pursuant to legal process under the Fourth Amendment must therefore decide how to apply this "lack of probable cause" element. Must they analyze the prosecution as a whole, such that probable cause for one charge generally supports the other charges for which there may not be probable cause—precluding most Fourth Amendment claims if there was probable cause for at least one charge? Or must courts instead ask whether each charge is itself supported by probable cause, and permit a malicious prosecution claim any time a judge later determines that at least one charge lacked probable cause?

In answering that question, *Manuel* suggests that courts should first "look . . . to the common law of torts" from the time of Section 1983's enactment to define the contours of a constitutional claim. 580 U.S. at 370. And that is where petitioners focus most of their energy—arguing that the charge-specific rule was the prevailing rule in the States and English courts around the time that Section 1983 was enacted. Pet. Br. 18-23, 33-35 (collecting authorities); *see also Williams v. Aguirre*, 965 F.3d 1147, 1159-61

(11th Cir. 2020) (similar). But that is not the end of the inquiry—or really even the beginning.

When "applying" and "adjusting" the elements of a common law tort in the Section 1983 context, "courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 580 U.S. at 370. And again, Section 1983 does not itself create substantive law, or provide a means for bringing state tort claims in federal court. Instead, it provides a vehicle "for vindicating *federal* rights elsewhere conferred." *Graham*, 490 U.S. at 393-94 (emphasis added) (citation omitted); *see Manuel*, 580 U.S. at 370 (noting that "§ 1983 is [not] simply a federalized amalgamation of pre-existing common law claims" (alteration in original) (citation omitted)).

Whatever the merits of their common law history, petitioners fail to account for the requirements of the Fourth Amendment, and err when they declare that a supposed "1871 tort-law consensus" is enough to "determin[e] the scope of the Fourth Amendment." Pet. Br. 24. State tort law does not "determin[e]" the Constitution's meaning. And a careful review of the Fourth Amendment and its objectives shows that petitioners' charge-specific rule falls far outside the scope of its protections.

2. The Fourth Amendment's plain text bars "unreasonable . . . seizures"—not unreasonable charges. U.S. Const. amend. IV.[2] This carries

---

[2] At points, petitioners also refer to the Fourth Amendment's Warrant Clause and separate protections against unreasonable seizures of property and searches. *See, e.g.*, Pet. Br. 11, 16-17, 28-30, 36-37. As the Solicitor General explains (at 23-29), those issues are not properly before the Court, and petitioners' reliance on these aspects of the Fourth Amendment

through to the Court's malicious prosecution case law, too, all of which assumes that a Section 1983 malicious prosecution claim requires a *seizure* (an arrest or other restraint) that is *unreasonable* (unsupported by probable cause). The *Manuel* claim went forward "because [the plaintiff's] . . . *weeks in custody* were . . . unsupported by probable cause," making his "*detention* . . . 'unreasonable.'" 580 U.S. at 364, 368 (emphasis added) (citation omitted). So too in *Thompson*, in which the plaintiff "was seized as a result" of a charge that lacked probable cause. 596 U.S. at 42; *see also id.* at 50 (Alito, J., dissenting) (explaining that "a Fourth Amendment claim based on an unreasonable seizure has two indispensable elements:" (1) a "seizure" that (2) "lacked probable cause"). In other words, the Fourth Amendment is only violated when a "seizure" takes place without probable cause—and so becomes "unreasonable."

Nothing in Section 1983 expands the scope of the Fourth Amendment's protections. It provides a cause of action against any person who, "under color" of state law, "subjects, or causes to be subjected," another "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Thus, in the Fourth Amendment context, Section 1983 requires that an official must

---

is misplaced in any event. The plain text of the Warrant Clause requires that a "Warrant[]," overall, have probable cause—without reference to specific charges therein. U.S. Const. amend. IV. And this Court's precedents make clear that "'the specific constitutional right' at issue" here is the "right of the people to be secure in their *persons* . . . against unreasonable . . . seizures"—not any rights relating to warrants, property, or searches. *Manuel*, 580 U.S. at 364, 370 (alterations in original) (emphasis added) (citation omitted).

have caused the deprivation of a defendant's right to be free from "unreasonable . . . seizures."

3. Petitioners' charge-specific rule cannot be squared with these principles. As petitioners frame it, they should be able to bring, and prevail on, a Fourth Amendment claim for *any* charge lacking in probable cause—even if other charges provided ample cause for the seizure, and even if that seizure would have occurred just the same without the baseless charges. *See, e.g.*, Pet. Br. 40 n.14. In other words, their charge-specific rule would allow a Fourth Amendment claim against a definitionally *reasonable* seizure. As the Solicitor General recognizes (at 29), that rule is fundamentally unsound.

Consider, for example, a defendant on trial for first-degree murder—for whom there is undisputedly probable cause for detention on that charge. In petitioners' view, the addition of another, less serious charge for which there was not probable cause (say, breaking and entering) can give rise to a Fourth Amendment "unreasonable seizure" claim—even if that additional charge had *no effect* on the defendant's seizure or continued detention. In that case, the only "seizure" was entirely reasonable—because supported by probable cause—and so no official caused any "deprivation" of a federal right. The Court should reject any rule that would allow a Section 1983 claim in such circumstances.

Petitioners confuse the constitutional inquiry here with the tort backdrop that is meant to "guide," not "control," that analysis. *Manuel*, 580 U.S. at 370. While common law torts are useful for "specifying the conditions for recovery under" Section 1983, they are not themselves actionable under that statute. *Id.* Where the Constitution is *silent* on particular

elements of a Section 1983 claim—e.g., an "accrual date," *id.* at 370-71, or the precise contours of what it means for proceedings to have ended in a "favorable termination," *Thompson*, 596 U.S. at 39—common law torts may be instructive. But nothing in this Court's precedents permits discarding a core element of a *constitutional* claim—here, the requirement of an unreasonable seizure—simply because, at common law, an analogous tort would not have required that element. *See, e.g.*, *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) ("[T]he Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of . . . malicious prosecution, and more.").

Such an approach "gets things exactly backwards." Hon. Timothy Tymkovich & Hayley Stillwell, *Malicious Prosecution as Undue Process: A Fourteenth Amendment Theory of Malicious Prosecution*, 20 Geo. J.L. & Pub. Pol'y 225, 244 (2022). "In cases arising under § 1983, federal courts should not determine the contours of constitutional rights by jamming constitutional claims into state law torts." *Id.* Doing so "conflates state common law with constitutional law and causes confusion about § 1983's limited scope as merely a vehicle for vindicating violations of constitutional law, not a source of substantive rights." *Id.* at 245.

In short, petitioners' approach fails to take into account the requirements of the Fourth Amendment.[3]

---

[3] Petitioners' attempt to find support (at 24-27) in the "values and purposes" of the Fourth Amendment fails. They note that *Thompson* addressed two such purposes—avoiding arbitrary results and protecting law enforcement interests—and

Although a Fourth Amendment claim for unreasonable seizure pursuant to legal process may be most *analogous* to a common law malicious prosecution claim, petitioners go astray when they collapse the two into a Section 1983 claim *for* common law malicious prosecution. Adopting their proposed charge-specific rule would unmoor Section 1983 claims from the Fourth Amendment, by allowing Fourth Amendment claims against government officials who, by definition, effected seizures *supported by* probable cause—and so did not cause any unreasonable seizure. In other words, it would provide a Section 1983 action with no underlying constitutional violation—a Fourth Amendment claim against baseless *charges*, not unreasonable *seizures*.

It is true that, even when they do not cause or lengthen the period of detention, additional, baseless charges can still have negative consequences. A "prosecution" "may disrupt [a person's] employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Albright*, 510 U.S. at 296 (Stevens, J., dissenting) (citation omitted); *see also Thompson*, 596 U.S. at 59 (Alito, J., dissenting) ("[A] prosecution can be very damaging even if the

---

contend that *those* purposes would not be impaired by adopting a charge-specific rule. *See* 596 U.S. at 48-49. But *Thompson* did not purport to exhaust the "values and purposes" underlying the Fourth Amendment, and did not involve the key question here: whether a Section 1983 claim for malicious prosecution may go forward even if a seizure *was* supported by probable cause. It should go without saying that allowing Fourth Amendment claims to go forward with no predicate Fourth Amendment violation is inconsistent with the "values and purposes" of that amendment.

victim is never detained."). But the Fourth Amendment protects only against the detention itself. William Alter, Note, *Reasonable Seizure on False Charges: Should Probable Cause to Detain a Person for Any Crime Bar a Malicious Prosecution Claim Under the Fourth Amendment?*, 56 Ind. L. Rev. 391, 410 (2023) (Even "real" harms caused by false charges are "not protected against by the Fourth Amendment" outside their effect on detention.).[4]

4. Respondents' any-crime rule, on the other hand, fits well with the Fourth Amendment. As the Sixth Circuit has explained, "a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge." *Howse v. Hodous*, 953 F.3d 402, 409 (6th Cir. 2020). If someone is detained on one charge for which there is probable cause and another for which there is not, he is, generally speaking, detained all the same. His *seizure*—assuming it would have been justified even without the second charge—is not made any less reasonable by the inclusion of the additional, baseless charge.

In some instances an additional, baseless charge might change the nature of the detention. Such a charge might, for instance, be the sole basis for a seizure, or it might cause someone to be seized for longer. In those circumstances, a plaintiff may be able to show that, but for the inclusion of the baseless charge, he could not have been seized at all, or for as long. And if that is the case, then the plaintiff will

---

[4] The Solicitor General suggests (at 30) that "other sources of law," like the Due Process Clause, might support relief "in the absence of an unreasonable seizure." But the only claim at issue in this case is based on a violation of the Fourth Amendment.

likely be able to show that the inclusion of the baseless charge made his seizure unreasonable—in violation of the Fourth Amendment. Thus, as the Sixth Circuit has observed, although "[t]acking on meritless charges" may not *always* "change the nature of [a] seizure[,] [i]f hypothetically it were to change the length of detention, that would be a different issue." *Id.* at 409 n.3. But courts cannot simply assume that an unreasonable charge equates to an unreasonable seizure. *Cf. Williams*, 965 F.3d at 1161 (assuming that all charges "meaningfully affect the existence and duration of [a] seizure").[5]

To bring a claim under Section 1983, plaintiffs must prove they were subjected to a "deprivation" of a constitutional right. And to bring a Section 1983 claim based on a violation of the Fourth Amendment under a malicious prosecution theory, plaintiffs must prove that any baseless charge actually resulted in an unreasonable seizure. *See* U.S. Br. 14 (recognizing that a plaintiff must "prov[e] that the baseless charge caused a violation of the Fourth Amendment"). Indeed, at the certiorari stage, petitioners admitted that "[t]he length of detention may be relevant to" assessing "the Fourth Amendment harm." Pet. Reply

---

[5] The Solicitor General argues that, under the Sixth Circuit's rule, a baseless charge can never result in the violation of the Fourth Amendment. *See* U.S. Br. 7-8, 10. That is incorrect. The Sixth Circuit has recognized that "chang[ing] the length of detention" alters the analysis. *Howse*, 953 F.3d at 409 n.3. Thus, as respondents have explained, under the Sixth Circuit's rule, "a plaintiff generally cannot prove malicious prosecution *unless* the unfounded charges changed the nature of the plaintiff's seizure or prolonged the plaintiff's detention." BIO 13. The Sixth Circuit did not need to go that far here because petitioners gave it no reason to do so. *See infra* note 6.

8. Petitioners failed to show any such harm below, so the Sixth Circuit was right to apply the any-crime rule to affirm—and this Court should do the same.

5. Petitioners argue that this Court should not reach what they call the "proposed 'length-of-detention' requirement" because this case does not "tee [it] up." Pet. Br. 40. That is incorrect. The Court granted certiorari to address "[w]hether Fourth Amendment malicious prosecution claims are governed . . . by the 'any-crime' rule*, as the Sixth Circuit holds*." Pet. i (emphasis added). As respondents explained in opposing the petition, the Sixth Circuit's "any-crime rule" *includes* a length-of-detention inquiry. BIO i, 13. This issue is thus fairly included within the question presented. *See, e.g.*, *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006). And it would "make little sense" to reserve it for another day, as petitioners suggest. *Id.* Having granted certiorari, the Court should fully address the issues "necessary for the proper disposition of the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981).[6]

---

[6] The Solicitor General acknowledges that this issue is before the Court, and suggests (at 7-8, 22-23) that the Court vacate and remand the case so that the lower courts can consider whether the "allegedly baseless charge caused an unreasonable seizure." A remand is unnecessary, however. The Sixth Circuit "did not ask" this question, U.S. Br. 7-8, because petitioners forfeited any argument that Chiaverini's detention was prolonged by the money-laundering charge itself, *see* Resp. Br. 41-42; BIO 13-14. There is no reason to give petitioners a do-over now, especially since the Sixth Circuit recognized years earlier in *Howse* that changing the length of the detention "would be a different issue," yet petitioners failed to argue this point below. 953 F.3d at 409 n.3. If this Court does remand, however, it should instruct the court of appeals to address the

### C. Wrongly Charged Individuals Retain Significant Protection Under State Law Malicious Prosecution Frameworks

Adopting the any-crime rule will not eliminate redress for individuals subjected to baseless criminal charges. Other avenues for relief—including state malicious prosecution claims—remain available.

Needless to say, this Court's decisions on the scope of federal rights do not automatically preclude the grant of additional state protections, if desired. *See Cooper v. California*, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) ("The constitutional floor is sturdy and often high, but it is a floor. Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution.").

"Every state recognizes a malicious prosecution cause of action under state law." Tymkovich & Stillwell, *supra*, at 260. And as petitioners belabor, many if not most of those state law causes of action will provide additional protections against malicious prosecution beyond those housed in the Fourth Amendment—including the charge-specific rule. *See, e.g.*, *Holmes v. Vill. of Hoffman Est.*, 511 F.3d 673, 682-83 (7th Cir. 2007) (concluding that the Illinois Supreme Court would adopt the charge-specific rule for a "malicious prosecution claim . . . founded on

---

forfeiture question first to eliminate the need for protracted (and costly) proceedings on remand.

state law"); *see also Cordova v. City of Albuquerque*, 816 F.3d 645, 662-63 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) (describing the ill match between the Fourth Amendment and common law malicious prosecution claims, but noting that "state tort law provides adequate remedies" itself).

As a result, the common law backdrop here on which petitioners focus is a good reason to *reject*, not adopt, petitioners' charge-specific rule. Malicious prosecution claims involve sensitive tradeoffs between the interests in deterring baseless charges and avoiding chilling effects on law enforcement officials. *See, e.g.*, *Stone v. Crocker*, 41 Mass. 81, 83 (1832) (explaining that, at common law, such claims were "managed with great caution" (citation omitted)). States remain free to impose rules like the charge-specific rule if they wish, and to adopt rules safeguarding interests—like one's reputation—that are not directly protected by the Fourth Amendment. This division of authority between the States and federal government serves both well—leaving States free to strike their own balance with respect to these claims, and Section 1983 to protect only the rights actually established by the Constitution.

But there is no basis for this Court to impose petitioners' flawed view of Fourth Amendment on *all* States.

## II. IF THE COURT ADOPTS PETITIONERS' CHARGE-SPECIFIC RULE, IT SHOULD MAKE CLEAR THAT RECOVERIES SHOULD ORDINARILY BE LIMITED

If this Court nevertheless adopts petitioners' categorical charge-specific rule, it should make clear that, in a case in which the detention is not caused or

prolonged by the charge, any recovery—including of attorney's fees—should be limited. At most, nominal damages would be appropriate in this situation. And as this Court has held, nominal damages ordinarily do not support an award of attorney's fees.[7]

### A. The Court Should Reiterate That Nominal Damages Awards Ordinarily Should Not Trigger Attorney's Fees At All

The Court has long held that a plaintiff awarded only nominal damages in a Section 1983 action should usually not recover any attorney's fees. If it were to hold in favor of petitioners on the merits here, the Court should reaffirm that limitation on attorney's fees and emphasize its application in this context.

1. Under 42 U.S.C. § 1988, a court may award the "prevailing party" in a Section 1983 action with "a reasonable attorney's fee." In *Farrar v. Hobby*, the Court first held that even "a plaintiff who wins nominal damages is a prevailing party under § 1988." 506 U.S. 103, 112 (1992). "[T]echnical" or "insignificant" victories are victories all the same for "prevailing party" purposes, regardless of the "the magnitude of the relief obtained." *Id.* at 113-14.

Still, the Court put important guardrails on this rule—making clear that the "'technical' nature of a nominal damages award or any other judgment . . . *does* bear on the propriety of fees awarded under § 1988." *Id.* at 114 (emphasis added). Whereas the

---

[7] We focus here on the award of attorney's fees. Obviously a plaintiff who cannot show that a baseless charge contributed to his detention should not be entitled to compensatory damages. BIO 10-11. Yet plaintiffs bringing malicious prosecution claims often seek exorbitant damages. Petitioners, for example, seek "damages in excess of $3 million." JA 60-61; *see* Pet. Reply 7-8.

"prevailing party" inquiry is binary—a plaintiff either prevailed or did not prevail—"'the *degree* of the plaintiff's overall success goes to the reasonableness' of a fee award." *Id.* (emphasis added) (citation omitted); *see Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983) (clarifying "the proper standard for setting a fee award where the plaintiff has achieved only limited success"). The "degree of success obtained" is "'the most critical factor' in determining the reasonableness of a fee award." *Farrar*, 506 U.S. at 114 (quoting *Hensley*, 461 U.S. at 436). "In a civil rights suit for damages . . . the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury." *Id.* at 115. In such a case, *Farrar* therefore held, "the only reasonable fee is usually no fee at all." *Id.* This constraint ensures that Section 1988 does not "produce windfalls to attorneys." *Id.* (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986) (plurality op.)); *see, e.g.*, *Talley v. District of Columbia*, 433 F. Supp. 2d 5, 9-10 (D.D.C. 2006) (finding, under *Farrar*, that any fee award would be "a 'windfall' for the plaintiff's attorney" (citation omitted)).

*Farrar*'s upshot on damages here is this: If a plaintiff could prevail on a malicious prosecution claim based on the addition of a baseless charge to otherwise proper charges—but without any effect on the nature or duration of the resulting detention—then only nominal damages would be appropriate. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (Plaintiffs may recover "nominal damages not to exceed one dollar" when their constitutional rights are violated but do not otherwise suffer any compensable injury.); *see also Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994) ("[Plaintiff] cannot

recover [compensatory] damages merely by showing that he was incarcerated on one illegitimate charge; he would also have to show that, but for that illegitimate charge, he would have been released. Nevertheless, . . . [w]hen constitutional rights are violated, a plaintiff may recover *nominal* damages even though he suffers no compensable injury."); Pet. Br. 40 n.14 (seeming to acknowledge this).

2. If that is right—and if plaintiffs in petitioners' situation can obtain only nominal damages—then the Court should reaffirm and underscore that *Farrar* bars the award of attorney's fees here.

Many courts have heeded *Farrar*'s instruction that a nominal damages award under Section 1983 usually should produce no attorney's fees under Section 1988. But of great concern to local governments, many have not. Rather, based on a solo concurrence in *Farrar*, these courts have developed a balancing test based on the "relevant indicia of success"—defined to include "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served." *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring); *see, e.g.*, *Mercer v. Duke Univ.*, 401 F.3d 199, 204 (4th Cir. 2005) (collecting cases).

For the courts applying the *Farrar*-concurrence "indicia of success" factors, the standards—especially for the "public purpose" factor—"vary widely, both in strictness and in focus." Maureen Carroll, *Fee Shifting, Nominal Damages, and the Public Interest*, St. John's L. Rev. (forthcoming) (manuscript at 37-38, 48) (citation omitted), https://ssrn.com/abstract=4455766. But "even if every circuit were to articulate the same version of the public-interest inquiry, consistency would remain elusive." *Id.* at 38. In the end, "a standard tied to the public interest

value of the litigation is likely to lead to unpredictable results." *Id.*

This danger is real. Applying the *Farrar* concurrence's balancing test, some lower courts across the country have awarded substantial attorney's fees to "prevailing" claimants under Section 1988, even when they received only nominal damages for their Section 1983 claims. *See, e.g.*, *Thurairajah v. City of Fort Smith*, 3 F.4th 1017, 1028-31 (8th Cir. 2021) ($15,100); *Mahach-Watkins v. Depee*, 593 F.3d 1054, 1059-63 (9th Cir. 2010) ($136,687.35); *Mercer*, 401 F.3d at 202-12 ($349,243.96); *Parada v. Anoka County*, 555 F. Supp. 3d 663, 684-87 (D. Minn. 2021) ($248,218.13), *aff'd*, 54 F.4th 1016 (8th Cir. 2022); *Citizens for Free Speech, LLC v. County of Alameda*, No. C14-02513, 2017 WL 912188, at *6-10 (N.D. Cal. Mar. 8, 2017) ($38,116). Here, too, petitioners stress (at 9) the "significant attorney's fees" they have expended pursuing a claim that, as discussed above, has no actual connection to any Fourth Amendment violation—fees that they will no doubt seek to recover from respondents if they were to prevail.

Whatever probable-cause rule the Court adopts here, it should clarify that, under *Farrar*, attorney's fees are ordinarily not warranted—or at a minimum, should be sharply limited—where, as here, all the plaintiff stands to gain is nominal damages. Without such a rule, plaintiffs (or attorneys in search of fees) will be encouraged to scour otherwise legitimate charging documents for vulnerable counts on which to premise Section 1983 claims—even without any indication that the inclusion of such counts caused or affected any seizure. These suits will not protect any *actual* Fourth Amendment interests—while any interests they will serve are already fully protected

under state law. *See supra* at 17-18. But they *will* impose major costs on the local governments and officials forced to respond to these claims and, possibly, pay out legal fees. The Court should guard against that result, and make clear that the award of attorney's fees should be reserved for Section 1983 malicious prosecution claims that involve actual Fourth Amendment violations, and so actual (not merely nominal) Fourth Amendment harms.

### B. A Contrary Regime Would Pose Acute Challenges For Resource-Limited Local Governments

The current state of the law—in particular, the risk that courts may award substantial attorney's fees to merely nominally prevailing plaintiffs without any Fourth Amendment violation—would pose special challenges for resource-strapped local governments and officials. Large, unbudgeted litigation expenses can—and do—have severe consequences for those governments and the communities they serve.

1. To begin, many local governments have balanced-budget requirements, limiting their ability to spend freely.[8] Even so, efforts to keep balanced budgets have been met with middling success at the state and local level. By one recent, conservative estimate, "roughly half of Americans live in States

---

[8] *See* Government Finance Officers Association, *Achieving a Structurally Balanced Budget* (Feb. 28, 2012), https://www.gfoa.org/materials/achieving-a-structurally-balanced-budget. Often, States directly impose such balanced-budget requirements on their local governments. *See e.g.*, *id.*; Colo. Rev. Stat. § 29-1-103(2); Ga. Code Ann. § 36-81-3; N.C. Gen. Stat. § 159-8(a); Wash. Rev. Code § 35.33.075.

that report short-term budget gaps, potential long-term deficits, or both."[9]

For local governments, the situation is getting worse. Even more than States, "cities were battered by the COVID-induced recession." Erin Adele Scharff & Darien Shanske, *The Surprisingly Strong Case for Local Income Taxes in the Era of Increased Remote Work*, 74 Hastings L.J. 823, 825 (2023). Local governments "face[d] the formidable task of committing resources to rising health care needs while maintaining services their communities expect[ed]," even as they "experienc[ed] large revenue shortfalls that ma[de] balancing budgets all the more difficult."[10] County budgets, for example, lost more than $ 144 billion through the 2021 financial year, while in late 2020, cities saw revenues drop by 21% and expenditures jump by 17%.[11] More recently, too,

---

9 *See* Josh Goodman, *State Budget Problems Spread*, Pew Charitable Tr. (Jan. 9, 2024), https://www.pewtrusts.org/en/research-and-analysis/articles/2024/01/09/state-budget-problems-spread (collecting States facing serious budget shortfalls ).

10 *See* The Pew Charitable Trusts, *Local Tax Limitations Can Hamper Fiscal Stability of Cities and Counties* (July 8, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/07/local-tax-limitations-can-hamper-fiscal-stability-of-cities-and-counties.

11 National Association of Counties, *Analysis of the Fiscal Impact of COVID-19 on Counties* 5 (May 2020), https://www.naco.org/sites/default/files/documents/NACo_COVID-19_Fiscal_Impact_Analysis_1.pdf; Press Release, National League of Cities, *New Survey Data Quantifies Pandemic's Impact on Cities: Municipal Revenues Down Twenty-One Percent While Expenses Increase Seventeen Percent* (Dec. 1, 2020), https://www.nlc.org/post/2020/12/01/new-survey-data-quantifies-pandemics-impact-on-cities-municipal-revenues-down-twenty-one-percent-while-expenses-increase-seventeen-percent/.

the influx of migrants, and the need for attendant services, has only compounded the budgetary demands faced by local governments across the country.[12]

Local governments project that these problems will only get worse in coming years.[13] New York City, for example, has a balanced budget for 2024 but "is facing tough fiscal times in the next few years," as "the City's four-year financial plan still shows large gaps of over $7.1 billion for 2025 (9.0 percent of City fund revenue) and roughly $6.5 billion for 2026 and 2027, despite [various] cuts."[14] Chicago, too, forecasts "ongoing concerns about [its] budget's persistent

---

[12] *See, e.g.*, S&P Global Ratings, Comments, *Migrants And Asylum Seekers Pose Budgetary Challenges In New York City, Chicago, And Denver* (Feb. 13, 2024), https://www.spglobal.com/ratings/en/research/articles/240213-migrants-and-asylum-seekers-pose-budgetary-challenges-in-new-york-city-chicago-and-denver-13000841 (noting that "rising expenditures . . . are significant enough to strain budgets and could pressure credit quality"); Jimmy Vielkind & Erin Ailworth, *New York Plans to Spend Billions More on Migrant Crisis*, Wall St. J. (Jan. 16, 2024), https://www.wsj.com/us-news/new-york-plans-to-spend-billions-more-on-migrant-crisis-f2499439 (similar).

[13] Daniel C. Vock, *Cities Stare Down Huge Budget Gaps*, Route Fifty (May 9, 2023), https://www.route-fifty.com/finance/2023/05/cities-stare-down-huge-budget-gaps/386139/ (noting that "[m]any city governments," including New York City, Oakland, Milwaukee, San Francisco, Seattle, Washington, D.C., are "suddenly confronting bad budget news, as . . . local economies continue to adjust to post-pandemic conditions").

[14] James Parrott & George Sweeting, *New York's 2024 Economic and Budget Outlook: Post-Pandemic Reckoning for the City and the State* 17, Center for N.Y.C. Affairs (Jan. 11, 2024), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/659f32d79001cd3af7a8912a/1704932057799/Jan+11+2024+CNYCA+NY+City+and+State+budget+econ+outlook.docx.pdf.

structural imbalance and the use of one-time revenue sources to close the budget gap."[15] Or consider Clark County, Washington. Although it managed to balance its 2024 budget, it "could be facing a budget shortfall within just a few years" due in part to a nearly $200 million pandemic-related "decline in revenue."[16]

2. Given these existing—and worsening—budgetary constraints, local governments are often forced to make difficult decisions about how to allocate their financial resources. Any new, unbudgeted expenditures threaten to throw already-precarious budgets even further out of balance. As relevant here, if local governments are saddled with large unbudgeted fees from malicious prosecution claims under petitioners' expansive charge-specific rule, they will have to come up with that money from somewhere. The most obvious options—"cutting spending or raising revenues"—however, come at the expense of everyday citizens.[17]

---

[15] The Civic Federation, *City of Chicago FY2024 Proposed Budget: Analysis and Recommendation* 4 (Nov. 1, 2023), https://civicfed.org/sites/default/files/2023-11/ChicagoFY2024BudgetAnalysis.pdf.

[16] Shari Phiel, *Clark County Council approves 2024 budget after public hearings*, The Columbian, Dec. 6, 2023, https://www.columbian.com/news/2023/dec/06/clark-county-council-approves-2024-budget-after-public-hearings/.

[17] *See, e.g.*, Gabrial Petek, *The 2022-23 Budget: State Appropriations Limit Implications* Legis. Analyst's Off. 2 (Mar. 30, 2022), https://lao.ca.gov/reports/2022/4583/SAL-Implications-033022.pdf; *cf. also* Montana Department of Revenue, *Montana Department of Revenue Biennial Report* 50 (2022), https://mtrevenue.gov/wp-content/uploads/dlm_uploads/2023/01/2020-2022-Biennial-Report.pdf ("[W]ith the requirements to have a balanced budget, state and local

To free up money to pay plaintiffs' (and their attorneys') fees under the petitioners' rule, local governments may require spending cuts to other programs, services, and resources. But critically, States "legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citation omitted). And state instrumentalities like local governments often play key roles in funding and facilitating everything from education to infrastructure to law enforcement to public health to roads to housing—services that benefit all Americans.[18]

When local governments must account for new unbudgeted costs, basic economics teach that, absent alternative revenue streams, the funding comes at the expense of these vital services. "[S]tate and local governments, which generally operate under balanced budget constraints, tend to respond to economic downturns with sweeping cuts that can . . . reduce services when they are most needed." David Gamage et al., *Weathering State and Local Budget Storms: Fiscal Federalism with an Uncooperative Congress*, 55 U. Mich. J.L. Reform 309, 318 (2022); *see* Neil H. Buchanan, *Social Security, Generational Justice, and Long-Term Deficits*, 58 Tax L. Rev. 275, 294 (2005) (noting that unanticipated market changes "are especially severe for state and local governments,

---

governments can only cut taxes for one group by raising taxes for another or by cutting services.")

[18] Urban Institute, *State and Local Backgrounds: State and Local Expenditures*, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures (last visited Mar. 7, 2024).

most of which operate under (modified) balanced budget requirements"). When local governments have to siphon resources from crucial public services to fund unbudgeted litigation expenses, the public is the ultimate loser.

To avoid spending cuts, local governments might instead seek to generate more revenue to afford the fee awards that petitioners' theory may invite across the country. Taxes are the obvious candidates for raising such revenue. But state law often hamstrings any efforts to impose new taxes.[19] And of course, even if local governments *can* pass such measures, taxpayers will be the ones to bear the brunt of the effects of petitioners' rule. In theory, local governments may also issue new debt—but every State significantly "restrict[s]" this power, too. Nadav Shoked, *Debt Limits' End*, 102 Iowa L. Rev. 1239, 1251 (2017); *see* Daniel J. Hemel, *Federalism As a Safeguard of Progressive Taxation*, 93 N.Y.U. L. Rev. 1, 52 (2018) ("[B]alanced budget requirements . . . severely constrain [governments'] ability to borrow in response to a negative revenue shock.").

In short, there is no easy path for local governments to raise new funds to meet unbudgeted litigation costs. Whether or not local governments *can* raise new funds to cover rising litigation costs, and regardless of *how* they do so, the consequences

---

[19] *See, e.g.*, National Association of Counties, *Counties Struggle with State Revenue Limitations, Mandates* (Nov. 11, 2016), https://www.naco.org/articles/counties-struggle-state-revenue-limitations-mandates ("State caps such as restricting the types of taxes counties may impose, limits on tax rates and total revenues collected, and an obstacle-strewn approval process financially handcuff counties.").

will thus fall in the same place: on the shoulders of local governments' constituents.

3. Petitioners' extreme theory of liability thus poses substantial risks to budget-strapped local governments—and, in turn, the public they serve.

Section 1988 provides significant structural incentives for plaintiffs to bring Section 1983 claims against local governments, already heavily "encouraging litigation." Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 Wm. & Mary Bill Rts. J. 829, 837 (2016); *see* Philip Matthew Stinson Sr. & Steven L. Brewer Jr., *Federal Civil Rights Litigation Pursuant to 42 U.S.C. §1983 as a Correlate of Police Crime*, 30 Crim. Just. Pol'y Rev. 223, 227 (2019) (attributing the "explo[sion]" of Section 1983 litigation in cases alleging police misconduct in part to the availability of Section 1988 attorneys' fees); *see also* Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 Ind. L.J. 1021, 1039 (2020) (Section 1988 "'reflects a heavy reliance on attorneys' fees' in order to secure compliance." (citation omitted)). And malicious prosecution claims—involving prosecuted individuals with perceived grievances against their local governments—bring their own incentives to sue, which are only amplified by plaintiffs' lawyers who may hope to recover fees. *See* Stinson & Brewer, *supra*, at 227.

Petitioners' charge-specific rule, and the expansion of Section 1983 liability it would entail, would only bolster these incentives—in cases that are, by definition, at the lowest ebb of Fourth Amendment concern. As explained, *supra* at 11-14, 22-23, petitioners' rule would allow plaintiffs (and their counsel) across the country to flyspeck indictments,

hoping to find the off charge lacking in probable cause, so as to manufacture a Section 1983 claim, even when the baseless claim had no effect on the detention. And it would *encourage* such behavior for those with an eye for a potentially lucrative fee award. In the atypical instances in which such suits are successful, they will seldom redress any actual *Fourth Amendment* harm under petitioners' rule. And even in the more common cases in which malicious prosecution claims fail,[20] these meritless suits can still impose massive litigation expenses, lead to increased insurance premiums and settlements, and so on. All the while, the public will suffer, as local governments burdened by costly and time-consuming litigation are forced to divert their limited financial resources away from public goods, or raise taxes, to foot these bills.

Neither the Constitution nor common sense supports that destructive regime.

---

[20] *See, e.g.*, *Land v. Sheriff of Jackson Cnty.*, 85 F.4th 1121, 1126-29 (11th Cir. 2023) (affirming grant of summary judgment dismissing Fourth Amendment malicious prosecution claim based on presence of probable cause); *Klein v. Steinkamp*, 44 F.4th 1111, 1116 (8th Cir. 2022) (same); *Pollack v. Miller*, 859 F. App'x 856, 861-62 (10th Cir. 2021) (same); *Cost v. Borough of Dickson City*, 858 F. App'x 514, 519-20 (3d Cir. 2021) (same); *McGrier v. City of New York*, 849 F. App'x 268, 270-71 (2d Cir. 2021) (same); *Lester v. Roberts*, 986 F.3d 599, 609 (6th Cir. 2021) (same); *Coleman v. City of Peoria*, 925 F.3d 336, 350-51 (7th Cir. 2019) (same).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GREGORY G. GARRE
*Counsel of Record*
JORDAN R. GOLDBERG
JOSEPH E. SITZMANN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

*Counsel for Amici Curiae*

March 12, 2024