No. 20-659

In the Supreme Court of the United States

LARRY THOMPSON,

Petitioner,

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL POLICE ACCOUNTABILITY PROJECT AND INNOCENCE NETWORK AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The National Police Accountability Project (NPAP) was founded in 1999 to address misconduct by law-enforcement and detention-facility officers. NPAP has approximately 600 attorney-members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information, and resources for nonprofit organizations and community groups involved with victims of law-enforcement and detention-facility misconduct. NPAP also supports legislative efforts aimed at increasing accountability and appears as *amicus curiae* in cases of particular importance for its members' clients.

The Innocence Network (the Network) is an association of independent organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 67 current members of the Network represent hundreds of prisoners with innocence claims in 49 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan.[2] The Innocence Network and

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] The member organizations for *amicus* brief purposes include the Actual Innocence Clinic at the University of Texas School of Law, After Innocence, Alaska Innocence Project, Arizona Justice Project, Boston College Innocence Program, California In-

its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

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nocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Law Center for Criminal Justice and Professional Responsibility, Exoneration Project, George C. Cochran Innocence Project at the University of Mississippi School of Law, Georgia Innocence Project, Great North Innocence Project, Hawai'i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Indiana University McKinney Wrongful Conviction Clinic, Innocence Project, Innocence Project Argentina, Innocence Project at the University of Virginia School of Law, Innocence Project Brasil, Innocence Project London, Innocence Project New Orleans, Innocence Project of Florida, Innocence Project of Texas, Italy Innocence Project, Justicia Reinvindicada Puerto Rico Innocence Project, Korey Wise Innocence Project, Loyola Law School Project for the Innocent, Manchester Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Montana Innocence Project, New England Innocence Project, New York Law School Post-Conviction Innocence Clinic, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Osgoode Hall Innocence Project, Rocky Mountain Innocence Center, Taiwan Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Arizona Innocence Project, University of Baltimore Innocence Project Clinic, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law, University of Miami Law Innocence Clinic, Wake Forest University School of Law Innocence and Justice Clinic, Washington Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, and Witness to Innocence.

This case involves the standard that governs actions brought under 42 U.S.C. § 1983 to challenge constitutional violations amounting to malicious prosecution. Because such suits invariably involve allegations of serious police misconduct, and because the standard applied below by the Second Circuit often will leave no effective remedy for misconduct of that sort, this litigation holds considerable importance for *amici* and their members. *Amici* therefore submit this brief to assist the Court in the resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner's brief demonstrates that the common-law background supports the rule stated in *Laskar* v. *Hurd*, 972 F.3d 1278, 1293 (11th Cir. 2020), petition for cert. filed, No. 20-1351 (U.S. Mar. 25, 2021), which allows a Section 1983 malicious prosecution suit to proceed so long as the plaintiff shows that the underlying criminal proceeding "formally ended in a manner not inconsistent with [the plaintiff's] innocence." Petitioner also shows that the alternative approach applied by the court below, which requires a showing that the criminal proceeding against the plaintiff instead "ended in a manner that affirmatively indicates his innocence," *Lanning* v. *City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018), is illogical and impossible to apply coherently. *Amici* fully embrace those arguments. Rather than repeat them, we focus here on a related consideration: the common-law standard most effectively facilitates the preservation of constitutional rights.

Experience demonstrates that actions such as the one in this case often present credible claims of

serious and destructive official misconduct that should be resolved on the merits by a court. At the same time, a variety of well-settled and frequently applied doctrines are available to screen out insubstantial Fourth Amendment claims at the pleading stage and, indeed, serve effectively to discourage such claims from being initiated at all. Against this background, the "affirmative indicia of innocence" requirement applied below serves only to frustrate Section 1983's central purpose: deterring, and providing compensation for, the deprivation of constitutional rights.

First, a restrictive "affirmative indicia of innocence" rule is not necessary to screen out insubstantial suits at the pleading stage. The substantive elements of Fourth Amendment claims, as well as the more generally applicable limits on recovery in suits alleging constitutional violations under Section 1983, typically lead to the dismissal of non-meritorious suits on motions to dismiss—and, for that reason, tend to discourage such suits from being brought in the first place. These restrictive substantive rules include the requirement that the plaintiff show that the defendant caused the challenged seizure, that there was no probable cause for the seizure, and that the underlying prosecution terminated favorably to the plaintiff; restrictions on recovery include immunity rules and limits on damages. The common-law standard applied in *Laskar* therefore will not open the floodgates to frivolous litigation.

Second, the "affirmative indicia of innocence" rule frustrates the central goal of Section 1983. That statute is intended to deter, and to provide compensation for, constitutional violations. But as this case

demonstrates, the "affirmative indicia of innocence" rule requires dismissal of Section 1983 suits even when the defendants violated the Constitution and inflicted serious injury. That outcome is perverse: victims of official misconduct should not be denied relief because they were *so* successful that they obtained complete dismissal of a wrongful prosecution prior to trial, when relief would have been available had the prosecution terminated in an acquittal *at* trial.

ARGUMENT

I. Existing constitutional and prudential doctrines will ensure that only substantial and credible Fourth Amendment claims proceed.

At the outset, it should not require extensive proof to show that the preservation of an effective mechanism for the assertion of Fourth Amendment claims involving unlawful seizures is essential. Such claims may involve allegations of very serious law-enforcement misconduct, including the fabrication of evidence; the suppression of exculpatory materials; and racially biased policing. When litigated, these claims are often shown to be credible—and, ultimately, found to be meritorious.[3] But they may founder at

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[3] See, *e.g.*, for a few recent, representative examples: *Noviho* v. *Lancaster Cnty. of Pennsylvania*, 683 F. App'x 160, 167 (3d Cir. 2017) (claim that plaintiff's arrest was generated by a state official whose sister had rear-ended the plaintiff's truck in a traffic accident dismissed on favorable termination grounds, even though the "allegations do not fail to give us pause"); *Smith* v. *Munday*, 848 F.3d 248, 251-52 (4th Cir. 2017) (police made no attempt to investigate defendant or connect her to the crime prior to seizure); *Sykes* v. *Anderson*, 625 F.3d 294, 309 (6th Cir.

an early stage under the "affirmative indicia on innocence standard," before they can be established through discovery, for reasons having nothing to do with the merits of the constitutional contentions. The common-law rule advocated by petitioner avoids that unfortunate result.

At the same time, existing doctrines are sufficient to prevent non-meritorious actions from succeeding, and therefore provide a powerful incentive for plaintiffs to proceed only with credible and legitimate claims.

These limiting doctrines fall into two major categories. *First*, the elements of a Section 1983 Fourth Amendment seizure claim themselves pose significant hurdles to plaintiffs seeking relief. These elements include the requirements that plaintiffs show that: (1) the defendant *caused* the seizure complained of; (2) there was no *probable cause* for the seizure; and (3) the criminal proceeding was *terminated favorably* for the plaintiff. Each requirement is substantial and filters out non-meritorious claims. *Second*, an additional set of doctrines limits recovery under Section 1983 more generally. These rules in-

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2010) (affirming jury verdict for malicious prosecution where officers accused three people, including a pregnant woman, of staging a robbery, based on nothing but "speculation" and "impermissibly layered inferences"), *aff'd,* 419 F. App'x 615 (6th Cir. 2011); *Hoskins* v. *Knox Cnty.*, No. CV 17-84-DLB-HAI, 2018 WL 1352163 (E.D. Ky. Mar. 15, 2018) (testimony showed that detectives generated false evidence and concealed exculpatory material); *Laskar*, 972 F.3d 1278 (11th Cir. 2020) (refusing to dismiss complaint alleging that police conducted baseless raids of a university professor's home in search of evidence to support subsequently dismissed fraud charges).

clude qualified immunity for police officers and limitations on available damages awards.

Of course, none of this is to say that plaintiffs asserting Section 1983 Fourth Amendment seizure claims cannot, or never should, succeed; such suits often do demonstrate well-supported cases of serious police misconduct where recovery is not only warranted, but essential to preserve constitutional rights. But the doctrines described below do impose substantial, practical obstacles to recovery for Section 1983 claims (sometimes even when constitutional rights were violated)—and make it unlikely that plaintiffs with weak or frivolous cases will initiate lawsuits at all.

A. Plaintiffs asserting Fourth Amendment seizure claims must show that the defendant caused their seizure.

Courts generally require plaintiffs bringing seizure claims under the Fourth Amendment to demonstrate that defendants caused the plaintiffs' seizure, a requirement that insubstantial claims are seldom able to meet. Thus, if this Court were to adopt petitioner's approach to favorable termination, this requirement and the others outlined below would suffice to preclude plaintiffs from "flooding" the courts with such claims.

To meet the causation requirement, plaintiffs must make two showings. First, they must identify the officers responsible for seizure. This entails describing "exactly who is alleged to have done what to whom" with "particular[ity,] * * * as distinguished from collective allegations." *Pahls* v. *Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (citations and emphasis omitted).

And second, they must show that the officers identified were in fact the cause of their seizure and, relatedly, of the alleged constitutional violation. The Court has made clear that "a public official is liable under § 1983 only if he *causes* the plaintiff to be subjected to deprivation of [the plaintiff's] constitutional rights." *Baker* v. *McCollan*, 443 U.S. 137, 142 (1979) (internal quotation marks omitted). As prosecutors are generally immune from Section 1983 liability for malicious prosecution, including for their decision to initiate proceedings, *Imbler* v. *Pachtman*, 424 U.S. 409, 430-31 (1976), plaintiffs tend to state their claims against the law enforcement officers who investigated their cases and caused the initial seizure.

In making such claims, plaintiffs must identify "specific actions taken by particular defendants" and link these actions to "the alleged constitutional violation" to avoid having their claims dismissed at the motion to dismiss stage. *Pahls*, 718 F.3d at 1226, 1228. In one such formulation of the rule, plaintiffs must "'plausibly allege' that the [d]efendants 'made, influenced, or participated in the decision to prosecute.'" *Hoskins* v. *Knox Cnty*., No. CV 17-84-DLB-HAI, 2018 WL 1352163, *7 (E.D. Ky. Mar. 15, 2018) (quoting *Sykes* v. *Anderson*, 625 F.3d 294, 308 (6th Cir. 2010)). Mere allegation that one's rights "were violated" by certain government officers "will not suffice." *Pahls*, 718 F.3d at 1226.

These requirements apply with special force when multiple defendants are alleged to have caused a constitutional violation. In such cases, "[p]laintiffs must do more than show that * * * 'defendants,' as a collective and undifferentiated whole, were responsible for those violations. *Id.* at 1228 (quoting *Dodds* v.

Richardson, 614 F.3d 1185, 1194 (10th Cir. 2010)). Instead, they must be able to point to "particular defendants * * * that violated their clearly established constitutional rights." *Ibid.*

Courts have deployed this standard—in conjunction with those outlined below—to distinguish between frivolous and substantial claims. For example, plaintiffs' claims in the Tenth Circuit case, *Brown* v. *Montoya,* were dismissed because, although the "[c]omplaint refers to actions of '[d]efendants' * * * that is not sufficient to show how [the particular defendant] 'might be individually liable for deprivations of [plaintiff's] constitution rights.'" 662 F.3d 1152, 1165 (10th Cir. 2011); see also *Lewis* v. *Tripp*, 604 F.3d 1221, 1230 (10th Cir. 2010) ("The record before us lacks any evidence suggesting [the defendant's] involvement in any of these * * * unlawful activities."). In other cases, courts have sustained plaintiffs' claims only after they presented "a myriad of specific factual allegations against" specifically identified defendants. See, *e.g.*, *Hoskins*, 2018 WL 1352163 at *7.

B. Plaintiffs must show that no probable cause existed for their seizures.

Plaintiffs bringing seizure claims under Section 1983 also must demonstrate that the seizure complained of was not supported by probable cause; the lack of probable cause is a necessary condition for any such claim to proceed. But this requirement is a significant hurdle for plaintiffs, given the relative ease with which defendants can establish the existence of probable cause.

The requirement that plaintiffs in such cases must demonstrate a lack of probable cause for the

complained-of seizure is well established and frequently litigated. See, *e.g.*, *Black* v. *Wigington*, 811 F.3d 1259, 1267 (11th Cir. 2016) (holding that the "presence of probable cause defeats a claim of malicious prosecution"); *Stansbury* v. *Wertman*, 721 F.3d 84, 94-95 (2d Cir. 2013) (same); *Lambert* v. *Williams*, 223 F.3d 257, 260 (4th Cir. 2000) (same). In other words, when probable cause exists for a seizure, it renders the seizure objectively reasonable and therefore constitutional under the Fourth Amendment. And "[b]ecause lack of probable cause is an element of a malicious prosecution claim, 'the existence of probable cause is a complete defense to a claim of malicious prosecution.'" *Stansbury*, 721 F.3d at 94-95 (citations omitted). *Cf. Whren* v. *United States*, 517 U.S. 806, 818 (1996) ("Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner * * *.").

Establishing the absence of probable cause can be a substantial hurdle, given the flexibility of the probable cause standard. As a general matter, when evaluating whether the defendant lacked probable cause, a court looks to the "totality of the circumstances." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). And probable cause does "not require[e]" that the prosecution have sufficient evidence to prove guilt "beyond a reasonable doubt[,]" just that there is a "probability or substantial chance of criminal activity." *United States* v. *Miknevich*, 638 F.3d 178, 182, 185 (3d Cir. 2011). In the malicious prosecution context in particular, courts have defined probable cause as "such facts and circumstances as would lead a

reasonably prudent person to believe the plaintiff guilty." *Stansbury*, 721 F.3d at 95.

And it has not proven difficult for Section 1983 defendants to establish that the seizure complained of was sufficiently supported by probable cause to defeat a malicious prosecution claim. In *Ornelas*, the Court emphasized the weight that should be given to the probable-cause determinations made by magistrates and police officers: while "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal," a reviewing court "should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). In practice, this standard is "not simply inconsistent with true de novo review; it is inconsistent in a way that gives the prosecution a leg up. * * * Taken as a whole, then, *Ornelas* may make appellate review of suppression rulings appreciably more hospitable to law enforcement." David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 300-301. Furthermore, as the discussion of qualified immunity below demonstrates, an officer, to resist Section 1983 damages, does not even need to demonstrate that probable cause *actually* existed—only that the officer's belief that probable cause existed was reasonable. See *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986).

Finally, courts do in fact grant judgment to defendants in Fourth Amendment Section 1983 actions with some frequency upon finding that probable cause for the seizure existed. In *Wood* v. *Kesler*, for

example, the Eleventh Circuit found that the plaintiff failed to show that the defendant acted without probable cause; the officer had "actual probable cause to issue the reckless driving citation and for the custodial arrest," thus barring a Section 1983 malicious prosecution claim. 323 F.3d 872, 882 (11th Cir. 2003); see also, *e.g.*, *Stansbury,* 721 F.3d at 95 (finding that the "uncontroverted facts in this case created probable cause to initiate Stansbury's prosecution for petit larceny; [the defendant officer] was therefore entitled to judgment as a matter of law").

Thus, the requirement that such plaintiffs demonstrate a lack of probable cause is a real and significant hurdle that actually prevents plaintiffs with non-meritorious claims from succeeding in court.

C. Plaintiffs must show that the criminal proceeding terminated in their favor.

Aside from meeting the above two requirements related to the underlying seizure, Section 1983 plaintiffs must also demonstrate that any resolution of the seizure was terminated in their favor. Regardless of the Court's decision here, favorable termination is an essential element of a malicious prosecution claim under Section 1983 and operates as a bar against redundant civil and criminal claims or claims that are not consistent with actual innocence, even under the Eleventh Circuit's *Laskar* standard. See *McDonough* v. *Smith*, 139 S. Ct. 2149, 2156-57 (2019). The nature of this requirement is described in petitioner's brief, at 2-3, 17-22; see also *Laskar*, 972 F.3d at 1295; *Williams* v. *Aguirre*, 965 F.3d 1147 (11th Cir. 2020).

D. Qualified immunity and limitations on damages will discourage insubstantial lawsuits.

Finally, a set of restrictive doctrines impose substantial barriers to imposing liability on individual officers under Section 1983. Combined with the limitations on damages that even successful plaintiffs are permitted to recover, these doctrines mean that plaintiffs will have little incentive to bring Fourth Amendment seizure suits absent a credible claim.

1. Individual Officer Liability

First, establishing individual officer liability is challenging because of police officers' qualified immunity. Even if a court finds that there was no probable cause for the plaintiff's seizure, the seizing officers' qualified immunity is overcome only if their belief that probable cause existed was unreasonable. "A police officer who applies for an arrest warrant can be liable for malicious prosecution if he should have known that his application 'failed to establish probable cause.'" *Black* v. *Wigington*, 811 F.3d 1259, 1267 (11th Cir. 2016) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986)). But this means that the "shield of immunity [is] lost" only where "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley*, 475 U.S. at 344-45. Thus, a police officer, to be liable under Section 1983, must not only be wrong that probable cause existed, but must be so wrong that his or her belief was "unreasonable."

Alternatively, a police officer may be liable for a seizure if "he made statements or omissions in his [warrant] application that were material and perjurious or recklessly false." *Black*, 811 F.3d at 1267

(citing *Franks* v. *Delaware*, 438 U.S. 154, 156, 165-71 (1978) (quotations removed)). Again, this is a significantly more demanding standard for establishing officer liability than proving merely that the officer made a mistake about whether probable cause existed: the plaintiff would have to demonstrate the officer's intentional perjury or reckless disregard for the truth to overcome qualified immunity.

2. Damages

Moreover, even where Section 1983 plaintiffs overcome qualified immunity or restrictive municipal liability doctrines, they face limitations on the damages they may recover. Damages under Section 1983 are governed by tort compensation principles. *Carey* v. *Piphus*, 435 U.S. 247, 254-55 (1978). The plaintiff's injuries must be traceable to the defendant's conduct, *ibid*., and that conduct must be a but-for cause of the injury. *Olsen* v. *Correiro*, 189 F.3d 52, 66 (1st Cir. 1999).

Under this standard, even when a plaintiff's loss of liberty followed from "deficient" procedures, no injury resulting from the deprivation would be compensable under Section 1983 if the deprivation was "justified." *Carey*, 435 U.S. at 263. Thus, in the context of a lawsuit for malicious prosecution or false imprisonment, a plaintiff "'cannot recover [actual] damages merely by showing that he was incarcerated on one illegitimate charge.' Instead, the plaintiff must also 'show that, but for that illegitimate charge, he would have been released' earlier or would not have faced detention." *Aguirre*, 965 F.3d at 1161 (quoting *Kelly* v. *Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994)); see also *Olsen*, 189 F.3d at 66 ("[Where] a defendant serves a period of imprisonment for two

crimes or two counts of conviction that result in the imposition of concurrent sentences[, * * * i]f one conviction is vacated, the defendant has nevertheless been imprisoned pursuant to a valid sentence. He may not then bring a § 1983 action for damages for his imprisonment.")

To be sure, under the Eleventh Circuit's "not inconsistent with innocence" standard, a plaintiff may state a claim for malicious prosecution when one of the charges that justified their seizure was not supported by probable cause and, moreover, did not result in conviction or an admission of guilt. Even so, however, the plaintiff will be unable to obtain compensatory damages unless they were held without probable cause for *any* charge.

The threshold for punitive liability is even higher. In a Section 1983 action, juries may award punitive damages only "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith* v. *Wade*, 461 U.S. 30, 56 (1983). And even in those rare cases where plaintiffs might be able to recover punitive damages against individual officers, municipalities are immune from punitive damages under Section 1983. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

Plaintiffs may still seek nominal damages when they cannot recover punitive or full compensatory damages. *Carey*, 435 U.S. at 266. But plaintiffs that likely would recover only nominal damages have little economic incentive to bring Section 1983 claims. Indeed, plaintiffs who receive only nominal damages after being unable to prove compensable injury typi-

cally are not awarded even attorney's fees, despite being a prevailing party under federal fee-shifting statutes. See *Farrar* v. *Hobby*, 506 U.S. 103, 115 (1992) ("When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, * * * the only reasonable fee is usually no fee at all" (citation omitted)). Consequently, the limited availability of attorneys' fees means that plaintiffs' attorneys have an economic incentive to decline these cases, helping ensure that only meritorious Fourth Amendment seizure claims for actually compensable injuries make it to court.

II. Section 1983 was enacted to provide a federal cause of action to every person whose constitutional rights are violated by a state actor.

One additional point bears emphasis. Petitioner shows that requiring demonstration of an "affirmative indication[] of innocence" as a prerequisite to bringing a Section 1983 Fourth Amendment claim finds no support in the common-law history and rests on a standard that cannot be practically administered. Pet. Br. 22-32, 34-39. And that standard also suffers from an additional, fundamental defect: it frustrates the central policy of Section 1983.

Cases presenting seizure claims under Section 1983 necessarily assert violations of the Constitution. As we have shown, these cases often involve very serious official misconduct, including such wrongful behavior as the fabrication of evidence, the suppression of exculpatory material, and racially biased policing. Meanwhile, ancillary legal doctrines addressing immunity and damages, as well as the

practical context in which these cases arise, require a showing of gross misconduct and serious injury if a plaintiff is to obtain any substantial recovery. There is no justification for layering on the additional requirement that plaintiffs also offer an affirmative showing of innocence as a prerequisite for proceeding under Section 1983.

In fact, the imposition of such a requirement would frustrate Section 1983's purpose. Section 1983 famously creates a "constitutional tort" (*City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 727-28 (1999) (Scalia, J., concurring in part) (citing cases)); yet as petitioner demonstrates (at Pet. Br. 22-32), nothing in tort principles requires plaintiffs in cases like this one to make an affirmative showing of innocence. Nor is there any such requirement in the text of Section 1983, which by its plain terms provides a cause of action to every person suffering a violation of federal rights; it does not restrict its remedy only to those who can affirmatively demonstrate their innocence of criminal behavior.

And centrally, so as to fully vindicate the constitutional rights of all persons, Section 1983 was created both "to provide compensation to the victims of past abuses" and "to serve as a deterrent against future constitutional deprivations." *Owen* v. *City of Indep.*, 445 U.S. 622, 651 (1980); see, *e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310 (1986); *City of Riverside* v. *Rivera*, 477 U.S. 561, 574-75 (1986); *Carey*, 435 U.S. at 256-57. The "affirmative indicia of innocence" requirement is directly contrary to that policy.

That requirement precludes the award of compensation, notwithstanding the denial of constitu-

tional rights and the infliction of serious injury, because of the happenstance that criminal charges against the plaintiff were dismissed prior to trial rather than after a verdict. Yet it is perverse to deny "compensation to the victims of past abuses" (*Owen*, 445 U.S. at 651) because the plaintiffs were *successful* in getting charges dismissed outright at an early stage, when recovery would be permitted had the plaintiffs been *less* successful in obtaining pretrial dismissal of the charges. At the same time, such a rule also dilutes Section 1983's deterrent effect, leaving bad actors unpunished for reasons that have nothing to do with the officials' culpability and, in the worst case, giving the state a mechanism for cutting off liability even after constitutional rights have been denied and injury inflicted—as would happen in this case under the Second Circuit's approach. Accordingly, if the common-law history leaves any doubt, these considerations militate strongly in favor of the Eleventh Circuit's "not inconsistent with innocence" standard.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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JUNE 2021

[4] The representation of *amici* by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.