NO. 20-659

In the
Supreme Court of the United States

LARRY THOMPSON,

Petitioner,

v.

POLICE OFFICER PAGIEL CLARK,
SHIELD #28472, *et al.*

Respondents.

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

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, CATO INSTITUTE, NEW YORK CIVIL LIBERTIES UNION, AND RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil-rights laws. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as amicus curiae. The **New York Civil Liberties Union (NYCLU)** is a statewide affiliate of the national ACLU.

The **Cato Institute** is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal-justice system, and accountability for law-enforcement officers.

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[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 entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing.

The **Rutherford Institute** is a nonprofit civil-liberties organization founded in 1982 by John W. Whitehead. The Institute's mission is to provide legal representation without charge to individuals whose civil liberties have been violated and to educate the public about constitutional and human-rights issues. The Rutherford Institute works tirelessly to resist threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on rights guaranteed by the Constitution and laws of the United States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

To maintain his Section 1983 claim against New York for its violation of his Fourth Amendment rights, petitioner Larry Thompson needed to prove the prosecution against him terminated in his favor. Mr. Thompson did just that when he established that the prosecutor dismissed the charges against him in the "interests of justice." Nevertheless, the Second Circuit concluded that Mr. Thompson had not obtained a favorable termination because the record, in the court's view, lacked a sufficient indication of his innocence.

Amici agree with Mr. Thompson that the Court should reverse because there was no such "indication-of-innocence" requirement at common law in 1871, when Congress enacted Section 1983. *See* Pet. Br. Section I.B. Only one Circuit—the Eleventh—has ever attempted to "examine the favorable-termination element of malicious prosecution as it existed when Congress enacted [S]ection 1983 in 1871." *Laskar v. Hurd*, 972 F.3d 1278, 1286 (11th Cir. 2020), *petition*

for cert. filed (U.S. Mar. 25, 2021) (No. 20-1351). The panel majority in that case comprehensively examined the common law at the time of Section 1983's enactment and concluded that "[t]he clear majority of American courts did not limit favorable terminations to those that suggested the accused's innocence." *Id.* at 1287; *see also id.* at 1286–87 (surveying history). The Second Circuit reached the opposite conclusion only by focusing on "modern common law," which is "not the touchstone when defining a claim under section 1983." *Id.* at 1294; *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) (explaining that, in "defining the contours of a claim under § 1983, we look to common-law principles that were well settled at the time of its enactment" in 1871) (quotation marks omitted).[2]

Amici also agree that the "indications-of-innocence" requirement is fundamentally incompatible with a justice system in which an accused is conclusively presumed innocent until proven—by competent evidence and beyond a reasonable doubt—to be guilty. *See* Pet. Br. Section III.A.

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[2] Moreover, it is not clear that the comment in the Restatement (Second) of Torts upon which the Second Circuit relied correctly states the standard even under *modern* law. *See, e.g.*, *Laskar*, 972 F.3d at 1294 (observing that it is "far from clear" that this rule reflects even a modern consensus); *Cordova v. City of Albuquerque*, 816 F.3d 645, 664 (10th Cir. 2016) (Gorsuch, J., concurring) (observing that "many states do not require [indications of innocence] as a matter of common law").

Amici write separately to raise two further reasons for the Court to reject the "indication-of-innocence" approach.

I. The Second Circuit's "indication-of-innocence" rule eviscerates the intent of Congress in enacting Section 1983.

A. Congress enacted Section 1983 to provide protection to those wronged by misuses of government power. The availability of Section 1983 damages is especially important in the Fourth Amendment context, where no other remedy suffices to protect the full enjoyment of personal security and liberty.

B. The "indications-of-innocence" approach erects an almost insurmountable barrier to vindicating Fourth Amendment rights. Making matters worse, the approach actively subverts governmental accountability. Under the Second Circuit's reading, prosecutors can effectively immunize the State from liability by simply dismissing charges that are based on false accusations before any "indications of innocence" appear in the record.

This ahistorical approach also forces falsely accused people to act contrary to their liberty interests if they wish to preserve the damages remedy. Because dismissals of charges do not indicate innocence, an accused must *object* to the dismissal to preserve the Section 1983 damages remedy.

II. The severe consequences experienced by individuals who are falsely accused of crimes demand a remedy. Those individuals are subjected to imprisonment, one of the most extreme deprivations of liberty. Even upon release, falsely accused

individuals must still appear at the court's command and are often precluded from leaving the jurisdiction. The economic costs of a false accusation are often disastrous and include diminished employment prospects, ruinous legal expenses, and difficulty re-entering the labor market upon release. Falsely accused individuals also experience damage to their reputations and the social stigma that accompanies being charged with a crime. Unsurprisingly, falsely accused individuals frequently suffer a wide range of psychological traumas. These harms also often spill over to negatively affect the accused's family and larger community. Given these enormous harms and the unavailability of other remedies to curb malicious prosecutions, it is particularly important that a damages remedy be available to deter such prosecutions and to compensate their victims.

ARGUMENT

I. The Second Circuit's Indications-of-Innocence Requirement Eviscerates Congress' Intent in Enacting Section 1983.

A. Damages Are the Only Remedy for the Claim Before the Court.

Section 1983 and the Fourth Amendment work hand in hand to protect rights that are "indispensable to the full enjoyment of personal security, personal liberty and private property ... [and are] the very essence of constitutional liberty." *Gouled v. United States*, 255 U.S. 298, 304 (1921) (quotation marks omitted). The Fourth Amendment "imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of

individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976); *see also* U.S. Const. pmbl. (among the fundamental purposes of the Constitution are to "establish Justice, ensure domestic Tranquility, … and secure the Blessings of Liberty"). And Section 1983's broad remedial provisions "provide protection to those persons wronged by the '[m]isuse of power … made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen v. City of Indep.*, 445 U.S. 622, 650 (1980) (quoting *Monroe v. Pape*, 365 U.S. 167, 184 (1961)).

When—as here—a prosecution based on a false accusation has been dismissed, Section 1983 damages are the only remedy for a constitutional violation. The other usual remedies for a Fourth Amendment violation—the exclusionary rule and a writ of habeas corpus—do not apply. The exclusionary rule operates to "suppress[] ... the evidence obtained through an unlawful search and seizure" and "any derivative use of that evidence." *United States v. Calandra*, 414 U.S. 338, 354 (1974).[3] But where a dismissal of a prosecution occurs, obviously, there is no trial (let alone evidence or derivative fruits to exclude from that trial).

Nor, of course, is a writ of habeas corpus a useful remedy for a wrongfully accused individual whose case has been dismissed and who is, as a result, no

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[3] Even in these cases, the exclusionary rule would be a pale substitute for a Section 1983 claim. This Court has limited the reach of the exclusionary rule in recent decades precisely *because* Section 1983 remedies are better vehicles for rectifying constitutional violations. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 597 (2006).

longer imprisoned.[4] The accused's injuries may have only just begun, *see infra* Section II, but the power of a court to ameliorate them with the Great Writ ends when the accused walks out the prison doors.

Nor is injunctive relief a viable—or available—remedy. Although federal courts are empowered to enjoin injurious conduct, there is no conduct to enjoin where, as here, the charges against a wrongfully accused individual have been dismissed and the individual has been released from prison.

Because all the usual remedies are useless, only damages under Section 1983 can "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights," and offer "relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). In the circumstances presented by this case, Section 1983 damages are the sole means for an individual in Mr. Thompson's shoes to "vindicate[]" rights conferred by the Fourth

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[4] In any event, in *Stone v. Powell*, this Court prohibited habeas corpus review of search-and-seizure claims whenever the State provided an "opportunity for full and fair litigation" of the claim. 428 U.S. 465, 494–95 (1976). The enforcement of Fourth Amendment claims through habeas corpus "ground to a halt" as a result. Larry W. Yackle, *The Habeas Hagioscope*, 66 S. Cal. L. Rev. 2331, 2400 (1993); *see also* Philip Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After* Stone v. Powell, 82 Colum. L. Rev. 1, 17–18 (1982) ("The lower federal courts generally agree that an erroneous [F]ourth [A]mendment decision by the state courts, without more, does not constitute denial of an 'opportunity for full and fair litigation.' It is of no consequence whether the state courts employed an incorrect legal standard, misapplied the correct standard, or erred in finding the underlying facts.") (footnotes omitted) (quoting *Mack v. Cupp*, 564 F.2d 898, 900 (9th Cir. 1977)).

Amendment, "a policy that Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 833 (2011) ("When a plaintiff succeeds in remedying a civil rights violation, we have stated, he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority.") (quotation marks omitted).

B. An Indications-of-Innocence Approach Undermines Section 1983.

The Second Circuit's "indications-of-innocence" approach erects insuperable barriers to the vindication of Fourth Amendment rights, while offering a new avenue for the State to compound its initial abuse of the accused. Under the Second Circuit's rule, a Section 1983 plaintiff cannot bring a claim for damages unless there are "affirmative indications of innocence" in the record. *Thompson v. Clark*, 794 F. App'x 140, 141 (2d Cir. 2020) (mem.) (quoting *Lanning v. City of Glens Falls*, 908 F.3d 19, 25 (2d Cir. 2018)). In other words, the Second Circuit requires (1) the accused to be adjudicated not guilty in that underlying case; (2) the judge to say, on the record, that the plaintiff is innocent upon dismissing the charges, *or* (3) the criminal trial record otherwise contains sufficient facts demonstrating that the accused is "innocen[t]." Far from protecting persons "wronged by the misuse of power," *Owen*, 445 U.S. at 650 (quotation marks omitted), this approach leads to at least two perverse results.

First, the Second Circuit's approach empowers a State to immunize itself from civil liability for its Fourth Amendment violations. A prosecutor, aware that a police officer has blundered (like the respondent

Officer in this case) can simply dismiss the charges, thereby preventing an "indication[] of innocence" from appearing on the record. In such cases (like this one), the indications-of-innocence requirement hands police and prosecution alike a "Get Out Of Liability Free" card. That result subverts the Fourth Amendment's purpose to protect individuals' property and liberty rights. *Cf. Calandra*, 414 U.S. at 354 (noting that Fourth Amendment remedies have a "function of deterring police misconduct").

Second, the *practical* effect of this rule is to lodge the accused on the horns of a Kafkaesque dilemma. On the one hand, the accused (like Mr. Thompson) could accept a no-strings offer of dismissal. But if he or she does that, the record would likely contain insufficient indications that the accused was innocent, thus precluding a Section 1983 suit. As Mr. Thompson argued below, affirmative indications of innocence appearing in the record is something that "never happens." Pet. App. 56a. At a minimum, affirmative indications of the type the court of appeals would require do not appear on the record when—as here—a prosecutor dismisses a groundless case by simply asserting it is "in the interests of justice" to protect the State from liability for its police department's misconduct.

This case is a powerful example. Although (or, perhaps more likely, *because*) Mr. Thompson expressed his desire to litigate his wrongful conviction through "to the end," JA157 (quoting Jan. 25, 2019 Trial Tr. 644:18–645:4), the prosecution dismissed its charges unconditionally. Pet. App. 55a–56a. By abruptly dismissing the charges against Mr.

Thompson, the prosecution prevented "affirmative indications of innocence" from ever appearing on the record. Then, when Mr. Thompson brought his Section 1983 claim, the State argued that his claim was barred because the prosecution's assertion that the dismissal was in the "interests of justice" did not go far enough in affirmatively establishing that Mr. Thompson was innocent. JA90. Thus, although respondent Officer clearly violated his Fourth Amendment rights, the State's dismissal of the charges against Mr. Thompson prevented him from vindicating those rights.

Under the "indications-of-innocence" approach, the only way Mr. Thompson could have preserved the right to vindicate his Fourth Amendment rights would have been to *object* to the dismissal of his case. Only by running the expensive gauntlet of an adjudication on the merits and risking a wrongful *conviction* could he ensure that the record was sufficiently "affirmative" to allow him to proceed with his Section 1983 claim.[5] The incentives the Second Circuit's rule creates are as perverse as they are obvious.

II. Individuals Falsely Accused of Crimes Suffer Severe Economic, Social, and Psychological Harms.

The Second Circuit's rule eviscerates any prospect that a wrongfully accused individual could ever hold

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[5] And, of course, a convicted accused cannot then maintain a Section 1983 action. *See Laskar*, 972 F.3d at 1286 (explaining that "[a]t common law, the favorable-termination requirement ensured that plaintiffs could not recover in the [civil] action, and yet be afterwards convicted on the original prosecution") (quotation marks omitted).

the State accountable under Section 1983. But people who have been falsely accused of crimes suffer severe, life-altering, and potentially irreparable consequences that demand a remedy. Given the enormity of these harms and the unavailability of other remedies that might curb malicious prosecutions, it is particularly important that a damages remedy be available to the wrongly accused.

Falsely accused individuals suffer severe deprivations of their liberty. First, and most obviously, they are "thrown into jail to await trial." *Albright v. Oliver*, 975 F.2d 343, 346 (7th Cir. 1992), *aff'd*, 510 U.S. 266 (1994). "[I]ncarceration of persons is the most common and one of the most feared instruments of state oppression." *Foucha v. Louisiana*, 504 U.S. 71, 90 (1992) (Kennedy, J., dissenting). Even if the falsely accused individual is released from custody pending trial, he or she "is hardly freed from the state's control upon … release." *Albright*, 510 U.S. at 278 (Ginsburg, J., concurring). The defendant still must "appear in court at the state's command," and must often "seek formal permission from the court … before exercising what would otherwise be his [or her] unquestioned right to travel outside the jurisdiction." *Id.* In short, falsely accused individuals are deprived of the "very essence of constitutional liberty." *Gouled*, 255 U.S. at 304.

These deprivations are accompanied by a wide range of tangible economic, social, and psychological harms. The economic harms alone are calamitous. Those falsely accused of crimes bear "the financial … strain of preparing a defense"—an expense that is, even for a fully employed individual, potentially

ruinous. *See Albright*, 510 U.S. at 278 (Ginsburg, J., concurring).

Making matters worse, the accused's "employment prospects may be diminished severely." *Id*. Whether in jail or out, criminal defendants frequently lose their jobs, "either because the employer does not want to be associated with someone under indictment or because the defendant cannot make bail and cannot show up for work." Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U.L. Rev. 1297, 1309 (2000). Even after release, incarcerated individuals often have great difficulty "re-enter[ing] labor markets," leading to persistent economic harms. Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 Fordham Urb. L.J. 1551, 1552–53 (2003).

Unemployment is often the start of a cascade in which catastrophe piles upon disaster. "Without income, the defendant and his family also may fall behind on payments and lose housing, transportation, and other basic necessities." Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1357 (2014). These harms extend to the family members of the accused "even as debts and expenses associated with court and legal fees mount." KJ Dell'Antonia, *When Parents Are in Prison, Children Suffer*, N.Y. Times (Apr. 26, 2016, 10:48 a.m.), https://nyti.ms/3uBsOkP.

But as devastating as those economic effects may be, they are far from the only effects of a false accusation. Falsely accused individuals "suffer reputational harm" of the most extreme sort.

Albright, 510 U.S. at 278 (Ginsburg, J., concurring). A recent systematic literature review of 20 separate studies on the effects of being falsely accused of a crime concluded that the "vast majority" of such individuals "reported damaged reputations or feeling stigmati[z]ed by others" and that "their standing in the community had been affected negatively." Samantha K. Brooks & Neil Greenberg, *Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review*, 61 Med., Sci. & L. 44, 47 (2021); *see also* Leipold, *Acquitted Defendant*, 94 Nw. U.L. Rev. at 1305 ("For most innocent defendants, it does not take long to realize that the stigma associated with an arrest and criminal charge does not easily wash away."); *In re Fried*, 161 F.2d 453, 458 (2d Cir. 1947) ("[A] wrongful indictment … often … works a grievous, irreparable injury to the person indicted. The stigma cannot easily be erased."). False accusations also reach beyond the accused to affect family members. *See, e.g.*, Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 Wash. & Lee L. Rev. 1297, 1319–20 (2012) (discussing burden pretrial detention exerts on an indicted offender's family).

And finally, a wrongful accusation often incurs a devastating psychological cost. Wrongfully accused individuals frequently experience "permanent changes to their personality," including becoming "paranoid and anxious," "hypervigilant or antagonistic," or "less confident." Compounding those psychological harms, the overwhelming majority of those falsely accused of crimes unsurprisingly report a "loss of faith in the criminal justice system" and a

"loss of trust in the police" as a result of their wrongful prosecution. Brooks & Greenberg, *Psychological Impact of Being Wrongfully Accused*, 61 Med., Sci. & L. at 47–48.

Moreover, falsely accused individuals frequently experience "symptoms of depression and suicidal ideation," "[a]nxiety and panic disorders," and post-traumatic stress disorder as a result. *Id.*; *see also* Leipold, *Acquitted Defendant*, 94 Nw. U.L. Rev. at 1307 ("[F]alse charges and pre-trial incarceration can lead to dissociative disorders, post-traumatic stress disorders, adjustment disorders, dysthymic disorders, and generalized anxiety disorders.").

This case offers a cautionary example of the harms that an individual falsely accused of a crime can face. Mr. Thompson was jailed. Pet. App. 16a, 18a. He was haled into court on criminal charges, causing him to miss work. Indeed, Mr. Thompson was denied a job opportunity as a direct result of the pending charges against him. Transcript of Hearing at 3:25–4:1, *People of the State of N.Y. v. Thompson*, No. 2014KN004196 (N.Y. Crim. Ct. Kings Cty. Mar. 5, 2014). And despite that he was a Navy veteran who *had done nothing wrong*, he suffered significant reputational harm as a result of New York's false accusation.

* * *

Mr. Thompson committed no crime. No one suggests otherwise. Yet respondent Officer unreasonably seized him, thus striking at the heart of the Constitution's protections of individuals *vis-à-vis* the State. Under the Second Circuit's dangerous rule, the prosecution's unconditional dismissal of the

charges nevertheless strips Mr. Thompson—a person whom the law conclusively presumes is innocent—of *any* remedy for the violations of his constitutional rights.

CONCLUSION

This Court should reverse the Second Circuit's judgment so that Mr. Thompson, and those like him, can seek an appropriate remedy for the violation of their Fourth Amendment rights.

Respectfully submitted,

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