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 U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF APA WATCH IN SUPPORT OF PETITIONER

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

Whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence," *Laskar v. Hurd*, 972 F.3d 1278, 1293 (11th Cir. 2020), or that the proceeding "ended in a manner that affirmatively indicates his innocence," *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018).

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INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch[1] is a nonprofit association dedicated to ensuring that federal, state, and local agencies act within their substantive authority, consistent with applicable procedural requirements. Judicial review—both in retrospective damages claims as here and for prospective equitable or declaratory relief—enables the public to enforce the

[1] *Amicus* files this brief with the written consent of petitioner; respondents have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting it.

substantive limits on governmental authority.

APA Watch members are involved in defending the rights of foreign citizens falsely imprisoned and maliciously prosecuted abroad, based on false extradition requests from the United States. The facts of those extradition cases bear on the important need for this Court to recognize that favorable termination of a prosecution includes dismissals by prosecutors when the falsity of their claims surface.

For these reasons, *amicus* APA Watch has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Amicus adopts the facts as state by the petitioner. Pet.'s Br. 6-9.

SUMMARY OF ARGUMENT

Accusing someone of a crime causes reputational harm, without regard to whether charges are filed and without regard to how those charges are dropped. This Court's Article III cases have found that a defendant cannot appeal the dismissal of a prosecution—*i.e.*, the favorable termination of the case—so there must be a civil-law counterpart that allows the person injured in their reputation to vindicate their name (Section I). The need for that Article III vehicle and remedy is an additional reason to read 42 U.S.C. § 1983 in the way that petitioner presses: namely, an action exists no matter how the underlying criminal matter ended in petitioner's favor.

In reaching its decision in the Article III case before it, this Court should consider the impact of its decision on other contexts, including those where one state or country requests the extradition of a suspect or defendant from another state or country (Section II). In those cases, a suspect or defendant incarcerated

awaiting extradition should have an action against the requesting jurisdiction or its officers if they allow him or her to languish in prison, notwithstanding that either the facts underlying the extradition have changed to no longer require extradition or that there never was probable cause in the first place.

ARGUMENT

I. PEOPLE WRONGLY ACCUSED OF CRIMES NEED A WAY TO CLEAR THEIR NAMES.

At bottom, criminal charges accuse the defendant of a crime. Accusing someone of a crime can inflict reputational harm. *Pollard v. Lyon*, 91 U.S. 225, 231-32 (1875). Depending on the circumstances, that harm can persist even if the prosecution voluntarily drops or dismisses the charges before trial.

Although the federal criminal rules contemplate independent judicial oversight of a prosecutor's decision to dismiss, FED. R. CRIM. P. 48(a), prosecutors historically have had "unrestricted authority to enter a *nolle prosequi* at any time before the empaneling of the jury." *U.S. v. Poindexter*, 719 F.Supp. 6, 10 (D.D.C. 1989). Many states continue to provide their prosecutors with that unrestrained power to dismiss charges or a case. But even Federal Rule 48(a)—which "seem[s] clearly directed toward an independent judicial assessment of the public interest in dismissing the indictment," *Rinaldi v. U.S.*, 434 U.S. 22, 34 (1977)—does not guarantee defendants the right to *appeal* a district court's decision to allow a dismissal without prejudice, even if the district judge erred *as a matter of law* in allowing dismissal without prejudice.

Specifically, this Court has held that defendants cannot appeal the dismissal of criminal charges: "Only

one injured by the judgment sought to be reviewed can appeal." *Parr v. U.S.*, 351 U.S. 513, 516 (1956); *accord Lewis v. U.S.*, 216 U.S. 611, 612 (1910) ("when discharged from custody he is not legally aggrieved and therefore cannot appeal"). Thus, notwithstanding the presence of a cognizable Article III injury in the form of ongoing reputational harm, the defendant who demonstrates that the charges against him are flawed cannot vindicate his or her name and reputation if the prosecutor decides to drop or dismiss those charges. That disconnect between right and remedy is alien to our laws: "Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) (interior quotation marks omitted). This Court should not deny relief to the victims of criminal charges so baseless that the prosecutors dismissed the charges before trial.

Here, thankfully, petitioner was cleared of the charges of child abuse because his daughter's diaper rash has been diagnosed as the source of her crying that night. But, for many other defendants, there may not be such definitive vindication. The legal system must have a way for the wrongly accused to vindicate themselves. If the criminal proceedings do not provide a way, given the limitations placed by Article III and decisions like *Parr* and *Lewis*, a civil-rights action like the petitioner's § 1983 action must exist when the prosecution dismisses a case that never should have been brought—or continued—in the first place.

II. AN "INDICATIONS-OF-INNOCENCE" STANDARD PERVERTS JUSTICE.

Amicus has nothing to add to petitioner's brief on

the question of *whether* petitioner should prevail. His brief ably demonstrates that the Congress that enacted § 1983 would not have intended "indications of innocence" as the standard for allowing civil-rights suits to proceed and also that such a standard would pervert justice by insulating baseless prosecutions most deserving of sanction. On the question of *how* petitioner should prevail, *amicus* respectfully submits that the Court must consider defendants incarcerated awaiting extradition to the state that is—or was—seeking to prosecute them.

The extraditing jurisdiction could be another state in the United States, or it could be another country. With other countries, there would be a treaty. Such foreign extradition requests typically get handled through our State Department and its counterparts abroad. When a suspect or defendant is incarcerated abroad awaiting extradition, the requesting country typically would have a duty under the treaty to advise the extraditing country of material changes to the original extradition request. So too would officers who requested the extradition, both under our laws, 18 U.S.C. § 1001(a); *Giglio v. U.S.*, 405 U.S. 150, 153 (1972), and likely also under the law of the extraditing country. *See*, *e.g.*, *Briess v Woolley*, [1954] AC 333 (H.L.) 349 ("[i]t was his duty, having made false representations, to correct them before the other party acted on them …, but he continued to conceal the true facts"); *Clerk & Lindsell on Torts* §18-10 (Michael A. Jones *et al.* eds., 21st ed. 2014) (one "who has made a true statement is bound to correct it if, though true when made, it is later to his knowledge falsified by events").

If—for whatever reason—the requesting jurisdiction no longer seeks extradition of a person

incarcerated awaiting extradition, that person should have an action for unnecessarily *remaining* incarcerated, once the facts underlying the original extradition request changed without notice to the extraditing country. For example, in the interval, someone else may have been convicted for the crime alleged against the incarcerated person. Depending on the circumstances, an action should lie for the unnecessary *continuation* of incarceration, even if the prosecution had probable cause for the original extradition request. *A fortiorari*, such an action should lie if there was *never* probable cause.

In cases involving foreign extradition, the choice-of-law analysis—potentially in a diversity action, not an action under § 1983—may indicate that foreign law governs any legal action against those responsible for the failure to correct an extradition request. If so, the decision in this case potentially would have little or no bearing on such cases. *Amicus* does not ask the Court intentionally to decide an extradition case not now before the Court. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911) (Article III does not allow advisory opinions). Instead, *amicus* asks the Court not to consider extradition cases to ensure that the Court avoids *unintentionally* deciding an extradition case not now before the Court.

CONCLUSION

This Court should reverse the judgment of the Second Circuit.

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Respectfully submitted,

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

Counsel for Amicus Curiae