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 RESPONDENT

RICHARD DEARING
Counsel of Record
DEVIN SLACK
JOHN MOORE
ANNA W. GOTTLIEB
KEVIN OSOWSKI
MELANIE T. WEST

GEORGIA M. PESTANA
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

Counsel for Respondent

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QUESTION PRESENTED

Did the Second Circuit correctly determine that respondent police officer Pagiel Clark was entitled to judgment as a matter of law on petitioner Larry Thompson's Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983, where no such claim exists and, even assuming it did, Thompson could not satisfy an essential element by proving that his prosecution ended in a manner indicating that the charges against him lacked merit?

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INTRODUCTION

Petitioner Larry Thompson put a series of claims under 42 U.S.C. § 1983 to a jury and lost across the board. He now asks this Court to announce a standard defining the "favorable termination" requirement for one claim that was resolved against him as a matter of law mid-trial. But whether that sole remaining claim even includes a favorable termination requirement depends on what the claim is. Identifying the claim should be a simple exercise, but Thompson's brief offers no clear description of it. Either Thompson is sticking with the claim he brought to trial or he is reimagining his claim on appeal. No matter which he chooses, this case should be over.

On the one hand, when Thompson describes his claim as one for "unreasonable seizure pursuant to legal process," he might be referring to the claim that he pleaded and pursued at trial, and that both lower courts addressed: a Fourth Amendment "malicious prosecution" claim that replicated the common-law tort. In *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), decided nearly two years before the trial here, the Court left open whether a claim for "unreasonable seizure pursuant to legal process" could be approached as a claim for malicious prosecution. Thompson opted for the malicious prosecution approach at trial.

If Thompson continues to embrace this claim, then his claim would clearly require favorable termination as a substantive element, because the claim would mimic the common-law tort of malicious prosecution. That mirroring is the reason favorable termination became an issue in this case, as well as the context in which the lower courts addressed it.

But if Thompson's claim is understood in this way, there is no point in opining on what favorable termination means, because the more fundamental insight is that a

Fourth Amendment malicious prosecution claim is not cognizable at all. Shoehorning malicious prosecution into the Fourth Amendment warps the constitutional inquiry, transforming the central question from whether a police officer caused an objectively unreasonable seizure into whether the officer maliciously influenced a prosecutor to pursue a groundless criminal case.

On the other hand, when Thompson speaks of a claim for "unreasonable seizure pursuant to legal process," he may be retreating from the claim he pursued at trial. His brief appears to be positing a reimagined Fourth Amendment claim that differs from the malicious prosecution claim he sought to put to the jury. But if Thompson's claim is understood in that way, it is far from clear whether the claim would even require favorable termination. The only two federal circuits to have addressed that question have disagreed about the answer.

If the Court does not resolve this case by holding that the malicious prosecution claim Thompson litigated through trial does not exist, the unsettled question of whether any reimagined claim would have a favorable termination requirement may be reason to dismiss the petition as improvidently granted. Alternatively, the Court could simply recognize that any reimagined claim focused on an alleged post-arraignment seizure would be barred by the jury's verdict—most clearly, by its finding that Officer Pagiel Clark did not fabricate material evidence that led to any deprivation of Thompson's liberty.

There is also a third path, but it too ends in defeat for Thompson. This Court could assume that the Second Circuit correctly identified the claim and its contours, as in *McDonough v. Smith*, 139 S. Ct. 2149 (2019). This option is the least desirable, because it would further entrench a fundamentally flawed claim for malicious prosecution under the Fourth Amendment. And in any event, the path

still ends with an affirmance, because the Second Circuit's favorable termination standard is the right one.

When Congress enacted § 1983, courts agreed that a claim for malicious prosecution had a favorable termination requirement, but evinced no consensus about its content. When the common law of 1871 does not provide a well-settled rule, the Court has looked to more recent authority on the theory that common-law developments arising from changing societal conditions should be reflected in § 1983. State and federal courts increasingly support the standard employed by the Second Circuit, which appropriately accounts for changes in police and prosecutorial offices since the mid-19th century and balances the conflicting interests at the heart of malicious prosecution litigation.

STATEMENT

This case began when Thompson's sister-in-law called 911 reporting that an infant was being sexually assaulted in the family's apartment. When the defendant police officers arrived on the scene, Thompson prevented them from entering the apartment to check on the infant's safety, leading to a struggle that culminated in Thompson's arrest and the officers' entry. A prosecutor, exercising independent authority, charged Thompson with obstructing governmental administration and resisting arrest. Thompson was released on his own recognizance and made two court appearances before the prosecutor dismissed the charges in the interest of justice.

Thompson brought this § 1983 action, and he had his day in court. A jury rejected his narrative of the encounter, rendering a defense verdict on his allegations that the officers: (1) entered the apartment without justification; (2) arrested him without probable cause; (3) used unreasonable force to arrest him; and (4) fabricated a materially

false account of the encounter leading to a deprivation of his liberty.

No challenge to any aspect of the jury's verdict is before the Court. Thompson instead seeks to revive a Fourth Amendment malicious prosecution claim that the district court resolved against him shortly before the case was submitted to the jury.

A. Factual background

1. On the night of January 15, 2014, respondent Clark and other police officers were dispatched to Thompson's Brooklyn address to respond to a 911 call reporting possible child abuse. C.A. App. 37-39.[1] The officers knew that the 911 caller was at the scene, and by the time they arrived, the call had been reclassified as a reported "sexual assault in progress." C.A. App. 39, 91-92.[2]

On arrival, the officers met two EMTs, who relayed that a woman identifying herself as the 911 caller had met them in the building lobby. C.A. App. 49-50, 55-56. The officers learned that she had escorted the EMTs upstairs to Thompson's apartment, but the EMTs were unable to examine the baby because Thompson angrily confronted them. C.A. App. 45, 51, 56, 66, 94-95, 136, 140, 161. The EMTs sought to deescalate the situation by suggesting they might have the wrong apartment, and then retreated to the lobby to wait for the police. JA152-53; C.A. App. 51, 56, 140.

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[1] "C.A. App. __" refers to the joint appendix in the court of appeals, No. 19-580 (CA2). "D.C. ECF No. __" refers to the docket of the district court, No. 14-cv-7349 (E.D.N.Y.).

[2] In describing the case, Thompson ignores that the jury rejected his claims arising from the same events. His version of the encounter must give way to the findings the jury necessarily made. *See infra* Argument pt. II.2.

The officers also learned from the EMTs that Thompson remained in the apartment with the baby and other family members, including the 911 caller. C.A. App. 56-57, 94-95, 161. The officers and EMTs then went up to Thompson's apartment together. None of the officers could see the infant from outside the apartment. C.A. App. 46, 150-51. When the officers told Thompson that they needed to check on the baby and speak to the 911 caller, Thompson responded by blocking their path into the apartment. JA153-54, 173; C.A. App. 46, 57, 151, 173-74, 193.

At trial, each officer and the two privately employed EMTs testified that, when one officer attempted to enter the apartment, Thompson forcefully shoved him, causing him to stumble backward. JA154; C.A. App. 57, 62, 97, 141, 151. Thompson denied the shove. C.A. App. 175. In any event, a struggle ensued, with the officers ultimately handcuffing and arresting Thompson. JA154; C.A. App. 41, 57, 163.

The officers and EMTs then entered the apartment. JA154; C.A. App. 54, 106, 142. The EMTs inspected the baby, and then brought her and the mother to a hospital, where an examination revealed no signs of abuse. JA154; C.A. App. 54, 58, 106, 142, 152, 164.

2. An assistant district attorney interviewed Clark and drafted a criminal complaint that Clark signed shortly after the encounter. C.A. App. 153; Pl.'s Tr. Ex. 1. The complaint alleged that Thompson had refused to allow officers into the apartment to conduct their investigation after being warned that the failure to do so could result in his arrest and then flailed his arms to prevent being handcuffed. C.A. App. 153-54; Pl.'s Tr. Ex. 1. Clark had no further involvement with the prosecution after signing the criminal complaint.

The district attorney's office charged Thompson with two misdemeanors: obstructing governmental administration and resisting arrest. JA155; C.A. App. 153; Pl.'s Tr. Ex. 1. At arraignment two days after his arrest, the criminal court released Thompson on his own recognizance. JA157. Thompson understood that he was "free to go and come back to court." C.A. App. 185.

At Thompson's second court appearance following arraignment, the case was dismissed "in the interest of justice" on the prosecutor's motion. JA157-58. No evidence suggests the prosecutor dismissed the case because the charges lacked merit.[3]

B. Procedural history

1. Thompson's operative complaint pleads more than half a dozen claims under § 1983. JA25-41. At multiple points in the lead-up to trial, the district court took care to dispel any doubt about which claims could be presented to the jury, enumerating them on three separate occasions. D.C. ECF No. 77, at 6; D.C. ECF No. 112-1, at 10-11; D.C. ECF No. 128, at 3. As has become common in § 1983 cases of this kind, four different claims centered around the basis for Thompson's arrest and prosecution.

First, Thompson's "false arrest" claim under the Fourth Amendment alleged that defendants arrested him without probable cause. JA29-31. The jury rejected this claim, necessarily finding there was probable cause for Thompson's

[3] At arraignment, Thompson's defense attorney made an unsuccessful oral motion to dismiss the indictment as facially insufficient. Thompson claims that the prosecutor dismissed the charges one day before his attorney's deadline for renewing the motion in writing, implying a connection between the two. Petr. Br. 9, 42. But nothing in his attorney's testimony indicates that she ever planned to renew the motion or that there was any deadline for doing so. JA101, 114.

arrest—the claim's only disputed element and one where defendants bore the burden of proof. JA134-39, 143.

Second, Thompson's "unlawful entry" claim under the Fourth Amendment alleged that defendants forced entry into his apartment without justification. JA39-40. The jury rejected this claim too, finding that the officers' entry was supported by "an urgent need to prevent possible ongoing harm to the child or to provide immediate aid to the child." JA133-34, 142. Thompson's argument that the officers' entry was unlawful was the linchpin of his contention that obstructing their entry did not give rise to probable cause. C.A. App. 222; *see also* JA68-70, 75.[4]

Third, Thompson's claim for "denial of the right to fair trial" under the due process clause of the 14th Amendment alleged that Clark fabricated evidence used to prosecute him. JA35. He argued to the jury that Clark falsely reported to the prosecutor that (1) officers had warned Thompson that he would be arrested if he did not allow them to enter the apartment, and (2) Thompson had slapped away the hand of an officer who tried to open the apartment door further to enable the officers' entry into the apartment. C.A. App. 223. Only the first of those assertions was included in the criminal complaint that was presented to the magistrate at arraignment. Pl.'s Tr. Ex. 1.

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[4] In New York, the offense of "obstructing governmental administration in the second degree" applies when a person intentionally "prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference." N.Y. Penal Law § 195.05. New York courts hold that blocking a police officer's lawful entry into an apartment for law-enforcement purposes satisfies the offense's *actus reus*. *See, e.g.*, *People v. Paige*, 77 A.D.3d 1193, 1195 (N.Y. App. Div. 2010), *aff'd*, 16 N.Y.3d 816 (2011); *People v. Broughton*, 63 Misc. 3d 435, 439 (N.Y. Crim. Ct. 2019).

Thompson's due process claim did not require him to show that probable cause was lacking. JA140-41. Nonetheless, the jury also found against him on this claim, rejecting the allegation that Clark provided a materially false account of the encounter that led to a deprivation of Thompson's liberty. JA141, 144.

2. The final claim in the cluster—and the only one that did not go to the jury—was a claim for "malicious prosecution" under the Fourth Amendment. Thompson now suggests that "malicious prosecution" was just an imprecise label, Petr. Br. 9, but the claim he sought to put to the jury was practically indistinguishable from the established common-law tort. Tracking malicious prosecution's elements at common law, Thompson's complaint alleged that Clark (and other officers) maliciously initiated a prosecution against him without probable cause, and that the prosecution terminated in his favor. JA33-35.[5]

Thompson's proposed jury instructions reveal that he saw this claim as centering on "his federal [right] to be free from malicious prosecution." JA74. Consistent with that view, he sought to replicate the common-law tort of malicious prosecution by incorporating all its elements. *Id.* Thompson did not understand his claim to be asking whether Clark had caused him to be seized pursuant to legal process. On the contrary, he maintained that the relevant liberty deprivation began *before* any legal process, starting with his arrest. *Id.*

Nor did Thompson understand his claim to be asking whether Clark misled a magistrate capable of ordering him detained at arraignment. He believed that what mattered was whether Clark had a role in initiating the criminal case. JA74. Under Thompson's conception, this

[5] By trial, Thompson's fair trial and malicious prosecution claims had been narrowed to respondent Clark. JA81, 132.

element was met simply because he had been charged with a crime, without reference to fabricated evidence or any other misconduct. *Id.* The district court's draft instructions dialed that back a bit, but would still have allowed the jury to find Clark liable if he merely "helped a prosecutor to prosecute" in the absence of probable cause. JA89-91.

Shortly before trial, Thompson sought a ruling on "the issue of favorable termination," which he characterized as "an element of [his] malicious prosecution cause of action." D.C. ECF No. 83, at 6. The district court withheld decision before trial, but confirmed that it—like Thompson—understood the heart of the claim to be that "Clark maliciously commenced a criminal proceeding against him." D.C. ECF No. 112-1, at 17.

The case proceeded to trial. Before the final day of testimony (the fourth day of the trial), the district court granted Clark judgment as a matter of law on Thompson's malicious prosecution claim. JA127-28. The court ruled that, in light of the Second Circuit's decision in *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018), a jury could not find that Thompson's criminal case had terminated in his favor, particularly given that the "evidence of criminality . . . was very high." JA127. The court later issued an opinion tracking these points and noting the "substantial evidence that the officers' warrantless entry was lawful." JA185.

On appeal, the Second Circuit rejected Thompson's challenge to the resolution of his malicious prosecution claim. JA20-22. Applying its decision in *Lanning* and confirming its view that favorable termination is a substantive element of § 1983 malicious prosecution claims, the court held that Thompson had failed to demonstrate affirmative indications of innocence that would satisfy the element. *Id.* The panel also noted the district court's conclusion, following an evidentiary hearing, that evidence of Thompson's

guilt was "substantial" and the criminal case's dismissal was "likely based on factors other than the merits." JA21.

SUMMARY OF ARGUMENT

The vagueness pervading Thompson's brief on the precise nature of his claim gives rise to three potential analytical paths: (1) hold Thompson to the claim he pursued through trial and determine whether such a claim even exists; (2) confront whether he can now reimagine his claim in the teeth of the jury's findings on his related claims; or (3) assume, contrary to reason, that the Second Circuit correctly articulated the claim and its contours and answer the question presented within that framework. The first and third of these paths yield a favorable termination requirement that the Court could, in theory, expound. But the second path does not clearly yield such a requirement.

This Court cannot meaningfully opine on what favorable termination requires in this case without first confirming that Thompson's claim has a favorable termination requirement. The absence of clarity on this basic point may be reason to dismiss the petition as improvidently granted. But because each of the three paths leads to a failed claim, the better course is to affirm the judgment resolving the claim against Thompson as a matter of law.

I. The claim Thompson pleaded and litigated at trial does not exist under the Fourth Amendment. Review of Thompson's complaint and the trial materials makes clear that he deliberately pursued a malicious prosecution claim that incorporated all the elements of the common-law tort, and he stuck with that framing through trial.

But any attempt to shoehorn a malicious prosecution claim into the Fourth Amendment encounters one obstacle after another. Whereas the Fourth Amendment is focused on unreasonable seizures, the focus of malicious prosecu-

tion is on groundless prosecutions. And while malice is the principal element of a malicious prosecution claim, it is foreign to the Fourth Amendment. Moreover, Thompson himself argues that the Fourth Amendment does not recognize a favorable termination element.

The Fourth Amendment malicious prosecution claim that Thompson pursued through trial is not cognizable. The claim was thus properly resolved against him as a matter of law. The Court could end here.

II. To the extent Thompson is changing tack on appeal, the shift would raise a host of problems that he fails to confront. To start, Thompson offers no basis to conclude that a reimagined claim properly focused on an unreasonable seizure under the Fourth Amendment would even have a favorable termination requirement.

Whether favorable termination would remain a requirement of a reimagined claim is, at best, a difficult question that Thompson has not helped the Court to answer. Neither lower court addressed the question and few courts nationwide have confronted it. Thus, if the Court does not resolve the case by holding Thompson to his malicious prosecution claim and finding that no such claim exists, there would be ample reason to dismiss the petition as improvidently granted.

But the Court need not do so because, even on its own terms, a reimagined claim would be precluded by the jury's findings on claims arising from the same facts. Most clearly, no claim focused on a Fourth Amendment seizure occurring at arraignment could survive the jury's finding that Officer Clark did not fabricate material evidence that caused any deprivation of Thompson's liberty.

III. Should the Court assume the existence of a Fourth Amendment malicious prosecution claim in order to reach

the question presented, the dismissal of Thompson's claim would still stand.

III.A. The historical record does not support Thompson's contention that favorable termination required only that the underlying criminal proceeding be at an end. While common-law courts in 1871 agreed that the tort of malicious prosecution included *some* favorable termination element, there was a marked—and widely recognized—divergence in how that element was given form. No well-settled rule existed in 1871 to guide the Court now.

One prominent line of authority required that the plaintiff be acquitted in the underlying criminal case. Notably, this Court was among those that expressed that understanding. This Court's statements are particularly significant because the point of looking to the law of 1871 is to glean what the Congress that enacted § 1983 would have understood to be the law of the day. Congress would certainly have been aware of this Court's pronouncements. Thompson's citation to contrary lines of authority at most proves that the law in 1871 was not well settled on this issue.

III.B. Because the common law of 1871 was not well settled on what constituted a favorable termination for malicious prosecution claims, the Court must look elsewhere for guidance. Faced with similar ambiguities, this Court has looked to modern law. And modern authorities increasingly favor requiring malicious prosecution plaintiffs to show that the underlying criminal case ended in a manner indicating that the charges lacked merit. This standard is now the law in seven federal circuits and 20 states (including the District of Columbia).

III.C. Sound policy also supports this standard. Malicious prosecution inevitably sets in tension an individual's right to be free from unfounded prosecutions and society's

interest in exposing crime when it occurs. The indications-of-innocence standard provides a useful filtering function by limiting claims to those plaintiffs who have already demonstrated some likelihood of success.

ARGUMENT

Thompson asks the Court to "reverse and remand for consideration of the merits of [his] claim." Petr. Br. 12. But that invites the question: what *is* his claim?

The question is simple but significant. We must know what Thompson's claim is to ascertain whether it includes a favorable termination requirement. *See Baker v. McCollan*, 443 U.S. 137, 140 (1979). And knowing whether the claim requires favorable termination is critical to the "intelligent resolution of the question presented." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (quotation marks omitted). It would be strange indeed to say what favorable termination means for a claim that does not require favorable termination at all—for instance, because the claim does not exist. *Cf. United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006) ("It makes little sense to address what the Fourth Amendment requires of anticipatory search warrants if it does not allow them at all.").[6]

It should be easy for Thompson to say what his claim is, but his brief leaves the matter vague. He never expressly disavows the claim he pleaded and pursued through trial, but appears to distance himself from it. He now characterizes his claim merely as one that is "sometimes described as a 'malicious prosecution' claim," Petr. Br. 9, suggesting that he sees his claim as differing from malicious prosecution, though in ways he never explains.

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[6] This issue was set out, and thus preserved, in our brief in opposition to certiorari. Br. in Opp. 2, 14-16; *see* Sup. Ct. R. 15(2).

The ambiguity about Thompson's claim obscures certain threshold questions, but does not change the result the Court should reach. Conceived either as he brought it to trial or as he seemingly recasts it on appeal, his claim fails. And if the Court assumes that Thompson's claim exists and includes a favorable termination requirement, then the Second Circuit's application of that requirement was correct.

I. The Fourth Amendment malicious prosecution claim that Thompson pleaded and pursued through trial does not exist.

The simplest way for the Court to resolve this case is to decide whether Thompson brought a cognizable claim under the Fourth Amendment. He did not.

1. Thompson pleaded and pressed—through trial—a Fourth Amendment claim for malicious prosecution with elements tracking the common-law tort. JA33-35; D.C. ECF No. 52, at 7-12. He asked that the jury be instructed that his claim alleged "the loss of his federal [right] to be free from malicious prosecution." JA74.

Consistent with that framing, Thompson did not understand his claim to be asking whether Clark had caused him to be seized pursuant to legal process. Indeed, he maintained that the liberty deprivation he suffered began *before* legal process, starting with his arrest. JA74. And he believed Clark could be held liable simply for signing the criminal complaint and thus initiating the prosecution. *Id.* As Thompson framed his claim at trial, it was irrelevant whether Clark had misled a magistrate into detaining (seizing) him post-arraignment. JA74-76.

Thompson stuck with that framing despite having other options. The Second Circuit had already addressed a claim, independent of malicious prosecution, for "unreasonable seizure under the Fourth Amendment" pursuant to

legal process. *Burg v. Gosselin*, 591 F.3d 95, 96 n.3 (2d Cir. 2010). And to the extent Thompson intends to suggest that this Court's decision in *Manuel*, 137 S. Ct. at 914, opened the door to such claims in some new way, *see* Petr. Br. 19 n.6, *Manuel* was decided nearly two years before the trial here. If Thompson wanted to pursue such a claim, it would hardly have been "futile" for him to do so. *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007). But he made a different choice: to pursue a malicious prosecution claim replicating the common-law tort, with a focus on whether Clark initiated a groundless prosecution.

Both courts below understood Thompson's claim just that way. That was the reason those courts analyzed whether the claim failed for lack of favorable termination—an established substantive element of malicious prosecution at common law. JA20-21, 122, 125-28. Their approach followed the consistent line of authority in the Second Circuit treating § 1983 malicious prosecution claims as mirroring the common-law tort. *See Spak v. Phillips*, 857 F.3d 458, 461 n.1 (2d Cir. 2017); *Boyd v. City of New York*, 336 F.3d 72, 75 (2d Cir. 2003). In short, the claim that Thompson litigated through trial was a malicious prosecution claim, with elements defined by the common law.

2. Taking the claim as such, this case should be over. As members of the Court have recognized, there is no such thing as a Fourth Amendment malicious prosecution claim. *See Manuel*, 137 S. Ct. at 925-26 (Alito, J., dissenting, joined by Thomas, J.); *Cordova v. City of Albuquerque*, 816 F.3d 645, 662-64 (10th Cir. 2016) (Gorsuch, J., concurring).

Despite having multiple opportunities to do so, this Court has never recognized a malicious prosecution claim arising under the Fourth Amendment. *See Manuel*, 137 S. Ct. at 921-22; *id.* at 923 (Alito, J., dissenting); *Wallace v. Kato*, 549 U.S. 384, 390 n.2 (2007); *Albright v. Oliver*, 510

U.S. 266, 275 (1994) (plurality opinion). The Court's silence, however, has engendered ever-deepening confusion among lower courts. Long ago, this Court noted the "embarrassing diversity of judicial opinion" about whether malicious prosecution claims are actionable under § 1983. *Albright*, 510 U.S. at 270 n.4 (quotation marks omitted). The intervening decades have not improved the picture. The law in this area has been a "mix of misstatements and omissions" leading to "inconsistencies and difficulties." *Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (en banc); *see also Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013); *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000).

The Court should take this opportunity to settle the question and join the three circuits that have rejected the existence of Fourth Amendment malicious prosecution claims. *Castellano*, 352 F.3d at 942 (5th Cir.); *Manuel v. City of Joliet* ("*Manuel II*"), 903 F.3d 667, 670 (7th Cir. 2018); *Kurtz v. Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001). Little clarity can be achieved on other questions while the core nature of the claim remains unknown. *See* Br. for United States as *Amicus Curiae* Supporting Petitioner 8, *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) (No. 14-9496) (highlighting the need for guidance on the "precise elements" of the appropriate claim).

3. Any attempt to define a Fourth Amendment claim through malicious prosecution's common-law elements falters at the outset. The essence of a malicious prosecution claim is a "groundless prosecution." *Singleton v. City of New York*, 632 F.2d 185, 195 (2d Cir. 1980). The Fourth Amendment, however, guards against "unreasonable searches and seizures," U.S. Const. amend. IV, not unreasonable prosecutions, *Britton v. Maloney*, 196 F.3d 24, 28 (1st Cir. 1999). Thus, suits for malicious prosecution focus on whether a police officer influenced the prosecutor in

pursuing a criminal case, instead of the proper Fourth Amendment inquiry into whether the officer caused a seizure by misleading a magistrate into ordering pretrial detention.

The mismatch is further illustrated by malicious prosecution's historical status as a "dignitary tort" that did not require a seizure at all. II Dan B. Dobbs, *The Law of Remedies* § 7.1(1) (2d ed., 1993); *see also Trussell v. GMC*, 559 N.E.2d 732, 736 (Ohio 1990). Whereas false imprisonment was understood to remedy "an injury to the person," malicious prosecution redressed "an injury to the reputation." John Townshend, *A Treatise on the Wrongs Called Slander and Libel and on the Remedy by Civil Action for those Wrongs, to which Is Added in this Edition a Chapter on Malicious Prosecution* § 420 at 699 (3d ed., 1877).

That character is perhaps why the malicious prosecution framework that Thompson embraced at trial relegates the constitutional "seizure" requirement to the sidelines. When the Second Circuit first adopted that framework for § 1983, it did not tie the claim to the Fourth Amendment at all. *Singleton*, 632 F.2d at 193, 195. The circuit later rebranded the framework under the Fourth Amendment, tacking on a requirement that the plaintiff establish a seizure. *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 116-17 (2d Cir. 1995). But even so, the claim remains "what is in effect a state law suit for malicious prosecution in federal court under Section 1983, so long as [plaintiffs] are able to demonstrate a deprivation of liberty amounting to a seizure." *Spak*, 857 F.3d at 461 n.1. Sometimes, the circuit leaves out the seizure requirement. *See*, *e.g.*, *Dufort v. City of New York*, 874 F.3d 338, 350 (2d Cir. 2017); *Boyd*, 336 F.3d at 75; *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 571 (2d Cir. 1996).

When the Second Circuit has recognized the seizure requirement, the court has denied it any force. In effect,

the court has held that "the pendency of a criminal proceeding alone is enough to support a § 1983 claim under the Fourth Amendment." *Murphy v. Lynn*, 118 F.3d 938, 953 (2d Cir. 1997) (Jacobs, J., dissenting). Even issuance of a criminal summons, together with a handful of court appearances, suffices. *Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013); *see also Mitchell v. City of New York*, 841 F.3d 72, 80 (2d Cir. 2016) (reserving the question whether a summons plus one appearance is enough).

Thus, the claim that Thompson sought to put to the jury all but dispensed with the Fourth Amendment's core element. An individual is seized through submission to authority when "a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quotation marks omitted). Here, Thompson understood the opposite: that he was "free to go" after being released on his own recognizance at arraignment. C.A. App. 185. The Second Circuit nonetheless counts that as a seizure. *See Murphy*, 118 F.3d at 946. That approach is not faithful to the Fourth Amendment.[7]

Nor can the common-law requirement of "malice" be squared with the Fourth Amendment. The Court has rejected any such Fourth Amendment inquiry, because doing so "puts in issue the subjective motivations of the

[7] The Government seemingly agrees that Thompson was not seized post-arraignment but mistakenly suggests that time he spent in custody before arraignment—after the filing of the criminal complaint—qualifies as a seizure pursuant to legal process. Br. for United States as *Amicus Curiae* Supporting Petitioner 11-12. The mere filing of a criminal complaint in a courthouse is not the legal process that effectuates a seizure of the person, which instead occurs when a criminal defendant "is bound over by a magistrate or arraigned on charges." *Wallace*, 549 U.S. at 389; *see also Manuel*, 137 S. Ct. at 915 (plaintiff's detention subsequent to judge's probable-cause determination marked start of seizure pursuant to legal process).

individual officers," which have "no bearing on whether a particular seizure is 'unreasonable.'" *Graham v. Connor*, 490 U.S. 386, 397 (1989). Nonetheless, the Second Circuit and four other circuits require malice for claims like Thompson's.[8] Three other circuits have tried to square the circle by dropping the malice requirement.[9] But malice is the claim's "principal element." IV William Wait, *A Treatise Upon Some of the General Principles of the Law* 337 (1885). Malicious prosecution without malice is like *Hamlet* without the prince.

And Thompson himself asserts that the Fourth Amendment does not recognize malicious prosecution's favorable termination element. Petr. Br. 32; Petr. C.A. Br. 21 ("There is no legal basis for taking a 'favorable termination' element from an analogous common-law tort and grafting it onto the Fourth Amendment."). The Court has described a Fourth Amendment wrong as "fully accomplished" by the unreasonable seizure itself. *United States v. Calandra*, 414 U.S. 338, 354 (1974). That is why at least some seizure claims accrue "before the setting aside of—indeed, even before the existence of—the related criminal conviction." *Wallace*, 549 U.S. at 394; *see also Haring v. Prosise*, 462 U.S. 306, 323 (1983) (holding that a "conviction in state court does not preclude [a plaintiff] from now seeking to recover damages . . . for an alleged Fourth Amendment violation"). "The Fourth Amendment, after all, prohibits *all* unreasonable seizures—regardless of whether a

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[8] *See Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010); *Allen v. N.J. State Police*, 974 F.3d 497, 502 (3d Cir. 2020); *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 (9th Cir. 2009); *Cordova*, 816 F.3d at 650 (10th Cir.); *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010).

[9] *See Jordan v. Town of Waldoboro*, 943 F.3d 532, 545 (1st Cir. 2019); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996); *Sykes v. Anderson*, 625 F.3d 294, 309 (6th Cir. 2010).

prosecution is ever brought or how a prosecution ends." *Manuel*, 137 S. Ct. at 925-26 (Alito, J., dissenting).

For all these reasons, no malicious prosecution claim lies under the Fourth Amendment. The claim focuses on an entirely different concern (groundless prosecutions rather than unreasonable seizures) and contains incompatible core elements. Thompson brought a malicious prosecution claim to trial and that is what the lower courts addressed. The claim is not viable, however, and thus was properly resolved against him as a matter of law.

II. A Fourth Amendment claim focused on a post-arraignment seizure may not even implicate the question presented, and is precluded by the jury's verdict in any event.

If Thompson is sticking with the malicious prosecution claim he brought to trial, it should be easy for him to say so. Of course, then he runs straight into the problems that come from trying to house a malicious prosecution claim under the Fourth Amendment. His vagueness on the claim he intends this Court to confront suggests that he may be trying to avoid those problems by reimagining the claim—with unspecified elements and new points of analytical focus.

But such a move would introduce new difficulties. At the threshold, it seems doubtful that a new claim could properly be asserted after this case has been litigated through trial, especially where the jury has already considered and rejected a cluster of related claims. *See Virginian Ry. Co v. Mullens*, 271 U.S. 220, 227-28 (1926); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486-87 (2008). In any event, just like his original claim, a recast claim would fail.

1. As an initial point, it is far from clear that a reimagined Fourth Amendment claim focused on a post-arraignment seizure would even include the favorable termination requirement Thompson asks this Court to define. Thompson seems to be inviting the Court to do the inverse of what it did in *McDonough*. There, the Court assumed that the Second Circuit had correctly articulated the claim and its contours in order to reach the question presented. *McDonough*, 139 S. Ct. at 2155. Here, in contrast, the Court would have to assume the opposite: that the malicious prosecution framework that the Second Circuit applied (and Thompson embraced through trial) is *incorrect*. The Court would then have to replace that claim with a new one, and go on to define a requirement that may not even be a part of the refashioned claim.

Whatever the contours of a newly recast Fourth Amendment claim may be, Thompson offers no real argument as to why such a claim must include a favorable termination requirement. His brief is premised on the assertion that *McDonough*, 139 S. Ct. 2149, and *Heck v. Humphrey*, 512 U.S. 477 (1994), impose a favorable termination requirement for such a Fourth Amendment claim. But that is incorrect. *See* Br. for United States as *Amicus Curiae* Supporting Petitioner 14-16 (acknowledging the point has not been resolved).

This Court has recognized that whether a claim requires favorable termination depends on the nature of the claim.[10] Both *McDonough* and *Heck* found that a favorable termination rule was warranted by the specific claims in

[10] Even among claims that require favorable termination, the understanding of what constitutes a favorable termination may differ based on the nature and context of the specific claims at issue. *See Ashley v. City of New York*, 992 F.3d 128, 140 (2d Cir. 2021) (Calabresi, J.); *Poventud v. City of New York*, 750 F.3d 121, 130-32, 136 (2d Cir. 2014) (en banc).

those cases. In *Heck*, the plaintiff's suit would necessarily have undermined his outstanding criminal conviction, *Heck*, 512 U.S. at 486-87, while the *McDonough* plaintiff sued the prosecutor and challenged the integrity of the criminal prosecution against him, *McDonough*, 139 S. Ct. at 2154, 2156-57.

Neither *McDonough* nor *Heck* applied the favorable termination rule to a Fourth Amendment seizure claim. *McDonough* assumed that the claim at issue there arose under the due process clause. *McDonough*, 139 S. Ct. at 2155. Thompson thus miscasts *McDonough* in his brief's opening sentence, suggesting the case addressed a "Fourth Amendment" claim. Petr. Br. 1. *Heck*, meanwhile, disavowed application of its rule to claims arising under the Fourth Amendment because such claims do not necessarily imply that a conviction was unlawful. *Heck*, 512 U.S. at 487 n.7. And in *Wallace*, the Court squarely rejected any favorable termination rule for Fourth Amendment seizure claims arising out of warrantless arrests. *Wallace*, 549 U.S. at 391; *see also Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (observing that an "illegal arrest or detention does not void a subsequent conviction").[11]

Thompson's allusions to this Court's decision in *Manuel*, 137 S. Ct. 911, offer him no help because the Court there expressly left the favorable termination question open. Two dissenters would have found that there was no such thing as a Fourth Amendment malicious prosecution claim and that any remaining Fourth Amendment claim accrued without reference to favorable termination. *Id.* at 922-23 (Thomas, J., dissenting); *id.* at 925-26 (Alito, J., dissenting).

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[11] Thompson fails to acknowledge that, under his own conception, requiring favorable termination for such a reimagined claim would deny relief to a category of plaintiffs who have suffered a Fourth Amendment wrong: those who were seized without probable cause, but later convicted based on after-acquired evidence.

The majority, meanwhile, noted that the parties' dispute about whether and how the claim resembled malicious prosecution was central to resolving the accrual question, and remanded the case to the Seventh Circuit to answer the question. *Id.* at 920, 922.

On remand, the Seventh Circuit held that favorable termination did not factor into when the plaintiff's unreasonable seizure claim accrued. *Manuel II*, 903 F.3d at 669-70; *see also Smith v. City of Chicago*, No. 19-2725, 2021 U.S. App. LEXIS 19136, at *15 (7th Cir. June 28, 2021). The Fifth Circuit has reached the opposite conclusion. *Winfrey v. Rogers*, 901 F.3d 483, 493 (5th Cir. 2018). The point is hardly settled. And further development on the issue is unlikely given that eight circuits recognize a malicious prosecution claim with an embedded favorable termination element, and thus need not weigh in on an independent accrual rule. This circumstance provides further reason for the Court to clear the decks by confirming that no claim for malicious prosecution exists under the Fourth Amendment.

2. The ambiguity surrounding Thompson's claim and whether that claim would require favorable termination is a sound reason to dismiss the petition as improvidently granted. But the Court could also affirm the judgment below on an alternate ground: any reimagined Fourth Amendment claim would be precluded by the verdict the jury has already rendered.

While Thompson would prefer that the verdict now be ignored, Petr. Br. 9 n.3, the jury's work is entitled to more respect than that. This Court and others have held that properly asserted claims that were removed from the jury's consideration will fail if they are foreclosed by the jury's verdict on other claims. *See, e.g.*, *Buckeye Powder Co. v. E. I. DuPont de Nemours Powder Co.*, 248 U.S. 55, 62 (1918) (upholding pre-verdict dismissal where the only

"substantial ground" for a dismissed claim was negated by the subsequent verdict); *Bridges v. Wilson*, 996 F.3d 1094, 1095 (10th Cir. 2021) (upholding a pre-verdict ruling because the claim was foreclosed by the jury's resolution of competing accounts of a police encounter against the plaintiff). At a minimum, any attempt to assert a new claim after trial must fail if the claim would contradict the jury's verdict.

Any reimagined claim alleging an unreasonable post-arraignment seizure stemming from "fabricated charges" would fly in the face of the verdict against Thompson. Petr. Br. 2. Here, of course, there was no post-arraignment seizure because Thompson was released on his own recognizance, which by itself defeats the claim. But putting that aside, the jury's rejection of Thompson's "fair trial" claim means that it necessarily found that Clark did not fabricate material evidence that led to *any* deprivation of Thompson's liberty—whether a seizure or not. JA140-41, 144. No Fourth Amendment claim based on purportedly fabricated charges could survive that clear finding.

The jury's verdict is also necessarily a finding that the events of January 15, 2014 established probable cause to seize Thompson. The jury's verdict on his false arrest and unlawful entry claims makes clear that there was probable cause for the charged offense of obstructing governmental administration. JA134-39, 143-44; *see also supra* Statement B.1. And while the Second Circuit applies a slightly higher standard of probable cause to prosecutions than to arrests, *see Stansbury v. Wertman*, 721 F.3d 84, 95 (2d Cir. 2013), that distinction falls away with the malicious prosecution framework. Probable cause is probable cause.

III. Assuming a Fourth Amendment malicious prosecution claim exists, it requires proof that the prosecution ended in a way indicating the charges lacked merit.

If the Court were instead to simply assume that the Second Circuit correctly understood the claim and its contours, *see McDonough*, 139 S. Ct. at 2155, that would entrench a problematic claim for malicious prosecution under the Fourth Amendment and engender more confusion among the circuits. But it would not save Thompson. Because the Second Circuit applied the correct favorable termination standard to the malicious prosecution claim Thompson pursued through trial, affirmance remains the right outcome.

A. The common law defining the application of the favorable termination element was not well settled in 1871.

The historical record does not support Thompson's position. When the Court looks to the common law to define the elements of a claim under § 1983, its inquiry begins by examining "common-law principles that were well settled at the time of [§ 1983's] enactment." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997)). The reason is that the Court assumes that the Congress that enacted § 1983 intended to incorporate well-settled tort principles into the statute. *Newport v. Fact Concerts*, 453 U.S. 247, 258 (1981). Looking to the well-settled law of the time is thus an exercise in understanding Congress's intent. But the common law defining the favorable termination requirement was not so well settled in 1871 that any congressional intent can reasonably be understood.

While the authorities of the day agreed that a favorable termination of the underlying action was necessary before

a plaintiff could sue for malicious prosecution, "just what [was] a legal termination of the prosecution and sufficient to maintain the action for malicious prosecution [did] not appear to have been so completely settled." Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 327 (1892); *accord* Melville M. Bigelow, *Elements of the Law of Torts for the Use of Students* 75 (3d ed., 1886) (decisions "not altogether consistent"); I Francis Hilliard, *The Law of Torts or Private Wrongs* 475 (4th ed., 1874) (authorities "not perfectly reconcilable").

Under one prominent line of authority, a favorable termination required that the plaintiff be acquitted in the underlying criminal case. Acquittal, at the time and in this context, was defined as the "absolution of a party charged with a crime or misdemeanor." I John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union* 68 (14th ed., 1871). An acquittal, therefore, was a ruling in favor of the accused on the merits.[12]

Notably, this Court understood the common law to require that a plaintiff have been acquitted before bringing a malicious prosecution claim. In *Wheeler v. Nesbitt*, 65 U.S. 544, 549 (1861), the Court wrote that the "well-settled rules of law" for malicious prosecution claims included the requirement that the charges "finally terminated in [the plaintiff's] acquittal." *Wheeler* is significant because, in looking to assess Congress's likely understanding of the state of the law while drafting § 1983, the

[12] Given this understanding, the Government's observation that "common-law courts' use of ['acquittal'] was not limited to the technical sense of a jury's verdict after trial" is accurate, but beside the point. Br. for United States as *Amicus Curiae* Supporting Petitioner 21. With or without a trial by jury, an acquittal indicated that the charges lacked merit.

natural place to begin is with the pronouncements of this Court. Congress can safely be assumed to have been familiar with the statements of the highest court in the country.

Nor did this Court stand alone. The highest courts in Alabama, Massachusetts, Ohio, Pennsylvania, and Rhode Island declared that malicious prosecution suits could only proceed where the plaintiff demonstrated that the underlying criminal charges were resolved in a manner indicating that they lacked merit. *Ragsdale v. Bowles*, 16 Ala. 62, 64 (1849); *Bacon v. Towne*, 58 Mass. 217, 235 (1849); *Fortman v. Rottier*, 8 Ohio St. 548, 550 (1858); *Kirkpatrick v. Kirkpatrick*, 39 Pa. 288, 291, 299 (1861); *Rounds v. Humes*, 7 R.I. 535, 537 (1863).[13]

Respected treatises of the day agreed that a malicious prosecution plaintiff had to be acquitted before bringing suit. II John Bouvier, *Institutes of American Law* 521 (1858); Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract* 186 (1879); *accord* Newell, *supra*, at 328. One treatise cited authority suggesting that a jury's mere *hesitation* before returning an acquittal could bar a malicious prosecution suit. Hilliard, *supra*, at 478-79 (noting that this principle was "usually stated with great qualification").

Thompson misses the point by dismissing these authorities as "passing dicta." Petr. Br. 27-28. Each articulated

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[13] Thompson incorrectly claims that Alabama had adopted his view of the common law in 1871. He ignores that *Ragsdale* superseded *Cotton v. Wilson*, Minor 203, 203 (Ala. 1824), and was not overruled until three decades after § 1983's enactment, *Southern Car & Foundry Co. v. Adams*, 131 Ala. 147, 157 (1901). *See also Jones v. Kirksey*, 10 Ala. 839, 840-41 (1846). Indeed, the fact that the Alabama Supreme Court felt the need to overrule *Ragsdale* in 1901 in order to announce the standard urged by Thompson suggests that *Ragsdale*'s acquittal rule prevailed up to that point.

the acquittal requirement in the belief that it was an accurate statement of the law. That widely held belief—one shared by this Court—is fatal to any argument that a *different* standard was so well settled that it was necessarily understood and intended by Congress.

To be sure, other jurisdictions adopted different approaches. Petr. Br. 25-30. Some courts found a termination favorable where the prosecution was simply "at an end." *Chapman v. Woods*, 6 Blackf. 504, 506 (Ind. 1843). Others applied a slightly more onerous standard requiring that the prosecution have been ended such that it "cannot be revived." *Clark v. Cleveland*, 6 Hill 344, 347 (N.Y. 1844); *Murray v. Lackey*, 6 N.C. 368, 369 (1818). Thompson cites decisions from nine states that he contends supported his proposed rule in 1871. Petr. Br. 25-31. Contrary to his claim, nine is not a "vast majority" of the 37 states then in the union. *Id.* at 16.

Even though there is support for Thompson's preferred rule in the common law of 1871, the rule was not so well settled that this Court can assume Congress intended to adopt it. It is not enough for Thompson to try to poke holes in the standard applied in his case and then claim that his preferred rule wins by default. If he thinks his proposed rule should be adopted based on the common law of 1871, he must show that the rule was well settled at the time. *Nieves*, 139 S. Ct. at 1726. He cannot do so.

B. Modern jurisprudence supports the indications-of-innocence standard.

Given the unsettled state of the common law in 1871, we can safely assume that Congress understood malicious prosecution claims to require a favorable termination, but not that Congress had a particular understanding of what constituted a favorable termination. Thus, a court looking

to give meaning to that element must look beyond the law of 1871 for guidance.

In circumstances like this, where the law as of 1871 is unclear, the Court has sought guidance from post-1871 authorities. *See Imbler v. Pachtman*, 424 U.S. 409, 417-19 (1976); *see also Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (describing *Imbler*'s "substantial reliance on post-1871 cases"); *Smith v. Wade*, 461 U.S. 30, 34, 39-48 (1983). The Court has similarly looked to more modern law when determining the scope of constitutional rights where Founding-era authorities do not provide clear guidance. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 326-28, 344-45 (2001); *Payton v. New York*, 445 U.S. 573, 593, 598-600 (1980). Recourse to modern authorities—particularly in response to historical ambiguities and changed contemporary circumstances—makes sense because there is no reason to believe that the Congress that enacted § 1983 intended to require courts to ignore further development of the common law on points that were then unsettled. *Smith*, 461 U.S. at 34 n.2.

Following that path here shows that the Second Circuit adopted the correct standard. Under that standard, courts consider the actual disposition of the criminal proceedings, as well as the relevant circumstances surrounding that disposition, to determine whether the criminal proceedings ended in a manner indicating that the underlying charges lacked merit. *See Lanning*, 908 F.3d at 28-29; *accord Laskar v. Hurd*, 972 F.3d 1278, 1307 (11th Cir. 2020) (Moore, J., dissenting).

1. To start, the federal circuit courts are virtually unanimous in holding that a successful malicious prosecution claim requires a plaintiff to demonstrate indications of innocence: evidence that the criminal prosecution ended in a manner that signals the underlying charges lacked merit. Seven of the eight circuits to have considered the

issue have found that malicious prosecution claims under § 1983 require a favorable termination reflecting indications of innocence.[14]

The only circuit to hold otherwise—the 11th Circuit—applied an unsound historical analysis that Thompson mirrors here. *See Laskar*, 972 F.3d at 1286-89. The *Laskar* majority claimed to have "no trouble discerning a well-settled principle of law" as of 1871, *id.* at 1289, even though the question vexed and divided courts and scholars of the time. And the opinion offers no explanation for why its modern parsing of authorities is a better indication of what Congress in 1871 understood than the contemporaneous articulation of the law offered by this Court in *Wheeler*. Given these flaws, *Laskar* takes little, if anything, away from the overwhelming consensus among the federal circuits.

2. The circuits' near-unanimous view is also reflected in treatises. Most notably, the 1938 Restatement of Torts explained that proceedings have been favorably terminated "only when their final disposition is such as to indicate the innocence of the accused." Restatement (First) of Torts § 660, cmt. a (Am. L. Inst. 1938); *see Nieves*, 139 S. Ct. at 1726-27 (consulting Restatement as an indicator of well-settled law for § 1983 claims). Other leading treatises, surveying the common law, have reached the same conclusion. *See* I Fowler V. Harper, Fleming James, Jr., Oscar S. Gray, *Harper, James and Gray on Torts* 469 (3d ed., 2009); W. Page Keeton, Dan B. Dobbs, Robert E. Keaton, David G. Owen, *Prosser and Keeton on the Law of Torts* 874 (5th ed., 1984).

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[14] *See Jordan*, 943 F.3d at 545 (1st Cir.); *Lanning*, 908 F.3d at 25-26 (2d Cir.); *Donahue v. Gavin*, 280 F.3d 371, 383 (3d Cir. 2002); *Salley v. Myers*, 971 F.3d 308, 312-13 (4th Cir. 2020); *Jones v. Clark County*, 959 F.3d 748, 763-64 (6th Cir. 2020); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004); *Cordova*, 816 F.3d at 651 (10th Cir.).

3. A substantial and growing number of state courts have also held that a favorable termination requires that the proceeding have ended in a manner indicating the plaintiff's innocence.[15] In addition, while Texas does not apply this precise rule, the state does require plaintiffs bringing malicious prosecution claims to prove their innocence as a freestanding element of the tort. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 n.3 (Tex. 2006).

What is more, there is a clear trend among the states in favor of requiring malicious prosecution plaintiffs to prove a termination indicating that the underlying charges lacked merit. *See Payton*, 445 U.S. at 600 (considering the strength of trend in state court decisions alongside weight of state-law authority). More and more jurisdictions, when faced with the question, are deciding that malicious prosecution's favorable termination element requires indications that the prosecution lacked merit. *See supra* notes 14, 15.

The weight and trend of authority on the subject supports the Second Circuit's standard. The experience of

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[15] *See Neff v. Neff*, 247 P.3d 380, 394 (Utah 2011); *Bearden v. BellSouth Telecomms., Inc.*, 29 So.3d 761, 766 (Miss. 2010); *Siliski v. Allstate Ins. Co.*, 811 A.2d 148, 151-52 (Vt. 2002); *Palmer Dev. Corp. v. Gordon*, 723 A.2d 881, 884 (Me. 1999); *Cox v. Williams*, 593 N.W.2d 173, 174-75 (Mich. Ct. App. 1999); *Ash v. Ash*, 651 N.E.2d 945, 947-48 (Ohio 1995); *Allen v. City of Aurora*, 892 P.2d 333, 335-36 (Colo. App. 1994); *Alamo Rent-A-Car v. Mancusi*, 632 So.2d 1352, 1356 (Fla. 1994); *McKenney v. Jack Eckerd Co.*, 402 S.E.2d 887, 887-88 (S.C. 1991); *Duvall v. Kroger Co.*, 549 N.E.2d 403, 406 (Ind. Ct. App. 1990); *Alcorn v. Gordon*, 762 S.W.2d 809, 812 (Ky. Ct. App. 1988); *Brown v. Carr*, 503 A.2d 1241, 1244-45 (D.C. 1986); *Schwartz v. First Nat'l Bank*, 390 N.W.2d 568, 571 (S.D. 1986); *Frey v. Stoneman*, 722 P.2d 274, 278-79 (Ariz. 1986); *Wynne v. Rosen*, 464 N.E. 1348, 1351-52 (Mass. 1984); *Miller v. Watkins*, 653 P.2d 126, 130 (Mont. 1982); *Joiner v. Benton Cmty. Bank*, 411 N.E.2d 229, 232 (Ill. 1980); *Rose v. Whitbeck*, 562 P.2d 188, 192 (Or. 1977); *Jaffe v. Stone*, 114 P.2d 335, 338 (Cal. 1941); *Irby v. Harrell*, 74 So. 163, 163 (La. 1917).

the courts in 20 states and seven federal circuits strongly counsels in favor of requiring malicious prosecution plaintiffs to demonstrate that the criminal charges underlying their claims terminated in a manner indicating that those charges lacked merit.

C. Sound policy considerations support the indications-of-innocence standard.

Significant policy considerations make clear that the courts that require malicious prosecution plaintiffs to show that their underlying prosecutions ended in a manner indicating their innocence are right to do so. While stringent, the requirement ensures that those plaintiffs most likely to be able to prove a valid case of malicious prosecution may proceed while minimizing the harms that could arise from discouraging the reporting of crime and permitting non-meritorious claims to clog judicial dockets.

1. Courts "strictly adhere" to the "true principles" underlying malicious prosecution suits. Newell, *supra*, at 21-22; *accord Cordova*, 816 F.3d at 653-54; *Martin v. O'Daniel*, 507 S.W.3d 1, 7 (Ky. 2016); *Ims v. Town of Portsmouth*, 32 A.3d 914, 922 (R.I. 2011). Care is taken to ensure that people are not deterred "from the praiseworthy work of bringing offenders to justice." William P. Fishback, *A Manual of Elementary Law, Being a Summary of the Well-Settled Elementary Principles of American Law* 182 (1896).

The strong trend toward requiring malicious prosecution plaintiffs to demonstrate that the criminal charges against them lacked merit "best reflects the need to balance an individual's right to be free from unreasonable criminal prosecutions with the public policy which favors the exposure of crime." *Swick v. Liautaud*, 662 N.E.2d 1238, 1243 (Ill. 1996). "Even a small departure from the exact prerequisites for liability may threaten the delicate

balance between protecting against wrongful prosecution and encouraging reporting of criminal conduct." *Browning-Ferris Indus. v. Lieck*, 881 S.W.2d 288, 291 (Tex. 1994).

The balance modern courts have struck also reflects the venerable principle that "malicious prosecution is a remedy for wrongs done to innocent persons, not a means to afford the guilty a bonus for a failure of justice." *Gedratis v. Carroll*, 225 N.W. 625, 629 (Mich. 1929). It makes sense to limit such claims focused on the wrongfulness of a prosecution to those plaintiffs who are most likely to be able to establish that the charges against them lacked merit. Requiring that the underlying proceedings signal the plaintiff's innocence makes it more difficult for "litigants who committed the acts of which they are accused, but who were able to escape liability on a 'technicality' or procedural device, to turn around and collect damages against their accuser." *Palmer Dev. Corp.*, 723 A.2d at 884.

Overall, the modern standard "serves as a useful filtering mechanism, barring actions that have not already demonstrated some likelihood of success." *Cordova*, 816 F.3d at 654. This filter is valuable because prosecutors dismiss criminal charges for all sorts of reasons that have nothing to do with the underlying merits of the case. *See* Br. for National, State, and Local Criminal Defense, Civil Rights, and Racial Justice Organizations as *Amici Curiae* Supporting Petitioner 8-9; Br. for *Amici Curiae* Current and Former Prosecutors, Department of Justice Officials, and Judges Supporting Petitioner 6. In this case, for example, the district court correctly noted that "the evidence of criminality . . . was very high." JA127. Thompson's proposed rule would permit every individual who had their charges dismissed to bring a suit for malicious prosecution so long as they allege that those charges were groundless.

Nor does the requirement that a malicious prosecution plaintiff plead a lack of probable cause substitute for the filter that a strong favorable termination requirement provides. A question of fact on the issue of probable cause can frequently be found whenever a plaintiff denies that he was doing what the arresting officer claimed. *See Laskar*, 972 F.3d at 1306 (Moore, J., dissenting). This ease of pleading means that even those cases where plaintiffs have no reasonable likelihood of prevailing will have to proceed through the time and expense of discovery and, often, trial. Likewise, qualified immunity averts neither discovery nor trial where plaintiffs deny the underlying events, rather than dispute their legal import.

The modern professionalization of law enforcement offices further demonstrates the desirability of the favorable termination filter. The common law developed at a time when criminal prosecutions were commonly brought by private actors who would not necessarily be expected to act with the public interest in mind. *Rehberg*, 566 U.S. at 364. Today's police and prosecutors, however, are hired to act solely in the public interest while handling far more criminal investigations and accusations than the typical private citizen of any era. Exposing a modern officer to "harassment by unfounded litigation would cause a deflection of the [officer's] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423.

Moreover, in most jurisdictions it is not the police but independent prosecutors who wield the authority to initiate or dismiss a prosecution. *Rehberg*, 566 U.S. at 371-72. Police officers tend to be the ones sued anyway because prosecutors are immune from § 1983 liability for malicious prosecutions. Br. for National Police Accountability Project and Innocence Network as *Amici Curiae* Supporting

Petitioner 8. This practice creates the "anomalous" circumstance whereby a police officer can be sued for "maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to prosecute." *Rehberg*, 566 U.S. at 372. The mismatch between who gets sued and who is responsible for the decision giving rise to the suit underscores the need for a filter for malicious prosecution claims brought against police officers.

2. The Court need pay little mind to the visions of doom Thompson and his amici predict will follow if the Court requires malicious prosecution plaintiffs to demonstrate that the underlying prosecution ended in a manner signaling that the charges lacked merit. Those claims would surely come as a surprise to the seven circuits and 20 states that have been administering that very standard. Thompson's doomsaying never engages with the robust and successful implementation of this standard.

The same point also defeats the argument that prosecutors may abuse their discretion by dismissing cases on unspecified grounds, when they otherwise would not, in order to limit police officers' civil liability. Petr. Br. 37-39. Neither Thompson nor his amici offer any evidence that such prosecutorial abuse occurs on a significant (or even insignificant) scale, despite the fact that the standard they warn against has long been employed across the country.

Instead, amici offer reason to doubt their own claims. Br. for *Amici Curiae* Current and Former Prosecutors, Department of Justice Officials, and Judges Supporting Petitioner 7 (noting that an "ethical prosecutor" would not "make a dismissal decision in order to deliberately deny a civil cause of action to an individual"); *see also Newton v. Rumery*, 480 U.S. 386, 397 (1987) (plurality opinion) ("[T]radition and experience justify our belief that the great majority of prosecutors will be faithful to their

duty."). If Thompson and his amici are concerned with combatting unscrupulous prosecutors, changing the favorable termination requirement for malicious prosecution claims against police officers seems a roundabout path.

Even as a matter of theory, Thompson does not explain why, if prosecutors resolve cases with an eye toward limiting police officers' civil liability, his preferred rule would not lead to undesirable consequences. Opening the courthouse doors to everyone whose prosecution ends short of a conviction would, under his theory, seemingly incentivize prosecutors to take more cases to trial in an attempt to secure a conviction or plea. As some amici argued in a similar context, that could "encourage prosecutors to resist dismissals" and "insist[] on guilty pleas." Br. for Criminal Defense Organizations, Civil Rights Organizations, and the Cato Institute as *Amici Curiae* Supporting Petitioner 9, *McDonough v. Smith*, 139 S. Ct. 2149 (2019) (No. 18-485); *accord Singleton*, 632 F.2d at 194.

Nor, contrary to several of Thompson's amici, is a more relaxed favorable termination standard required to ensure police accountability. This argument overlooks the varied avenues for holding police officers accountable for misconduct. Officers who fabricate evidence can face criminal and professional consequences. *See* 18 U.S.C. §§ 241-42; N.Y. Penal Law § 210.45; NYPD, *New York City Police Department Disciplinary System Penalty Guidelines* 29-32 (effective Jan. 15, 2021), *available at* https://perma.cc/6BZG-K8B6. And as this case demonstrates, multiple federal civil claims exist as safeguards against the kinds of misconduct Thompson and his amici posit. State claims are also available, though Thompson opted not to pursue them here.[16] Thus, even if

[16] Amici struggle to make their contentions concrete. For instance, in *Moore v. Keller*, cited in the NAACP's brief, the plaintiff's federal malicious prosecution claim was dismissed, but her false arrest and excessive force claims survived, she had abandoned a due process

Thompson were precluded from bringing a Fourth Amendment malicious prosecution claim under § 1983, he had no shortage of available claims. He simply forwent some and lost before a jury on the others.

CONCLUSION

The Court should affirm the judgment of the Second Circuit or, in the alternative, dismiss the petition as improvidently granted.

Respectfully submitted,

RICHARD DEARING
Counsel of Record
DEVIN SLACK
JOHN MOORE
ANNA W. GOTTLIEB
KEVIN OSOWSKI
MELANIE T. WEST

GEORGIA M. PESTANA
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

Counsel for Respondent

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claim, and she had forfeited a state-law malicious prosecution claim. 498 F. Supp. 3d 335, 347, 353, 355-57 (N.D.N.Y. 2020). With so many potential claims available, it is hard to see why the dismissal of one claim would lessen police accountability.