No. 23–50

In the Supreme Court of the United States

JASCHA CHIAVERINI, et al.,

Petitioners,

v.

NICHOLAS EVANOFF, et al.,

Respondents.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

To make out a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983, a plaintiff must show that legal process was instituted without probable cause. *Thompson v. Clark*, 142 S. Ct. 1332, 1338 (2022). Under the charge-specific rule, a malicious prosecution claim can proceed as to a baseless criminal charge, even if other charges brought alongside the baseless charge are supported by probable cause. Under the "any-crime" rule, probable cause for even one charge defeats a plaintiff's malicious prosecution claims as to every other charge, including those lacking probable cause.

The question presented is: Whether Fourth Amendment malicious prosecution claims are governed by the charge-specific rule, as the Second, Third, and Eleventh Circuits hold, or by the "any-crime" rule, as the Sixth Circuit holds.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files amicus briefs, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case interests Cato because of the importance of protecting the constitutional rights of individuals who engage with the American criminal legal system.

[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party has authored this brief in whole or in part and that no one other than *amicus* and its counsel has made any monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This case will determine whether courts can effectively adjudicate civil rights claims brought by innocent individuals wrongly accused of crimes, and it may impact the way in which crimes are charged in our criminal legal system. Petitioners' proposed "charge-specific" rule is consistent with the text and history of the Fourth Amendment and the common law of malicious prosecution. In line with this Court's cases, it ensures that meritorious civil claims arising from the abuse of state criminal proceedings can proceed in federal court. It reflects the way in which civil claims of wrongful prosecution are already litigated across the United States. And it appropriately sets incentives for actors in our criminal legal system to exercise precision when charging individuals with crimes that place their liberty in jeopardy.

The "any-crime" rule would have the opposite effect. This brief focuses on three serious problems presented by the any-crime rule:

First, the any-crime rule would categorically and arbitrarily bar meritorious federal civil suits by innocent individuals wrongly accused of state crimes they did not commit, undermining this Court's and Congress's strong protection of the constitutional rights of individuals who encounter our criminal legal system. This Court and Congress have long ensured that individuals improperly subjected to state criminal proceedings based on false evidence have a federal remedy under § 1983 once those proceedings come to an end. *McDonough v. Smith*, 139 S. Ct. 2149, 2153 (2019). Strong federal

protections against corrupt state prosecutions are "implicit in any concept of ordered liberty," *Napue v. Illinois*, 360 U.S. 264, 269 (1959), and Congress passed § 1983 principally to stop such prosecutions, *Mitchum v. Foster*, 407 U.S. 225, 240 (1972). The any-crime rule would categorically bar meritorious suits concerning critical individual liberties and undermine important protections against corrupt state prosecutions.

Second, the any-crime rule imposes an outright bar on civil claims with no corresponding benefit to our civil legal system. A potential appeal of the any-crime rule is the notion that it will weed out unmeritorious lawsuits. But that concern is well-addressed by basic causation principles that already apply in § 1983 claims.

But-for causation provides that an act is the factual cause of an outcome only if, in the absence of the act, the outcome would not have occurred. In a civil case arising from a state prosecution in which probable cause was lacking on one of many criminal charges, but-for causation requires a showing that, but for the filing of the baseless criminal charge, the plaintiff's injuries resulting from the criminal prosecution would not have occurred. In a meritorious case, that showing can be made and the civil claim will proceed. But where the plaintiff's asserted injuries would have occurred even without the baseless charge, as the result of other charges supported by probable cause, but-for causation cannot be established, and the meritless civil claim will fail. But-for causation thus acts as a bar to unmeritorious malicious prosecution suits, while allowing meritorious claims to proceed.

It should be no surprise, then, that but-for causation is the mechanism that courts have used to determine the effect that the presence or absence of probable cause on various charges has in malicious prosecution suits. Courts took this approach at common law, and they do so today in state and federal court. Instead of applying the crude and categorical bar of the any-crime rule, this Court should let the civil legal system function as it already has been, sorting through meritorious and unmeritorious malicious prosecution claims using the principle of but-for causation.

Third, the any-crime rule sets a bad incentive for state actors in our criminal legal system to overcharge criminal defendants. The problem of overcharging is already pronounced in our criminal legal system, as the number of crimes has proliferated. Overcharging represents one of the largest threats to individual liberty for the millions of Americans who encounter our criminal legal system each year. When this Court establishes requirements in federal civil litigation concerning state criminal prosecutions, it necessarily sets incentives for state actors conducting those prosecutions, as the Court recognized in *McDonough*, 139 S. Ct. at 2153, and *Thompson v. Clark*, 596 U.S. 36, 48-49 (2022). The any-crime rule will incentivize additional criminal charges as a hedge against civil exposure, exacerbating the problem of overcharging, compromising the individual liberties of criminal defendants, and harming our criminal legal system.

Cato submits this brief because the charge-specific rule avoids the problems presented by the

any-crime rule. It ensures the continued efficient functioning of our civil and criminal legal systems, and it does so in the manner most protective of individual liberty.

ARGUMENT

This brief illustrates three problems with the any-crime rule using the hypothetical cases of Innocent Defendant and Guilty Defendant:

Innocent Defendant is charged and prosecuted for first-degree murder based solely on a police officer's fabrication of evidence, a charge for which there is no probable cause. Innocent Defendant had nothing to do with the crime. At the time of his arrest, Innocent Defendant happens to be in possession of marijuana (it remains illegal in his state), and so he is also charged in the criminal case with that possession crime, for which there is probable cause.

Guilty Defendant is also charged and prosecuted for first-degree murder. Again, there is no probable cause for that charge, but in this case it is merely because state actors lack evidence that Guilty Defendant acted with the required premeditation. Nonetheless, Guilty Defendant in fact intended to commit serious bodily harm, knowing it could result in death, and so Guilty Defendant is charged with second-degree murder, for which there is probable cause.

In both criminal cases, the serious charges mean that the state judge denies bond, the defendants are seized for lengthy periods of time before trial, the plea deals offered by the state are for decades-long sentences, the cost of defense is high, the defendants

are held in dangerous, maximum-security jails, with limited visitation, and their reputations suffer because of the charges. Both defendants obtain a favorable termination of their criminal proceedings, within the meaning of *McDonough*, 139 S. Ct. at 2153, and both bring lawsuits under § 1983.

I. THE ANY-CRIME RULE BARS CLAIMS BROUGHT BY INNOCENT INDIVIDUALS WRONGLY ACCUSED OF CRIMES IN STATE COURTS, CONTRADICTING THIS COURT'S CASES AND SECTION 1983

The any-crime rule would bar both Innocent Defendant and Guilty Defendant from filing suit under § 1983 for injuries caused by the first-degree murder charge that was not supported by probable cause. For Guilty Defendant, the bar to suit is for good reason. But for Innocent Defendant, the bar exists merely because there was probable cause for a drug possession charge. Innocent Defendant would lack a federal remedy for the violation of his Fourth Amendment rights despite being detained and prosecuted based on fabricated evidence for a murder he did not commit.

That result cannot be reconciled with this Court's cases or Congress's enactment of § 1983. It contradicts cases holding that individuals improperly subjected to state criminal proceedings based on false evidence have a civil remedy under § 1983 once their convictions are vacated and criminal proceedings come to an end. *McDonough*, 139 S. Ct. at 2153 (limitations period for a § 1983 claim for fabrication of evidence used to pursue a

baseless criminal case runs from favorable termination of the criminal proceedings).[2] It undoes "[t]he principle that a State may not knowingly use false evidence . . . to obtain a tainted conviction," which is "implicit in any concept of ordered liberty[.]" *Napue*, 360 U.S. at 269.[3] And it ignores that Congress enacted § 1983 principally to combat state-court criminal proceedings in which state actors abuse federal constitutional rights. *Mitchum*, 407 U.S. at 240.[4]

This Court observed recently in a similar situation that a categorical bar to § 1983 claims that "hand[s] authority . . . to the state courts" relegates certain constitutional rights "'to the status of a poor

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[2] See also *Heck v. Humphrey*, 512 U.S. 477, 478-79, 483-86 (1994) (holding that a § 1983 claim challenging the validity of a criminal conviction should be brought after the conviction is invalidated); *Buckley v. Fitzsimmons*, 509 U.S. 259, 259-60 (1993) (holding that a prosecutor who fabricates evidence during a preliminary investigation is not entitled to absolute immunity from civil suit); *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986) (holding that an officer who secures legal process using evidence the officer knows does not establish probable cause may be liable under § 1983).

[3] See also *Miller v. Pate*, 386 U.S. 1, 7 (1967) ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."); *Pyle v. Kansas*, 317 U.S. 213, 215-216 (1942) (holding that state police officers' fabrication of testimony used to obtain a conviction is "a deprivation of rights guaranteed by the Federal Constitution").

[4] See also *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

relation' among the provisions of the Bill of Rights[,]" and it held that in such a situation a plaintiff must be "guaranteed a federal forum under § 1983[.]" *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2169-70 (2019) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)). That decision was correct, and the full force of its reasoning applies in this case. The any-crime rule would impose a categorical bar to meritorious § 1983 claims based solely on a state actor's decision to file additional criminal charges in a state court proceeding. Just as such a regime was impermissible in *Knick*, it is impermissible here as well.

This Court should not adopt a rule that bars meritorious civil rights claims categorically. The any-crime rule would prevent individuals, like Innocent Defendant, who have been injured by baseless state criminal prosecutions from obtaining federal relief under § 1983. If such a bar were implemented, it would need to have an extremely sound doctrinal basis. But the any-crime rule contradicts this Court's and Congress's longstanding efforts to ensure a federal forum for such claims.

II. BUT-FOR CAUSATION ALREADY FORECLOSES THE MERITLESS LAWSUITS THAT THE ANY-CRIME RULE HOPES TO AVOID, BUT WITHOUT BARRING MERITORIOUS CASES

While the any-crime rule may make sense for Fourth Amendment false arrest claims concerning seizures before legal process, where an officer needs only a single basis to effect a brief seizure, the rule

should not extend to the post-legal process, malicious prosecution context. The desire to apply the any-crime rule in the malicious prosecution context may be animated by a concern that individuals, like Guilty Defendant, will bring meritless civil rights suits asserting that one charge in the criminal case was not supported by probable cause, when the prosecution on other charges was well founded. While the any-crime rule bars such cases, it throws the baby out with the bathwater, eliminating meritorious cases as well. That approach does not make sense, particularly when there is a well-established mechanism that better addresses any concern about meritless lawsuits: but-for causation.

1. Section 1983 renders liable a state actor who "subjects, or causes to be subjected" an individual to a constitutional violation. 42 U.S.C. § 1983. That provision is "read against the background of tort liability," *Monroe v. Pape*, 365 U.S. 167, 187 (1961), which requires proof of but-for causation, *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020); see also *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009); *Carey v. Piphus*, 435 U.S. 247, 255 (1978).

The principle of but-for causation provides that "an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred." RESTATEMENT (THIRD) OF TORTS § 26 (2010); see also *id.* § 27. Or as this Court put it in *Comcast*, "a plaintiff must demonstrate that, but for the defendant's unlawful conduct, [the plaintiff's] alleged injury would not have occurred." 140 S. Ct. at 1014; see also T. SHEARMAN & A. REDFIELD, A

TREATISE ON THE LAW OF NEGLIGENCE § 10 (3d ed. 1869) (explaining at the time § 1983 was enacted, "[i]f the defendant's negligence concurred with some other event . . . to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened . . . the defendant is responsible, even though his negligent act was not the nearest cause in the order of time"). Applied in cases like this one, but-for causation requires proof that, but for the state actor's filing of the criminal charge for which there was no probable cause, the particular injuries asserted by the plaintiff would not have occurred.

Innocent Defendant can satisfy the but-for causation requirement. He can plead and prove that but for the filing of the fabricated first-degree murder charge, he would not have suffered specific injuries—*e.g.*, the denial of bond or high bond amount, the long seizure in a maximum-security jail, the inability to avoid prosecution through a plea deal, the increased cost of the criminal defense, or the reputational harms. These injuries would not have followed—likely at all but certainly not to the same degree—from the marijuana charge supported by probable cause that was filed against Innocent Defendant. So, the police officer's fabrication of evidence and filing of a baseless murder charge are the but-for cause of Innocent Defendant's injury. And that officer may be found liable because the injuries asserted are the foreseeable result of the fabrication of evidence of murder. See generally

Staub v. Proctor Hosp., 562 U.S. 411, 419-20 (2011).[5]

On the other hand, but-for causation means that Guilty Defendant's § 1983 claim will be dead on arrival. "[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). If we remove Guilty Defendant's first-degree murder charge unsupported by probable cause, the outcome for Guilty Defendant does not change a bit—he would have suffered precisely the same injuries as a result of the other charge against him that was supported by probable cause. The asserted constitutional violation at issue in Guilty Defendant's case is not the but-for cause of his injuries. As a result, Guilty Defendant cannot plead or prove a Fourth Amendment violation that caused him any injury.

Notably, the Sixth Circuit's cases imposing and defending the any-crime rule have assumed the outcome of the but-for causation analysis, rather than performing that analysis. *Howse v. Hodous* justified the any-crime rule by saying that "a person

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[5] Innocent Defendant's case is hypothetical, but there are many such real examples. Consider Anthony Jakes, a teenager in Chicago, who was charged with and wrongfully convicted of murder based upon evidence fabricated by police. Nat'l Registry of Exonerations, *Anthony Jakes*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5321 (last visited Feb. 7, 2024). He, like Innocent Defendant, was arrested in possession of drugs. Jakes would not have been charged with a felony at all or even subjected to the adult criminal system but for the murder charge.

is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge." 953 F.3d 402, 409 (6th Cir. 2020). That statement may be true in one case—like Guilty Defendant's—but not another—like Innocent Defendant's. The proper causation question to ask, as other courts have asked, is whether the person would have been seized at all or seized in the same manner but for the invalid charge. See, *e.g.*, *Williams v. Aguirre*, 965 F.3d 1147, 1161 (11th Cir. 2020) ("[T]he plaintiff must also show that, but for that illegitimate charge, he would have been released earlier or would not have faced detention.") (internal quotation marks and citations omitted).

The any-crime rule represents a crude attempt to prevent unmeritorious § 1983 claims by barring all such cases where there was probable cause for any charge in the criminal case. By contrast, the principle of but-for causation, which already applies in § 1983 cases, more accurately sorts the meritorious cases from those lacking merit. Where a putative plaintiff cannot demonstrate that a constitutionally infirm criminal charge was the but-for cause of alleged injuries suffered in the state criminal system, the civil claim will not move forward. Indeed, such a claim would rarely, if ever, be filed by competent attorneys in the first place. But where the plaintiff shows that a trumped-up charge caused injuries that otherwise would not have occurred, the suit will proceed. But-for causation thus addresses the concern that animates the any-crime rule, but it does so without barring meritorious civil rights cases.

2. Deploying but-for causation in these circumstances, instead of applying a categorical bar to civil suits, is also most consistent with the historical practice at common law, and the modern practice in state and federal courts.

Modern day malicious prosecution can be traced from early Anglo-Saxon and Norman legal mechanisms created to "deter[] prosecutors and claimants from bringing false cases against the innocent." Hon. Timothy Tymkovich & Hayley Stillwell, *Malicious Prosecution as Undue Process: A Fourteenth Amendment Theory of Malicious Prosecution*, 20 GEO. J.L. & PUB. POL'Y 225, 229 (2022). English courts later refined actions for malicious prosecution by limiting its application to situations where the plaintiff incurred damages. *Id.*; see also *Savile v. Roberts*, 91 Eng. Rep. 1147, 1149-50 (K.B. 1698). Its development continued in English courts, with Blackstone eventually articulating what would become essential elements of the tort: lack of probable cause and malice. WILLIAM BLACKSTONE, COMMENTARIES 48 (Henry W. Ballantine ed. 1915); see also William Alter, *Reasonable Seizure on False Charges: Should Probable Cause to Detain A Person for Any Crime Bar A Malicious Prosecution Claim Under the Fourth Amendment?*, 56 IND. L. REV. 391, 408 (2023).

The framework of the tort adopted by early American courts closely followed these traditions, with those courts focusing their analysis on probable cause and malice, while recognizing the suffering a plaintiff alleging the action necessarily endured. See *Munns v. De Nemours*, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811). These early American courts viewed the

lack of probable cause as the "*essential* ground of this action." *Stone v. Crocker*, 41 Mass. (24 Pick.) 81, 84 (1832); see also *Wheeler v. Nesbitt*, 65 U.S. (24 How.) 544, 550 (1860) (stating that the lack of probable cause is a "material element" of the tort). Juries were heavily involved in the determination of whether probable cause existed. See generally *Bulkeley v. Keteltas*, 6 N.Y. 384 (1852). At this time, there was no explicit discussion of but-for causation, as it was presumed by courts that a prosecution for a charge without probable cause was the but-for cause of injuries to reputation, to liberty, and to property. *E.g.*, *Stone*, 41 Mass. (24 Pick.) at 83. ("[F]or what greater private injury can any man suffer than to be arraigned for a felony or other crime, exposed to the danger of a conviction, and subjected to the expense, vexation and ignominy of a public trial; and what act can more deserve the severest animadversion of the law, than the prostitution of its process to the gratification of malice at the expense of innocence?").

Today, the requirement of but-for causation is a feature of malicious prosecution litigation in state courts. Take, for example, *Singleton v. Perry*, in which the Supreme Court of California applied but-for causation to analyze the plaintiff's malicious prosecution claim on two intertwined charges—both for theft. 45 Cal. 2d 489, 496-97 (1955). Removing the charge unsupported by probable cause would not have alleviated the injuries the plaintiff sustained because of the other, supported charge and so the unsupported charge was not the but-for cause of the plaintiff's injuries. *Id.* Still, the court reasoned, such a but-for cause could exist in different

circumstances: "[I]f a person were imprisoned on two charges, entirely dissimilar, a person might sustain damages by reason of being charged with some crime of horror as against a more conventional crime, even though lawfully incarcerated for the conventional crime." *Id.* at 497.

The same analysis applies in federal courts. To make out a § 1983 malicious prosecution claim, "[p]laintiffs must establish both but-for and proximate causation." *Shrewsbury v. Williams*, 439 F. Supp. 3d 765, 778 (W.D. Va. 2020); see also *Williams*, 965 F.3d at 1161 (explaining that plaintiff must show illegitimate charge was the but-for cause of his injuries for malicious prosecution claim); *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) ("[C]onstitutional torts, like their common law brethren, require a demonstration of both but-for and proximate causation"); *King v. Macri*, 800 F. Supp. 1157, 1163 (S.D.N.Y. 1992) (noting that the jury found that "but for [the defendant's] filing of charges, [the plaintiff] would not have been incarcerated and would not have suffered actual damages").

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Applying the principle of but-for causation instead of the any-crime rule more effectively addresses policy concerns, preserves meritorious civil cases, and reflects the historical and modern practice. This Court should adopt the charge-specific rule and allow the principle of but-for causation to do the rest of the work.

III. THE ANY-CRIME RULE CREATES A BAD INCENTIVE FOR STATE ACTORS TO OVERCHARGE CRIMES

Adopting the any-crime rule would also incentivize overcharging in state criminal cases and harm our criminal legal system as a result. Overcharging is a longstanding problem in our criminal legal system and works in two ways. First, a state actor may inflate an initial charge (vertical overcharging). For instance, a prosecutor might bring charges for a felony in the first- and second-degree for the same conduct. Second, a state actor may charge an accused person with distinct crimes resulting from the same conduct (horizontal overcharging).[6] For example, a prosecutor could bring charges for aggravated assault, battery, and disturbing the peace regarding the same conduct. See, *e.g.*, *Webster v. People*, 60 V.I. 666, 670-72 (2014) (among other charges, defendant charged with third-degree assault, aggravated assault and battery, and disturbing the peace for the same underlying conduct).

Given the litany of criminal offenses available in contemporary criminal codes, see generally DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3-17 (2008), prosecutors have little difficulty finding a basis to charge an individual with additional crimes, whether or not the added charges are supported by probable cause.

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[6] Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 93 (1968) (illustrating the basic themes of vertical and horizontal overcharging in their varying forms).

Overcharging has been expressly disapproved by courts,[7] professional bodies,[8] and scholars[9] for its coercive effect on the criminal legal process, in plea

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[7] See, *e.g.*, *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (observing that plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense"); *Scott v. United States*, 419 F.2d 264, 276 (D.C. Cir. 1969) (Bazelon, C.J.) ("A policy of deliberately overcharging defendants with no intention of prosecuting on all counts simply in order to have chips at the bargaining table would, for example, constitute improper harassment of the defendant.").

[8] STANDARDS RELATING TO THE PROSECUTION FUNCTION § 3-4.3 (AM. BAR. ASS'N 2017) (requiring prosecutors not to press charges that cannot be proven beyond a reasonable doubt); MODEL RULE OF PROF'L CONDUCT 3.8 (AM. BAR ASS'N) (requiring each charge to be supported by probable cause).

[9] Andrew M. Crespo, *The Hidden Law of Plea Bargaining*, 188 COLUM. L. REV. 1303, 1368 n.198 (2018) (describing the prosecutor's control over a defendant's sentencing exposure by manipulating charges against him as "the central and most criticized mechanism of prosecutorial power"); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001) (worrying that, if overcharging is taken to its limit, "we are likely to come ever closer to a world in which the law on the books makes everyone a felon").

bargaining,[10] and in sentencing.[11] Empirical research demonstrates that multiple criminal charges increase the odds of a guilty verdict by more than 10%, an effect that continues to increase with the number of charges added, and one that grows stronger the weaker the government's case.[12]

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[10] See Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal*, NBC NEWS (Aug. 8, 2019), https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201 (describing stacking charges as among the American prosecutor's "fearsome array of tools . . . to extract confessions and discourage people from exercising their right to a jury trial."); see also J.A. Haby & E.M. Brank, *The Role of Anchoring in Plea Bargains,* 44 MONITOR ON PSYCHOL. 30 (2013), available at https://www.apa.org/monitor/2013/04/jn ("Anchoring is the cognitive bias that occurs when an individual uses the first piece of available information (in this case, the initial charge) as a reference point that informs later judgments. If the initial charge is excessive, then the anchoring can skew a defendant's perception to believe that any charge less than the initial charge is more acceptable, even if it is still more serious than what might have been proven at trial. Psychological research on anchoring suggests that even implausible anchors will sway a defendant's decision.").

[11] See, *e.g.*, *Berthoff v. United State*s, 140 F. Supp. 2d 50, 61–67 (D. Mass. 2001) (discussing challenges facing judges in imposing a sentence following a guilty plea, due to the bargaining process).

[12] Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 368, 383-84 tbl.U (2006); James Farrin, Note, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 LAW & CONTEMP. PROBS. 325, 331 (1989)

Moreover, overcharging has cascading consequences for individuals charged with a crime. It can subject them to increased bail, longer or harsher post-legal process, pre-trial detention, greater costs of criminal defense, and increased penalties or sentencing later, if the individual is charged with a subsequent crime.[13]

Overcharging also has a disproportionate impact on people of color. For example, in a five-year assessment of the Baltimore Police Department, the Department of Justice found that Black individuals were disproportionately arrested and more likely to be charged with offenses that "lacked probable cause or otherwise did not merit prosecution."[14] And a national study on misdemeanor arrests showed that

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(citing empirical social psychology research to note that "the joinder effect [is] greater when the cases are weak"); see also Note, *Stacked: Where Criminal Charge Stacking Happens—And Where it Doesn't*, 136 HARV. L. REV. 1390, 1391-92 (2023) (analyzing federal and state charging data and concluding, "[r]egardless of jurisdiction, more charges correlate with higher rates of conviction").

[13] See, *e.g.*, *Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007) ("[A]s the list of charges lengthens (along with the sentence to which the accused is exposed), the cost and psychic toll of the prosecution on the accused increase."); see also Jacob P. Goldstein, Note, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643, 645 (2006) (quoting *Savile v. Roberts*, 91 Eng. Rep. 1147, 1149–50 (K.B. 1698) (Holt, C.J.)) (describing the various injuries underlying a malicious prosecution claim).

[14] U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (Aug. 10, 2016), available at https://www.justice.gov/crt/file/883371/download.

Black people were arrested for misdemeanors at the highest rate of any racial group.[15]

Adopting the any-crime rule for § 1983 malicious prosecution claims alongside a criminal legal system already rife with overcharging would further incentivize police and prosecutors to add criminal charges to shield themselves from the possibility of future civil litigation, while barring meritorious civil rights claims at the same time. The Court has recognized that its civil cases may set incentives and have consequences for the criminal legal system. *McDonough*, 139 S. Ct. at 2160-61. And police officers and prosecuting attorneys already have strong motivations to overcharge. Providing a separate incentive to add charges to a criminal case, with the hope that those additional charges will shield state actors from a later civil suit regarding allegations of misconduct or the invasion of constitutional rights, will create a criminal legal

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[15] Becca Cadoff, *et al.*, Misdemeanor Enforcement Trends Across Seven U.S. Jurisdictions, Data Collaborative for Justice at John Jay College (Oct. 2020), available at https://datacollaborativeforjustice.org/wp-content/uploads/2020/10/2020_20_10_Crosssite-Draft-Final.pdf.

Further, in a national study of the rates of case dismissal against felony arrestees by race during the period of 1990-1998, researchers found that Black defendants were 9 percent more likely to have their felony charges dismissed than white defendants, and even more so when the charges involved more officer discretion. See Aleksander Tomic, *et al.*, *Case Dismissed: Police Discretion and Racial Differences in Dismissals of Felony Charges*, 10 AM. L. & ECON. REV. 110, 127-129 (2008), https://www.jstor.org/stable/42705528?seq=1.

system with more unnecessary criminal charges, an increased burden on the criminal legal system to adjudicate those charges, additional coercion of criminal defendants who face a choice about whether to plead guilty or proceed to trial, and a corresponding unjustified intrusion upon the individual liberties of criminal defendants. Moreover, those effects would be disproportionally borne by communities of color that are already overrepresented in the criminal legal system.

In addition, adopting the any-crime rule and eliminating the need for charge-specific probable cause would leave state actors "free to tack a variety of baseless charges on to one valid charge with no risk of being held accountable for their excess." *Holmes v. Village of Hoffman Estates*, 511 F.3d 673, 683 (7th Cir. 2007). When there is nothing to ensure accountability, the door is left open for unchecked misconduct.[16] Given the already high frequency of overcharging, the adoption of the any-crime rule and increase in overcharging will harm our criminal legal system.

Malicious prosecution claims under § 1983 present a safeguard against such abuses of the criminal legal process. These claims are exceedingly hard to win, given the hurdles to success—including

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[16] *Cf.* Jay Schweikert, *The Killing of Tyre Nichols Reaffirms the Urgent Need for Police Accountability*, Cato at Liberty Blog (Feb. 2, 2023), https://www.cato.org/blog/killing-tyre-nichols-reaffirms-urgent-need-police-accountability ("If police officers are told . . . that they can't be held liable for rights violations at all, that hardly gives them the correct incentives to ensure they respect people's constitutional rights.").

the requirements of favorable termination, a showing of the absence of probable cause for a charge, proof that the unsupported charge was the but-for cause of injuries, and the qualified immunity that state actors enjoy. Yet this constitutional tort still provides an avenue for relief for meritorious claims, and the application of the charge-specific rule works to *dis*incentivize overcharging, requiring state actors to ensure that there is probable cause for each charge that is filed. This Court should adopt the charge-specific approach to provide a remedy for misconduct and to eliminate perverse incentives to overcharge in the state criminal legal system.

CONCLUSION

The any-crime rule is contrary to this Court's and Congress's efforts to ensure a § 1983 remedy to innocent individuals wrongly prosecuted for state crimes. It would set up a categorical bar to meritorious and unmeritorious malicious prosecution suits alike, even though but-for causation principles that have long applied in § 1983 cases effectively sort between meritorious and unmeritorious suits already. And it sets bad incentives for state actors to overcharge crimes in a system already burdened by overcharging. For all of those reasons, this Court should reject the any-crime rule, adopt Petitioners' charge-specific rule, and reverse the judgment of the court of appeals.

Respectfully submitted,

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