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 PETITIONER

AMIR H. ALI
Counsel of Record
DEVI M. RAO
DAMILOLA G. AROWOLAJU
ELISE M. BARANOUSKI
PERRY R. CAO
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
amir.ali@macarthurjustice.org
Counsel for Petitioner

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner Larry Thompson is the plaintiff. Respondent Pagiel Clark is the defendant for the question granted by and now under review in this Court. The three other respondents listed in the certiorari petition are not defendants for the question under review.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

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INTRODUCTION

A person who is unreasonably seized pursuant to legal process in violation of the Fourth Amendment must wait until "the underlying criminal proceedings have resolved in [his] favor" before bringing a civil action under Section 1983. *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019) (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)). This prerequisite of favorable termination derives from the common law, and it is "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation" and avoiding "collateral attacks on criminal judgments through civil litigation." *Id.* at 2157. Thus, this Court has held, a person brought to trial on fabricated charges may bring a Section 1983 claim challenging the validity of the prosecution upon acquittal. *Id.* at 2157-58. If instead he is convicted of the unfounded charges, he must then wait until the criminal judgment is invalidated on direct

appeal, habeas, or otherwise before bringing his Section 1983 claim. *Heck*, 512 U.S. at 486-87.

The question here is whether a criminal proceeding has terminated in the accused's favor when he succeeds in getting the charges against him dismissed before trial and without any conviction. The answer is yes. When charges are dismissed, a civil suit is neither parallel to any criminal proceeding nor a collateral attack on any criminal judgment. Indeed, for the person answering to fabricated charges, outright dismissal of those charges is the *most* favorable termination one can hope for—certainly preferable to facing a criminal trial and getting acquitted, or to being wrongfully convicted and having to invalidate the judgment. A criminal proceeding ends in the accused's favor when the charges are dismissed and the prosecution failed to obtain a conviction or admission of guilt.

This is not only common sense; it is the common law. This Court read the favorable-termination rule into Section 1983 not as some freewheeling policy, but because that rule developed "[o]ver the centuries" at common law as a well-settled prerequisite for civil actions challenging the validity of earlier prosecutions. *Heck*, 512 U.S. at 483. As Chief Judge Pryor recently explained after conducting an extensive survey of English and early American common law, all jurisdictions except one agreed that the favorable-termination prerequisite was satisfied "when a court formally dismissed the prosecution and discharged the plaintiff." *Laskar v. Hurd*, 972 F.3d 1278, 1289 (11th Cir. 2020). Consistent with this Court's understanding, the common-law rule existed "to prevent plaintiffs from attacking criminal proceedings that either were

ongoing or had vindicated the defendant's accusations." *Id*. at 1286. And accordingly, "the only final terminations that would bar a plaintiff's suit were those that were inconsistent with a plaintiff's innocence—that is, if a jury convicted the plaintiff or if the plaintiff compromised with his accuser to end the prosecution in a way that conceded his guilt." *Id*. at 1289.

The court below disagreed, concluding that a criminal proceeding does not terminate in the accused's favor upon the dismissal of all charges unless the dismissal is accompanied by some sort of "affirmative indication that the person is innocent of the offense charged." JA21 (quoting *Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018)). This additional constraint comes not from an examination of the common law, but from an unsubstantiated comment in a Restatement. *See Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980); Restatement (Second) of Torts § 660, cmt. a (stating without citation that "[p]roceedings are 'terminated in favor of the accused,' * * * only when their final disposition is such as to indicate the innocence of the accused"). Whatever the authors of the Restatement meant to convey by their comment, it does not remotely represent the well-settled common-law consensus required to read it into Section 1983. *See Cordova v. City of Albuquerque*, 816 F.3d 645, 664 n.* (10th Cir. 2016) (Gorsuch, J., concurring) (concluding "after a brief and lonely look" that the Restatement's "'indicative of innocence' gloss" is "not a firm and settled requirement in anything like all common law jurisdictions"). In fact, of all jurisdictions when Section 1983 was enacted, "[o]nly the Supreme Court of Rhode Island held that the favorable-termination requirement turned on evidence

of a plaintiff's innocence." *Laskar*, 972 F.3d at 1287. "The clear majority of American courts did not limit favorable terminations to those that suggested the accused's innocence." *Id.*

On top of being incorrect, a standard that turns on whether a criminal prosecution has produced "affirmative indications of innocence" is incoherent, perverse, and inadministrable. That standard misunderstands the purpose and design of the criminal legal system, and leaves courts with little guidance about what it means to "indicate" innocence or where to look for those "indications." As a result, the standard has functioned as a series of arbitrary lines and ad-hoc exceptions. The Court should reject the indications-of-innocence standard and adhere to the clear rule in its prior cases and at the time Section 1983 was enacted.

OPINIONS BELOW

The Second Circuit's unpublished order (JA18-22) is available at 794 F. App'x 140. The district court's oral ruling at trial (JA122-27) is unpublished and its post-trial opinion (JA147-88) is published at 364 F. Supp. 3d 178.

JURISDICTION

The Second Circuit entered its opinion on February 24, 2020 and denied a timely petition for rehearing on June 9, 2020. Petitioner filed a timely petition on November 6, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides: "The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * ." U.S. Const. amend. IV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

42 U.S.C. § 1983.

STATEMENT

A. Factual Background[1]

Petitioner Larry Thompson is a Navy veteran and 25-year employee of the U.S. Postal Service who lives in Brooklyn with his wife, Talleta Watson. C.A. App. 168-69.[2] During the relevant time period, Talleta's sister, Camille Watson, who has cognitive delays, was living with the couple. C.A. App. 79.

On January 15, 2014, petitioner and Talleta were the proud parents of a one-week-old daughter, Nala. C.A. App. 169-70. Early that day, the couple took Nala to her one-week check-up, where she received a clean bill of health. *Id.* Around 10:00 p.m., the family was at home, and petitioner and Talleta were getting ready for bed. C.A. App. 171. They were dressed in their underwear. *Id.* Unbeknownst to them, Camille dialed 911, telling the operator that she heard Nala cry when petitioner changed Nala's diaper and saw "red rashes" on Nala's buttocks area (commonly known as, and later confirmed to be, diaper rash). C.A. App. 138, 144. Mistaking these for signs of abuse, Camille provided a description of petitioner and his address. *Id.*

In response, two Emergency Medical Technicians ("EMTs") arrived at petitioner's apartment building. The EMTs met Camille outside and she brought them into petitioner's apartment unit. C.A. App. 135-36.

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[1] This case arises on review of judgment as a matter of law for respondent and therefore the Court "must draw all reasonable inferences in favor of" petitioner. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).

[2] "C.A. App. __" refers to the joint appendix in the court of appeals, No. 19-580 (CA2), ECF No. 34.

There, the EMTs saw Talleta sitting on the couch holding Nala safely. *Id*. When petitioner entered the room, he asked the EMTs what was going on and they responded that someone had called 911 reporting possible child abuse. C.A. App. 171-72. Unaware of Camille's 911 call, petitioner informed the EMTs that no one in his home had called 911. *Id*. He said, "I'm sorry, you got the wrong apartment" and tried to help the EMTs brainstorm the other units with kids. *Id*. The EMTs told petitioner he was right, they must have the wrong unit, and they left his apartment. C.A. App. 172, 196.

Shortly thereafter, four NYPD officers, including respondent, arrived at petitioner's building and spoke with the EMTs who had just been inside petitioner's home. C.A. App. 140. The EMTs reported that they saw petitioner's daughter, but did not examine her. *Id*.

The officers went upstairs to petitioner's unit and petitioner answered the door. C.A. App. 173. They demanded that petitioner let them into his home, telling him that they received an anonymous call. *Id*. Petitioner never raised his voice or did anything that could be interpreted as aggressive or threatening. C.A. App. 174. He explained that he had just spoken with the EMTs and told them they had the wrong apartment. C.A. App. 173. When the officers insisted on entering petitioner's home, petitioner asked if he could speak with their supervising officer. C.A. App. 174. When the officers refused, petitioner told them they would need to get a warrant to enter his home. C.A. App. 173. The officers attempted to push through petitioner, then tackled him to the floor and pinned him facedown, with their bodyweight on his head and

back. C.A. App. 32, 151, 175, 199. Petitioner never resisted the officers. C.A. App. 175-76, 199.

The EMTs entered petitioner's apartment again, examined Nala, and saw what they understood to be diaper rash, with no signs of abuse. C.A. App. 43, 138. The EMTs believed they were nonetheless required to take Nala to the hospital for evaluation, where medical professionals again confirmed there were no signs of abuse. C.A. App. 43.

After the event, respondent sought to justify the force used and injuries caused to petitioner by falsely reporting that petitioner had violently resisted, slapping an officer, flailing his arms, and engaging in a physical struggle. C.A. App. 163; Pl.'s Tr. Ex. 1, 2. Respondent personally signed a criminal complaint that was produced on the basis of his false account, which was promptly filed to initiate criminal charges against petitioner for resisting arrest and obstructing governmental administration. C.A. App. 153; Pl.'s Tr. Ex. 1. Petitioner was detained for roughly two days. C.A. App. 178-81 (describing petitioner's detention in various jail cells and shackling in a hospital bed during treatment for his injuries).

In the criminal proceedings that followed, petitioner consistently denied the charges against him. He refused any plea or other compromise offered by the prosecution. For example, two months after the charges were filed, the prosecution encouraged him to stipulate to an "adjournment in contemplation of dismissal" under New York law, which would have led to all records of the prosecution being sealed without any punishment. C.A. App. 181; *see* N.Y. Crim. Proc. L. § 170.55. As the prosecutor urged petitioner, all he had to do was "stay out of trouble and everything will

go away." C.A. App. 181. Petitioner declined the offer, insisting the charges against him were unfounded and that he would "see this to the end." C.A. App. 181-82.

When petitioner's counsel orally moved to dismiss the charges for facial insufficiency, the trial court suggested that counsel submit the motion in writing. JA101. The day before petitioner's motion was due, the prosecution told petitioner's counsel it would dismiss the charges. JA101, 114; ECF No. 57-1 at 3. One week later, the court called petitioner's case and the prosecution stated: "People are dismissing the case in the interest of justice." JA158. The court granted the motion, stating: "The matter is dismissed." *Id.*; *see also* Pl.'s Tr. Ex. 5 (recognizing that the charges were dismissed on motion of the district attorney).

B. Procedural Posture

After obtaining dismissal of the charges, petitioner filed this action under 42 U.S.C. § 1983 alleging that respondent violated the Fourth Amendment by unreasonably seizing him pursuant to legal process (sometimes described as a "malicious prosecution" claim, referring to the most analogous common-law tort). This claim against respondent survived summary judgment and proceeded to trial.[3]

At trial, respondent argued that petitioner had not shown that the criminal proceedings terminated in his favor, as required to bring his claim. Relying on Second Circuit precedent, respondent urged that the dismissal of charges is not a favorable termination unless it "affirmatively indicated that the plaintiff was innocent of the crimes charged." C.A. App. 24, 129-30

[3] Petitioner also asserted other claims that are no longer at issue.

(quoting *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018)). According to respondent, the Second Circuit's rule means that a person who wants to bring a civil action under Section 1983 should oppose dismissal of unfounded criminal charges and insist on a criminal trial. C.A. App. 24 (acknowledging that under this rule, a criminal defendant should say, "your Honor, we want to bring a civil suit * * * so don't dismiss it").

The district court agreed, explaining that under Second Circuit precedent criminal proceedings terminate "in favor of the accused only when their final disposition [is] such as to indicate the accused is not guilty." JA125 (quoting *Lanning*, 908 F.3d at 26). In the district court's view, that rule was "wrong" and led to "insane" results. JA126-27.

The court held an evidentiary hearing to determine whether the dismissal in this case sufficiently "indicated" petitioner's innocence. At the hearing, petitioner's public defender testified concerning her recollection of the criminal proceedings, her notes from conversations with the prosecution, and her assessment of whether petitioner committed a crime. JA97-119. In a post-trial opinion, the court noted uncertainty as to "how much evidence must be supplied by a plaintiff to show that the dismissal was essentially for innocence" under the Second Circuit's rule. JA187. The court nonetheless conducted its own assessment of what could be gleaned about petitioner's innocence from the circumstances, concluding that although "evidence was presented suggesting plaintiff's innocence," petitioner failed to show the charges were "dismissed in a manner affirmatively indicative of his innocence." JA185-86.

Petitioner appealed. The Second Circuit held that it was "bound by *Lanning* to enter judgment in favor of" respondent. JA21-22. The panel thus issued a summary order reiterating that a plaintiff asserting a Section 1983 claim for unreasonable seizure pursuant to legal process must show "'affirmative indications of innocence to establish favorable termination.'" JA20 (quoting *Lanning*, 908 F.3d at 25). Because "neither the prosecution nor the court provided any specific reasons about the dismissal on the record" and petitioner failed to "point to any affirmative indication of innocence" elsewhere in the record, he could not satisfy this standard. JA21. The panel added that it would remain bound by the indications-of-innocence standard "until such time as [it is] overruled either by an en banc panel of our Court or by the Supreme Court." *Id.*[4]

The Second Circuit denied rehearing *en banc*, JA23-24, and this Court granted certiorari.

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[4] Respondent did not contest that petitioner was seized for the purposes of this claim in either of the courts below. However, in addition to challenging whether petitioner satisfied the favorable-termination rule, respondent argued that petitioner's claim failed because there was probable cause and, on appeal, asserted the defense of qualified immunity. The issues of probable cause and qualified immunity (including whether the defense was preserved) were not reached by the Second Circuit and remain unresolved in the lower courts.

SUMMARY OF ARGUMENT

The Second Circuit's conclusion that the favorable-termination rule requires petitioner to show "affirmative indications of innocence" in his criminal proceeding is incorrect. The dismissal of all charges terminates a criminal proceeding in the accused's favor and thereby satisfies this prerequisite to filing a Section 1983 claim. The Court should reverse and remand for consideration of the merits of petitioner's claim.

I. To succeed in reading an "affirmative indications of innocence" standard into Section 1983's favorable-termination rule, respondent must show that it was a "well settled" common-law principle "at the time of [Section 1983's] enactment." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). Respondent cannot come close.

I.A. This Court has consistently recognized that the favorable-termination rule "is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation" and with avoiding "collateral attacks on criminal judgments through civil litigation." *McDonough v. Smith*, 139 S. Ct. 2149, 2157 (2019) (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)). When a plaintiff waits until charges are dismissed before bringing his Section 1983 claim, his civil action is neither parallel litigation nor a collateral attack.

The Court has never understood the favorable-termination rule to depend on "indications of innocence." And requiring such indications conflicts with every example of favorable termination that this Court has recognized to date—none of which "indicate" the accused's innocence.

I.B. Common-law courts in 1871 understood the favorable-termination rule the same. Far from a well-settled consensus in favor of respondent, "[t]he clear majority of American courts did not limit favorable terminations to those that suggested the accused's innocence." *Laskar v. Hurd*, 972 F.3d 1278, 1287 (11th Cir. 2020). "[O]utside of Rhode Island, the only final terminations that would bar a plaintiff's suit were those that were inconsistent with a plaintiff's innocence—that is, if a jury convicted the plaintiff or if the plaintiff compromised with his accuser to end the prosecution in a way that conceded his guilt." *Id.* at 1289.

Absent a conviction or concession of guilt, the dispositive inquiry in 1871 was whether the earlier proceeding was "at an end." Common-law courts thus routinely held that the dismissal of charges terminates a criminal proceeding in the accused's favor.

II. The Second Circuit's and respondent's answer is that this Court's prior favorable-termination precedent is irrelevant because it concerns only the question of when a cause of action arises under Section 1983. They contend that the Fourth Amendment imposes its own, distinct favorable-termination element and *that* element demands these "affirmative indications of innocence." BIO 18-19; *Lanning*, 908 F.3d at 28. This is unconvincing.

This Court has never said the Fourth Amendment has an element of indicating innocence. The relevant inquiry is whether a person was subject to "unreasonable * * * seizure," U.S. Const. amend. IV—namely, whether a person was seized without probable cause. Everyone agrees petitioner's claim requires him to

prove the absence of probable cause, an issue that remains unresolved in this case and is not before this Court.

The Second Circuit's and respondent's position is also nonsensical: Even assuming petitioner's claim called for some dual inquiry into favorable termination—once to determine whether his Section 1983 claim has accrued and once to evaluate this purported element of the Fourth Amendment—why would the definition of favorable termination change from one look to the next? Respondent has never explained.

III. The indications-of-innocence standard is illogical, perverse, and difficult to apply.

III.A. Looking for "affirmative indications of innocence" in a criminal prosecution makes no sense. The criminal process is designed to adjudicate whether the prosecution has proffered *evidence of guilt* beyond a reasonable doubt, not whether the accused has proffered evidence of his innocence. Indeed, even if a person subject to prosecution was intent on proving his innocence, the criminal process generally does not provide a mechanism to do it. When the prosecution dismisses or abandons charges, for example, the accused often has not had an opportunity to make submissions regarding his innocence.

III.B. The indications-of-innocence standard perverts the criminal legal system in several ways. First, it puts a victim of fabricated charges in the untenable position of having to *object to* dismissal of the unfounded charges or else forgo his Section 1983 claim. Second, it inverts the usual expectation of which criminal cases are brought to trial. Ordinarily, we expect cases with more evidence of guilt to go to trial, and

cases with the least foundation to be dismissed as early as possible. Yet, while purporting to be about innocence, respondent's rule allows the person who is tried—and even convicted—to accrue a cause of action and forecloses it for the person whose charges are dismissed. Third, the indications-of-innocence standard attaches perverse consequences to prosecutorial discretion, causing the decision not to proceed further with a prosecution to insulate other government actors from accountability for their misconduct.

III.C. The indications-of-innocence standard is difficult for courts to apply. The notion of an "indication" of innocence is not an established legal threshold and thus gives courts little guidance about what they are looking for or how to evaluate it. The inquiry has required lower courts to hold civil minitrials, in which criminal defense attorneys and/or prosecutors testify about the circumstances surrounding dismissal at issue (as occurred here). In practice, the indications-of-innocence inquiry has functioned not as an administrable rule, but as a series of arbitrary lines and ad-hoc exceptions.

ARGUMENT

I. The Dismissal Of Charges Terminates A Criminal Proceeding In The Accused's Favor.

The dismissal of all charges terminates a criminal proceeding in the accused's favor, a prerequisite to filing a Section 1983 claim that "challenge[s] the integrity of criminal prosecutions undertaken 'pursuant to legal process.'" *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019); *see also Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (recognizing this claim under the Fourth Amendment). The Second Circuit held otherwise, concluding that the favorable-termination rule requires a plaintiff to point to "an affirmative indication that [he] is innocent of the offense charged." JA21 (quoting *Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018)). That was wrong.

To incorporate an indications-of-innocence standard into Section 1983's favorable-termination rule, respondent must show that the inquiry was a "well settled" common-law principle "at the time of [Section 1983's] enactment." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *see also Manuel*, 137 S. Ct. at 920 (recognizing that Section 1983's prerequisite of favorable termination was "adopt[ed] wholesale" from the common law). Respondent cannot. The indications-of-innocence standard conflicts with this Court's understanding of the favorable-termination rule, and with the way the rule was understood by the vast majority of courts in 1871, the year Section 1983 was enacted.

A. This Court Has Consistently Understood The Favorable-Termination Rule To Be About Consistency And Finality, Not "Indications Of Innocence."

This Court's precedents make clear that the dismissal of all charges terminates a criminal proceeding in favor of the accused. Whether the criminal proceeding happened to produce "affirmative indications" of the accused's innocence —whatever that means—is irrelevant and conflicts with the Court's understanding of the favorable-termination rule.

1. This Court recognized the rule that certain Section 1983 claims await "termination of the prior criminal proceeding in favor of the accused" in *Heck*. 512 U.S. at 485. There, the plaintiff was convicted and then brought a Section 1983 action alleging that his conviction and associated confinement were unconstitutional. *Id.* at 478-80. The difficulty, the Court explained, was that success on the plaintiff's Section 1983 claim "would necessarily imply the invalidity of his conviction or sentence." *Id*. at 487.

The Court appreciated that it was not the first to confront this dilemma: "[O]ver the centuries," the common law developed a set of rules and "prerequisites" to recovery in tort actions. *Id*. at 483. In particular, similar to the claim in *Heck*, common-law courts confronted civil actions that challenged the integrity of an earlier legal proceeding when adjudicating the tort of malicious prosecution. *Id*. at 484. They resolved the potential for conflict by requiring the civil plaintiff to show "termination of the prior criminal proceeding in [his] favor." *Id*. This prerequisite "avoid[ed] parallel litigation over the issues of probable cause and guilt"

and the possibility of "two conflicting resolutions arising out of the same or identical transaction." *Id.* (citation omitted). Moreover, requiring that the proceeding terminate in the accused's favor prevented "a collateral attack on the conviction through the vehicle of a civil suit." *Id.*

The Court held that this "hoary principle" and its underlying "concerns for finality and consistency" carried over into Section 1983, thereby requiring a plaintiff whose claim challenges the validity of a criminal proceeding to first show that "the criminal proceedings have terminated in [his] favor." *Id.* at 485, 486, 489. Applying that principle to the still-convicted plaintiff in *Heck*, the Court explained that a cause of action would "not accrue until the conviction or sentence has been invalidated." *Id.* at 489-90. Specifically, the plaintiff had to wait until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 487; *see also id.* at 489.[5]

The Court revisited Section 1983's favorable-termination rule in *McDonough*. There, the plaintiff was tried and acquitted of the charges against him, and subsequently brought a Section 1983 action alleging that his pretrial deprivations of liberty resulted from the defendant's fabrication of evidence. 139 S. Ct. at

[5] Because the plaintiff in *Heck* was subject to a still-valid conviction, the Court's decision was also driven by the need to resolve "the intersection of" Section 1983 and the federal habeas statute. 512 U.S. at 480-81. No such "intersection" exists where charges have been dismissed and the federal habeas statute has no application.

2154. The Court held that the favorable-termination requirement applied to the plaintiff's claim because, as in *Heck*, it "challenge[d] the integrity of criminal prosecutions undertaken 'pursuant to legal process.'" *Id.* at 2156 (quoting *Heck*, 512 U.S. at 484); *see also id.* at 2157-58.

The Court reiterated that the common-law rule to await favorable termination was "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter" and preventing "collateral attacks on criminal judgments." *Id.* at 2156-57 (citing *Heck*, 512 U.S. at 484-85). Because *Heck*'s concern for parallel litigation and conflicting judgments "extends to an ongoing prosecution as well," the plaintiff in *McDonough* could not bring his claim before obtaining "favorable termination of his prosecution." *Id.* at 2156, 2160. Thus, the plaintiff's claim accrued "when he was acquitted," which was "unquestionably a favorable termination." *Id.* at 2160-61 & n.10.[6]

2. When a plaintiff awaits dismissal of the charges against him before bringing his Section 1983 action,

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[6] The plaintiff in *McDonough* declined to "ground his fabricated-evidence claim in a particular constitutional provision," causing the majority to "assume[] without deciding" that the claim arose under the Due Process Clause. 139 S. Ct. at 2155. The dissent took issue with the petitioner's reluctance "to specify which constitutional right the respondent allegedly violated" and would have dismissed the case as improvidently granted. *Id.* at 2161 (Thomas, J., dissenting). Here, it is undisputed that petitioner's claim of unreasonable seizure pursuant to legal process arises under the Fourth Amendment. *See Manuel*, 137 S. Ct. at 914 (recognizing this claim).

the civil suit does not implicate either of the "pragmatic concerns" underlying the favorable-termination requirement. *Id.* at 2157 (quoting *Heck*, 512 U.S. at 484). When charges have been dismissed, the civil action does not entail "parallel criminal and civil litigation," and there would be nothing "conflicting" about the dismissal of criminal charges and a judgment that the prosecution lacked probable cause in the first place. *Id.* Nor is there any concern for "collateral attacks on criminal judgments through civil litigation," *id.*, because when charges are dismissed there *is* no judgment to be attacked. The dismissal of charges accordingly terminates the criminal proceeding in the accused's favor.

It would be quite backward to hold otherwise. If a criminal proceeding terminates in favor of the accused when he is put through trial but not found guilty beyond a reasonable doubt (*McDonough*), and even if he is *convicted* of the crime and later forced to invalidate the judgment (*Heck*), then surely it has terminated in favor of the accused when he succeeds in getting the charges dismissed outright before any trial or criminal conviction.

3. Interpreting the favorable-termination rule to ask whether there are sufficient "indications of innocence" conflicts with the Court's precedent. The Court has never understood the rule to screen for "innocence"; as set forth above, the Court has consistently understood it as a rule that protects "finality and consistency." *McDonough*, 139 S. Ct. at 2157; *Heck*, 512 U.S. at 485. Moreover, none of the favorable terminations recognized in those cases "indicate" innocence:

In *Heck*, the Court held that a convicted plaintiff achieves favorable termination when his conviction is

"invalidated," which requires showing that it was "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486-87. *Not one* of these terminations affirmatively indicates the plaintiff's innocence. To the contrary, "[a]ny of these outcomes can occur" irrespective of innocence. *Savory v. Cannon*, 947 F.3d 409, 429 (7th Cir. 2020) (en banc) (observing that the indications-of-innocence standard "finds no support in *Heck*" and, to the contrary, this Court "offered a list of possible resolutions that would satisfy the favorable termination requirement, and none require an affirmative finding of innocence"). It is thus difficult to see why being convicted and having that conviction overturned or "called into question" on appeal, habeas, or an executive pardon would be a favorable termination, but succeeding outright by dismissal without ever being convicted would not.

McDonough makes clear that an acquittal is also a favorable termination. 139 S. Ct. at 2160-61 & n.10. Like the invalidation of a conviction in *Heck*, an acquittal does not "affirmatively indicate" that the accused was innocent. It establishes at most that the defendant was not guilty beyond a reasonable doubt. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) ("[A]n acquittal on criminal charges merely proves the existence of a reasonable doubt as to his guilt."); *Savory*, 947 F.3d at 429 ("*McDonough* added that acquittal is a favorable termination under *Heck* * * *, another resolution that does not necessarily imply innocence.").

The notion that a criminal proceeding terminates in favor of the accused only if it "affirmatively indicates" his innocence misunderstands and contravenes this Court's caselaw.

B. In 1871, Favorable Termination Was Understood To Require An End To The Prosecution, Not "Indications Of Innocence."

This Court's understanding of the common-law favorable-termination requirement is correct. Both English and American common-law courts understood the rule to be about finality and consistency—*i.e.*, "to prevent plaintiffs from attacking criminal proceedings that either were ongoing or had vindicated the defendant's accusations." *Laskar v. Hurd*, 972 F.3d 1278, 1286 (11th Cir. 2020). Thus, absent a conviction by jury or admission of guilt, the inquiry was whether the criminal proceeding was "at an end." *E.g.*, *Fisher v. Bristow*, (1779) 99 Eng. Rep. 140, 140, 1 Dougl. 215, 215; *Chapman v. Woods*, 6 Blackf. 504, 505-06 (Ind. 1843); *Clark v. Cleveland*, 6 Hill 344, 346-47 (N.Y. 1844); *Long v. Rogers*, 17 Ala. 540, 546 (1850); *Brown v. Randall*, 36 Conn. at 56, 62 (1869); *Stanton v. Hart*, 27 Mich. 539, 540 (1873).

Consequently, there was no "well settled" principle of requiring "affirmative indications of innocence" that could justify reading such a requirement into Section 1983. *Nieves*, 139 S. Ct. at 1726. Far from it: only one state adopted that view and "[t]he clear majority of American courts *did not* limit favorable terminations to those that suggested the accused's innocence." *Laskar*, 972 F.3d at 1287 (emphasis added).

1. English common-law courts adopted the favorable-termination requirement as part of the tort of malicious prosecution, a cause of action that challenged the foundation of an earlier prosecution. The tort of malicious prosecution was successor to the English writ of conspiracy, which had provided a strict remedy against people who acted in concert to obtain a false indictment. James Wallace Bryan, *The Development of the English Law of Conspiracy* 25-27 (1909). One of the writ's strict constraints was that "[n]othing else than a technical acquittal by verdict would support the action." *Id*. at 23; *see also* Edward Coke, *The Third Part of the Institutes of the Laws of England* 143 (6th ed. 1680) (recognizing the writ of conspiracy's requirement that "the party is lawfully acquitted"); *Glaseour v. Hurlestone*, (1587) 75 Eng. Rep. 988, 988, Gouldsb. 51, 51 ("[B]efore a man be acquitted, a writ of conspiracy doth not lye for him by the law.").

From the 15th to the early 18th century, English courts recognized ways in which "[t]his ancient remedy fell short" and gradually eliminated barriers that had placed "wrongful acts beyond the purview of the writ of conspiracy," giving rise to the distinct common-law action of malicious prosecution. Bryan, *supra*, at 26-27. Among the "intolerable" defects of the writ of conspiracy was its failure to appreciate that "[f]alse accusations might fail in other ways than by the acquittal of the accused." *Id.* at 27. In particular, limiting relief to acquittals arbitrarily insulated wrongful acts where charges were dismissed and "there is no possibility that there can be an acquittal." *Jones v. Gwynn*, (1713) 88 Eng. Rep. 699, 701, 10 Mod. 214, 219.

Courts thus abandoned the requirement of an acquittal when they developed the new tort of malicious prosecution. Bryan, *supra*, at 27-28; *see also* 3 William Blackstone, *Commentaries* *127 (recognizing that "an action for a malicious prosecution may be founded on such an indictment whereon no acquittal can be"); *Chambers v. Robinson*, (1725) 93 Eng. Rep. 787, 787, 2 Strange 691, 691-92. They replaced it with a rule that barred only the plaintiff who "might recover in the action, and yet be afterwards convicted on the original prosecution," or who had already been convicted. *Fisher*, 99 Eng. Rep. at 140, 1 Dougl. at 215; *Morgan v. Hughes*, (1788) 100 Eng. Rep. 123, 126, 2 T. R. 225, 231-32 (Buller, J.); *Basebe v. Matthews*, 16 L. T. Rep. 417, 418 (1867); *see also* Bryan, *supra*, at 33-34; Martin L. Newell, *Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 331 (1892). That is, English common-law courts understood the favorable-termination requirement the same as this Court in *Heck* and *McDonough*: to protect against parallel proceedings and conflicting judgments. *See supra* Part I.A.

Absent a judgment or admission of guilt that vindicated the prosecution, English common-law courts required "the original suit, wherever instituted, to be at an end." *Fisher*, 99 Eng. Rep. at 140, 1 Dougl. at 215; *Pierce v. Street*, (1832) 110 Eng. Rep. 142, 143, 3 B. & Ad. 397, 399; *Morgan*, 100 Eng. Rep. at 126, 2 T. R. at 231-32 (Buller, J.). This requirement could be satisfied by the range of ways in which proceedings terminated prior to conviction, including by dismissal or abandonment of the original proceeding by the accuser, *e.g.*, *Arundell v. White*, (1811) 104 Eng. Rep. 583, 584-85, 14 East 215, 218-20; *Nicholson v. Coghill*,

(1825) 107 Eng. Rep. 967, 967, 4 Barn. & Cress. 21, 23-24; *Watkins v. Lee*, (1839) 151 Eng. Rep. 115, 115, 5 Mees. & Wels. 270, 270, by dismissal for want of prosecution, *e.g.*, *Pierce*, 110 Eng. Rep. at 143, by a no-bill returned by the grand jury, *e.g.*, *Jones*, 88 Eng. Rep. at 701, 10 Mod. at 219, by dismissal of a faulty indictment, *e.g.*, *Chambers*, 93 Eng. Rep. at 787, 2 Strange at 691; *see also* Blackstone, *supra*, at *127 (listing examples), or by dismissal in a court that lacked jurisdiction over the charges, *e.g.*, *Goslin v. Wilcock*, (1766) 95 Eng. Rep. 824, 827, 2 Wils. 302, 308.[7] This was so even though such terminations did not "affirmatively indicate" the accused's innocence of the dismissed or abandoned charges.

2. American courts adhered to the same understanding of what it means for criminal proceedings to terminate in favor of the accused, rather than in favor of the prosecution. Like their English counterparts, American courts up to and beyond 1871 understood the favorable-termination rule to be grounded in a desire to avoid parallel litigation and inconsistent judgments, as well as collateral attack on a prior judgment. *See also* Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* §§ 246, 250 (1889) (recognizing that the rule's purpose was "to prohibit parties from litigating the same thing at the same time through two separate proceedings" and to estop the plaintiff "[i]f the proceeding against him was successful"); Newell, *supra*, at 331; *see also*, *e.g.*, *Page v. Cushing*,

[7] When the relevant proceedings against the plaintiff were *ex parte* and the plaintiff therefore had no opportunity to controvert the false accusation, the favorable-termination requirement did not apply at all. *See Steward v. Gromett*, (1859) 141 Eng. Rep. 788, 793-95.

38 Me. 523, 527-28 (1854) (recognizing that "[t]he reason for averring and proving how the original prosecution was determined" was to avoid the possibility that "the results would be inconsistent"); *Marbourg v. Smith*, 11 Kan. 554, 562 (1873) (recognizing the possibility of inconsistent judgments and collateral attack as the "reasons why an action should be terminated in favor of a defendant").

The rule accordingly precluded suits challenging the validity of a proceeding that was "still pending and undetermined," *e.g.*, *Lowe v. Wartman*, 1 A. 489, 489-90 (N.J. Sup. Ct. 1885); *Bacon v. Townsend*, 2 Edm. Sel. Cas. 120, 121-22 (N.Y. Sup. Ct. 1848), or that terminated in a conviction or admission of guilt, which could be "justly considered as conclusive evidence of probable cause," *Brown*, 36 Conn. at 61. But absent a termination that was itself inconsistent with innocence, American courts required only that the original proceeding had come to an end. As the Supreme Court of Indiana put it: "If it be shown that the original prosecution, wherever instituted, is at an end, it will be sufficient." *Chapman*, 6 Blackf. at 505-06; *Clark*, 6 Hill at 347 ("[T]he technical prerequisite" of favorable termination requires "only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor must be put to a new one."); *Brown*, 36 Conn. 62-63; *Murray v. Lackey*, 6 N.C. 368, 369 (1818); *Long*, 17 Ala. at 546; *Page*, 38 Me. at 527-28; *Stanton*, 27 Mich. at 540; *see also Kennedy v. Holladay*, 25 Mo. App. 503, 517 (1887) ("The essential thing is, that the prosecution, on which the civil action is predicated, should have come to an end. How it came to an end can make no difference to the rights of the person injured thereby.").

Accordingly, in the years leading up to the enactment of Section 1983, American courts routinely held that a plaintiff satisfied the favorable-termination rule by showing that the charges against him were dismissed or abandoned. *Cotton v. Wilson*, Minor 203, 203 (Ala. 1824); *Chapman*, 6 Blackf. at 505-06; *Yocum v. Polly*, 40 Ky. (1 B. Mon.) 358, 359 (1841); *Clark*, 6 Hill at 347; *Brown*, 36 Conn. at 61-63; *Page*, 38 Me. at 527-28. Courts reviewing the law shortly after the statute's enactment understood the same. *See, e.g.*, *Marbourg*, 11 Kan. at 562 ("If the action has been dismissed, as in this case, that is sufficient, if the action is not commenced again."); *Casebeer v. Drahoble*, 14 N.W. 397, 397 (Neb. 1882) (recognizing that "the weight of authority, as well as of reason" is that favorable termination requires only that the particular prosecution is dismissed); *Kennedy*, 25 Mo. App. at 517 (holding favorable-termination requirement met "where the prosecution terminates by a voluntary dismissal, entered by the state's attorney"); *S. Car & Foundry Co. v. Adams*, 131 Ala. 147, 157 (1902) (holding favorable-termination rule satisfied when "prosecution against the plaintiff in the present suit was dismissed").

Of all states in 1871, "only Rhode Island required evidence of a plaintiff's innocence" to satisfy the favorable-termination rule. *Laskar*, 972 F.3d at 1289; *see Rounds v. Humes*, 7 R.I. 535, 537 (1863) (requiring the plaintiff to allege "not only that the proceeding complained of is terminated," but "that the termination [is] such as to furnish *prima facie* evidence that the action was without foundation"). Other decisions that described the favorable-termination requirement by reference to an acquittal did so in "passing dicta," in

cases that did not present the issue. *Laskar*, 972 F.3d at 1290 (citing examples, such as *Wheeler v. Nesbitt*, 65 U.S. (24 How.) 544, 549 (1860), and *Bacon v. Towne*, 58 Mass. (4 Cush.) 217, 235 (1849)). The vast majority of courts did not restrict the favorable-termination rule to acquittals or determinations on the merits of the charges and, when confronted with that argument, explicitly rejected it. *See, e.g.*, *Moore v. Sauborin*, 42 Mo. 490, 493-94 (1868) ("The prosecution, it is true, must be wholly ended and determined; but it does not follow that the actual proof of innocence is necessary to support the action."); *Thomas v. De Graffenreid*, 11 S.C.L. (2 Nott & McC.) 143, 145 (S.C. 1819) (explaining that the favorable-termination requirement "is not to be understood" as requiring that "the party has been acquitted by a jury on trial"); *Hays v. Blizzard*, 30 Ind. 457, 458 (1868) (rejecting the argument that "it must appear that the plaintiff was finally acquitted of the criminal charge"); *S. Car & Foundry Co.*, 131 Ala. at 157 (rejecting the argument that favorable termination requires a plaintiff to show that the charges against him were "judicially investigated" or that he was "acquitted and discharged" because "[s]uch a result is not compatible with the law"); *Vinal v. Core*, 18 W. Va. 1, 24 (1881).

In other words, most courts recognized that for the purposes of the favorable-termination rule, the dismissal or abandonment of charges was "equivalent to" an acquittal. *Kelley v. Sage*, 12 Kan. 109, 111 (1873). The reason, they explained, was clear:

> The mischief is done by the arrest and disgrace caused by a charge of crime, and by the expense and annoyance attending the proceeding. A dis-

> charge without a trial does not destroy the effect of the mischief, but often aggravates it by leaving the party injured without the complete vindication of a verdict in his favor. As long as the proceedings are pending, it may be considered that there may possibly be a conviction under them, which would justify the accusation. But as soon as the proceedings have come to an end, by such an order or discontinuance as will prevent a further prosecution without a new complaint, there is no longer occasion for any such presumption.

Stanton, 27 Mich. at 540; *see also S. Car & Foundry Co.*, 131 Ala. at 157 (observing that "it would be anomalous if the law did not furnish [the accused] a remedy" simply because charges were dismissed before trial).

Early American courts recognized that, to the extent the particular manner of dismissal was relevant, it went not to the favorable-termination rule, but to the distinct questions of probable cause and the quantum of damages. Courts recognized that some circumstances of dismissal may make it harder for a plaintiff to prove want of probable cause. *See, e.g.*, *Clark*, 6 Hill at 347 ("The manner in which the prosecution is disposed of, as if it be by compromise, * * * may interpose great if not insurmountable obstacles to showing a want of probable cause[.]"). Other circumstances may make it easier to prove want of probable cause. *See, e.g.*, *McLeod v. McLeod*, 75 Ala. 483, 487 (1883) (holding that "abandoning a prosecution" is not dispositive of, but can be indicative of, lack of probable cause and should be considered with "all other circumstances" by

the jury). Similarly, that the plaintiff prevailed by pretrial dismissal rather than a jury verdict made "no difference to" the plaintiff's right to bring his civil action; it was "only a difference of degree, affecting the amount of his recovery." *Kennedy*, 25 Mo. App. at 517. But the issues of probable cause and damages were distinct from the "technical prerequisite" of favorable termination, which required "only that the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor must be put to a new one." *Clark*, 6 Hill at 347.

To the extent disagreements between courts arose at common law, they reinforced the focus on consistency and finality, not "indications of innocence." *See Laskar*, 972 F.3d at 1288 (observing the same). For instance, some courts disagreed over whether a *nolle prosequi* counted as a favorable termination. Newell, *supra*, at 333-42. But the dispute centered on whether "entry of the *nolle prosequi* [was] the mere act of the prosecuting attorney" without any order of the court, such that it might "not be an end of the proceedings," or whether "a judgment of discharge or some other action has been entered or had by the court upon the *nolle prosequi*," such that it was an end. *Id.* at 342. In other words, the dispositive consideration remained whether the proceedings were at "an end," not whether the circumstance of the *nolle prosequi* conveyed "indications of innocence."

3. As Chief Judge Pryor observed, courts that superimpose an "affirmative indications of innocence" requirement onto Section 1983 have not based it on an examination of how common-law courts treated similar claims in 1871. Rather, "[e]ach circuit to embrace

the indication-of-innocence approach grounded its decision in a comment in the *Restatement (Second) of Torts* or the modern decisions of States that adopted that comment." *Laskar*, 972 F.3d at 1294; *see, e.g.*, *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980) (transplanting the Restatement's comment into Section 1983).

Comment "a" to Section 660 of the Restatement (Second) of Torts says: "Proceedings are 'terminated in favor of the accused,' * * * only when their final disposition is such as to indicate the innocence of the accused." The authors do not offer any authority to support the comment, let alone ones that demonstrate a well-settled consensus in 1871. It is thus not clear whether this comment reflects the authors' inaccurate view of English and early American common law, or is an attempt to restate the law at some modern point in time. *But see Laskar*, 972 F.3d at 1294 (observing that it is "far from clear" this comment reflects even a modern consensus); *Cordova v. City of Albuquerque*, 816 F.3d 645, 664 (10th Cir. 2016) (Gorsuch, J., concurring) (observing that "many states do not require [indications of innocence] as a matter of common law").

Whatever the Restatement authors had in mind, the critical inquiry when interpreting Section 1983 is the common-law principles that were "well settled at the time of its enactment." *Nieves*, 139 S. Ct. at 1726. As set forth above, there was not even a remotely well-settled understanding that favorable termination required "affirmative indications of innocence."

II. Contrary To The Second Circuit And Respondent, The Fourth Amendment Does Not Contain Its Own Favorable-Termination Element.

The analysis above resolves this case: Neither this Court's precedent nor the common law support reading an "affirmative indications of innocence" inquiry into Section 1983's favorable-termination rule.

The Second Circuit and respondent, however, say that all this is beside the point. They contend that this Court's caselaw defining when a cause of action accrues under Section 1983 is irrelevant because the Fourth Amendment contains its own distinct favorable-termination element and it is *that* element that requires "affirmative indications of innocence." The Second Circuit reasons that this comes from the Fourth Amendment because the right "to be free from unreasonable seizure" is not violated "absent an affirmative indication that the person is innocent." *Lanning*, 908 F.3d at 28. Respondent similarly attempts to write off this Court's explanation of the favorable-termination rule in *Heck* and *McDonough* as just "accrual jurisprudence." BIO 18-19. He says there are two "differen[t]" favorable-termination rules—one "guide[s] accrual" of a cause of action under Section 1983 and one is "a substantive element" of petitioner's Fourth Amendment claim. BIO 19; Appellee Br. 22, 24 & n.6.[8]

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[8] Respondent's successful briefing to the Second Circuit declined to even address *Heck* and cited *McDonough* in a footnote to say only that it was about "accrual" and "sheds no light" on the substantive elements of petitioner's Fourth Amendment claim. Appellee Br. 20 n.3.

This is a head scratcher. First, this Court has never suggested the Fourth Amendment has an element requiring indications of innocence. The relevant inquiry is whether a person was subject to "unreasonable * * * seizure," U.S. Const. amend. IV—namely, whether the person was seized without "probable cause to believe [he] committed a crime." *Manuel*, 137 S. Ct. at 917. Everyone agrees that petitioner's Fourth Amendment claim will require him to prove the absence of probable cause. As Chief Judge Pryor observed, however, "nothing in the Fourth Amendment" imposes a distinct indications-of-innocence element. *Laskar*, 972 F.3d at 1292.

The Second Circuit and respondent's suggestion that the indications-of-innocence requirement stems from the Fourth Amendment all but confirms they are conflating Section 1983's prerequisite of favorable termination with the merits of showing the absence of probable cause. In other words, they are committing the same misstep that common-law courts frequently identified and rejected. *See supra* p. 29-30.

In any event, even assuming petitioner's claim requires a dual inquiry into favorable termination—*i.e.*, once to determine whether a cause of action has accrued under Section 1983 and once as a "substantive element" of the Fourth Amendment claim, BIO 19—why on Earth would the definition of "favorable termination" change from one look to the next? By the Second Circuit's and respondent's own terms, both inquiries are derived from the rule at common law. *See* BIO 20-22; *Lanning*, 908 F.3d at 25. Why would consulting the common law yield "not inconsistent with innocence" for accrual, but yield "affirmatively indicates innocence" for the Fourth Amendment?

Contrary to the Second Circuit's and respondent's contention, the Fourth Amendment does not impose an indications-of-innocence requirement.

III. The Indications-Of-Innocence Standard Is Unworkable And Undesirable.

In addition to being incorrect, examining a criminal record for "affirmative indications of innocence" is incoherent, perverse, and inadministrable.

A. The Standard Is Incoherent.

1. Asking whether a criminal prosecution has produced "affirmative indications" of the accused's innocence is illogical. The criminal legal system is designed to adjudicate whether the prosecution has proffered *evidence of the accused's guilt* beyond a reasonable doubt, not whether the accused has proffered evidence of his innocence. In other words, the indications-of-innocence standard asks the civil plaintiff to find something in his criminal proceeding that it was not designed to produce.

Indeed, the expectation that a criminal defendant would proffer evidence of his innocence during a criminal prosecution conflicts with bedrock principles of the American criminal legal system. Among those "axiomatic and elementary" principles is the presumption of innocence, under which a person accused of a crime is considered innocent under the law—irrespective of whether he has proffered any "indications" of it—unless and until the prosecution proves or obtains an admission of guilt. *Coffin v. United States*, 156 U.S. 432, 453 (1895) (observing that enforcement of the presumption of innocence "lies at the foundation of the administration of our criminal law"). When the prosecution chose to dismiss the charges against petitioner,

it left that presumption unrebutted. To now ask "how much evidence" there was "suggesting plaintiff's innocence," JA186-87, is irrational. *See also Deng v. Sears, Roebuck & Co.*, 552 F.3d 574, 576 (7th Cir. 2009) (Easterbrook, J.) (questioning "whether it is sensible" to ask the question about indications of innocence because "[i]f criminal charges are dismissed and never reinstated, the accused has won" and "[a] technical knockout is a knockout nonetheless").[9]

2. Even if a person subject to prosecution was intent on showing his innocence, the criminal legal system generally does not provide a mechanism to do it. This is clearest in the context of charges that are dismissed or abandoned pretrial. When a defendant is haled into criminal court for his arraignment or preliminary hearings, he is generally not given an opportunity to proffer his own evidence. And once the prosecution chooses to dismiss the charges, the accused generally has no mechanism to make submissions about his innocence.

B. The Standard Is Perverse.

The indications-of-innocence standard distorts the criminal legal system in several respects.

1. First, the standard puts a victim of fabricated charges in the untenable position of having to *object to* dismissal of the unfounded charges or else forgo his

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[9] Indeed, other bedrock principles recognize an accused person's right and incentive to *not* offer his own "indications of innocence" during a criminal proceeding, including the privilege against self-incrimination. *See Doe v. United States*, 487 U.S. 201, 213 (1988) (recognizing that in our adversarial system, the privilege against self-incrimination "is often a protection to the innocent" (quotation marks omitted)).

cause of action under Section 1983. When prosecutors dismiss charges, they virtually never offer statements about the accused's innocence or the lack of foundation for the prosecution. According to respondent's argument, in these circumstances, an accused person who wishes to preserve his civil claim should insist on being criminally tried on the unfounded charges, with the hope that he will be acquitted. *See* C.A. App. 24 (accepting that the accused would have to say, "your Honor, we want to bring a civil suit * * * so don't dismiss it"). To borrow the district court's words, this is "insane," JA126, and not something this Court should condone.

Early American courts explicitly recognized and refused this perverse consequence of requiring a determination on the merits of criminal charges. As the Alabama Supreme Court explained:

> If it be true that the plaintiff must, in order to sustain this suit, aver and prove that the prosecution against him had been "judicially investigated," in the sense, that the charge preferred against him had been regularly tried by and before the arresting magistrate, and plaintiff, as the result thereof, had been acquitted and discharged, it is manifest, he could not maintain his action for malicious prosecution, although he may have been damaged as much in such case, as if he had been tried and acquitted. * * * He would be left, therefore, remediless for what might have been a very great and improper violation of his personal rights.

S. Car & Foundry Co., 131 Ala. at 157; *see also, e.g.*, *Chapman*, 6 Blackf. at 506 (observing that a person

subject to fabricated charges "may not be able to obtain a trial on the merits" and thus, "if no action lies, an innocent man may be harassed without the hope of redress").

2. Second, the indications-of-innocence standard upsets the usual expectation regarding which criminal cases are brought to trial. Ordinarily one would expect—and hope—cases pursued to trial are those in which a prosecutor has concluded there is evidence to prove guilt beyond a reasonable doubt. Meanwhile, one would expect—and hope—prosecutions with the *least* foundation are dismissed as early in the criminal process as possible. Yet under the indications-of-innocence standard, the plaintiff who is taken to trial—indeed, even the plaintiff who is convicted—can accrue a cause of action to challenge the validity of the criminal proceeding, but the plaintiff whose charges are dismissed cannot. In other words, the standard would insulate the most unjustified accusations.

3. Third, the indications-of-innocence standard attaches perverse consequences to prosecutorial decisionmaking. Under that rule, a well-meaning prosecutor who decides to dismiss charges because she lacks the evidence to move forward or based on other legitimate considerations would now be responsible for insulating other government actors for any and all prior misconduct that they engaged in to cause wrongful charges, including deliberate fabrications of evidence. The decision to dismiss would have that effect—absent some prosecutorial statement on the record about innocence—even though the prosecutor may lack the information necessary to determine whether evidence was fabricated, or may lack personal authority to proclaim charges unfounded in open court.

This Court has expressed the view that such consequences would be "valid considerations" when determining what counts as a favorable termination. *McDonough*, 139 S. Ct. at 2160. In *McDonough*, the respondent prosecutor warned that applying the favorable-termination rule to claims challenging pretrial deprivations would give "abusive government actors" a "powerful incentive to ensure that the proceedings do not terminate favorably," by dismissing charges to insulate earlier misconduct.[10] The Court explained that the respondent's concern about the perverse incentives to dismiss cases "more properly bear[s] on the question whether a given resolution should be understood as favorable or not." *Id*. at 2160 & n.10. Although the Court had "no occasion to address the broader range of ways" a criminal proceeding can terminate in the accused's favor, it explained that the respondent's threat simply reinforced an understanding of favorable termination that is "more capacious" than the respondent's—*i.e.*, an understanding that "take[s] account of prosecutors' broad discretion," including "whether charges will be dropped." *Id*.

Early American courts recognized the same concerns in concluding that dismissal is sufficient to terminate a proceeding in the accused's favor. *See, e.g.*, *Marbourg*, 11 Kan. at 563 ("[C]an the [wrongdoer] relieve himself from liability to an action for malicious prosecution by simply dismissing his action? Will the [victim] have no remedy in such a case?"); *Clark*, 6 Hill

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[10] Respondent's Br. 41-42, *McDonough*, 139 S. Ct. 2149 (No. 18-485), 2018 WL 7890209 (relying on examples of lower court decisions holding that dismissal is not a favorable termination).

at 347 ("[I]t would be strange if a party could be protected from prosecution for his malice by procuring the cause to be discontinued on account of some irregularity.").

C. The Standard Is Inadministrable.

In contrast to the "simplifying step of treating all favorable dismissals the same," *Deng*, 552 F.3d at 576, courts have found the indications-of-innocence standard to be a practical quagmire. As one court asked, "How can a judge or jury tell whether the dismissal is 'indicative of the innocence of the accused'?" *Id*. Or, as another court criticized, the "difficulty" is inherent in the standard itself and its "problematic connection" with "the concept of 'innocence.'" *Sanchez v. Duffy*, 416 F. Supp. 3d 1131, 1146 (D. Colo. 2018); *see also Perdue v. Kenny*, 559 U.S. 542, 551-52 (2010) (recognizing the virtue of having a rule that is "readily administrable" and "objective" so that it "permits meaningful judicial review, and produces reasonably predictable results").

1. The indications-of-innocence standard does not provide courts with a meaningful and objective legal threshold. For instance, what does it mean for a piece of evidence or an opinion stated on the record to "indicate" innocence? Is it the civil court's inkling that the person is innocent? Probable cause to believe it? More probable than not? And setting aside the threshold, is it enough if one piece of evidence or opinion on the record "indicates" this innocence? Or does the later civil court engage in some sort of balancing—for instance, weighing a prosecutor's favorable opinion of the accused against a dismissing judge's less favorable statement?

The record here illustrates the arbitrary threshold. The district court found that "evidence *was* presented suggesting plaintiff's innocence." JA186 (emphasis added). After all, petitioner rejected the prosecutor's offers to make the charges just "go away" through favorable deals, instead insisting on defending himself "to the end." C.A. App. 181-82. And the dismissal promptly followed a conversation with petitioner's defense counsel, who urged that respondent effectively charged petitioner for "not allowing the police into [his] home." JA187. Faced with an indications-of-innocence standard that "[l]eft open" the question of "how much evidence must be supplied by a plaintiff to show that the dismissal was essentially for innocence," JA187, the district court concluded there was insufficient evidence that the charges were "dismissed in a manner affirmatively indicative of [petitioner's] innocence," JA185.

2. Even if courts knew *what* they were looking for, the indications-of-innocence standard does not tell them *how* to go about it, short of a civil minitrial. The Second Circuit holds that the innocence inquiry requires "examining the totality of the circumstances," including the "reasons the [prosecutor] stated on the record for dismissing the charges" and the accused's allegations of why the charges were dismissed. *Lanning*, 908 F.3d at 28. Other courts similarly recognize that the inquiry requires looking into "the stated reasons for the dismissal as well as to the circumstances surrounding it." *Sanchez*, 416 F. Supp. 3d at 1145 (quoting *Wilkins v. DeReyes*, 528 F.3d 790, 803 (10th Cir. 2008)). Because those reasons and circumstances may not be evident, the plaintiff must be "free to make the case that there was more to the dismissal than the

explanation given by the prosecutor" and "to prove the criminal court judge's motivations." *Id*. at 1146.

So, district courts applying the standard are forced to hold evidentiary hearings on the likely reasons for dismissal and their relation to the accused's "innocence." These minitrials not only waste judicial resources, but also tread on areas committed to attorney-client or prosecutorial privilege. *See Lopez v. City of New York*, 901 F. Supp. 684, 690 (S.D.N.Y. 1995) (recognizing that "a natural product of making the favorable termination issue turn on the basis for the decision" may be "opening the door to discovery of the reasons for prosecutorial decisions"). Here, for instance, the district court held an evidentiary hearing to ascertain whether the dismissal "was on the merits." JA97. Respondent proposed that the prosecutor who dismissed the charges would be "the appropriate witness" to testify about the reasons for dismissal. ECF No. 109 at 2; *see also Deng*, 552 F.3d at 577 (observing that the indications-of-innocence standard entailed "dragg[ing] the prosecutor through a deposition, an intrusion on the prosecutorial function" and finding it "hard to believe that [a prosecuting body] really wants its criminal prosecutors subjected to this kind of inquisition"). Because the prosecutor "had no recollection" of the reasons for dismissal, the parties instead questioned petitioner's public defender about the circumstances leading up to the dismissal, including her conversations with the prosecutor and her belief as to why the prosecutor dismissed the charges. C.A. App. 24; JA97-119.

3. Finally, and consequently, the indications-of-innocence standard functions not as an administrable

legal rule, but as a series of arbitrary lines and ad-hoc exceptions.

Consider, for instance, how inconsistently the Second Circuit has applied its test to a few run-of-the-mill terminations. In a recent decision "clarify[ing]" that the court would continue to require "affirmative indications of innocence," it just as soon carved out an exception. *Lanning*, 908 F.3d at 25. According to the court, "the dismissal of a prosecution on speedy trial grounds" would count as a favorable termination even though it is "neutral with respect to guilt or innocence." *Id.* at 27 n.6. In other words, if a prosecutor simply fails to prosecute a case until the clock runs, then it counts; if the prosecutor steps into court and says she is dismissing the case, it wipes out the cause of action. This makes no sense.

When it comes to the dismissal of a charging document for facial insufficiency, well, sometimes that "do[es] not qualify," and sometimes it does. *Ashley v. City of New York*, 992 F.3d 128, 140, 141 & n.6 (2d Cir. 2021). How is the line drawn? Such a dismissal counts if it came from "*the court's sense* that the prosecution's case without more simply did not support a charge." *Id.* at 141. (emphasis added). Again, the arbitrariness of this line is palpable on the record here. Recall that petitioner's counsel was invited to file a written motion to dismiss for facial insufficiency, only to have the prosecution agree to dismiss the charges before that motion was due. C.A. App. 72-73, 76; ECF No. 57-1 at 3. Why is the prosecutor's voluntary capitulation *less* indicative of the accused's innocence than allowing the motion to go to the court?

* * *

Because the indications-of-innocence standard is detached from the common law, logic, and practical reality, it leaves courts with no objective and predictable way to resolve all these problems that come with it. This Court should adhere to the straightforward rule reflected in its precedent and at common law.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

AMIR H. ALI
Counsel of Record
DEVI M. RAO
DAMILOLA G. AROWOLAJU
ELISE M. BARANOUSKI
PERRY R. CAO
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
amir.ali@macarthurjustice.org
Counsel for Petitioner

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