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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Lacking a passable argument on the question this Court granted, respondent spends much of his brief proclaiming newfound confusion about the "clarity" of petitioner's claim. Respondent Br. 10. This is feigned. Petitioner's claim is, and has always been, the same: that he was unreasonably seized "pursuant to legal process" in violation of the Fourth Amendment. *Manuel v. City of Joliet*, 137 S. Ct. 911, 917-20 (2017). Petitioner described his claim using the exact same language in the court below, *see* Appellant Br. 1, 2, 13, 35, and respondent had no confusion then. Petitioner described his claim the same way in the certiorari petition—indeed, right in the question presented—Pet. i, 5, 11, 21, and respondent had no confusion then, ei-

ther. None of the fifteen amici briefs shares respondent's purported confusion about the claim at issue. Respondent's other DIG attempts are recycled from the BIO, without even contesting the cert reply's observation that those arguments were forfeited and unpersuasive. They remain so.

The question before the Court is whether a plaintiff who brings a Section 1983 claim for unreasonable seizure pursuant to legal process must show "affirmative indications of innocence" to establish that the criminal proceeding terminated in his favor. Pet. i. When respondent finally gets around to the question presented—on page twenty-five of his brief—he has no plausible explanation for reading that additional requirement into Section 1983.

Respondent could not figure out a way to reconcile the indications-of-innocence inquiry with this Court's understanding that the favorable-termination rule is "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter" and preventing "collateral attacks on criminal judgments." *McDonough v. Smith*, 139 S. Ct. 2149, 2156-57 (2019) (citing *Heck v. Humphrey*, 512 U.S. 477, 484-85 (1994)). So, respondent simply forgoes any discussion of it. Respondent also could not reconcile his inquiry with the terminations the Court has previously recognized as favorable, *none* of which "indicate" the accused's innocence. *See* Opening Br. 20-21. So, respondent forgoes any discussion of those, too. Indeed, respondent never explains why facing criminal trial and being acquitted (*McDonough*) or being wrongfully convicted and invalidating the judgment (*Heck*) terminates a proceeding in the accused's favor, but outright dismissal of charges does not.

Moreover, respondent does not meaningfully challenge the historical underpinnings of the Court's understanding in *Heck* and *McDonough*. The Eleventh Circuit and petitioner offered extensive accounts of the law leading up to and around 1871, demonstrating that the favorable-termination rule was widely understood to be about finality and consistency, not "innocence." Accordingly, virtually all courts held the rule was satisfied upon the dismissal of charges, in which case the criminal proceeding had ended without any conviction or admission of guilt. *See Laskar v. Hurd*, 972 F.3d 1278, 1286-92 (11th Cir. 2020); Opening Br. § I.B. Respondent's answer to those detailed accounts is a single cursory paragraph decrying them as "unsound historical analysis" that "takes little, if anything, away" from the circuits that have mistakenly imported the indications-of-innocence standard into Section 1983 based on a Restatement comment. Respondent Br. 30. The best respondent could muster is a few historical cases that mention acquittal when noting the favorable-termination rule in passing, and which did not consider or decide any question related to the scope of the favorable-termination rule. And even that is distraction: respondent is not proposing an acquittal rule and an acquittal does not "indicate" innocence, so this hardly supports his rule.

Respondent's new defense of the indications-of-innocence standard is implausible. He admits there was no well-settled principle of inquiring into "innocence" under the favorable-termination rule, and Congress therefore had no such expectation when it enacted Section 1983. Respondent Br. 25. That should be the end. Instead, respondent says the Court is free to read his added inquiry into Section 1983 based on "modern

jurisprudence." Absurdly, respondent says this methodology yields his rule even if *a minority* of modern states adopt it. This is not a credible theory of statutory interpretation.

It is deafening that respondent has *nothing* to say to lower courts that have found the indications-of-innocence standard completely inadministrable. *See* Opening Br. 39-43. They (and petitioner) have asked what it even means for a record to "signal the plaintiff's innocence." Respondent Br. 33; *see* Opening Br. 39-40. Respondent does not try to articulate an objective legal threshold. He also does not say how courts could evaluate the reasons for dismissal short of conducting minitrials in which prosecutors and defense attorneys testify, as lower courts are presently forced to do under his standard. *See* Opening Br. 39-41. And respondent never explains why one would expect a criminal prosecution to generate "indications of innocence" in the first place. *See* Opening Br. 34-35. If respondent cannot say what a court is looking for, how to find it, or why it should be there to begin with, then his rule does not offer "a useful filtering function." Respondent Br. 13.

The Court should reject the indications-of-innocence standard.

ARGUMENT

I. Respondent's Desperate Attempts At A DIG Are Weak.

A. Respondent's Late-Breaking Confusion As To The Claim The Court Recognized In *Manuel* Is Manufactured.

For the first time ever in this case, respondent declares confusion about petitioner's claim. Suddenly when petitioner "speaks of a claim for 'unreasonable seizure pursuant to legal process,'" there is an "absence of clarity." Respondent Br. 2. This is playacting. Respondent asserted no such confusion in the court below or at the certiorari stage, even though the claim was described exactly the same way. *See* Appellant Br. 1, 2, 13, 35; Pet. i, 5, 11, 21. None of the thirteen amici for petitioner or the two for respondent had any confusion about the claim at issue.

The constitutional violation that petitioner alleged and sought to prove—and expressly identified in the question presented—was explicitly recognized in *Manuel*: a violation of the Fourth Amendment based on a seizure undertaken "pursuant to legal process." 137 S. Ct. at 917-20. Respondent does not dispute this claim exists—indeed, he concedes it. *See* Respondent Br. 1 (acknowledging *Manuel* recognized a claim for "unreasonable seizure pursuant to legal process"). Instead, respondent says petitioner "deliberately pursued" a "different" Fourth Amendment claim because he referred to his claim as "malicious prosecution" and "incorporated all the elements of the common-law tort." Respondent Br. 10, 15.

This is utter nonsense. The Second Circuit calls a Fourth Amendment claim challenging post-legal-process seizure a federal "malicious prosecution" claim. *See, e.g.*, *Lanning v. City of Glens Falls*, 908 F.3d 19, 28 (2d Cir. 2018) ("A § 1983 claim for malicious prosecution essentially alleges a violation of the plaintiff's right under the Fourth Amendment to be free from unreasonable seizure."). Most circuits use that shorthand. *See, e.g.*, *Durham v. Horner*, 690 F.3d 183, 188 (4th Cir. 2012) ("What has been inartfully termed a 'malicious prosecution' claim is simply a claim founded on a Fourth Amendment seizure . . . pursuant to legal process that was not supported by probable cause." (cleaned up)); *Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013) ("Unreasonable seizures imposed with legal process precipitate Fourth Amendment malicious-prosecution claims."); *Tlapanco v. Elges*, 969 F.3d 638, 659 (6th Cir. 2020) (Thapar, J., concurring) (recognizing that what courts have "repeatedly *called* 'malicious prosecution' . . . is a Fourth Amendment claim for unreasonable seizures related to prosecutions"). This Court understood the same in *Manuel*. *See* 137 S. Ct. at 921 & 917 n.4 (collecting cases recognizing "a Fourth Amendment claim like" *Manuel*'s, including Second Circuit and other cases using the "malicious prosecution" label).

The Second Circuit holds that this Section 1983 claim requires the plaintiff to prove "both 'a violation of his rights under the Fourth Amendment' and 'the elements of a malicious prosecution claim under state law.'" *Dettelis v. Sharbaugh*, 919 F.3d 161, 163-64 (2d Cir. 2019); *Swartz v. Insogna*, 704 F.3d 105, 111-12 (2d Cir. 2013); *Manganiello v. City of New York*, 612

F.3d 149, 160-61 (2d Cir. 2010).[1] As other circuits have put it, the Second Circuit adopts "a blended constitutional/common law approach," not "a purely constitutional" one. *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013).

So that is what petitioner pled and sought to prove. He "deliberately pursued" a claim that included both unreasonable seizure and "all the elements of the common-law," Respondent Br. 10; JA33-34, because Second Circuit precedent required it. The notion that this somehow *forfeited* his claim is absurd. Indeed, had petitioner *not* pled all the elements required by the Second Circuit, his claim would have been dismissed.

Petitioner agrees with respondent that the Second Circuit is wrong to uncritically import common-law elements like malice into this claim, which cannot "be squared with the Fourth Amendment." Respondent Br. 18. If respondent wants to stipulate that such elements are not required on remand, petitioner will gladly join him. But this Court need not resolve that issue: the Second Circuit decided this appeal on the favorable-termination rule this Court has held applicable to certain Section 1983 actions, not on any other element.[2]

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[1] Respondent's sole citation in asserting that the Second Circuit offers two Fourth Amendment "options" to challenge post-legal-process seizure—one that includes common-law elements and one that does not—is a footnote describing *an attorney* who disclaimed certain arguments. Respondent Br. 14-15 (citing *Burg v. Gosselin*, 591 F.3d 95, 96 n.3 (2d Cir. 2010)).

[2] For this reason, respondent's rhetoric about whether to "shoehorn a malicious prosecution claim into the Fourth Amendment" is a strawman. Respondent Br. 10-11, 18-19. Even circuits that

B. Respondent's Repetition Of The BIO's Vehicle Arguments Is Meritless.

Next, respondent rehashes two purported vehicle issues from his BIO.

First, he questions whether petitioner was seized pursuant to legal process. Respondent Br. 18. When respondent first tried this argument in the BIO, he claimed only that it was not "clear" a seizure occurred. BIO 13-14. Now he goes bigger, saying the seizure requirement was "dispensed with" altogether. Respondent Br. 18. As the cert reply explained, respondent forfeited either version years ago. The district court held at summary judgment that petitioner was seized for purposes of this claim, and respondent never argued otherwise in the district court or Second Circuit. Cert. Reply 7. Respondent regurgitates the argument without even contesting that it was forfeited.

In any event, petitioner was seized pursuant to legal process. Petitioner challenged the duration of his confinement in jail, most of which took place after respondent's false criminal complaint was filed, initiating legal process and causing petitioner to be detained pending a hearing. Pl. Tr. Ex. 1; C.A. App. 178-81. As the United States acknowledges, detention pursuant to the initiation of criminal proceedings, pending a hearing, is properly considered under *Manuel*. *See* Amicus Br. of United States 12; *see Manuel*, 137 S. Ct. at 919. In addition, under unchallenged Second Circuit precedent, the restraints on petitioner following his release constitute a seizure. *See*, *e.g.*, *Swartz*, 704

"adopt a purely constitutional approach" require favorable termination. *Hernandez-Cuevas*, 723 F.3d at 100-01.

F.3d at 112; *Rohman v. New York City Transit Auth.*, 215 F.3d 208, 216 (2d Cir. 2000). If respondent wanted to challenge that precedent, he should have preserved it below.

Second, respondent repackages his BIO argument that the jury's verdict on other claims somehow precludes petitioner's *Manuel* claim. *See* Respondent Br. 23-24; BIO i, 2, 13-17. According to respondent, because the jury found against petitioner on his fair-trial, unlawful-entry, and false-arrest claims, it "necessarily" would have rejected his *Manuel* claim. Not so.

As the cert reply pointed out, respondent never argued below that petitioner's fair-trial or unlawful-entry claims had any bearing on the present claim, and so forfeited such arguments. Cert Reply 7. Respondent does not contend otherwise. Nor do those arguments make sense. Petitioner's fair-trial claim arises under the Due Process Clause, a different constitutional provision that protects different constitutional interests. *See Smalls v. Collins*, No. 20-1099-CV, __ F.4th __, 2021 WL 3700194, at *8 (2d Cir. Aug. 20, 2021) (recognizing that a fair-trial claim "vindicates a different constitutional right" that does not turn on probable cause). Petitioner's unlawful-entry claim turned on whether officers could have perceived a need to render emergency aid at the time they entered petitioner's apartment, *see* JA134, not whether probable cause existed to initiate legal process, well after it was confirmed that no child abuse had taken place.

Respondent's argument that the false-arrest verdict is "necessarily a finding" that probable cause existed to initiate legal process is similarly misplaced. Respondent Br. 24. As the cert reply explained, courts

uniformly recognize that "probable cause to prosecute should not be conflated with probable cause to arrest." *Kee v. City of New York*, No. 20-2201, __ F.4th __, 2021 WL 3852241, at *4-7, *11 (2d Cir. Aug. 30, 2021) (holding there was probable cause to arrest, but not to initiate legal process); Cert Reply 8 n.4. That probable cause may have existed as to some crime at the time of arrest does not establish probable cause existed when criminal proceedings were later initiated as to a different crime. Indeed, the jury was instructed, at respondent's urging, that it could find probable cause to arrest for "any criminal offense," even if there was no probable cause "for the offense with which [petitioner] eventually was charged." JA49, 135-38. This may be why respondent's BIO more modestly described the false-arrest verdict as a "powerful signal" probable cause existed, never suggesting it precluded the present claim. BIO 17; *see also* Appellee Br. 17-18 (arguing false-arrest verdict "strongly suggests" probable cause).

At any rate, neither restated BIO argument impedes resolution of the question presented. *See, e.g.*, *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) ("[a]ssuming, without deciding" that "there was a 'seizure' for purposes of the Fourth Amendment"). Respondent acknowledges this, saying the Court "could" choose to consider his forfeited, record-specific arguments instead of resolving the question it granted. Respondent Br. 2, 25. The Court should not.

II. The Second Circuit Erred By Requiring "Affirmative Indications Of Innocence."

When respondent is finally forced to defend "indications of innocence" as the "the correct favorable termination standard," Respondent Br. 25, he has nothing. He cannot reconcile it with this Court's precedent, or with the law in 1871. He cannot even say what his standard means, how courts should evaluate it, or why it is coherent.

A. Respondent Cannot Reconcile The Court's Precedent With The Indications-Of-Innocence Standard.

Respondent's failure to address the Court's precedent is palpable. As the opening brief described, each time this Court has applied Section 1983's favorable-termination rule, it has explained that the rule is "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter" and preventing "collateral attacks on criminal judgments." *McDonough*, 139 S. Ct. at 2156-57; *Heck*, 512 U.S. at 484-85 (recognizing the same "concerns for finality and consistency"); *see* Opening Br. 1, 12, 17-20. Search respondent's brief and you will find no mention of this. You also will find no explanation for how asking about "innocence" bears any relation to finality or consistency. In other words, respondent all but concedes that the indications-of-innocence inquiry is indefensible under the Court's understanding of Section 1983's favorable-termination rule.

The opening brief also explained that this Court has recognized several dispositions that terminate a criminal proceeding in the accused's favor, none of which "indicate" innocence. Opening Br. 20-21. When

the Court first incorporated the favorable-termination requirement into Section 1983, it explained that the rule required the convicted plaintiff to show his "conviction or sentence has been invalidated," including being "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." *Heck*, 512 U.S. at 487, 489-90. Respondent does not dispute that none of these resolutions themselves "indicate" innocence. *See Savory v. Cannon*, 947 F.3d 409, 429 (7th Cir. 2020) (en banc). And respondent does not dispute that the acquittal in *McDonough* "does not necessarily imply innocence," either. *Id*. Again, unable to square his proposed rule with this precedent, respondent never mentions it.

To the extent respondent engages with the Court's caselaw concerning Section 1983's favorable-termination rule, it is to say that a *Manuel* claim "may not" require favorable termination *at all*, unlike other claims challenging deprivations pursuant to the criminal process. Respondent Br. 20-23. He observes that *Manuel* left for remand whether to apply the favorable-termination rule. *Id*. Moreover, respondent postulates, *McDonough* and *Heck* could be confined to "the specific claims in those cases." Respondent Br. 21-22. Because this Court has not yet squarely applied Section 1983's favorable-termination rule to a *Manuel* claim, respondent declares he has generated an "ambiguity" and therefore "a sound reason to dismiss the petition as improvidently granted." *Id*.

Come again? If the Court concludes that a plaintiff challenging seizure pursuant to legal process can sue without having to first achieve favorable termination

of the criminal proceeding, then the Second Circuit obviously erred by requiring petitioner to show "indications of innocence" on that basis. For the same reason, that conclusion would resolve the circuit conflict. Respondent cites no authority for the proposition that floating an alternative resolution of the question presented in favor of petitioner is "sound reason" to DIG. By respondent's own terms, any "further development on the issue is unlikely," Respondent Br. 23, so a DIG would serve no purpose but to let the conflict persist.

Although respondent's "ambiguity" is just another route for petitioner to win, petitioner submits that the more faithful and complete account of the Court's precedent is the one offered by petitioner and the United States. In *Heck*, this Court recognized that the favorable-termination rule's "concerns for finality and consistency" are implicated by Section 1983 claims that "necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." 512 U.S. at 485-86. And, after *Manuel*, the Court recognized that these "pragmatic considerations" apply not only to claims challenging a conviction, but also to claims which "challenge the validity of the criminal proceedings" that gave rise to pretrial deprivations. *McDonough*, 139 S. Ct. at 2157-58.

Respondent's position—that a plaintiff may challenge the legality of a seizure undertaken pursuant to legal process without awaiting favorable termination of that process—would introduce all the problems this Court sought to avoid in *McDonough*. As the criminal process plays out, the seized plaintiff would face "a ticking limitations clock" to bring his *Manuel* claim and the "untenable choice" of letting his claim expire

or initiating "parallel civil litigation" that "risks tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context." *Id.* at 2158. Such parallel litigation "would run counter to core principles of federalism, comity, consistency, and judicial economy." *Id*. And it is exactly what the favorable-termination rule was designed to prevent.[3]

Petitioner, the United States, and the Eleventh Circuit offer a straightforward reading of the Court's caselaw: A plaintiff who suffers a deprivation pursuant to the initiation of legal process cannot use Section 1983 to challenge the validity of that process unless and until it terminates in his favor. Achieving the outright dismissal of charges, without having to face trial or undo a conviction, satisfies that prerequisite.

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[3] It would be bizarre if the favorable-termination rule applied to Section 1983 claims challenging *some* deprivations pursuant to legal process, like *McDonough*'s, but not to such claims under the Fourth Amendment. A chief rationale for the rule was that successful prosecution "estopped" the plaintiff from asserting the criminal proceeding was initiated "without probable cause." Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* § 250 (1889); Martin L. Newell, *Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 331 (1892). To exclude post-legal-process seizures under the Fourth Amendment—whose legality actually turns on probable cause—would be puzzling.

B. This Court's Understanding Is Correct: In 1871, Favorable Termination Was About Finality And Consistency, And Not About "Innocence."

Respondent offers no good reason to reconsider the Court's understanding of the favorable-termination rule in *Heck* and *McDonough*. Petitioner provided a detailed account of the rule's origins, including English courts' deliberate abandonment of an acquittal requirement (which had applied to the common-law writ of conspiracy), in favor of a rule encompassing dismissals, "whereon no acquittal can be." 3 William Blackstone, *Commentaries* *127; *see* Opening Br. 23-25. Petitioner walked through dozens of historical authorities illustrating that leading up to and around 1871, American courts almost uniformly held the favorable-termination rule was satisfied provided the criminal proceeding had ended without a conviction or admission of guilt. *See* Opening Br. 25-29. As the Eleventh Circuit put it, "[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." *Id.*

Respondent answers with a three-and-a-half-page take on the history, and makes a fatal concession. He acknowledges there was no "well settled" common-law principle of inquiring into innocence "at the time of [Section 1983's] enactment," the touchstone inquiry when determining the "contours" of a Section 1983 claim. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019); Respondent Br. 25. In other words, respondent admits that when Congress enacted Section 1983, it did not have any background assumption that plaintiffs must

show "affirmative indications of innocence" to proceed with their claim. JA20. That should be the end.

Instead, respondent argues the Court nonetheless is free to add his indications-of-innocence requirement into the statute because (i) caselaw applying the favorable-termination rule was not "completely" or "perfectly" free of disagreement, Respondent Br. 25-26; (ii) some cases contained language equating favorable termination with acquittal, Respondent Br. 26; and (iii) some minority of states have since adopted respondent's rule, Respondent Br. 28-32. Each step is unsound.

First, although respondent quotes from treatises acknowledging that some disagreement arose when applying the favorable-termination rule, those same treatises make clear that the disagreement centered on whether particular terminations were sufficiently final—not whether the favorable-termination rule required some showing of "innocence." Consider respondent's lead treatise, relied on to say that what qualified as favorable termination was not "so completely settled." Respondent Br. 26 (quoting Martin L. Newell, *Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* 327 (1892)). Read in whole, it completely tracks the opening brief. It explains that "[t]he general rules of law" defining favorable termination had "long been well settled." Newell, *supra*, at 327. And it explains that in addition to acquittal at trial, a pretrial order "that the accused be discharged" based on the withdrawal of a prosecution was a favorable termination and treated "equivalent to an acquittal." *Id.* at 328. The dismissal of charges counts, the treatise explains, because the relevant inquiry is whether the particular

termination "shows a legal end to the prosecution." *Id.*[4]

The treatise then discusses the "reasons why" the favorable-termination rule existed, and identifies the same reasons as this Court: *first*, avoiding parallel litigation "if the action is still pending"; and, *second*, preventing inconsistent judgments or collateral attack where "there is already an adjudication against" the plaintiff. *Id*. at 331; *see* Opening Br. 17-19; *supra* p. 11. And, still in keeping with the opening brief, the treatise explains that cases "did not appear to be perfectly settled" as to whether an out-of-court *nolle prosequi* was properly considered "an end of the proceedings." Newell, *supra*, at 333-42 (summarizing cases); Opening Br. 30. In other words, the disagreement reinforces petitioner's test. Nothing in the treatise suggests meaningful confusion as to whether favorable termination entailed inquiry into "innocence."

Second, respondent's attempt to assemble a "prominent line of authority" limiting favorable termination to acquittals, Respondent Br. 26, is unconvincing and unhelpful. In support, respondent cites *Wheeler v. Nesbitt*, 65 U.S. 544 (1861), and groups four states with Rhode Island as "acquittal rule" states. Respondent Br. 26-28 & n.13. As Chief Judge Pryor observed, *Wheeler* and respondent's other cases mentioned the favorable-termination rule in "passing dicta." *Laskar*, 972 F.3d at 1290. Respondent disagrees in rhetoric, but does not actually contend that these cases con-

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[4] Respondent claims this section says a plaintiff "had to be acquitted." Respondent Br. 27. It is worth a read to see how far that mischaracterizes it.

fronted or decided questions about the scope of the favorable-termination rule. The best he offers is that the courts must have had a "belief" they were providing "an accurate statement of the law," Respondent Br. 27-28—of course, true of any dicta.

In *Wheeler*, the plaintiff was held for seven days and discharged by a magistrate before trial. 65 U.S. at 546-48. The plaintiff brought a common-law malicious prosecution claim and, upon losing, challenged a jury instruction that the defendants should prevail if "they had probable cause" or acted "without malice." *Id.* at 549. The Court upheld the instruction, concluding the plaintiff was appropriately assigned the burden to "prove affirmatively" both elements. *Id.* at 550-51; *see also Nieves*, 139 S. Ct. at 1726. The case did not involve any question about the favorable-termination rule or whether it required acquittal. Indeed, *Wheeler* itself used "acquittal" to describe pre-trial discharge, such that the criminal proceeding was "wholly ended and determined." 65 U.S. at 546.

Respondent's remaining citations for this "prominent" acquittal-only rule are equally strained. For instance, he says Alabama limited favorable termination to acquittal in *Ragsdale v. Bowles*, 16 Ala. 62 (1849). But the Alabama Supreme Court expressly rejected that argument just one year after *Ragsdale*. *See Long v. Rogers*, 17 Ala. 540, 546 (1850) (rejecting argument that *Ragsdale* means "discharge before the magistrate is insufficient" and holding discharge is sufficient because it "ends that prosecution"). Similarly, respondent argues the Ohio Supreme Court's mention of acquittal in *Fortman v. Rottier*, 8 Ohio St. 548 (1858), was not dicta. But the Ohio Supreme Court disagrees. *See Douglas v. Allen*, 56 Ohio St. 156,

158-59 (1897) (observing that whether favorable termination requires acquittal after trial "was not involved" in *Fortman*, and holding that the rule is "well satisfied" by *nolle prosequi* and discharge, which serves as "acquittal of the charge").

At any rate, it is not clear what exercise respondent has us doing. He, like the Second Circuit, asks whether a proceeding "ended in a manner indicating the plaintiff's innocence." Respondent Br. 31. Even if respondent could find an acquittal-only jurisdiction, it would not support that rule. A jury acquittal does not "indicate" the defendant was innocent, only that the prosecution failed to prove guilt beyond a reasonable doubt. *See* Opening Br. 21. So under respondent's perfunctory historical analysis (in which Rhode Island is an "acquittal" jurisdiction), *no* jurisdiction supports his indications-of-innocence standard.

Petitioner and the Eleventh Circuit set forth detailed analyses showing "the vast majority of courts" in 1871 understood favorable termination to require an end to the criminal proceeding, not that "a particular termination affirmatively supported a plaintiff's innocence." *Laskar*, 872 F.3d at 1289, 1292. But the Court need not take our word for it; courts contemporaneously documented the widespread support for petitioner's rule. The Nebraska Supreme Court concluded petitioner's rule had "the weight of authority." *Casebeer v. Drahoble*, 14 N.W. 397, 397 (Neb. 1882). The New Hampshire Supreme Court said petitioner's rule represented "reason and authority." *Woodman v. Prescott*, 22 A. 456, 457 (N.H. 1891). The Wisconsin Supreme Court called it "principle as well as authority." *Woodworth v. Mills*, 20 N.W. 728, 732 (Wis.

1884). The Alabama Supreme Court described petitioner's as the meaning "everywhere held" and "sustained by citation of authorities." *Southern Car & Foundry Co. v. Adams*, 131 Ala. 147, 156 (1902). The Indiana Supreme Court felt comfortable saying "[a]ll the authorities concur" in asking whether the proceeding "is determined" or "at an end." *Chapman v. Woods*, 6 Blackf. 504, 505 (Ind. 1843). The California Supreme Court called petitioner's rule the one that "always prevailed both in England and in this country." *Carpenter v. Nutter*, 59 P. 301, 302 (Cal. 1899).

What respondent is doing here is not novel. By trying to import "innocence" or "merit" into the favorable-termination rule, he would muddle it with the separate question of probable cause. Courts in 1871 widely recognized that the particular manner of termination bears on the latter. Many held, for instance, that acquittals were *prima facie* evidence of want of probable cause. *See Newell*, supra, at 289-303; *Acquittal, Discharge, or Discontinuance as Evidence of Want of Probable Cause in Action for Malicious Prosecution*, 24 A.L.R. 261 (1923). Courts back then rejected efforts to conflate the two inquiries, *see* Opening Br. 29-30, and this Court should too.

C. Respondent's Position That Section 1983's Favorable-Termination Rule Evolves With "Modern Law" Is Wrong.

Respondent correctly concedes there was no "well-settled" consensus for inquiring into "innocence" when Section 1983 was enacted. In doing so, he abandons the court of appeals, which sought to apply "the traditional common law" and mistakenly believed the traditional rule was "reflected in the Restatement." *Lanning v. City of Glens Falls*, 908 F.3d 19, 26-28 (2d Cir.

2018). Once respondent concedes Congress would not have presupposed his additional indications-of-innocence inquiry, it is hard to see what his statutory theory is.

In certain contexts, namely immunities, the Court has occasionally resorted to "a 'functional approach,'" wherein it "consult[s] the common law to identify those governmental functions that were historically viewed as so important and vulnerable to interference" and asks whether those original concerns apply "with equal force" to modern circumstances. *Rehberg v. Paulk*, 566 U.S. 356, 363-64, 367 (2012). But as described above, respondent does not even attempt to tie his inquiry to the original "pragmatic concerns" behind the favorable-termination rule. *McDonough*, 139 S. Ct. at 2157 (citing *Heck*, 512 U.S. at 484); *see supra* p. 11. Instead, respondent tells the Court it can skip history altogether. He says the Court can read his additional inquiry into the statute based exclusively on "[m]odern jurisprudence." Respondent Br. 28. This is not convincing.

As an initial matter, respondent's notion of "modern jurisprudence" is suspect. His starting point is the federal circuits. Respondent Br. 29-30. But that is entirely circular: federal circuits are themselves interpreting Section 1983's favorable-termination rule, not defining favorable termination as a matter of federal common law. Next, respondent says those circuits' interpretation "is reflected in" the Restatement. Again, entirely circular: the authority those circuits relied on *was* the Restatement. *See* Opening Br. 30-31; *Laskar,* 972 F.3d at 1294.

If those circles are not dizzying enough, respondent then says the Court can read his "innocence" inquiry into Section 1983 based on a "trend" in modern state law. Respondent Br. 31-32. The existence of that trend is dubious. Indeed, a more recent Restatement rejects respondent's rule in favor of petitioner's rule. *See Restatement (Third) of Torts: Liability for Economic Harm* § 23 cmt. a & n.a (2020); *see also Laskar*, 972 F.3d at 1294. This is also not a workable approach to statutory interpretation. At what point does a modern "trend" inject a new inquiry into a federal statute? By respondent's own count, only two-fifths of states adopt his rule. Respondent Br. 31-32. Why on Earth would *a minority* be enough?[5]

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

Without precedent or history, respondent asks the Court to read the indications-of-innocence standard into the statute because it "provides a useful filtering function." Respondent Br. 13. Hardly.

As the opening brief explained, lower courts forced to apply respondent's standard have struggled with questions as fundamental as: "How can a judge or jury tell whether the dismissal is 'indicative of the innocence of the accused'?" and "whether it is sensible" to

[5] Even getting to twenty requires mischaracterization. Respondent includes states that openly reject his rule. *E.g.*, *Raine v. Drasin*, 621 S.W.2d 895, 900 (Ky. 1981). Others use language that sounds like his, but include dismissals. *E.g.*, *Rose v. Whitbeck*, 562 P.2d 188, 192 (Or. 1977); *Plouffe v. Montana Dep't of Pub. Health & Hum. Servs.*, 45 P.3d 10, 18 (Mont. 2002). Others do not purport to adopt respondent's standard, only making offhand citations to the Restatement.

even ask that question. *Deng v. Sears, Roebuck & Co.*, 552 F.3d 574, 576 (7th Cir. 2009). Other courts have stressed the standard's "difficulty" and "problematic" nature from a practical perspective. *Sanchez v. Duffy*, 416 F. Supp. 3d 1131, 1146 (D. Colo. 2018); *Rusakiewicz v. Lowe*, 556 F.3d 1095, 1106 (10th Cir. 2009) (giving up because the court "cannot tell" if dismissal was "reflective of" or "on" the merits). So, the opening brief posed some pretty basic questions for respondent:

- What does it mean for a record to "indicate" innocence? As the district court wondered, "how much evidence" need there be "suggesting the plaintiff's innocence," and how is competing evidence weighed? Opening Br. 39-40 (quoting JA186-87).
- How do courts evaluate the reasons for dismissal short of minitrials in which prosecutors and defense attorneys testify about their notes and recollections? Opening Br. 40-41.
- Why is it coherent to look for "indications of innocence" in a criminal record if the accused is presumed innocent and generally has no mechanism to prove his innocence? Opening Br. 34-35.

Respondent does not answer any of them.

Respondent also has no response to inconsistent and arbitrary lines lower courts have had to draw under his rule. *See* Opening Br. 42; *Kee*, 2021 WL 3852241, *10 (reaffirming that dismissal on speedy trial grounds is favorable although "neutral" as to innocence). Actually, respondent makes things *worse*,

admitting that under his approach the meaning of "favorable termination" varies depending on "the nature and context of the specific claims at issue." Respondent Br. 21 n.10. That captures the disarray unfolding in the Second Circuit. For example, just days after respondent filed his brief, the Second Circuit decided that the definition of favorable termination *does not* include "indications of innocence" for due-process-based claims, but *does* include that inquiry for *Manuel* claims. *Smalls*, 2021 WL 3700194, at *15-16.[6] The Court can either adopt the straightforward and historically grounded test of petitioner, the Eleventh Circuit, and the United States, or it can adopt a test that respondent cannot delineate and changes from one "nature and context" to the next. *See* Amicus Br. of Institute for Justice 3, 13 (explaining that petitioner's historically grounded rule reflects a "stable, neutral rule of law" in contrast to "the mercurial indications-of-innocence approach").

Respondent's final plea is to use the favorable-termination rule to protect government officials, who "act with the public interest in mind." Respondent Br. 34. The Court already has doctrines to do that, *e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (qualified immunity), but the favorable-termination rule is not one of them. *See* Amicus Br. of National Police Accountability Project 4 (explaining that "a variety of well-settled and frequently applied doctrines" already

[6] The court's sole rationale for preserving the indications-of-innocence test for *Manuel* claims was that the Fourth Amendment turns on "reasonable grounds for the prosecution." *Smalls*, 2021 WL 3700194, *8. This confirms the Second Circuit is simply muddling favorable termination and probable cause.

exist to discourage non-meritorious claims).[7] Defendants back in 1871 were clever enough to make this plea for policymaking, too. Just like respondent, they asked courts to limit favorable termination to a criminal proceeding resolved "on its merits," or else the law might favor "a party criminally prosecuted" over the defendant who acted "ostensibly for the public good." *Brown v. Randall*, 36 Conn. 56, 62 (1869). As one of the canonical cases put it, favorable termination was "no such rule." *Id*. Defendants were welcome to make their argument "to a jury," but they could not distort the favorable-termination rule "to shut out the truth." *Id*.

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[7] Respondent's policy perspective on "the desirability" of his rule, Respondent Br. 34, is sharply contradicted by a broad coalition of amici, from law enforcement professionals, to parental rights advocates, to libertarian, civil-rights and racial justice organizations.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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