No. 16-729

IN THE

Supreme Court of the United States

ANTONIO FRANCIS BUEHLER

Petitioner,

v.

AUSTIN POLICE DEPARTMENT, ET AL.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This Court recently held that "[t]he grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014). Although the Constitution does not require grand juries to hear any exculpatory evidence, *United States v. Williams*, 504 U.S. 36, 45 (1992), here a grand jury found probable cause to arrest even after hearing testimony not only from petitioner Antonio Buehler, but also six favorable witnesses and still returned indictments.

Can petitioner use Section 1983 to collaterally attack the grand jury's probable cause determination—by presenting the exact same evidence to a petit jury—thereby subjecting the police officers to civil liability for false arrest?

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BRIEF IN OPPOSITION

Officers arrested petitioner Antonio Buehler three times. Each time, a magistrate judge found probable cause for the arrest. Prosecutors then decided to seek indictments. Alongside the officers' accounts, the grand jury considered all the relevant exculpatory evidence, including testimony by Buehler himself, as well as several witnesses favorable to him. The grand jury then indicted Buehler for all three incidents, finding probable cause to believe that he had broken the law. And yet, Buehler claims that a third entity—a petit jury—should cast aside those prior findings and force respondents to pay a substantial monetary award.

No precedent from this Court or any other circuit court requires such second-guessing of the grand jury's probable cause findings. Here, the Fifth Circuit correctly held that Buehler cannot use § 1983 to overturn the grand jury's determination.

Buehler has failed to demonstrate that this Court should review that decision. Indeed, the arguments against certiorari are compelling. The case involves idiosyncratic facts that do not implicate any purported circuit split. It does not present a clean vehicle to consider the relationship between false arrest claims and judicial probable cause findings more broadly. The Fifth Circuit's decision was correct because on the facts of this case, this Court's precedents would treat the grand jury's probable cause determination as conclusive. For these reasons and those explained more fully herein, this Court should deny certiorari.

STATEMENT OF THE CASE

The petition omits many facts necessary to provide the full context in which this case arises. Chief among these omissions is a proper understanding of respondent

Austin Police Department ("APD") and its policies and practices safeguarding activities protected by the First Amendment.

The APD is widely recognized as a model police department. The Commission on Accreditation of Law Enforcement Agencies, which develops rigorous standards for law enforcement agencies, honored APD as a "Flagship Law Enforcement Agency," a title only 10% of certified agencies receive. Acevedo Aff., D. Ct. Dkt #92-11 at 7. Moreover, every APD officer—including respondents Oborski, Snider, Berry, and Johnson—has completed an eight-month training course and over 1,280 hours of continuing education certified by the Texas Commission on Law Enforcement, more than double the hours required by state law. *Id.* at 6.

The APD specifically facilitates citizens observing and filming police officers performing their duties. *See id.* at 2. Throughout its training, the APD instructs its officers that citizens have a right to record official acts in public. *See id.* In fact, to protect free speech and assembly rights at large events such as protests, the APD has created a "Special Response Team" that has as its motto: "Defend the First." *Id.*

Indeed, APD Chief Hubert Acevedo testified under oath that in his seven-plus years as chief, the APD *never* had a citizen complain that one of its officers interfered with a citizen's filming. *Id.*

Buehler is familiar with these policies and their successful application. *See* Buehler Dep., D. Ct. Dkt #92-9 at 22. While Buehler and the other members of the Peaceful Streets Project, which he founded, have filmed APD officers on hundreds of occasions, *see id.* at 33, officers have overwhelmingly respected Buehler's right to film. In the single incident when that was not true, the

APD took prompt and aggressive action. Only once—on its own initiative—the APD uncovered an incident of an officer attempting to prohibit Buehler from filming. Acevedo Aff., *supra*, at 3. In response, the APD quickly investigated the incident and disciplined the veteran officer, suspending him for ten days without pay despite his otherwise spotless record. *Id.* Further putting into practice its commitment to protecting the First Amendment, the APD has attempted to proactively engage with Buehler to arrange safe, unobstructed locations from where he can film traffic stops. Johnson Aff. and Dep., D. Ct. Dkt #92-8 at 7, 16–17.

Buehler has rebuffed all these attempts at cooperation. *Id.* Instead of engaging with respondents, Buehler prefers to blog and tweet, typically referring to police officers as "pigs" and "terrorists," disparaging reform, and calling for "nothing less than the abolition of police."[1] Tweets from the Peaceful Streets Project, many of which Buehler retweets, frequently end with the

[1] *See, e.g.,* @AntonioBuehler, Twitter (Sep. 5, 2016, 4:11 PM), https://twitter.com/AntonioBuehler/status/772904947142631425, *archived at* https://perma.cc/7DY5-NXTY; @AntonioBuehler, Twitter (Oct. 13, 2016, 9:07 AM), https://twitter.com/AntonioBuehler/status/786599284548395008, *archived at* https://perma.cc/LB6B-CSLW; *We Can Say Screw Daniel Holtzclaw and Still Advocate Abolishing Prison: To End the Police State We Must #AbolishPrison*, Peaceful Streets Project (Jan. 25, 2016), http://peacefulstreets.com/2016/01/we-can-say-screw-daniel-holtzclaw-and-still-advocate-abolishing-prison-to-end-the-police-state-we-must-abolishprison ("Trying to turn this system of policing into something that is socially beneficial is akin to what would have happened if the Nazis won World War II and people tried to argue that they later needed to simply alter the mission of the Schutzstaffel. . . . Systems of oppression should be abolished, not reformed. . . . We must seek nothing less than the abolition of police . . . .").

hashtag "#ACAB," an acronym for "all cops are bastards."[2] And Buehler and the Peaceful Streets Project have opined that "[t]he most honorable thing a cop can do is to kill himself or kill another terrorist cop." @PeacefulStreets, Twitter (Jan. 7, 2017, 7:30 PM), https://twitter.com/PeacefulStreets/status/817906176876802048, *archived at* https://perma.cc/NC64-UBRV.[3]

Of course, if Buehler were merely a provocateur who wanted to film the police and tweet invective, he would be within his rights. But Buehler has made it clear that when he films the police, he does so with the specific intent to "terroriz[e]" them.[4] Thus, Buehler and his fellow Peaceful Streets Project members regularly follow, encircle, and film APD officers as they conduct routine traffic stops. *See* Buehler Dep., *supra*, at 33. During these encounters, Buehler often does not stand quietly aside; instead, he inserts himself into the scenes by standing too close to ongoing investigations, *see, e.g.,* Pet. App. 5a,

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[2] *See, e.g.,* @PeacefulStreets, Twitter (Jan. 9, 2017, 8:15 PM), https://twitter.com/PeacefulStreets/status/818642272933834754, *archived at* https://perma.cc/Z5B2-PUVG ("While we acknowledge that not all cops are bad . . . Just kidding. All cops are bastards. #ACAB").

[3] In other online postings, Buehler has publicly revealed undercover officers on covert operations for which he was also indicted, Berry Aff., D. Ct. Dkt #92-6 at 2, disclosed photographs and addresses of officers' homes, *see* Oborski Aff., D. Ct. Dkt #92-3 at 6–7, and incited others to act against officers, *id.* Buehler's actions have so greatly increased the APD's concerns for officer safety that it has deployed a 24/7 protective detail around certain officers. *See id.*

[4] *See* @AntonioBuehler, Twitter (Sep. 14, 2015, 4:21 PM), https://twitter.com/AntonioBuehler/status/643535170390372352, *archived at* https://perma.cc/MZ9U-G4KE ("I love terrorizing pig police by filming their asses. #filmthepolice #ACAB #CowardCops . . .").

disobeying orders to move to safe locations, *see, e.g., id.* at 4a, and verbally harassing officers, *see, e.g., id.* at 3a–4a. Police interactions can be tense, uncertain and rapidly evolving, *Graham v. Connor,* 490 U.S. 386, 396-97 (1989), and Buehler's actions often escalate this danger by making subjects "agitated," *id.* at 4a, and distracting officers who must remain vigilant for their own safety and that of the public, *see, e.g., id*. at 6a.

On several occasions, Buehler's own statements show that he has broken the law. This case arises out of three arrests, on January 1, August 26, and September 21 of 2012. Pet. 4. During these three incidents, Buehler was unusually aggressive and noncompliant while filming officers conducting investigations and making arrests. *See, e.g.,* Pet. App. 24a. His actions put officers and members of the public at risk. *See, e.g., id.* Each time, he disobeyed specific lawful orders and challenged the officers' commands as they were attempting to perform their duties. *See id.* at 3a, 4a, 5a. Although the officers arrested Buehler, they assured him that they had no issue with his filming and allowed him to continue filming even as he was arrested. *See id.* at 24a, 27a, 28a. Others at the scene who were also filming or observing the police complied with orders, were not arrested, and continued filming.[5]

On the day of each arrest, a magistrate judge found probable cause to arrest Buehler for various felonies and misdemeanors. *Id.* at 3a, 5a, 6a.

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[5] The one exception is Sarah Dickerson, who was arrested by APD officers during the September 21 incident because she, like Buehler, refused to comply with lawful orders to relocate. Rodriguez Aff., D. Ct. Dkt #92-13 at 34–37.

The case was then separately presented to a grand jury. *Id.* at 6a. Though not required by state law, the grand jury heard testimony not only from the arresting officers, but also from Buehler and six additional witnesses favorable to him. *Id.* at 43a. After hearing all the exculpatory evidence,[6] the grand jury found probable cause and returned three indictments against Buehler, one for each arrest, for failing to obey a lawful order. *Id.* at 6a. Buehler was acquitted of one charge, and prosecutors chose not to pursue the remaining two. *Id.*

Buehler sued the City of Austin, the APD, Chief of Police, and four APD officers—respondents here—under 42 U.S.C. § 1983 asserting that he had been wrongfully arrested in violation of the First and Fourth Amendments. *Id.* at 17a. The district court granted summary judgment to respondents. *Id.* at 47a. Focusing its analysis on qualified immunity, the district court reiterated its previous finding on respondents' motion to dismiss that both the right to record police officers performing official duties and the right to be free from unlawful arrest are clearly established. *Id.* at 36a. The district court then considered whether respondents had violated either of those rights. *Id.* at 36a–46a. Probable cause is a complete defense to all of Buehler's claims, and the district court held that the grand jury's indictments were conclusive determinations of probable cause that

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[6] Buehler has conceded that six witnesses presented testimony favorable to him before the grand jury, Buehler Aff., D. Ct. Dkt #97-12 at 10 n.57, and has never pointed to any exculpatory evidence that was withheld from the grand jury. Indeed, he has never even argued that the evidence he would present in this civil case would differ in any material respect from the evidence the grand jury considered before indicting him.

necessarily defeated Buehler's allegations that he had been unlawfully arrested. *Id.* at 47a.

The Fifth Circuit affirmed. *Id.* at 14a. It declined to overrule its precedents holding that an officer "will not be liable if *the facts* supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury," which then finds probable cause. *Id.* at 8a. The court stressed that "[a]n independent intermediary's probable cause finding does not protect law enforcement officials whose malicious motive . . . lead[s] them to withhold any relevant information, or otherwise misdirect[] the magistrate or the grand jury by omission or commission[.]" *Id.* at 10a (citations and quotations omitted). Noting Buehler's failure to develop and cite to the evidentiary record, the Fifth Circuit affirmed the district court's rejection of Buehler's argument that the grand jury proceedings in this case were somehow tainted by impropriety. *Id.* at 11a.

The Fifth Circuit emphasized that Buehler's challenge to the grand jury's probable cause findings was "especially unpersuasive . . . because the grand jury heard testimony from Buehler and several witnesses who testified in Buehler's favor at his criminal trial—and presumably would have been favorable to Buehler before the grand jury as well—but still returned indictments." *Id.* at 13a. Because the grand jury had heard all the evidence that Buehler would present to challenge probable cause in this case, and because nothing had been withheld from the grand jury, the Fifth Circuit affirmed the district court's decision treating the grand jury's finding as conclusive on the question of probable cause. *Id.* at 14a.

The Fifth Circuit denied rehearing, *id.* at 50a, and Buehler now seeks certiorari.

REASONS TO DENY THE WRIT

The petition asks this Court to hold, as a categorical matter, that even if a properly constituted grand jury presented with all the facts finds probable cause, the indictee may nevertheless relitigate whether there was probable cause to arrest him in a subsequent § 1983 action. Buehler argues that an indictment cannot conclusively establish probable cause because the grand jury could find probable cause based on the record before it even if the more limited facts known to the officers at the time of the arrest did not in fact give rise to probable cause.

This is not that case. Whatever the merits of that argument in other contexts, it has no force when, as here, the additional facts known to the grand jury made it less likely to find probable cause. No post-arrest investigation revealed additional inculpatory evidence, and the grand jury heard testimony from Buehler and six other witnesses who spoke in his favor. The fact that the grand jury nevertheless indicted Buehler for the conduct that gave rise to each of his three arrests is therefore damning: it proves that the officers' probable cause determinations were correct, *a fortiori*.

These atypical facts do not implicate any circuit split that might exist, they make this case a bad vehicle to decide the question presented, and they establish that the Fifth Circuit's decision was correct. Certiorari should be denied.

I. No Circuit Has Decided A Similar Case Differently.

Buehler attempts to manufacture a circuit split by snipping language from disparate cases, but a closer analysis shows that this is not the "mature and intractable" conflict he claims. Pet. 12. At most, there is a

1-2 split over a very narrow legal issue, but even that split is dubious because neither of the two courts that have arguably disagreed with the Fifth Circuit have considered truly analogous facts, or this Court's most recent precedent.

1. First, none of the decisions Buehler cites was decided after *Kaley v. United States*, 134 S. Ct. 1090 (2014). There, this Court emphatically affirmed the "fundamental and historic commitment . . . to entrust . . . probable cause findings to grand juries." *Id*. at 1097. This Court recognized that grand juries are able to not only "initiate a prosecution for a serious crime[,]" but also "immediately depriv[e] the accused of her freedom." *Id.* at 1097–98. For a person not yet in custody, "an indictment triggers issuance of an arrest warrant without further inquiry into the case's strength." *Id.* at 1098 (quotation and citations omitted). For a person arrested without a warrant, "an indictment eliminates her Fourth Amendment right to a prompt judicial assessment of probable cause to support any detention." *Id.* (citation omitted).[7] The well-established and recently affirmed fealty to grand jury probable cause findings cuts strongly against any decision by a circuit court that would allow a plaintiff to collaterally attack that finding by presenting *the exact same evidence to a petit jury in a civil case.* Because it is likely that, in light of *Kaley*, a circuit court would reconsider any decision contrary to the Fifth Circuit's holding in this case, this Court should allow any issue to continue to percolate.

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[7] *Kaley*'s reaffirmation that indictments conclusively determine probable cause provides strong proof that the Fifth Circuit's decision was correct on the merits. This point is discussed *infra* at 20-29.

2. Even independent of *Kaley*, the facts of Buehler's case do not implicate any circuit split. His petition at times challenges whether an indictment can *ever* insulate an officer from false arrest liability. Every circuit agrees that the answer is "yes" in the typical case, *i.e.*, a case in which an indictment is obtained prior to the arrest.[8] Buehler does not argue otherwise. Thus, on the most common fact pattern, there is no circuit split.

Any potential circuit split is on the much narrower, and much rarer, question of whether a *post-arrest* indictment has the same effect as a pre-arrest indictment.[9] The issue, however, is more complicated than Buehler makes it out to be, because the Fifth Circuit does not hold that every post-arrest indictment always definitively establishes that probable cause existed at the time of arrest. Instead, the Fifth Circuit holds that an indictment suffices only if the grand jury is presented

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[8] For example, the courts that Buehler places on the other side of the split agree that when an arrest is made pursuant to an indictment, a false arrest claim must fail. *See, e.g.*, *Smith v. Sheriff*, 506 F. App'x 894, 898 (11th Cir. 2013) ("[W]here, as here, a judge or grand jury issues a warrant or indictment prior to an arrest, such intervening acts 'br[eak] the chain of causation for the detention from the alleged false arrest.'" (citing *Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir.1999)); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 307 n.13 (6th Cir. 2005) ("In a situation where the arrest of the plaintiff was *pursuant* to a grand jury indictment, 'the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.'" (quoting *Higgason v. Stephens*, 288 F.3d 868, 877 (6th Cir. 2002)).

[9] Apart from this case, the Fifth Circuit has held that a post-arrest indictment shields an officer from potential liability in only one other published opinion. *See Taylor v. Gregg*, 36 F.3d 453, 456–57 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (en banc).

with "all the facts," and there is no taint. *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988). In this case, the Fifth Circuit found that "Buehler's evidence simply shows that his actions and those of the arresting officers were subject to different interpretations." Pet. App. 12a-13a. And this Court has already decided the issue in *Kaley*, recognizing that "if the person was arrested without a warrant, an indictment eliminates her Fourth Amendment right to a prompt judicial assessment of probable cause to support any detention." 134 S. Ct. at 1098.

And Buehler's grand jury certainly did hear all the facts: it heard not only from the arresting officers, but also from Buehler and six sympathetic witnesses. Pet. App. 43a. The grand jury had the entire story: both sides, with nothing left out.[10] Moreover, the grand jury's finding

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[10] Buehler may argue that the Fifth Circuit's rule actually is broader, noting that in an unpublished decision, *Russell v. Altom*, 546 F. App'x 432, 437 (5th Cir. 2013), the Fifth Circuit "rejected taint arguments even where the grand jury did not hear from pro-plaintiff witnesses and the plaintiff dispute[d] the version of the facts presented, as well as the prosecutor's failure to present potentially exculpatory evidence," Pet. App. 13a (quotation omitted). This conflicts with the plain language of the Fifth Circuit's published opinions, *see, e.g.*, *Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010) ("[T]he chain of causation is broken only where all the facts are presented to the grand jury[.]" (citing *Hand*, 838 F.2d at 1428) (first alteration in original)). And the Fifth Circuit has affirmed at least one district court that explicitly required the grand jury to hear exculpatory evidence if the indictment were to shield an officer from liability. *See Shields v. Twiss*, No. SA-01-CA-0289-RF, 2003 WL 23879705, at *3 (W.D. Tex. July 9, 2003) ("[T]he failure to present all of the facts, both inculpatory and exculpatory, to the grand jury; or the presentation of false or fabricated evidence, expose the defendant to liability for false imprisonment or arrest." (citing *Hand*, 838 F.2d at 1428)), *affirmed*, 389 F.3d 142 (5th Cir. 2004). In

was entirely consistent with the findings of independent magistrate judges immediately after the arrests. Buehler gives no reason to believe that any circuit would hold, on similar facts, that the grand jury's finding is not conclusive.

3. Buehler's best cases come from the Sixth and Eleventh Circuits. But these cases are distinguishable from this one because they involved either clear police misconduct or grand jury irregularity, not alleged here.

For example, in *Radvansky v. City of Olmsted Falls*, 395 F.3d 291 (6th Cir. 2005), the Sixth Circuit held that a reasonable jury could find that a police officer ignored exculpatory evidence and therefore arrested Radvansky without probable cause. *See id.* at 305–06. The Sixth Circuit stated, in a footnote of this pre-*Kaley* opinion, that "after-the-fact grand jury involvement cannot serve to validate a prior arrest." *Id.* at 307 n.13. But that made sense because the officers who arrested Radvansky did not testify before the grand jury. *See id.* at 316–17 & n.20. Instead, the grand jury heard testimony only from Detective Caine, a savory figure with limited involvement in the case, who wanted to prosecute Radvansky "to cover [the police] against any lawsuit." *Id.* at 317. These circumstances created a factual dispute about whether the grand jury had "all the facts," *Hand*, 838 F.2d at 1428, pertaining to Radvansky's arrest. The facts of Buehler's case could not be more different: he cannot dispute that

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any event, because the grand jury in this case did have all the facts, the question of what courts in the Fifth Circuit may have done in other unpublished cases does not matter. For the same reason, Buehler's petition is a poor vehicle for this Court to consider that supposed broader version of the Fifth Circuit's rule. Should this Court wish to entertain that challenge, it should wait for a case that properly presents it.

his grand jury heard all the evidence because it heard from the arresting officers and several witnesses who presented exculpatory evidence. Pet. App. 43a. The factual dispute in *Radvansky* would not satisfy the Fifth Circuit's rule.

Similarly, in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999), the Eleventh Circuit affirmed a magistrate judge's denial of summary judgment on Jones' false arrest claim. *See id.* at 1287. It first found a factual issue regarding whether a police officer had fabricated the confession, the sole evidence contained in the arrest affidavit prepared for Jones's probable cause hearing. *See id.* at 1283–84. Even though the prosecutor had sought and obtained an indictment, the district court had found a factual dispute over whether the officers "either intentionally withheld or falsely presented matters to the grand jury and the trial judge[.]"[11] The district court thus held that there was "no conclusiveness in these probable cause determinations."[12] In this case, however, a magistrate judge found probable cause shortly after each arrest, Pet. App. 3a, 5a, 6a, and Buehler does not allege any impropriety. He has likewise pointed to no evidence suggesting that his grand jury proceedings were tainted. The facts surrounding *both* probable cause determinations in *Jones*, unlike Buehler's case, would not pass muster under the Fifth Circuit's rule.

Finally, in *Garmon v. Lumpkin County*, 878 F.2d 1406 (11th Cir. 1989), the district court had directed a verdict,

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[11] The district court's summary judgment order was not published and is not available on any electronic database. The quotation can be found in appellee Jones's Eleventh Circuit brief. *See* 1998 WL 34083468.

[12] *Id.*

finding that although the police officer arrested Garmon without probable cause, the arrest warrant and the later indictment insulated the officer from liability. *See id.* at 1408. The Eleventh Circuit reversed, reasoning that "[a] subsequent indictment does not retroactively provide probable cause for an arrest that has already taken place." *Id.* at 1409. But the facts of *Garmon* are distinguishable from this case. The affidavit used to obtain the warrant for Garmon's arrest contained *nothing* except for the officer's conclusion that Garmon had committed the crime, which makes it facially invalid. *See id.* Buehler has not shown any such misconduct. And the record in *Garmon* did not disclose what evidence was presented to the grand jury, but the only possibility is that the grand jury either heard additional inculpatory evidence or returned a tainted indictment based on nothing at all. Buehler's grand jury, by contrast, heard from at least eight witnesses, and apart from the arresting officers, it heard only *exculpatory* evidence. *See* Pet. App. 43a. These crucial distinctions illustrate why the Fifth Circuit has never held a post-arrest probable cause finding to shield an officer from liability in circumstances like those in *Garmon*.

4. None of the other cases Buehler cites even come close to proving any kind of circuit split. The First and Fourth Circuits have stated that post-arrest grand jury indictments establish probable cause in false arrest cases, but only in dictum. *See Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 98 (2013); *Kennedy v. Town of Billerica*, 617 F.3d 520, 534 (1st Cir. 2010). The Third Circuit likewise has only discussed this issue in unpublished dictum. *See Cox v. Pate*, 283 F. App'x 37, 39 (3d Cir. 2008) (stating offhandedly that grand jury indictments are not conclusive while recounting the procedural history of the case).

The Eighth Circuit has addressed the issue only in a cryptic footnote, where the court erroneously reasoned that a grand jury indictment cannot defeat a false arrest claim because such a rule "would eliminate all § 1983 lawsuits for false arrest." *See Arnott v. Mataya*, 995 F.2d 121, n.4 (8th Cir. 1993). That statement is obviously wrong because not every arrest results in an indictment—and not every indictment involves grand jury proceedings as robust as the one in this case (indeed, the vast majority do not). If the Eighth Circuit had an opportunity to consider facts like the ones here, it would likely agree with the Fifth Circuit.

The Second Circuit's analysis also does not conflict with the Fifth's. That court has never determined whether grand jury findings defeat false arrest claims as a matter of federal law. In *Savino v. City of New York*, 331 F.3d 63 (2d Cir. 2003), the Second Circuit noted that "the New York Court of Appeals has expressly held that the presumption of probable cause arising from an indictment 'applies only in causes of action for malicious prosecution and is totally misplaced when applied in false [arrest] actions.'" *Id.* at 75 (quoting *Broughton v. State*, 335 N.E.2d 310, 313 (N.Y. 1975)); *see also McClellan v. Smith*, 439 F.3d 137, 145 (2d Cir. 2006) (same). But even if state law does not treat grand jury indictments as conclusive in false arrest tort cases, that does not prove that the courts of appeals disagree about the meaning of federal law. *Cf. Gerstein v. Pugh*, 420 U.S. 103, 123 (1975) (recognizing space for federalism in state probable cause standards). Moreover, at least one district court in the Second Circuit has held that "probable cause is presumed" in a false arrest case when, "after the plaintiff was arrested he was subsequently indicted by the grand jury." *See Rivas v. Suffolk Cty.*, 326 F. Supp. 2d 355, 361 (E.D.N.Y. 2004) (citing *Bernard v. United States*, 25 F.3d

98, 104 (2d Cir. 1994)). At a minimum, the law in that circuit is unclear—and therefore not clearly contrary to the rule in the Fifth Circuit.

5. Finally, there is no pressing need for the Court to address any perceived circuit split. To the extent that courts adopt different rules, the difference only matters when (1) a grand jury returns an indictment after an arrest (2) based on all the facts, including exculpatory ones, but (3) the officers nevertheless lacked probable cause to make an arrest, and (4) there are no alternative grounds upon which the plaintiff's claim must fail (*e.g.*, qualified immunity or bars on municipal liability). A vanishingly small subset of cases will meet those criteria.[13] Thus, even if the Court perceives tension between the holdings of the courts of appeals, intervention is not warranted.

II. This Case Is A Poor Vehicle To Decide The Question Presented.

As the foregoing discussion illustrates, this case is a poor vehicle to examine the question presented because it implicates only a small and unusual corner of the issue.

1. This case is manifestly a poor vehicle to consider whether an arrestee can bring a false arrest claim after being arrested pursuant to a warrant or grand jury indictment—which is the most common fact pattern. *See, e.g., Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010). That is because, as the petition argues, the legal considerations relating to pre-arrest and post-arrest indictments may be different. Pet. 19.

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[13] Indeed, as explained *infra 17-19*, this case does not fall within that subset because the officers had probable cause to arrest Buehler.

2. This case is also a poor vehicle to consider the propriety of the Fifth Circuit's rule that a post-arrest grand jury finding suffices to defeat a false arrest claim if the finding is based on all the facts, and untainted by any deception. The district court found that Buehler had not raised a triable issue of fact regarding whether the grand jury's determination had been tainted by police impropriety. Pet. App. 43a–44a. The Fifth Circuit affirmed, noting in the process that Buehler had failed to include "precise record citations in his appellate brief, instead citing entire exhibits—including a five-hundred-page trial transcript and lengthy videos—for important factual propositions," in violation of Fifth Circuit rules. *Id.* at 11a n.7. The court did its "best to review the evidence identified in the argument section of Buehler's brief," and found "no error in" the district court's conclusion. *Id.* The petition, in turn, does not contest the Fifth Circuit's holding that the grand jury's verdict was untainted. Instead, it argues that it is difficult to show taint, and so the grand jury's findings should always be disregarded. Pet. 21–22. The only reason Buehler is advancing such a bold legal proposition is because, due to his own litigating mistakes, he failed to pursue evidence of taint. But this Court's review has never been a mechanism to bail out less than competent litigants.

3. Alternative grounds also support the decision below. Even if, as Buehler asserts, the grand jury's findings of probable cause are not entirely conclusive, Buehler's claim would fail in any event because there is ample evidence in the record establishing probable cause. This Court has stressed time and again that probable cause is "is not a high bar" to clear. *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014); *see also Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (noting that probable cause requires only the "kind of 'fair probability' on which

'reasonable and prudent [people,] not legal technicians, act'") (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (noting that probable cause "'means less than evidence which would justify condemnation' or conviction") (quoting *Locke v. United States*, 11 U.S. 339, 348 (1813)). Moreover, the inquiry is objective: as long as there was probable cause to arrest Buehler for *some* crime, it does not matter whether the officers correctly assessed that they had probable cause for any particular crime. *See, e.g., Virginia v. Moore*, 553 U.S. 164, 171 (2008). And even if the officers' decision was based on a reasonable mistake of law (*e.g.*, a misunderstanding of what the law prohibited), it nevertheless may give rise to probable cause. *Cf. Heien v. North Carolina*, 135 S. Ct. 530 (2014).

The facts of this case easily clear that low bar. In addition to the grand jury findings, three different magistrate judges found probable cause to arrest Buehler essentially contemporaneously to each of his arrests. Pet. App. 3a, 5a, 6a. Buehler relegates this fact to a footnote, but it is strong evidence that his claim is wrong. Pet. 7 n.2. The Fifth Circuit noted that Buehler "admits that group members sometimes ignore what Buehler terms 'illegal or arbitrary orders,'" in essence admitting the very charge for which he was indicted. Pet. App. 4a. The lower court also found it undisputed that Buehler "resisted to some degree" Officer Oborski's order to put his hands behind his back on January 1, Pet. App. 3a, "protested" Officer Berry's order to back up on August 26, *id.* at 4a, and again "protested" Sergeant Johnson's order to move to a specified location on September 21, *id.* at 5a. Pet. App. 6a. This evidence establishes that the officers had probable

cause to arrest Buehler for violating a lawful order,[14] even ignoring identical determinations by three magistrate judges and a grand jury. Granting certiorari in this case would therefore be futile: even if this Court remands this case, Buehler will still be unable to demonstrate that the officers lacked probable cause.

4. The amicus brief filed by the Cato Institute and others requests that this Court add an additional question presented to the case regarding First Amendment retaliation. Cato Br. i. That request should be denied along with the petition. In terms of this Court's ability to evaluate the viability of the Fifth Circuit's rule, nothing would be gained by adding Cato's proposed question. Instead, Cato is making the request because it wants to use this case as a platform to discuss the filming of police generally, *id.* at 14–23—even though respondents have made clear time and again that they have no objection to citizens filming officers, *see* Affidavit of Hubert Arturo Acevedo, D. Ct. Dkt #92-11 at 2. Cato's interest in the case reveals how Buehler and others intend to use this Court's profile to generate notoriety. While there is nothing wrong with activists wanting to draw attention to themselves or to their professed causes, the Court may

[14] The facts of this case make it essentially undisputable that the officers had probable cause to arrest Buehler. A person commits the offense of failing to obey a lawful order—the misdemeanor for which Buehler was indicted—if he "knowingly fails or refuses to comply with an order or direction of a peace officer that is given by a visible or audible signal," Austin Mun. Ord. § 9-4-51. APD officers surely had probable cause to believe Buehler violated this ordinance when making each arrest in light of his admissions.

wish to consider whether it wants to lend its name to that effort.[15]

III. The Decision Below Is Correct.

This Court should also deny certiorari because the Fifth Circuit correctly held that in this case, the grand jury's finding of probable cause should be treated as conclusive.

A. This Court's Precedents Treat Grand Jury Indictments As Conclusive Evidence Of Probable Cause.

This Court has repeatedly held that an indictment "returned by a 'properly constituted grand jury' . . . 'conclusively determines the existence of probable cause.'" *Kaley v. United States*, 134 S. Ct. 1090, 1097 (2014) (citing *Gerstein v. Pugh*, 420 U.S. 103, 117, n.19 (1975)) (quoting *Ex parte United States*, 287 U.S. 241, 250 (1932)). Here, the grand jury heard all the evidence available at the time of Buehler's arrests, including significant exculpatory evidence from witnesses sympathetic to Buehler. *See* Buehler Aff., D. Ct. Dkt. #97-12 at 10 n.57. After giving Buehler a full and fair opportunity to tell his side of the story, *see* Pet. App. 43a, the grand jury nevertheless found that probable cause existed for each incident that resulted in an arrest, Pet. App. 6a. Buehler's allegation that the grand jury's findings were tainted has been rejected as baseless and his

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[15] To the extent the Court perceives any value in Cato's proposed addition to the case, that too is a reason to deny certiorari, as Buehler has not incorporated any First Amendment retaliation arguments into his petition and this Court typically does not add an issue a petitioner has not himself included. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

petition does not press that contention.[16] And Buehler has not suggested that he would present any new or different evidence to a petit jury. Buehler's false arrest claims, which are all predicated on a lack of probable cause, cannot survive these determinations.

Buehler thus asks this Court for a do-over. But allowing courts adjudicating constitutional torts to second-guess the grand jury's determinations would undermine the institution's independence, and therefore its "singular role," *Kaley v. United States*, 134 S. Ct. 1090, 1097 (2014), in making determinations of probable cause and "protecting citizens against unfounded criminal prosecutions," *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972). Time and again parties have asked this Court to second-guess grand juries' determinations of probable cause and this Court has declined to do so. *See Kaley v. United States*, 134 S. Ct. 1090, 1097–98 (2014); *Costello v. United States*, 350 U.S. 359, 362 (1956) ("No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury." (internal quotations omitted)); *United States v. Williams*, 504 U.S. 36, 47 (1992) ("[T]he grand jury is an institution separate from the courts, over whose functioning the courts do not preside.").

Importantly, *Kaley* recognized that the grand jury's decision "may do more than commence a criminal proceeding." *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014). The defendants in *Kaley* attempted to challenge the conclusiveness of the grand jury's finding of probable cause in order to reverse the resulting seizure of their assets so they could hire the counsel of their choice. *Id.* at

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[16] Such a factbound holding would not be certworthy in any event.

1094. This court had no trouble holding that the grand jury's finding was conclusive despite the weighty Sixth Amendment concerns at stake: "We simply see no reason to treat a grand jury's probable cause determination as conclusive for *all* other purposes (including, in some circumstances, locking up the defendant), but not for the one at issue here." *Id.* at 1099 n.7 (emphasis added). A grand jury's finding of probable cause is thus conclusive across the board.

And, the grand jury's finding in this case is an especially strong inference given the identical findings by three different magistrate judges, every judicial body that has considered this issue has come to the same conclusion.

Under these precedents, the decision in this case was correct, and Buehler's insistence that he should be able to second-guess the grand jury's finding of probable cause is plainly wrong.[17]

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[17] Buehler flaunts statistics purporting to show that grand juries merely rubber stamp prosecutors' desires. Pet. 22. But Buehler's own experience belies that assertion: his grand jury did not return felony indictments, even though prosecutors sought them. Pet. App. 7a. Moreover, the high rate of indictment is not surprising in light of the fact that 84.6% of cases brought to trial in 2010 resulted in a conviction (and many more indicted cases obviously pleaded out before trial). *See Criminal Defendants Disposed of in U.S. District Courts, Sourcebook of Criminal Justice Statistics Online*, http://www.albany.edu/sourcebook/pdf/t5222010.pdf. Understood within this context, Buehler's cited statistics reflect little more than a finely tuned prosecutorial machine that presents grand juries with overwhelmingly well-substantiated cases. And in any event, similar arguments failed to persuade this Court to permit second-guessing of grand jury indictments in other contexts.

B. Buehler's Attack On The Fifth Circuit's Reasoning Is Unpersuasive.

1. Buehler argues that this case is different because the indictments against him were obtained *after* his arrest. Pet. 16. His entire critique rests on the fact that some courts have framed the issue in terms of the element of causation,[18] reasoning that indictments break the causal chain between the arresting officer's conduct and the arrestee's detention. *See, e.g.*, *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988). Buehler attacks this reasoning, arguing that it is logically impossible for a post-arrest probable cause determination to break the causal chain that resulted in the arrest. *See* Pet. 19.

Buehler's simplistic logic elides the true import of the subsequent grand jury determination. The analogy between pre-arrest and post-arrest indictments does not depend on a strict theory of causation under which the present alters the past. The key point is that regardless of the indictment's timing, the grand jury asks the same question: whether the conduct that resulted in the arrest gave rise to probable cause. Because a post-arrest indictment provides the same answer to that question as one issued pre-arrest, it dooms the false arrest claim in exactly the same way. In other words, even if Buehler is technically correct that a subsequent indictment cannot break the prior causal chain that resulted in his arrest,

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[18] Causation is an element of false arrest: "An actor is subject to liability to another for false imprisonment if: (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it." Restatement (Second) of Torts § 35 (1965).

that does not mean that courts should treat the grand jury's probable cause finding as anything other than conclusive evidence of probable cause—indeed, that is exactly what this Court's precedents require. *See Kaley*, 134 S. Ct. at 1098 ([A]n indictment fair upon its face and returned by a properly constituted grand jury . . . conclusively determines the existence of probable cause (quotations omitted)).

Buehler's only response is to argue that the post-arrest grand jury will often consider "a more developed evidentiary record than available to the officer[s] at the time of the arrest[s]," Pet. 3, such that its decision to indict cannot validate the officer's decision to arrest. That argument can only help a plaintiff in Buehler's position if the record before the grand jury was worse for the plaintiff than the record before the officer—so that the grand jury was more likely to find probable cause. Whatever the merits of that argument in those circumstances, the facts here are the opposite because the record before the grand jury included the same information that the officers had, plus the testimony of Buehler and his allies, which would have tended to exculpate him.

2. For doctrinal support, Buehler hangs his hat on *Malley v. Briggs*, 475 U.S. 335 (1986). But *Malley*'s holding is cabined to a rejection of absolute immunity for police officers in favor of qualified immunity. In *Malley*, an officer who was overseeing a court-authorized wiretap on a third-party's phone overheard conversations that suggested two prominent community members possessed controlled substances. Upon this basis, the officer submitted a felony complaint, which was approved by a magistrate judge. *Malley*, 475 U.S. at 338. The grand jury, however, refused to indict. *Malley*, 475 U.S. at 338. The suspects brought suit under § 1983, and the officer

asserted absolute immunity. *Malley*, 475 U.S. at 338–39. This Court rejected the officer's defense, but found instead that only qualified immunity could apply. *Malley*, 475 U.S. at 344–45. The Court thus held that a magistrate judge's approval of a warrant would shield the arresting officer from liability unless the warrant application was "so lacking in indicia of probable cause" that no reasonable officer could conclude probable cause existed. *Malley*, 475 U.S. at 345.

Buehler relies heavily on a single footnote in *Malley*, which by his own admission is dicta. *See* Pet. for Rehearing 6 ("The Supreme Court Rejects Independent Intermediary Doctrine in *Dicta*") (emphasis added). But "[d]ictum settles nothing, even in the court that utters it." *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005). And this dictum in *Malley* did not set out to diminish the importance of the grand jury, but merely restated the uncontroversial tort principle that "a man [can be] responsible for the natural consequences of his actions." *Id.* at n.7 (quotation omitted).

For three reasons, *Malley* does not help Buehler. First, as explained above, the outcome of this case does not turn on rigid principles of causation, but instead on the import of the grand jury's probable cause determination.

Second, even in terms of causation, *Malley* is distinguishable. That case was *only* about a magistrate's determination of probable cause; the grand jury refused to return an indictment. Here, *both* three magistrates and the grand jury found probable cause to believe that Buehler had committed a crime. The distinction matters because even if an officer's ex parte application might sometimes "cause" a magistrate to issue an arrest warrant, the officer has no comparable influence over a

grand jury, which engages in a substantially more robust inquiry.

Third, the Fifth Circuit's doctrine does not flout *Malley*; rather, it complies with *Malley* by holding that presentment of tainted or incomplete facts to a grand jury or magistrate will leave the chain of causation unbroken. *See Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010) (the chain of causation remains intact if "it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant" (quoting *Hand*, 838 F.2d at 1428)). Even under its broadest reading, *Malley*'s acknowledgment of the causal link between a complaint and a subsequent arrest is merely an iteration of the Fifth's Circuit's taint exception.

C. Buehler's Rule, If Accepted, Would Have Severe Negative Consequences.

If accepted, Buehler's rule would also undermine the grand jury's ability to protect the citizenry, and expose officers and municipalities to unnecessary additional liability.

1. Buehler ignores the way that his rule would be harmful to criminal defendants and citizens. First, if Buehler prevails, he will destroy the incentive that prosecutors have to present exculpatory evidence to the grand jury. This Court has already held that the Fifth Amendment's Indictment Clause does not require such a presentation. *See United States v. Williams*, 504 U.S. 36, 51 ("it has always been thought sufficient to hear only the prosecutor's side."). But prosecutors nevertheless do so because it is only by providing the grand jury with "all the facts" that they can avail themselves of the indictment as a defense to liability. *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988). Under Buehler's rule, prosecutors would

have every incentive to present a more one-sided account.

Second, Buehler's rule would also eliminate an incentive to decline prosecution of minor offenses after an indictment. In a case like this one, where a grand jury returns an indictment for a relatively minor offense, the prosecutor will know that if he goes to trial and prevails, that victory will eliminate any potential civil liability for the police and the government. He therefore has an incentive to do so. However, if the prosecutor can rely instead on the indictment, he can safely dismiss the charges, sparing prosecutorial, defense, and judicial resources. Buehler's rule would foreclose that reliance, leaving an overwhelming incentive to pursue a conviction.

2. Buehler's rule would also interfere with the legal regime that this Court has crafted over a period of decades to ensure that the law permits police officers to protect themselves on the job. As this Court has explained, "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). The specter of police liability must therefore remain limited to instances of unreasonable police behavior to avoid deterring officers from making the decisions necessary to protect both their own lives and public safety. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving . . . .'" *Graham v.* Connor, 490 U.S. 386, 396–97 (1989)). Yet Buehler seeks to defeat respondents' claim to qualified immunity by challenging exactly these kinds of split-second decisions, which from

the "peace of a judge's chambers" may "seem unnecessary." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

Here, the officers acted eminently reasonably. Faced with escalating unrest, they applied the fundamentals of their training—which caution against allowing individuals to recruit others to the scene or allowing bystanders to "divide and conquer," or place officers and citizens in possible cross fire situations. Deposition of Adam Johnson, D. Ct. Dkt #92-8 at 8. The officers made repeated attempts to control Buehler verbally, instructing him about where to go even as he shouted and otherwise interfered with their work. When their efforts failed and they became legitimately concerned that Buehler's disruptions created a safety issue, they arrested him and promptly sought determinations of probable cause from magistrate judges. Prosecutors independently decided to prosecute the case, and a grand jury found probable cause for each arrest.

Indeed, it is difficult to imagine what else the officers were supposed to do in these circumstances with a subject who demonstrated a continued refusal to comply with any directive. In Buehler's view, officers should have allowed him to continue a course of harassment interfering within the very same space they were attempting to perform arrests, which distracted them and raised concerns about potential threats from not having command of their surroundings. But the law does not require officers to put themselves in such unnecessary danger, *see Michigan v. Long*, 463 U.S. 1032, 1052 (1983); *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) ("The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized, we have stressed, if the officers routinely exercise unquestioned command of the situation." (internal citations and quotations omitted))—

and especially does not require it when, as here, multiple magistrate judges and a properly convened grand jury concurred with the officers' assessment that there was probable cause to believe that Buehler had committed a crime.

CONCLUSION

Certiorari should be denied.

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