No. 14–9496

In the Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET ET AL.,

Respondents.

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

BRIEF OF ALBERT W. ALSCHULER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

INTEREST OF *AMICUS CURIAE*

I am a member of the Illinois Bar and the Julius Kreeger Professor Emeritus at the University of Chicago Law School. My principal fields of study are criminal law and criminal procedure, subjects I have taught for fifty years. My interest in this case is simply that of a friend of this Court.[1]

SUMMARY OF ARGUMENT

This brief argues that the seizure of Elijah Manuel began when he was unlawfully arrested and ended when he was released forty-eight days later. The Seventh Circuit's contrary view—that the Fourth Amendment "falls out of the picture" when legal process issues—is inconsistent with the amendment's text, the Framers' understanding of this amendment, and many of this Court's decisions. The principal object of the Fourth Amendment was to outlaw abuses of legal process and to prevent the sorts of oppressive searches and seizures that judges previously had authorized. The Seventh Circuit's view is also inconsistent with *Gerstein v. Pugh*, 420 U.S. 103 (1975), which holds that the Fourth Amendment protects against unwarranted detention throughout the pretrial

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[1] Pursuant to Rule 37.6, I declare that no counsel for a party has authored this brief in whole or in part and that no one other than my co-counsel and I has made any monetary contribution to the preparation and submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3.

period. Finally, the court's view is inconsistent with this Court's § 1983 jurisprudence. *Malley v. Briggs*, 475 U.S. 335 (1985), and *Kalina v. Fletcher*, 522 U.S. 118 (1997), resolve the question presented by this case, for they permit recovery for post-process deprivations of liberty in violation of the Fourth Amendment. This brief asks the Court to approve the view of nine courts of appeals that wrongful detention following the issuance of legal process can violate the Fourth Amendment and give rise to a cause of action under 42 U.S.C. § 1983.

PART I

BACKGROUND

To clarify the stakes in Manuel's case and the legal context in which it arises, this introductory Part reviews some procedural steps in a criminal case, notes some requisites of a collateral challenge to a judicial determination of probable cause, describes the common law torts of false imprisonment and malicious prosecution, and sets forth the competing positions of the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits on the one hand and the Seventh and Fifth Circuits on the other. This Part begins by recounting some recent history and describing a hypothetical case.

A. RECENT EXONERATIONS AND A HYPOTHETICAL CASE

According to the National Registry of Exonerations, 1781 people convicted of crimes have been exonerated by pardon, dismissal, or acquittal since 1989. Official misconduct contributed to the

convictions of 923 (52%) of these people. The National Registry of Exonerations, *Percentage of Exonerations by Contributing Factor*, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited May 8, 2016).

In an astonishing number of cases, police officers deliberately fabricated evidence to implicate the innocent. See, *e.g.*, Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 549 (2001) (describing the Rampart police scandal in which numerous Los Angeles police officers framed people by planting evidence and committing perjury); Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash. U. L. Rev. 1133, 1139–41 (2013) (describing how the State of Texas agreed to vacate nearly fifty convictions obtained after undercover agent Tom Coleman falsely claimed to have bought cocaine from more than 20 percent of the adult black residents of Tulia, Texas); Duggan, *"Sheetrock Scandal" Hits Dallas Police; Cases Dropped, Officers Probed After Cocaine "Evidence" Turns Out to be Fake*, Wash. Post, Jan. 18, 2002, at A12 (reporting the dismissal of 39 cases in Dallas when material that police laboratory testing allegedly had shown to be cocaine was shown in fact to be ground-up wallboard material).

Actions under 42 U.S.C. § 1983 alleging arrest and detention in violation of the Fourth Amendment may arise from circumstances like those of the following hypothetical case:

On Day 1, Officer Rogue planted false evidence and arrested Innocent Plaintiff. On Day 2, the planted evidence persuaded a magistrate to find probable cause for Plaintiff's arrest and to hold him for trial. On Day 100, the false evidence convinced a jury to convict Plaintiff, and a judge sentenced him to ten years in prison. On Day 2500, the Governor pardoned Innocent Plaintiff, declaring that both his innocence and Officer Rogue's misconduct had been shown by overwhelming evidence.

B. THREE PERIODS OF DETENTION FOLLOWING A WARRANTLESS ARREST: WHY A RULING AGAINST THE PLAINTIFF IN THIS CASE MIGHT LEAVE MANY VICTIMS OF FALSIFIED EVIDENCE WITH NO FEDERAL REMEDY

The case before this Court differs from Innocent Plaintiff's in one respect. Elijah Manuel's innocence became clear and his detention ended prior to trial. The prosecutor dismissed his case and he was released after he had been held for forty-eight days, dropped college courses he was unable to attend, missed work, and saw his credit rating lowered because he was unable to make payments on student loans and other obligations. Manuel's case, unlike Innocent Plaintiff's, does not pose the question whether an unconstitutionally seized person may recover damages for imprisonment following conviction.

Nevertheless, it may aid the Court's analysis to take a broader view of the criminal process than

the present case requires. This section therefore considers three periods of detention that may follow an arrest without a warrant—(1) from arrest to a judicial determination of probable cause, (2) from a judicial determination of probable cause to conviction by trial or guilty plea, and (3) from conviction by trial or guilty plea to exoneration and release.

As a result of decisions by this Court, the initial period of detention is likely to be brief. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), holds that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest." It also holds that this "determination must be made by a judicial officer either before or promptly after arrest." *Id*. at 125. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), holds that the judicial determination of probable cause ordinarily must be made within 48 hours of an arrest made without a warrant.

Section 1983 entitles someone in Innocent Plaintiff's position to recover damages for the unlawful detention that occurred in the first period (the period before the judicial determination of probable cause). See *Wallace v. Kato*, 549 U.S. 384, 389–90 (2007). As a practical matter, however, someone framed by the police often may be unable to obtain this recovery. Until Innocent Plaintiff was exonerated, no rational lawyer would have taken his seemingly hopeless case. By the time he was

exonerated, if the statute of limitations had begun to run at arraignment, the period for filing suit probably would have passed.[2]

Wallace holds that the statute of limitations does begin to run at arraignment when a plaintiff has presented only a "Fourth Amendment false-arrest claim." 549 U.S. at 387 n.1 ("We expressly limited our grant of certiorari to the Fourth Amendment false-arrest claim."); *id*. at 389–90 (holding that the false arrest claim accrued at the time of arraignment). The decision also holds that, although this plaintiff may not file suit while imprisoned following his conviction, the statute of limitations is not tolled during this period. *Id*. at 394–97. The Court, however, recognized that a Fourth Amendment violation might extend beyond arraignment into the second and third periods of detention. See *id*. at 390 n.2 ("We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983 . . . and we do not do so here.").

The second period of detention—between a determination of probable cause and a trial verdict or other disposition—can be short (or even

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[2] This Court has held that the applicable statute of limitations is the one governing personal injury actions in the state courts. *Wilson v. Garcia*, 471 U.S. 261, 276–79 (1985). In most states, this statute sets the limitations period at two or three years. See Nolo, *Chart: Statutes of Limitations in All 50 States*, http://www.nolo.com/legal-encyclopedia/statute-of-limitations-state-laws-chart-29941.html (last visited May 8, 2016).

nonexistent if the accused is released unconditionally pending trial). But this period can also be long. In 2013, 539 inmates of the Cook County Jail had been held for more than two years while awaiting trial, and forty had been held for more than five years. See Thomas, *Burke Criticizes Pretrial Jailing, Extended Stays*, Chicago Daily Law Bulletin, Dec. 11, 2015, http://www.chicagolawbulletin.com/Archives/2015/12/11/burke-keynote-12-11-15.aspx.

The third period—from conviction to exoneration and release—is likely to be long. The average time served by America's wrongly convicted, later exonerated prisoners was nine years. The National Registry of Exonerations, *Basic Patterns*, http://www.law.umich.edu/special/exoneration/Pages/Basic-Patterns.aspx (last visited May 8, 2016). A person framed by a police officer, however, can sometimes obtain damages for imprisonment during this final period without securing a determination that the officer violated the Fourth Amendment.

The officer may be liable for wrongful detention during this last period because he participated in the state's failure to reveal exculpatory evidence. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995). In some circumstances, he may also be liable for the knowing use of perjured testimony, for this use is also a due process violation. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935). In addition, the malicious initiation of a baseless prosecution may constitute a due process violation when an adequate state

remedy for common law tort of malicious prosecution is unavailable. See *Albright v. Oliver*, 510 U.S. 266, 281–86 (1994) (Kennedy, J., concurring in the judgment); *Newsome v. McCabe*, 256 F.3d 747, 750–51 (7th Cir. 2001).

The due process rights just described are limited, however, in ways that may block a § 1983 plaintiff framed by a police officer from obtaining a federal remedy for wrongful detention in the second and third periods:

1) Although the Due Process Clause may entitle a plaintiff to recover for malicious prosecution when no adequate state remedy is available, only one reported decision appears ever to have held a state remedy inadequate. See *Julian v. Hanna*, 732 F.3d 842, 846 (7th Cir. 2013) (holding remedies inadequate when a state afforded police officers absolutely immunity from suit).

2) An officer who himself gives perjured testimony at trial or before a grand jury is immune from suit for his perjury. *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983); *Rehberg v. Paulk*, 132 S. Ct. 1497, 1500 (2012).

3) *Brady*'s disclosure requirements are unlikely to provide a basis for recovery when, as in this case, charges are dismissed prior to trial. See LaFave et al., *Criminal Procedure* § 24.3, at 1147 (5th ed. 2009) ("[T]he *Brady* rule does not impose a general requirement that the government disclose prior to trial exculpatory evidence

that is material to the issue of guilt. Due process requires only that disclosure of exculpatory evidence be made in sufficient time to permit defendant to make effective use of that evidence at trial."); *Rogala v. District of Columbia*, 161 F.3d 44, 55–56 (D.C. Cir. 1998) (publishing and endorsing the district court's opinion) (declaring that a pretrial dismissal "ends the analysis" because plaintiffs cannot show that an officer's failure to preserve evidence was prejudicial).

4) *Brady* also may provide no basis for recovery when a wrongly accused plaintiff has been acquitted at trial. See *Bianchi v. McQueen*, No. 14–1635, ___ F.3d ___, 2016 WL 1213270, at *8 (7th Cir. Mar. 29, 2016) ("A violation of *Brady* requires a showing of prejudice, which can't be made here because the plaintiffs were acquitted.").

5) *Brady* may not supply a basis for recovery even after conviction when a wrongly accused person has pleaded guilty. See Covey, *Plea Bargaining Law After* Lafler *and* Frye, 51 Duq. L. Rev. 595, 601 (2013) ("It is . . . unclear whether a prosecutor has a constitutional duty to produce exculpatory evidence . . . before a guilty plea is entered."); cf. *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (holding that the due process clause does not require "preguilty plea disclosure of impeachment information" while leaving open the

question whether the clause may require the disclosure of other *Brady* material).

In all of these circumstances, the ability to establish a Fourth Amendment violation may be crucial. Holding that a Fourth Amendment violation ends when a wrongly arrested plaintiff is arraigned may leave a plaintiff without a federal remedy for post-process detention even when he has been framed by a police officer.[3]

C. TWO COMMON LAW TORTS

At both the time the Fourth Amendment was ratified and the time § 1983 was enacted, the common law would have allowed Innocent Plaintiff to recover damages from Officer Rogue for the entire period from his arrest to his release. At the time the Fourth Amendment was ratified, however, pleading requirements would have required Plaintiff to bring two separate lawsuits to obtain

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[3] Even when recovery for detention in the second and third periods is permitted, obtaining this recovery is difficult. Following a judicial determination of probable cause, a § 1983 plaintiff can offer only two sorts of challenges. First, he can allege that evidence presented to the judicial officer was both false and essential to the determination of probable cause. To prevail, the plaintiff must show that the police officer deliberately falsified the critical evidence or presented it with reckless disregard of the truth. *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Second, the plaintiff can claim that, although the police officer was truthful, the evidence he presented did not establish probable cause. A plaintiff who makes a claim of this sort can prevail only if "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." *Malley*, 475 U.S. at 341.

this recovery—one alleging false imprisonment and the other alleging malicious prosecution. By 1871, when § 1983 was enacted, many states had relaxed these pleading requirements, allowing joinder of the two claims.

As this Court explained in *Wallace*:

> The sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process* . . . . Thereafter, unlawful detention forms part of the damages for the "entirely distinct" tort of malicious prosecution, which remedies detention accompanied, not by an absence of legal process, but by *wrongful institution* of legal process.

549 U.S. at 389–90; see also *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) ("[U]nlike the related cause of action for false arrest or imprisonment, [the cause of action for malicious prosecution] permits damages for confinement imposed pursuant to legal process.").

The torts described by the Court are centuries old and grew out of different royal writs. The appropriate form of action for false imprisonment was trespass *vi et armis*, see 3 W. Blackstone, *Commentaries* *138, and that for malicious prosecution was trespass on the case. See *id*. at *126–27. Establishing liability for malicious prosecution required proof of two elements not included in the action for false imprisonment—malice and a termination of the proceedings in favor of the accused. See D. Dobbs, *The Law of Torts* §§ 433 and 434 (2000); *Stewart v. Sonneborn*,

98 U.S. 187, 192 (1878) (declaring that the plaintiff must show that the defendant was "actuated in his conduct by malice, or some improper or sinister motive"); *id*. at 195 ("In every case of an action for a malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed."). Both torts required a showing that the defendant acted without probable cause. See Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 Texas L. Rev. 157, 176 (1937).[4]

A plaintiff who claimed that his arrest was unlawful was required to choose between the two causes of action. If the arrest had occurred without a warrant, he could challenge its legality only in a suit for false imprisonment. If the arrest had occurred pursuant to a warrant, he could challenge it only in a suit for malicious prosecution. The issuance of an arrest warrant or other legal process marked a sharp divide between the two actions. See, *e.g*., *Morgan v. Hughes*, 100 Eng. Rep. 123, 125–26 (K.B. 1788) ("[A] justice of the peace, who grants a warrant against a person accused, cannot

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[4] False imprisonment required proof of one element not included in the action for malicious prosecution—imprisonment. The wrongful institution of legal process was actionable at common law even if the defendant had not been seized or arrested. From an early date, however, actions for malicious prosecution permitted the recovery of damages for arrest and imprisonment that followed a false charge as well as for the injury to reputation worked by the charge itself. See Harper, *supra*, at 160 n.8 (collecting sources).

be punished in an action of trespass, though the accusation be false: but if, without any accusation, and knowing the person not to be guilty, he grant his warrant, on which the party is arrested, he is liable to an action on the case by the person unjustly accused."); *Stonehouse v. Elliot*, 101 Eng. Rep. 571, 571–72 (K.B. 1795) (holding that, because a person falsely accused of theft had been brought before a constable who could not initiate legal proceedings, his suit should be for false imprisonment rather than malicious prosecution); *Dinsman v. Wilkes*, 53 U.S. 390, 402 (1852) (Taney, C.J.) (noting that an action against a naval officer who ordered a marine private put in irons for failing to perform his duty had "no analogy to a suit for a malicious prosecution" because no legal process had issued); *Colter v. Lower*, 35 Ind. 285, 286–87 (1871); *Southern R. Co. v. Shirley*, 90 S.W. 597, 599 (Ky. 1906); *Roberts v. Thomas*, 135 Ky. 63, 64 (1909); *Broughton v. State*, 335 N.E.2d 310, 314–15 (N.Y. 1975).

An Illinois court noted in 1896, "[A]t common law a claim to recover damages for false imprisonment, in which the form of action was trespass, could not be joined with a claim to recover for malicious prosecution, in which the form of action was trespass on the case." *Mexican C.R. Co. v. Gehr*, 66 Ill. App. 173, 179 (1896). Starting in 1848 and rapidly thereafter, however, code pleading replaced common law pleading in many states. See C. Hepburn, *The Historical Development of Code Pleading in America and England* 92–115 (1897). By the time Congress enacted § 1983, a substantial number of states permitted plaintiffs to

file false imprisonment and malicious prosecution claims together. See, *e.g.*, *Doyle v. Russell*, 30 Barb. 300 (N.Y. S. Ct. 1859) (counts for false imprisonment and malicious prosecution joined); *Bauer v. Clay*, 8 Kan. 580, 584 (1871) ("Under our Code where a party has a cause of action containing all the elements of both malicious prosecution and false imprisonment, as understood at common law, he . . . may prosecute for his whole cause of action."); *Krug v. Ward*, 77 Ill. 603, 605 (1875) (upholding the joinder of malicious prosecution and false imprisonment claims); *Williams v. Planters' Ins. Co.*, 57 Miss. 759, 764 (1880) (characterizing as "absurd" the "refinements of the common law pleaders in their subtle distinctions between trespass *vi et armis* and case"); *Marks v. Townsend*, 97 N.Y. 590, 594 (1885) (declaring that actions for malicious prosecution and false imprisonment may be joined in the same complaint "and it has been common practice to unite them").

D. TWO VIEWS OF THIS CASE

1. *The Majority View: An Invalid Judicial Determination of Probable Cause Does Not Bring an Unlawful Seizure to an End*

In *Wallace*, this Court noted, "We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983 . . . and we do not do so here." 549 U.S. at 390 n.2. This language invited lower courts to consider whether someone detained pursuant to legal process may bring a "Fourth Amendment malicious-prosecution suit under § 1983." Nine courts of appeals have now

allowed suits to recover damages for wrongful detention following the issuance of legal process.[5]

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[5] **D.C. Circuit**: *Pitt v. District of Columbia*, 491 F.3d 494, 511 (D.C. Cir. 2007) ("We join the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably 'seized' without probable cause, in violation of the Fourth Amendment."). **First Circuit**: *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99–100 (1st Cir. 2013) ("[W]e join our sister circuits in concluding that the Fourth Amendment protection against seizure but upon probable cause does not end when an arrestee becomes held pursuant to legal process."). **Second Circuit**: *Swartz v. Insogna*, 704 F.3d 105, 111–12 (2d Cir. 2012) ("The elements of a malicious prosecution claim under section 1983 are derived from applicable state law. . . . Additionally, . . . to be actionable under section 1983 there must be a post-arraignment seizure, the claim being grounded ultimately on the Fourth Amendment's prohibition of unreasonable seizures."). **Third Circuit**: *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) ("[T]he constitutional violation is the deprivation of liberty accompanying the prosecution."). **Fourth Circuit**: *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) ("A 'malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort.'") (quoting *Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000)). **Sixth Circuit**: *Webb v. United States*, 789 F.3d 647, 659 (6th Cir. 2015) ("Freedom from malicious prosecution is a clearly established Fourth Amendment right."). **Ninth Circuit**: *Lacey v. Maricopa County*, 693 F.3d 896, 919 (9th Cir. 2012) ("To claim malicious prosecution [under § 1983], a petitioner must allege 'that the defendants prosecuted her with malice and without probable cause, and that they did so for the purpose of denying her of equal protection or another specific constitutional right.'") (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189

In addressing the question posed by *Wallace*, some courts have noted that the term "Fourth Amendment malicious-prosecution suit" can be confusing. See, *e.g.*, *Castellano v. Fragozo*, 352 F.3d 939, 953–54 (5th Cir. 2003) (declaring that Fourth Amendment claims "are not claims for malicious prosecution and labeling them as such only invites confusion"); *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) ("[T]here is nothing but confusion gained by calling [a] legal theory [brought under the Fourth or any other amendment] 'malicious prosecution.'"). The confusion arises from the fact that the common-law tort and the constitutional provision address different injuries. Malicious prosecution can occur even when a wrongly prosecuted person has not been seized, and a seizure in violation of the Fourth Amendment can occur even when a wrongly seized person has not been prosecuted. See *Gerstein*, 420 U.S. at 118–19 (1975) ("In holding that the prosecutor's assessment of probable cause is not

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(9th Cir. 1995)). **Tenth Circuit**: *Sanchez v. Hartley*, 810 F.3d 750, 755 (10th Cir. 2016) ("[W]e have repeatedly recognized a cause of action under § 1983 for malicious prosecution under the Fourth Amendment."). **Eleventh Circuit**: *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010) ("To establish a § 1983 malicious prosecution claim, the plaintiff must prove two things: (1) the elements of the common law tort of malicious prosecution; *and* (2) a violation of his Fourth Amendment right to be free from unreasonable seizures."). The **Eighth Circuit** has not resolved the question. See *Harrington v. City of Council Bluffs*, 678 F.3d 676, 679–80 (8th Cir. 2012).

sufficient alone to justify *restraint of liberty pending trial*, we do not imply that the accused is entitled to judicial oversight or review of *the decision to prosecute*.") (emphasis added); *Albright*, 510 U.S. at 281–82 (Kennedy, J., concurring in the judgment) (noting that the plaintiff's complaint concerned, not the seizure of his person, "but instead the malicious initiation of a baseless criminal prosecution against him" and that "[t]he specific provisions of the Bill of rights [do not] impose a standard for the initiation of a prosecution").

Despite the confusion it may engender, the term "Fourth Amendment malicious-prosecution suit" can be useful. The common law tort, although concerned with the commencement of legal proceedings, allowed recovery for the detention that might follow this event. It thus remedied some but not all of the detention that might now violate the Fourth Amendment. For example, Elijah Manuel might have been able to show prior to the dismissal of the criminal charge against him that he was detained without probable cause. Until the charge was dismissed, however, he could not have established an element of common-law malicious prosecution, a termination of the criminal proceedings in his favor.[6] The authors of § 1983

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[6] A plaintiff who could prove what is now a Fourth Amendment violation also might be unable to establish malice. See, *e.g.*, *Farmer v. Darling*, 98 Eng. Rep. 27, 28 (K.B. 1766) ("[M]alice . . . and the want of probable cause must both

might not have meant to authorize Manuel's recovery before he could prove the elements of the common-law tort. They might have assumed that recovery under § 1983 would be limited in the same way that common-law recovery had been limited. If that were so, it would make sense to refer to a "Fourth Amendment malicious-prosecution suit" and to distinguish it from a "Fourth Amendment false-arrest suit." In this case, Manuel seeks damages for post-process detention in violation of the Fourth Amendment that the common law would have made actionable prior to the enactment of § 1983. He thus brings a Fourth Amendment malicious prosecution suit.

The courts of appeals that would allow Manuel's recovery are divided about whether a plaintiff must establish the elements of the common-law tort. As the First Circuit explained,

> The Fourth, Fifth, Sixth, and Tenth Circuits have adopted a purely constitutional approach, requiring the plaintiff to demonstrate only a Fourth Amendment violation. The Second, Third, Ninth, and Eleventh Circuits, on the other hand, have adopted a blended constitutional/common law approach, requiring the plaintiff to demonstrate a Fourth Amendment violation and all the

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concur."); Dobbs, *supra*, § 433 (noting differences between malice and the absence of probable cause).

> elements of a common law malicious prosecution claim.

Hernandez-Cuevas v. Taylor, 723 F.3d 91, 99 (1st Cir. 2013).[7]

Just as the courts that recognize a Fourth Amendment malicious prosecution suit under § 1983 differ about what elements a plaintiff must establish, they conceptualize the underlying Fourth Amendment violation somewhat differently. The Sixth Circuit has said, "[T]he gravamen of the complaint is continued detention without probable cause." *Gregory v. City of Louisville*, 444 F.3d 725, 748 (6th Cir. 2006).

This position echoes that of four Justices of this Court in *Albright v. Oliver*, 510 U.S. 266 (1994). In *Albright*, as in this case, the criminal case against the plaintiff was dismissed prior to trial. Although the plaintiff did not "claim a violation of his Fourth Amendment rights," *id*. at 271, Justice Ginsburg suggested in a concurring opinion that a Fourth Amendment claim would have been viable. She wrote that the seizure of a person continues until this person is "freed from the state's control." *Id*. at

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[7] Most courts of appeals seem not to have noticed, but this Court has largely resolved the apparent conflict described in *Hernandez-Cuevas*. *Malley v. Briggs*, 475 U.S. 335 (1985), considers whether a plaintiff alleging post-process detention in violation of the Fourth Amendment must establish common-law malice. It holds that, although he need not, he must establish a close substitute. *Id*. at 341. *Heck*, 512 U.S. at 486–90, holds that this plaintiff must establish a termination of the criminal proceedings in his favor.

278 (Ginsburg, J., concurring). Justice Souter similarly concluded that the protections of the Fourth Amendment continued beyond the issuance of legal process. *Id*. at 289–90 (Souter, J., concurring). Justice Stevens, joined by Justice Blackmun, also declared that "the initial seizure of petitioner continued until his discharge." *Id*. at 307 (Stevens, J., dissenting). Because the plaintiff had presented no Fourth Amendment claim, the other members of the Court did not address the question.

Most courts that have recognized a Fourth Amendment malicious prosecution claim under the Fourth Amendment have envisioned the constitutional violation somewhat differently. They view holding a person for trial and imposing pretrial restraints on his liberty as a seizure distinct from the initial arrest. See *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) ("[T]he constitutional violation is the deprivation of liberty accompanying the prosecution."); *Britton v. Maloney*, 196 F.3d 24, 28 (1st Cir. 1999) ("For a state actor to violate the Fourth Amendment by initiating malicious prosecution against someone, the criminal charges at issue must have imposed some deprivation of liberty . . . .").

This Court's decisions recognize that extending or augmenting an existing restraint on liberty can constitute a seizure. For example, this Court treats an arrest following a *Terry* stop as a distinct seizure although the arrestee's liberty already has been restrained. See, *e.g*., *United States v. Sharpe*, 470 U.S. 675, 682–88 (1985); see also *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015)

(treating the unreasonable extension of a traffic stop as a Fourth Amendment violation).

2. *The Minority View: The Fourth Amendment Vanishes When Invalid Legal Process Issues*

When the Seventh Circuit upheld the dismissal of Manuel's § 1983 action, it relied on its recent decision in *Llovet v. City of Chicago*, 761 F.3d 759 (7th Cir. 2014). In *Llovet*, the court found an "implication" in decisions of this Court

> that once detention by reason of arrest turns into detention by reason of arraignment—once police action gives way to legal process—the Fourth Amendment falls out of the picture and the detainee's claim that detention is improper becomes a claim of malicious prosecution violative of due process. If this is right, the doctrine of "continuing seizure" is wrong, as we held, for example, in *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004), which states that our court has "repeatedly rejected the 'continuing seizure approach," instead holding "that the scope of a Fourth Amendment claim is limited up to the point of arraignment." To the same effect is *Hernandez v. Sheahan*, [455 F.3d 772, 777 (7th Cir. 2006)]: "the fourth amendment drops out of the picture following a person's initial appearance in court."

Id. at 763.[8]

One court of appeals other than the Seventh Circuit has endorsed the "vanishing Fourth Amendment" position. The Fifth Circuit, however, left uncertain when the amendment evaporates. In *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003), it held that "the umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution." The court reserved the question whether the Fourth Amendment might still cast its protection over the period following a judicial officer's determination of probable cause but before the beginning of a trial.

PART II

ARGUMENT

A. THE SEVENTH CIRCUIT'S "VANISHING FOURTH AMENDMENT" VIEW IS INCONSISTENT WITH THE TEXT AND HISTORY OF THE FOURTH AMENDMENT

Although the Seventh Circuit has held repeatedly that the Fourth Amendment "falls out of

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[8] Although *Llovet* spoke of "a claim of malicious prosecution violative of due process," the Seventh Circuit has held that an adequate state remedy for malicious prosecution satisfies all due process requirements and thereby "*knocks out* any constitutional tort of malicious prosecution." *Newsome*, 256 F.3d at 751; cf. *Albright*, 510 U.S. at 281–86 (Kennedy, J., concurring in the judgment).

the picture" when legal process issues, it has offered little explanation of this position. The court's earliest articulation of its view appears to be a statement in *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), in which the plaintiff sought damages for an interrogation at gunpoint that occurred after his arrest but before his arraignment. According to the court, the difficulty with the plaintiff's Fourth Amendment claim was that he

> had already been seized. He was seized when he was arrested. A natural although not inevitable interpretation of the word "seizure" would limit it to the initial act of seizing, with the result that subsequent events would be deemed to have occurred after rather than during the seizure. Now once an arrested person is charged but before he is convicted, the question whether the fact, manner, or duration of his continued confinement is unconstitutional passes over from the Fourth Amendment to the due process clause. See *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (Friendly, J.).

Id. at 192–93.

The court supported its assertion that the Fourth Amendment vanishes when an arrestee is arraigned by citing *Johnson v. Glick*, but this opinion did not support its statement in any way. Judge Friendly wrote in a case that did not present any Fourth Amendment issue at all, and his opinion mentioned the Fourth Amendment only to say, "[B]oth before and after sentence,

constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment or . . . of the Fourth." *Johnson*, 481 F.2d at 1032.

Before concluding that the Fourth Amendment vanishes, the Seventh Circuit pointed to the amendment's text. As it observed, one could plausibly read the word "seizure" to refer only to the initial apprehension of a suspect—something that happens in a moment—and not to include any detention following this person's arrest. Even acknowledging that the seizure of a person continues until he is arraigned, however, rejects this interpretation and endorses a concept of a (briefly) continuing seizure. Like the Seventh Circuit, this Court has held that a Fourth Amendment seizure continues at least until legal process issues. See *Wallace*, 549 U.S. at 389–90.

The issue in this case is not whether a seizure continues but how long, and the Seventh Circuit offered little reason for vaporizing the Fourth Amendment at the moment it chose—the moment of arraignment. The most natural answer to the question how long a seizure lasts is "until it ends," and courts sometimes have spoken of the duration of a seizure in the same way as the rest of us. See, *e.g.*, *Wood v. United States*, 41 U.S. 342, 359 (1842) (Story, J.) ("If a seizure [of property] has been actually made, and is a continuing seizure; it is no bar to proceedings thereon, that the cause of forfeiture relied on is not the same upon which the seizure was originally made."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) ("[T]he District Court . . . issued a preliminary

injunction restraining the Secretary from 'continuing the seizure . . . .'"); *Dockham v. New Orleans*, 26 La. Ann. 302, 303 (La. 1874) (noting that a seizure of property did not lapse after seventy days as one party contended but continued in accordance with the law); *Stilphen v. Ulmer*, 33 A. 980, 985 (Me. 1895) ("His arrest continued for the space of 12 hours.").

The Seventh Circuit most recently explained its distinctive position in *Llovet v. City of Chicago*, 761 F.3d 759 (7th Cir. 2014). Pointing once more to the amendment's text, it wrote, "There is a difference between seizing a person and not letting him go. . . . When, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention." *Id.* at 764.

Of course every moment following a person's wrongful arrest can be characterized as one in which he is "not let go when he should be." As noted above, an arrest at the conclusion of a *Terry* stop is not seen as a "failure to let go" governed by the Due Process Clause. It is instead a seizure governed by the Fourth Amendment. The Seventh Circuit offered no reason for focusing only on the moment a *judicial* officer should have let the wrongly arrested person go.[9]

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[9] Even if the constitutional term "seizure" referred only to the initial moment of apprehension, the injury resulting from a seizure would include later detention. This Court has said that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural

Llovet hinted at a historical rather than a textual argument for its view of the Fourth Amendment when it wrote, "The tort of false arrest is the common law counterpart to an unreasonable seizure, forbidden by the Fourth Amendment." 761 F.3d at 763.[10] Perhaps the Seventh Circuit imagined that the Framers of the Fourth Amendment intended to provide a remedy only for wrongs that constituted false imprisonment at common law and not for wrongs that constituted malicious prosecution. That assumption, however, would have been erroneous. Our forebears did not mean the Fourth Amendment to vanish when legal process issued.

An arrest warrant constitutes legal process. See *Cook v. Hart*, 146 U.S. 183, 191 (1892) (discussing an arrest "without warrant or other legal process"); *Wallace*, 549 U.S. at 389 ("[T]he allegations before us arise from respondents' detention of petitioner

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consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). In both Innocent Plaintiff's case and Elijah Manuel's, detention following a judicial determination of probable cause was not only foreseeable at the time the plaintiff was apprehended, it was foreseen and intended. A determination of probable cause might break the causal chain, but only when this determination rested on evidence other than that fabricated by the arresting officer. In the absence of such a break, the initial seizure would remain the cause of the detention.

[10] Ironically, the tort of false imprisonment can be committed by a failure to let go, as when a jailer fails to release an inmate whose term is up. See Dobbs, *supra*, at § 38.

without legal process in January 1994. They did not have a warrant for his arrest."); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995) (in a malicious prosecution suit, "'legal process' will be either in the form of a warrant . . . or a subsequent arraignment"); *Gauger v. Hendle*, 349 F.3d 354, 361 (7th Cir. 2003) ("A warrant is legal process, and so a complaint about conduct pursuant to it is a challenge to legal process and thus resembles malicious prosecution."); *Young v. Davis*, 554 F.3d 1254, 1257 (10th Cir. 2009) ("An arrest warrant and the probable cause determination by a judicial officer after a warrantless arrest are essentially the same legal process, except that one occurs prior to arrest and the other occurs after."); see also Part I–C *supra* (noting that, at the Framing, a plaintiff challenging an arrest pursuant to a warrant was required to establish the elements of malicious prosecution).

The principal object of the Fourth Amendment was to outlaw abuses of legal process and to prevent oppressive searches and seizures of the sort judges had previously authorized. The Framers spoke to judges, not police officers, when they wrote, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const., Amdt. 4. Declaring that the Fourth Amendment vanishes when legal process issues would lead to the astonishing conclusion that an arrest following

the issuance of an arrest warrant cannot violate the Fourth Amendment. The Framers would have shuddered at the idea.[11]

The Fourth Amendment's warrants clause enshrined in the Constitution three landmark English decisions of the 1760s that held general warrants unlawful. See *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); *Entick v. Carrington*, 19 Howell's St. Tr. 1029 (C.P. 1765); *Leach v. Money*, 97 Eng. Rep. 1075 (K.B. 1765). In a recent, authoritative study titled *The Original Fourth Amendment*, Professor Donohue notes that a "systematic assault on general warrants" began in England more than 100 years before these decisions. The chief architect of this assault was Sir Edward Coke, previously the Chief Justice of the Court of King's Bench. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. (forthcoming 2016), *available at* http://scholarship.law.georgetown.edu/facpub/1616/.

Coke himself had been seized pursuant to a general warrant in 1621. In 1628, he complained to Parliament not only about his arrest and the unlawful search of his papers but also about the post-arrest detention the invalid warrant produced. "I was committed to the Tower and all my books and study searched . . . . I was inquired after what I had done all my life before." Donohue, *supra,* at 21

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[11] This Court has never doubted that an arrest pursuant to a warrant can violate the amendment. See, *e.g.*, *Whiteley v. Warden*, 401 U.S. 560, 564–65 (1971).

(quoting Coke to Parliament, Committee of the Whole House, Proceedings and Debates, ff. 100–100v, in CD, III, 149–51 (Apr. 29, 1628), in 3 E. Coke, *Selected Writings of Sir Edward Coke* 58 (Steve Sheppard, ed. 2003)). Coke also declared, "If we agree to this imprisonment 'for matters of state' and 'a convenient time,' we shall leave Magna Carta and the other statutes and make them fruitless, and do what our ancestors would never do." *Id*. at 21–22 (quoting Coke to Parliament, Committee of the Whole House, Proceedings and Debates, f. 99, in CD, III, 94–96 (Apr. 26, 1628), in Coke, *supra*, at 55–56)).

The Framers would have seen Coke's post-legal process detention as inconsistent with the Fourth Amendment, and neither the Seventh Circuit nor anyone else has offered a reason to believe they meant to treat legal process following a warrantless arrest (as in Manuel's case) differently from legal process preceding an arrest (as in Coke's case). It is difficult to conceive of a reason why anyone would endorse this distinction.

One guesses that the Framers would have been appalled by the thought that "once police action gives way to legal process[,] the Fourth Amendment falls out of the picture." A wrongful arrest deprives a person of what Blackstone called an "absolute right[] . . . vested in [him] by the immutable law of nature"— the right of personal liberty. 1 W. Blackstone, *Commentaries* *124. "This personal liberty consists in the power of . . . removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint unless by due course of law." *Id*. at

*134. The denial of this "absolute" right continues until a wrongly detained person is released.

B. THIS COURT'S DECISIONS REJECT THE "VANISHING FOURTH AMENDMENT" VIEW

Just as the Seventh Circuit's position cannot be reconciled with the text or history of the Fourth Amendment, it cannot be reconciled with *Gerstein v. Pugh*, 420 U.S. 103 (1975). *Gerstein* requires a judicial order as a prerequisite to an extended restraint on liberty pending trial, and the restraint authorized by an order follows the order itself. *Gerstein* holds that the Fourth Amendment protects against unwarranted detention throughout the pretrial period, the period at issue in this case. The protection of the Fourth Amendment does not "drop out" when legal process issues.

The Seventh Circuit's position is also inconsistent with this Court's § 1983 decisions. The question on which the Court granted certiorari in this case is "whether an individual's Fourth Amendment right to be free from unreasonable seizures continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment." Petition for Cert., p. i. The opinion of the Court in *Wallace* invited this phrasing of the question, for the Court wrote: "We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983 . . . and we do not do so here." 549 U.S. at 390 n.2. *Wallace*'s dictum, however, was inaccurate. This Court *has* "explored the contours of a Fourth Amendment malicious-prosecution suit under

§ 1983." In fact, it already has resolved the question on which it granted certiorari in this case.

As noted above, an arrest warrant constitutes legal process. This warrant supplies the determination of probable cause necessary to justify an extended restraint on liberty prior to trial. When a judge has issued a warrant before an arrest, no "arraignment," "initial appearance," or "*Gerstein* hearing" need be held following the arrest. *Gerstein* itself noted the equivalence of pre-arrest and post-arrest determinations of probable cause. 420 U.S. at 125 (declaring that the determination of probable cause "must be made by a judicial officer either before or promptly after arrest"). Shortly after *Gerstein*, this Court noted, "Since an adversary hearing is not required [when a judicial determination of probable cause follows an arrest], and since the probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." *Baker v. McCollan*, 443 U.S. 137, 143 (1979).

This Court first held that "an individual's Fourth Amendment right to be free from unreasonable seizures continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment" in *Malley v. Briggs*, 475 U.S. 335 (1986). The plaintiffs in *Malley* were taken into custody after legal process issued; they were arrested pursuant to two warrants. Following their arrests, they were

booked, held several hours, arraigned, and released. The charges against them were dismissed when a grand jury refused to return an indictment.

The plaintiffs then filed suit under § 1983 against the police officer who had procured the warrants, alleging that the evidence he presented to the issuing judge fell short of establishing probable cause. *Id*. at 338–39. A federal district court dismissed their complaint, declaring "that the act of the judge in issuing the warrants . . . broke the causal chain" between the police officer's presentation and the plaintiffs' arrests. *Id*. The district court also said that, because the police officer believed the facts he presented to the judge, he might be immune from suit. *Id*. at 339. Both the First Circuit and this Court ordered the plaintiffs' complaint reinstated.

Because the police officer claimed absolute immunity from suit, the Court began its analysis by asking whether the common law would have afforded him immunity at the time § 1983 was enacted. It answered this question no, observing that the officer would have been subject to a suit for malicious prosecution:

> In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity.

Id. at 340–41. The Court cited several nineteenth-century malicious prosecution decisions and a nineteenth-century treatise to support this conclusion.

Malley departed from the common law in one respect. The Court did not require the plaintiffs to prove the officer's subjective malice. Instead, it reiterated the objective standard it had established for overcoming an officer's qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982). The plaintiffs would be required to show that "no reasonably competent officer would have concluded that a warrant should issue." *Malley*, 475 U.S. at 341. The Court declared that this standard "sufficiently serves [the same] goal" as the common law's requirement of malice. *Id*. The Court thus looked to the common law to shape but not define the constitutional tort created by § 1983. Cf. *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978) (observing that although "common law rules, defining the elements of damages and the prerequisites for their recovery, provide the starting point for inquiry under § 1983," these rules may not "provide a complete solution").

In *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court unanimously reiterated its holding in *Malley*. Although prosecutors generally are absolutely immune from suit, *Kalina* allowed recovery under § 1983 from a prosecutor who made false statements in an affidavit for an arrest warrant. The Court once more held that "an individual's Fourth Amendment right to be free from unreasonable seizures continues beyond legal

process so as to allow a malicious prosecution claim based upon the Fourth Amendment."

In the present case, an invalid judicial determination of probable cause followed an unlawful arrest; in *Malley* and *Kalina*, it came before. This difference was unimportant historically, and there appears to be no reason why it should matter today. The difference in timing does not in any way distinguish the two cases. Section 1983 and the Fourth Amendment permit recovery from an officer for an unlawful deprivation of liberty that he has persuaded an erring judge to approve; the Fourth Amendment does not "drop out" when legal process issues. *Malley* and *Kalina* are on point in this case.

Indeed, because police officers should be encouraged to seek warrants before making arrests, it would be backwards to cut off the recovery of a suspect arrested without a warrant but not the recovery of a suspect arrested pursuant to a warrant. See *Gerstein*, 420 U.S. at 113 (noting the Court's "preference for the use of arrest warrants when feasible"); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes the far less reliable procedure of an after-the-event justification . . . ."). As noted above, there need be no "*Gerstein* hearing" when a suspect is arrested pursuant to a warrant. In the absence of such a hearing, *Malley* and *Kalina* allow this suspect to recover damages for the full period of his unlawful pretrial confinement. This suspect's right to recover is not limited by the issuance of legal

process, something that occurred before his arrest. Allowing this suspect to recover fully while limiting the recovery of a suspect arrested without a warrant and later subjected to legal process looks upside down. Cutting off this second suspect's recovery at the moment of his arraignment protects the officer who has acted without a warrant from the liability *Malley* and *Kalina* impose on an officer who has sought a judge's approval.

CONCLUSION

A NOTE ON UN-EXONERATED PLAINTIFFS

When a common-law plaintiff could not establish the elements of malicious prosecution, he could recover only for whatever unlawful detention preceded the issuance of legal process. For him, the pre-process, post-process line mattered.

A hypothetical case illustrates the limits of the recovery the common law afforded: Officer Rogue arrests Guilty Plaintiff (Innocent Plaintiff's brother) without probable cause on the basis of fabricated evidence. A search incident to the arrest reveals *truthful* evidence that leads to Guilty Plaintiff's detention before trial and then to his conviction and imprisonment. While serving his sentence, Guilty Plaintiff uncovers evidence of Officer Rogue's misconduct. Still imprisoned, he files a § 1983 action, alleging that his imprisonment was a foreseeable and intended consequence of Officer Rogue's violation of the Fourth Amendment.

Unlike Innocent Plaintiff, Guilty Plaintiff could not have recovered at common law for his post-

legal-process detention. He could not have established an element of malicious prosecution, a termination of the criminal proceedings in his favor.

At common law, moreover, not every favorable termination of the criminal proceedings would do. Even if Guilty Plaintiff's conviction and sentence had been vacated on procedural grounds, recovery would be barred. See Dobbs, *supra*, § 434 ("An acquittal of the accused . . . is of course a termination favorable to the accused. Short of that, courts have looked for dispositions that tend to show the accused's innocence or at least a determination that a criminal case could not be proved, saying with Prosser that a mere procedural victory would not suffice."); J. Townshend, *A Treatise on the Wrongs Called Slander and Libel* § 423 at 704 (3th ed. 1877) ("It is certain that the termination should be such as to furnish *prima facie* evidence that the prosecution was unfounded, and was terminated on account of the plaintiff's innocence, or at least was in favor of the plaintiff.").

As noted in Part I–D–1 above, some of the courts of appeals that afford a § 1983 remedy for post-process detention in violation of the Fourth Amendment require a plaintiff to establish only the Fourth Amendment violation. Others require a plaintiff to establish not only this violation but also all the elements of the common-law tort. The conflict is less significant than one might imagine because *Heck* independently bars Guilty Plaintiff's recovery. In *Heck*, this Court analogized *all* § 1983 actions challenging the validity of a conviction or sentence to common law actions for malicious

prosecution, and it applied the common law's favorable-termination requirement to all of them. 512 U.S. at 485–90.

The issues posed by a plaintiff who alleges a violation of his constitutional rights although a common-law doctrine would have blocked his recovery are challenging, but these issues are not currently before the Court. The issue before it is whether the Fourth Amendment should vanish upon the issuance of legal process when this process would *not* have blocked the plaintiff's recovery at common law. This issue is easy.

The Seventh Circuit's view that the Fourth Amendment disappears when legal process issues is inconsistent with history, with the text of the amendment, and with *Gerstein*. Moreover, in *Malley* and *Kalina*, this Court ruled that an individual's Fourth Amendment right to be free from unreasonable seizures continues beyond legal process so as to allow a malicious prosecution claim based on the Fourth Amendment. The Court has already decided this case.

Respectfully submitted,

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