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 FOR THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD P. BRESS
Counsel of Record
MELISSA ARBUS SHERRY
STEPHEN P. BARRY
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
rick.bress@lw.com

Counsel for Amicus Curiae

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INTERESTS OF AMICUS CURIAE[1]

The National Association for Public Defense ("NAPD") is a nonprofit association of approximately 14,000 public defense practitioners that include lawyers, investigators, and legislative advocates. Founded in 2013, NAPD's mission is to ensure fairness and access to justice in the nation's courts. Leveraging its collective expertise, NAPD defends liberty and protects the constitutional rights of citizens within the criminal justice system. In pursuit of these goals, NAPD regularly files briefs in federal and state courts throughout the country, and has filed amicus briefs in nine cases before this Court since 2014. *See, e.g.*, Brief in Support of Petitioner, *Manuel v. City of Joliet*, No. 14-9496 (May 9, 2016) (regarding Fourth Amendment claim for wrongful detention); Brief in Support of Petitioner, *Grassi v. Colorado*, No. 14-5963 (Oct. 15, 2014) (regarding Fourth Amendment claim of unlawful blood sampling).

NAPD fully supports Petitioner's arguments, and writes separately to offer its unique perspective as an association of day-to-day participants in criminal legal systems. NAPD members have observed firsthand the dangers that aggressive over-policing poses to individual rights, and strongly supports the courts' vital role in ensuring law enforcement accountability.

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[1] Counsel of record for all parties received timely notice of NAPD's intention to file this brief, and have consented to the brief's submission. No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than amicus and its counsel, made a monetary contribution intended to fund its preparation or submission.

Because the Fifth Circuit's expansive approach to the independent intermediary doctrine undermines the ability of unlawfully arrested citizens to obtain redress for their injuries, NAPD has a profound interest in the Court's review of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit's decision provides law enforcement officers absolute immunity from liability under 42 U.S.C. § 1983 for false arrests, no matter how insufficient the cause, so long as a grand jury later finds grounds to indict the arrestee for any crime. In addition to presenting an entrenched conflict among the circuits, the Fifth Circuit's application of the "independent intermediary doctrine" in this categorical fashion warrants review for at least three reasons.

First, as a matter of basic tort law causation principles, a subsequent indictment cannot break the causal chain between a past arrest and the pre-indictment harm that has already been suffered from that arrest. Once an officer effectuates a warrantless arrest without probable cause, the deprivation of rights supporting a § 1983 claim is fully consummated. A grand jury later considering an indictment does not act independently of the arrest and cannot in a temporal or causal sense be deemed an "intermediary."

Second, in practice and as a matter of basic Fourth Amendment principles, subsequent grand jury indictments are not reliable proxies for the constitutionality of prior arrests. Probable cause for an arrest depends on the facts known to an officer at the time of the arrest. A grand jury later considering whether to indict may examine all then-available

evidence, including illegally obtained and inadmissible evidence and information completely unknown to the arresting officer. The grand jury's hindsight assessment of a broader factual record may have no bearing on whether the officer's contemporaneous knowledge supported probable cause.

Finally, the Fifth Circuit's application of the independent intermediary doctrine is even more expansive than the absolute immunity for arresting officers that this Court rejected in *Malley v. Briggs*, 475 U.S. 335 (1986), and if allowed to stand carries dangerous implications. In *Malley*, this Court held that even a magistrate judge's *intervening* issuance of a warrant does not absolutely immunize the officer who applied for the warrant, because no such absolute immunity existed at common law and because qualified immunity already provides the appropriate protections and incentives for law enforcement. The sweeping form of the independent intermediary doctrine applied by the Fifth Circuit flies in the face of *Malley* because it effectively resurrects absolute immunity under a different name and undermines § 1983's intended deterrent effect. With public confidence in law enforcement at an historical low, the nation can ill afford a bright-line rule that so dilutes police accountability.

All of these considerations counsel strongly in favor of review.

ARGUMENT

I. THE FIFTH CIRCUIT'S APPROACH DISTORTS TORT LAW PRINCIPLES AND DEFIES COMMON SENSE

The Fifth Circuit has adopted a uniquely expansive version of the "independent intermediary doctrine" that effectively immunizes officers from liability for false arrests so long as a grand jury ultimately indicts the arrestee for any crime. As this case aptly demonstrates, the Fifth Circuit applies this rule to *post*-arrest grand jury indictments and to *pre*-indictment injuries. The fatal defect in that approach is that the grand jury is neither "independent" nor an "intermediary."

There are good reasons to question whether the independent intermediary doctrine should play any role in a § 1983 suit for false arrest. *See Zahrey v. Coffey*, 221 F.3d 342, 352 (2d Cir. 2000) ("Even if the intervening decision-maker (such as a prosecutor, grand jury, or judge) is not misled or coerced, it is not readily apparent why the chain of causation should be considered broken where the initial wrongdoer can reasonably foresee that his misconduct will contribute to an 'independent' decision that results in a deprivation of liberty."); *see infra* at 9, 13-15 (explaining why even a pre-arrest indictment or warrant is not "independent" in the relevant causal sense). But even if a more limited version of the doctrine might be defensible in certain circumstances, the Fifth Circuit has gone too far. As the petition

explains in great detail, the Fifth Circuit's approach is extreme and an outlier.[2]

The other courts that have adopted an independent intermediary doctrine generally apply it only when the officer conducted the arrest *pursuant to* a warrant issued by a judge or an indictment issued by a grand jury. In those circumstances, the arresting officer is not held responsible for a false arrest because the issuance of the warrant is deemed an "intervening act[] [that] 'b[reaks] the chain of causation for the detention from the alleged false arrest.'" *Smith v. Sheriff*, 506 F. App'x 894, 898 (11th Cir. 2013) (citation omitted); *see*

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[2] Every other court of appeals to decide the issue has rejected the view that a grand jury's *post hoc* probable cause finding should automatically excuse an unlawful arrest. *See, e.g.*, *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 307 n.13 (6th Cir. 2005) ("What we have previously held implicitly, we now state explicitly—after-the-fact grand jury involvement cannot serve to validate a prior arrest."); *Savino v. City of New York*, 331 F.3d 63, 75 (2d Cir. 2003) ("[T]he presumption of probable cause arising from an indictment . . . 'is totally misplaced when applied in false [arrest] actions.'" (last alteration in original) (citation omitted)); *Arnott v. Mataya*, 995 F.2d 121, 124 n.4 (8th Cir. 1993) (finding argument that a "grand jury's indictment . . . insulates [defendants] from § 1983 liability for false arrest" to be "without merit," and noting that "to hold as defendants suggest would eliminate all § 1983 lawsuits for false arrest, a result contrary to congressional intent"); *Garmon v. Lumpkin Cty.*, 878 F.2d 1406, 1409 (11th Cir. 1989) ("A subsequent indictment does not retroactively provide probable cause for an arrest that has already taken place."). *But see Evans v. Chalmers*, 703 F.3d 636, 647-48 (4th Cir. 2012) (suggesting, in dicta in a malicious prosecution case, that "subsequent acts of independent decision-makers (*e.g.*, prosecutors, grand juries, and judges) may constitute intervening superseding causes that break the causal chain between a defendant-officer's misconduct and a plaintiff's unlawful seizure"), *cert. denied*, 134 S. Ct. 98 (2013).

also Egervary v. Young, 366 F.3d 238, 248 (3d Cir. 2004) (explaining that where "there had been an independent exercise of judicial review, that judicial action was a superseding cause that by its intervention prevented the original actor from being liable for the harm"), *cert. denied*, 543 U.S. 1049 (2005). According to those courts, even though the officer's exercise of authority is a "but-for" cause of the challenged arrest, the intermediary's *ex ante* decision is a superseding cause that breaks the causal chain. *Cf. 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)).

On the same theory, where an independent decision-maker finds probable cause *after* an arrest, some courts treat that finding as an intervening act that shields the arresting officer from liability for *subsequent* detention-related harms. *See, e.g.*, *Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999) (permitting recovery "only for . . . detention prior to the grand jury indictment"). In those circumstances as well, the doctrine relieves an arresting officer from liability for injuries incurred *after* the purported "independent" decision.

The Fifth Circuit's approach goes much further and stretches the independent intermediary doctrine beyond its guiding rationale. For suppression-hearing purposes, the Fifth Circuit recognizes (as it must) that an arrest without probable cause is an unlawful seizure,

regardless of any subsequent indictment. *See United States v. Ho*, 94 F.3d 932, 936 (5th Cir. 1996). Yet, for purposes of § 1983, the Fifth Circuit holds that a subsequent grand jury indictment will *retroactively* supply probable cause for an otherwise unlawful arrest. *See Taylor v. Gregg*, 36 F.3d 453, 456-57 (5th Cir. 1994), *overruled in part on other grounds by Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (en banc), *cert. denied*, 543 U.S. 808 (2004). Under the Fifth Circuit's approach, therefore, an indictment will immunize the arresting officer from liability for a false arrest "even if," as here, the indictment "occurred after the arrest, and even if the arrestee was never convicted of any crime." Pet. App. 8a–9a (footnote omitted). According to the Fifth Circuit, a post-arrest "decision to . . . return an indictment breaks the causal chain and insulates the initiating party." *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir.), *cert. denied*, 459 U.S. 1005 (1982).[3] That reasoning is unsound and cannot be squared with the basic tort law principles that govern § 1983 actions.

It is well established that § 1983 is "read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds by Monell v. Dep't of Soc.*

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[3] Only if the later probable cause finding was "tainted" by statements or omissions that misled the magistrate or grand jury can the claimant evade the independent intermediary bar and recover damages. *See Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010), *cert. denied*, 563 U.S. 1033 (2011). That narrow exception does not obviate the fundamental doctrinal flaws in the Fifth Circuit's rule and, for the reasons discussed below, is unworkable in any event. *See infra* at 17-18.

Servs., 436 U.S. 658, 663 (1978). Accordingly, analysis of a constitutional false arrest claim must account for common-law principles "concerning causation." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 408-09 (1971) (Harlan, J., concurring in the judgment).

"Causation in fact—*i.e.*, proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524 (2013). But because "[e]very event has many causes," a cause must also be "proximate," meaning "that it was not just any cause, but one with a sufficient connection to the result." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014). Although "[c]ommon-law 'proximate cause' formulations [have] varied," *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011), this Court has recognized that an "intervening cause" may "break[] the chain of causation," *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 659 (2008). For a cause to be "intervening" or "superseding" in the relevant causal sense, it must (1) actually intervene temporally between the defendant's conduct and the injury, and (2) be of "independent origin that was not foreseeable." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (citation omitted).

To the extent the independent intermediary doctrine is grounded in the notion of superseding cause, the Fifth Circuit's application of the doctrine satisfies neither prerequisite. *First*, a *post*-arrest grand jury indictment or *post*-arrest warrant is not an *intervening* event. "When a person's Fourth Amendment rights have been violated by a false arrest, the injury occurs at the time of the arrest." *Wallace v. City of Chicago*,

440 F.3d 421, 425 (7th Cir. 2006), *aff'd sub nom. Wallace v. Kato*, 549 U.S. 384 (2007). When the arresting officer acted without a prior warrant or indictment, and no other decision-maker approved—much less directed—the arrest, there is no superseding cause for the arrest. The arresting officer in this scenario is the *sole* cause of the harm resulting from the arrest itself, and no later action can retroactively break that causal chain.

Second, an after-the-fact grand jury indictment or warrant is neither independent of nor unforeseeable to the arresting officer. That is the teaching of *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, this Court considered a police officer's § 1983 liability for allegedly presenting an insufficient affidavit to a judicial officer who issued a warrant resulting in the plaintiff's arrest. Although the case focused primarily on whether the circumstances warranted absolute immunity, the Court also considered and rejected the district court's alternative holding that, under tort law principles, the judicial officer's decision broke the "causal chain between the application for the warrant and the improvident arrest." *Id.* at 344 n.7. This Court rejected "the [d]istrict [c]ourt's 'no causation' rationale" because "the common law recognized the causal link between the submission of a complaint and an ensuing arrest." *Id.* That conclusion applies with equal force here.

Because a subsequent grand jury is neither an intermediary in nor independent of the prior arrest, the Fifth Circuit's application of the independent intermediary doctrine flouts the basic tort law principles that underlie § 1983. If not corrected, this

fundamental error will sow further confusion in the law.

II. THE FIFTH CIRCUIT'S APPROACH REFLECTS A FUNDAMENTAL MISUNDERSTANDING OF THE CRIMINAL PROCESS

The Fourth Amendment's probable cause standard protects against unlawful seizures by prohibiting arrest unless reliable facts known to an officer at the time establish a "probability or substantial chance of criminal activity." *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983). By definition, events occurring after the arrest cannot supply that probable cause. *Cf. Rios v. United States*, 364 U.S. 253, 261-62 (1960) ("If . . . the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make that arrest lawful . . . ."). In other words, probable cause "is an *ex ante* test: the fact that the officer later discovers additional evidence unknown to her at the time of the arrest is irrelevant to whether probable cause existed at the crucial time." *Bailey v. City of Chicago*, 779 F.3d 689, 695 (7th Cir.) (citation omitted), *cert. denied*, 136 S. Ct. 200 (2015).

In contrast, a grand jury is armed with nearly limitless investigative powers to uncover additional evidence not known at the time of arrest. Allowing a grand jury's *post hoc* determination nonetheless to insulate an officer from liability for an earlier false arrest makes no doctrinal sense.

A. The Probable Cause Inquiry Hinges On An Officer's Contemporaneous Knowledge of Facts And Circumstances Supporting Arrest

As this Court has explained, "[t]he standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (alteration in original) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). This standard requires an examination of "the facts available to the officers at the moment of the arrest." *Beck*, 379 U.S. at 96; *see also Bridewell v. Eberle*, 730 F.3d 672, 675 (7th Cir. 2013) ("[P]robable cause is not determined by retrospect. It depends on what the police know, or reasonably believe, at the time."). "Neither the officer's subjective beliefs nor information gleaned post-hoc bear on this inquiry." *Manzanares v. Higdon*, 575 F.3d 1135, 1144 (10th Cir. 2009); *see also Royster v. Nichols*, 698 F.3d 681, 688 (8th Cir. 2012) ("As probable cause is determined at the moment the arrest was made, any later[-]developed facts are irrelevant to the probable cause analysis for an arrest." (alteration in original) (citation omitted)). By requiring contemporaneous evidence of illegal conduct, the probable cause requirement protects citizens against the risk of police abuse.

B. Grand Juries Possess Broad Powers To Investigate Facts And Consider Evidence Unknown To Arresting Officers At The Time Of Arrest

The grand jury's inquiry is markedly different from that of the arresting officer. The grand jury possesses "extraordinary powers of investigation and great responsibility for directing its own efforts." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423 (1983). "The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred." *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991). In discharging that sweeping duty, "jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." *United States v. Dionisio*, 410 U.S. 1, 15 (1973). Given this vast fact-gathering authority, the grand jury's decision is often based on evidence and information unknown to an officer at the time of arrest.

Grand juries typically are empowered to compel testimony or document production under the penalty of contempt. *See, e.g.*, Fed. R. Crim. P. 17; 18 U.S.C. § 401(3); 28 U.S.C. § 1826. In Texas, for example, where this case arose, "the grand jury is empowered with authority to call any witness and 'inquire into all offenses liable to indictment.'" *Wooldridge v. State*, 653 S.W.2d 811, 814 (Tex. Crim. App. 1983) (en banc) (citation omitted). Grand juries also generally can procure immunity for witnesses otherwise refusing to testify. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

Critically, the grand jury may even consider unlawfully obtained evidence in its deliberations. *United States v. Calandra*, 414 U.S. 338, 339, 342 (1974) (holding that a grand jury witness cannot "refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure"). And grand jury proceedings are not otherwise bound by the rules of evidence. *See id.* at 343 ("The grand jury . . . generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials."); *United States v. Pike*, 523 F.2d 734, 736 n.1 (5th Cir. 1975) ("[G]rand juries are not bound by the same rules of evidence that restrict a trial court and can consider evidence seized in an illegal search."), *cert. denied*, 426 U.S. 906 (1976). In short, "[t]he grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered." *Calandra*, 414 U.S. at 344-45.

In addition to considering evidence unknown to arresting officers, grand juries act in close coordination with prosecutors, who exercise substantial influence over the indictment process. "The prosecutor ordinarily brings matters to the attention of the grand jury and gathers the evidence required for the jury's consideration." *Sells Eng'g*, 463 U.S. at 430. Prosecutors also are not limited to the facts known to the officer at the time of the arrest. To the contrary, prosecutors are "allowed considerable leeway in attempting to prepare for a grand jury investigation" and "regularly interview witnesses prior to appearances before the grand jury." *United States v. Elliott*, 849 F.2d 554, 556-57 (11th Cir. 1988).

Prosecutors also have great influence over the substantive course of the grand jury's inquiry. They often "advise[] the lay jury" on the legal elements of the offense under consideration. *Sells Eng'g*, 463 U.S. at 430; *see also United States v. Sigma Int'l, Inc.*, 196 F.3d 1314, 1323 (11th Cir. 1999) ("[T]he prosecutor may . . . explain why a piece of evidence is legally significant . . . ."). And they typically are permitted to present the grand jury with a completely one-sided version of the facts: "Because the grand jury's function is limited, the prosecutor has no duty to present evidence in his possession which tends to negate guilt." *United States v. Leverage Funding Sys., Inc.*, 637 F.2d 645, 648 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

As a result of these dynamics, grand juries "tend to indict in the overwhelming number of cases brought by prosecutors." *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 (9th Cir.), *cert. denied*, 546 U.S. 1036 (2005). Between October 2010 and September 2011, grand juries failed to return indictments in only 22—roughly .01 percent—of the 193,534 cases pursued by federal prosecutors. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Justice Statistics, 2011 – Statistical Tables* at 10-11, Tables 2.2 & 2.3 (2015), http://www.bjs.gov/content/pub/pdf/fjs11st.pdf. The following year's statistics are equally stark. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Justice Statistics, 2012 – Statistical Tables* at 11-12, Tables 2.2 & 2.3 (2015), http://www.bjs.gov/content/pub/pdf/fjs12st.pdf (no bills of indictment in just 14 of 196,109 federal cases).[4]

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[4] State grand juries—including in Texas, where this case arose—likewise return indictments in the overwhelming majority

Mindful of these trends, commentators have criticized "the grand jury's present tendency to rubberstamp the prosecutor's decisions." Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463, 474 (1980); *see also, e.g.*, Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1, 2 (2004) ("Most knowledgeable observers would describe the federal grand jury more as a handmaiden of the prosecutor than a bulwark of constitutional liberty; to quote the classic vignette, the grand jury is little more than a rubber stamp that would 'indict a ham sandwich' if the prosecutor asked."). Several courts have expressed similar concerns. *See, e.g.*, *United States v. Ross*, 412 F.3d 771, 774 (7th Cir. 2005) ("Realistically, federal grand juries today provide little protection for criminal suspects whom a U.S. Attorney wishes to indict."). And occasionally, such extensive control over the grand jury's investigative process has led to prosecutorial abuse. *See, e.g.*, *United States v. Williams*, 504 U.S. 36, 61 (1992) (Stevens, J., dissenting) (observing that "prosecutorial misconduct . . . has sometimes infected grand jury proceedings"); *Sigma Int'l*, 196 F.3d at 1323 (finding that prosecutor "attempted to turn" the grand jury's "independent decision to indict . . . into simply a rubber stamp decision").

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of cases. *See, e.g.*, Kevin Schwaller, *Recent Travis County grand juries indict 96 percent of cases*, KXAN (Aug. 3, 2015) http://kxan.com/2015/08/03/recent-travis-county-grand-juries-indict-96-percent-of-cases/ (noting 96 percent indictment rate in Travis County, Texas, between April 2015 and June 2015).

Because grand juries act in secret, moreover, a court's ability to determine *how* the grand jury has exercised its expansive investigatory powers is significantly constrained. Grand jury proceedings are strictly closed to the public, including the accused, and members are prohibited from disclosing what occurred. *See* Fed. R. Crim. P. 6(d), (e)(2); *Calandra*, 414 U.S. at 343 ("No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry.").

Finally, the mechanics of the grand jury process vary widely across different jurisdictions. Federal law does not ensure state defendants a right to indictment by their peers, *see Hurtado v. California*, 110 U.S. 516, 536-38 (1884), and does not otherwise prescribe uniform rules for grand juries nationally. *See generally* David B. Rottman & Shauna M. Strickland, Bureau of Justice Statistics, U.S. Dep't of Justice, *State Court Organization, 2004*, at 215-17, Table 38 (2006), https://www.bjs.gov/content/pub/pdf/sco04.pdf (describing different rules). In some jurisdictions, for instance, three-fourths of grand jurors must approve an indictment; in others, only a bare majority is required. *Id.* And a minority of jurisdictions require prosecutors to disclose exculpatory evidence to the grand jury, while most jurisdictions impose no such requirement. *See generally* Anna Offit, *Ethical Guidance for a Grander Jury*, 24 Geo. J. Legal Ethics 761, 764-65 (2011).

C. A Grand Jury's Subsequent Indictment Cannot Logically Be Treated As An Independent Validation Of Probable Cause At The Time Of Arrest

The Fifth Circuit's categorical rule thus fails for reasons even beyond the threshold flaw of treating an after-occurring event as an intervening cause. Given the generally more limited scope of a police officer's pre-arrest inquiry, the grand jury's *post hoc* evaluation of a broader factual record does not map sensibly onto the probable cause standard. The grand jury's actions, moreover, are sufficiently influenced by the prosecutor's office that it does not function in a truly independent way. And the lack of uniform grand jury rules across jurisdictions makes the automatic foreclosure of liability for federal constitutional violations particularly indefensible. For all of these reasons, it makes no sense to apply the independent intermediary doctrine in a categorical way that, upon an indictment, treats the arrest as conclusively valid.

To be sure, the Fifth Circuit recognizes one exception to the doctrine, in cases where the arresting officer's testimony has so misled the grand jury so as to "taint" the indictment. *See Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010). But this exception is insufficient for two reasons. *First,* while the possibility of fraud certainly introduces an additional concern, the fundamental problem is a mismatch between the record considered by a grand jury and the on-the-spot determination of probable cause made by an arresting officer—and that mismatch exists even where the officer's testimony is completely truthful. *Second*, because the grand jury acts secretly, most arrestees have no practical ability to know or

prove that their grand jury was tainted. Parties may obtain transcripts of grand jury proceedings only in limited circumstances; where, for example, "the need for disclosure is greater than the need for continued secrecy, and . . . the[] request is structured to cover only material so needed." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). Few arrestees will be able to make the heightened showing necessary to discover the evidence that swayed their grand jury. And a rule that encourages arrestees systematically to try to pierce the veil of grand jury secrecy is bad policy in any event, as it undermines the important goals this secrecy is meant to protect. *Cf. United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 & n.6 (1958).

This Court has consistently avoided these problems by evaluating probable cause in the suppression context based solely on the circumstances existing at the time of the arrest. *See Rios*, 364 U.S. at 261 (deeming arrest unlawful, despite subsequent grand jury indictment, where "upon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time the officers decided to alight from their car and approach the taxi in which the petitioner was riding"). There is no compelling reason, or even any logical one, to apply a different rule in the § 1983 context. To maintain grand jury secrecy and avoid further doctrinal confusion, the Court should grant certiorari to affirm that, in the § 1983 context as well as in the suppression context, a grand jury's after-the-fact assessment cannot excuse an arrest unsupported in the moment by probable cause.

III. THE FIFTH CIRCUIT'S DECISION IMPLICATES CRITICAL AND TIMELY ISSUES OF PUBLIC CONCERN WARRANTING THIS COURT'S REVIEW

The Fifth Circuit's expansive application of the independent intermediary doctrine recreates, as a practical matter, a form of absolute immunity that this Court squarely rejected in *Malley*, and threatens to undermine the deterrent force of § 1983 that *Malley* sought to preserve. Particularly in the face of lagging public trust in law enforcement, the judiciary must maintain its crucial role in ensuring police accountability.

Section 1983 was enacted "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). "This deterrent effect is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986); *accord Carlson v. Green*, 446 U.S. 14, 21 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." (footnote omitted)).

In *Malley*, this Court addressed the deterrent function of § 1983 in circumstances bearing directly on this case. The question in *Malley* was whether a magistrate judge's issuance of a warrant should absolutely immunize the officer who applied for that warrant from any liability for a subsequent unlawful arrest. The Court found no basis in doctrine or policy to confer absolute immunity on such arresting officers.

To the contrary, it observed that "complaining witnesses were not absolutely immune at common law," and that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." 475 U.S. at 340-41. The Court acknowledged that "an officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his affidavit establishes probable cause." *Id.* at 343. "But," it explained, "such reflection is desirable." *Id.* The Court found, moreover, that "it would be incongruous to test police behavior by the 'objective reasonableness' standard in a suppression hearing while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a § 1983 damages action." *Id.* at 344 (citation omitted).

Although not articulated as a form of immunity, the Fifth Circuit's application of the independent intermediary doctrine functionally affords an absolute immunity even more expansive than the immunity at issue in *Malley*. Whereas the absolute immunity requested in *Malley* would have insulated from liability an officer applying for a warrant only where a third-party magistrate found probable cause and issued the warrant prior to any arrest, the Fifth Circuit's rule insulates all arresting officers from liability so long as a grand jury indicts the arrestee at some point *after* the arrest (and even if the indictment is for a different crime). The Court did not reject absolute immunity in *Malley* only to have it reemerge—in even more sweeping form—through the back door by a different name. Regardless of nomenclature, all of this Court's

reasons for rejecting absolute immunity in *Malley* apply equally and, indeed, more powerfully here.

Instead of incentivizing strict adherence to the probable cause standard, the Fifth Circuit's rule permits an officer to arrest first and, with the prosecution's support, later avoid liability for false arrest via a grand jury indictment. Courts have repeatedly rejected this kind of "arrest first, find evidence later" approach. *See, e.g.*, *Henry v. United States* 361 U.S. 98, 101 (1959) ("Arrest on mere suspicion collides violently with the basic human right of liberty."); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (delaying probable cause hearing following warrantless arrest "for the purpose of gathering additional evidence to justify the arrest" is unreasonable); *Brown v. Sudduth*, 675 F.3d 472, 479 (5th Cir. 2012) ("Holding someone for [the purpose of gathering additional evidence] is an improper restraint when authorities do not have reasonable grounds to believe that person is guilty of an offense justifying an arrest."); *People v. Gonzalez (In re Gonzalez)*, 64 Cal. App. 4th 432, 439 (1998) ("Arrests made without probable cause in the hope that something might 'turn up' are unlawful . . . .").

The potential negative impact of the Fifth Circuit's rule is significant. As the U.S. Department of Justice has acknowledged, "[b]uilding and maintaining community trust is the cornerstone of successful policing and law enforcement." Office of Community Oriented Policing Services, U.S. Dep't of Justice, *Building Trust Between the Police and the Citizens They Serve* 3, http://www.theiacp.org/portals/0/pdfs/buildingtrust.pdf (last visited Dec. 29, 2016); *see also* Robert Wasserman, U.S. Dep't of Justice,

Office of Community Oriented Policing Services, *Guidance for Building Communities of Trust* 8 (2010), https://nsi.ncirc.gov/documents/e071021293_BuildingCommTrust_v2.pdf (observing that "the protection of privacy, civil rights, and civil liberties are fundamental to effective crime control"). Although "law enforcement executives bear the primary responsibility for their departments' honesty, integrity, legitimacy, and competence," *Building Trust*, *supra*, at 7, the courts—by enforcing the interests § 1983 protects—play a complementary role in preserving public confidence.

The Fifth Circuit's standard weakens this framework—and does so at a time when the deterrent effect of § 1983 is most needed, amid waning public confidence in police. "Recent events in Ferguson, New York City, Chicago, and elsewhere in the United States have exposed rifts in the relationships between the police and the communities they protect and serve. These incidents have damaged police legitimacy by promoting perceptions among community members that police do not play an appropriate role in making and implementing rules governing community conduct." Anthony A. Braga, *Better Policing Can Improve Legitimacy and Reduce Mass Incarceration*, 129 Harv. L. Rev. F. 233, 233 (2016). Today, American confidence in police is at an historic low. *See* Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup (June 19, 2015), http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx. Minority perceptions of law enforcement are especially bleak. *See* Jens Manuel Krogstad, *Latino confidence in local police lower than among whites*, Pew Research Center (Aug.

28, 2014), http://www.pewresearch.org/fact-tank/2014/08/28/latino-confidence-in-local-police-lower-than-among-whites/. And "most Americans give relatively low marks to police departments around the country for holding officers accountable for misconduct." Pew Research Center, *Few Say Police Forces Nationally Do Well in Treating Races Equally* (Aug. 25, 2014), http://www.people-press.org/2014/08/25/few-say-police-forces-nationally-do-well-in-treating-races-equally/. Against the backdrop of these growing concerns, the Fifth Circuit's doctrine, if not corrected, will further undermine police accountability and the public's confidence in the nation's police forces.

This case presents a timely opportunity to reaffirm—and restore—§ 1983's purpose of ensuring proper relations between law enforcement officers and the citizens they serve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD P. BRESS
Counsel of Record
MELISSA ARBUS SHERRY
STEPHEN P. BARRY
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
rick.bress@lw.com

Counsel for Amicus Curiae

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