No. 16-729

In The
Supreme Court of the United States

ANTONIO FRANCIS BUEHLER,

Petitioner,

v.

AUSTIN POLICE DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

As their attempt to reframe the question presented reveals, respondents fundamentally misunderstand the legal issue before this Court. Respondents accuse (BIO i) Buehler of a "collateral[] attack" on the grand jury's indictment, but his actual request is far different: to correct the Fifth Circuit's legal rule that a post-arrest grand jury indictment automatically precludes civil liability for a pre-indictment false-arrest claim (subject only to a "taint exception"), and to bring it in line with precedent of this Court and other courts of appeals.

Respondents defend the Fifth Circuit's outlier rule on the premise that "a post-arrest indictment provides the same answer to th[e] [probable cause] question as one issued pre-arrest." BIO 23. That premise is plainly wrong. The facts known pre-arrest may be substantially different than the facts known at the time of a post-arrest indictment. The relevant inquiry for section 1983 false-arrest purposes is not what the grand jury found based on whatever after-the-fact record was presented to it, but whether the facts known to the officer at the time of the arrest supported probable cause.

Respondents attempt to elide that key distinction—critical to the Fifth Circuit's much-maligned expansion of the "independent intermediary" doctrine—by relying on an overly expansive reading of the "taint exception" directed at fraudulent conduct. But as the decision below makes clear in its two-part analysis, the Fifth Circuit's taint exception is just that—an "exception"—and one that Buehler does not invoke before this Court. Buehler's argument is that no exception should be necessary because, consistent with every other circuit to have considered the precise issue, a grand jury's post-arrest indictment should never in and of itself preclude a false-arrest claim. While such an indictment may affect other types of section 1983 claims (*e.g.*, malicious prosecution or post-indictment detention) and may limit the available damages, it does not presumptively bar false-arrest claims.

Because (and only because) this case arises in the Fifth Circuit, Buehler had no opportunity to press his false-arrest claims on the merits. The decision

below thus tees up the question presented perfectly, and this Court should resolve it.

ARGUMENT

I. THE CIRCUIT CONFLICT IS CLEAR AND DIRECT

Although respondents describe the circuit conflict as "manufacture[d]," BIO 8, both courts in this case acknowledged it, Pet. App. 9a, 38a-39a. These opinions, and those of other courts of appeals, reflect widespread uncertainty as to the continuing vitality of the independent intermediary doctrine despite this Court's rejection of its underpinning in *Malley v. Briggs*, 475 U.S. 335 (1986). Pet. 12. Respondents try to whittle the discord spanning no less than eight courts of appeals down to a "1-2 split," and then to dodge that split by recasting the doctrine solely in terms of a "taint exception." BIO 8-9. But respondents cannot avoid the reality that a post-arrest grand jury indictment would not have barred Buehler's claims in at least five other circuits.

A. As a threshold matter, nothing in *Kaley v. United States*, 134 S. Ct. 1090 (2014), invites further percolation. *Kaley* holds that a grand jury indictment supplies probable cause for post-indictment detention and asset restraint. But it makes no mention of the independent intermediary doctrine and says nothing about the use of indictments to immunize retroactively pre-indictment conduct. And the "well-established" grand jury concepts from *Gerstein v. Pugh*, 420 U.S. 103 (1975), and other cases that *Kaley* "affirmed," BIO 9, 20, predate *Malley*'s 30-year-old understanding that the independent intermediary doctrine's rationale "is inconsistent with [this

Court's] interpretation of § 1983," 475 U.S. at 344 n.7.

Accordingly, courts have had decades to consider the interplay between this Court's grand jury and section 1983 jurisprudence. *Kaley* does not move the needle in that respect. Respondents thus cannot point to *any* basis for their speculation that "a circuit court would reconsider any decision contrary to the Fifth Circuit's holding in this case." BIO 9. Quite the opposite, the Third Circuit declined to reconsider its position just last year and reaffirmed the rule that post-arrest indictments do not retroactively insulate officers from false-arrest claims. *See Goodwin v. Conway*, 836 F.3d 321, 329 n.35 (3d Cir. 2016).

Respondents further surmise that, *Kaley* aside, the circuit conflict is mitigated because (they say) grand jury indictments conclusively establish probable cause where the same evidence would be presented in a section 1983 suit. BIO 10-12. But respondents fail to cite a single case so holding or even undertaking that case-specific inquiry. This is unsurprising: no such case exists, and any such narrow exception only underscores the far more categorical nature of the Fifth Circuit's rule.

In any event, Buehler's section 1983 evidence goes much further. For instance, Buehler's expert concludes that "ongoing animosity" has made Buehler a "target[] for both arrest and prosecution," as demonstrated by the "highly unusual" release of a training bulletin "conveniently tailored" to Buehler's organization. C.A. App. 1440-1441. Similarly, respondents' own expert made clear that "specialized knowledge" would be "key" to a "lay person"

conducting "a reliable evaluation of law enforcement officers' conduct" in Buehler's lawsuit. *Id.* at 853. Because such evidence postdates the grand jury presentation by a year and a half, respondents are wrong to suggest a complete overlap between the facts considered by the grand jury and those at issue in this action.

Nor should it be presumed that a grand jury received the same evidence as would be presented in a section 1983 action. The Fifth Circuit assumed that because some witnesses favorable to Buehler testified before the grand jury, their testimony would be identical in both proceedings. But a prosecutor seeking an indictment is unlikely to elicit the same testimony as a section 1983 defendant. Nor would a prosecutor cross-examine the state's witnesses, as defendant's counsel would do.

B. Despite respondents' best efforts to obfuscate, the well-developed circuit conflict on the question presented is clear.

1. At the very least, respondents concede (BIO 14-15) that the Second, Third, and Eighth Circuits agree that post-arrest grand jury indictments do *not* preclude false-arrest claims. Those decisions alone make the Fifth Circuit's anomalous rule worthy of this Court's review. All the more so if, as respondents suggest, the First and Fourth Circuits join the Fifth Circuit in "stat[ing] that post-arrest grand jury indictments establish probable cause in false arrest cases." BIO 14.

Respondents nevertheless cherry-pick lines from the Second, Third, and Eighth Circuit decisions and characterize them as "erroneous[]," "cryptic,"

"dictum," "unclear," or "not clearly contrary to the rule in the Fifth Circuit." BIO 14-16. Those labels do nothing to diminish the fact that those courts of appeals have rejected the notion that a post-arrest grand jury indictment precludes a false-arrest claim. Pet. 16-17. Moreover, those labels ring hollow. Far more than "hav[ing] only discussed this issue in unpublished dictum," BIO 14, the Third Circuit has squarely held that a grand jury's probable cause determination "has no bearing on an arrest that precedes the indictment." *Goodwin*, 836 F.3d at 329 n.35.

Take also respondents' casting of the Second Circuit's authority as limited to false-arrest claims arising under state law. BIO 15-16. Unmentioned is the fact that the Second Circuit, reviewing the very *district court* opinion respondents invoke, drew no such distinction in holding that a "§ 1983 false arrest claim" was erroneously dismissed on the "'totally misplaced'" view that the indictment provides probable cause. *Rivas v. Suffolk Cty.*, No. 04-4813-pr(L), 2008 WL 45406, at *1 (2d Cir. Jan. 3, 2008) (quoting *Savino v. City of N.Y.*, 331 F.3d 63, 75 (2d Cir. 2003)). That rule, if applied below, plainly would have permitted Buehler's claims to proceed to the merits.

2. If that were not enough, the Fifth Circuit runs up against the Sixth and Eleventh Circuits as well. Respondents try to extricate those circuits from the conflict by positing that "under the Fifth Circuit's rule" the decisions would remain unchanged. BIO 12-14. Yet what respondents claim is "the Fifth Circuit's rule"—*i.e.*, "that an indictment suffices only if the grand jury is presented with 'all the facts,'"

BIO 10-11—is really the standard for the taint *exception* to the Fifth Circuit's (actual) rule that an indictment insulates the arresting officer from liability "even if the independent intermediary's action occurred after the arrest." Pet. App. 8a-9a. As the Fifth Circuit's two-part analysis makes clear, its baseline rule and the taint exception to that rule are distinct: (1) a grand jury indictment immunizes an arresting officer from liability for a false arrest, *id.* at 8a-10a; and (2) that immunization yields only upon proof that the indictment was tainted by fraud, *id.* at 10a-14a.

The Sixth and Eleventh Circuits apply an irreconcilably different, single-step rule: "What we have previously held implicitly, we now state explicitly—after-the-fact grand jury involvement cannot serve to validate a prior arrest," full stop. *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 307 n.13 (6th Cir. 2005); *see 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."). Grand jury proceedings, tainted or not, are irrelevant to a section 1983 false-arrest claim.[1]

To be sure, the taint exception allows for the *possibility* that the Fifth Circuit might allow a section 1983 claim to proceed where fraud is proven. But the choice of legal rule matters in this and other

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[1] Respondents' discussion of *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999), is tied entirely to an unavailable district court order. BIO 13. The Eleventh Circuit made no mention of any "factual dispute" (*id.*) concerning the grand jury presentation.

cases. *See* p. 9, *infra*. As *amicus* National Association for Public Defense (NAPD) explains, refusing to apply the independent intermediary doctrine on account of a taint exception—rather than on account of basic causation principles—is "insufficient" given that (among other reasons) "most arrestees have no practical ability to know or prove that their grand jury was tainted." Br. 17-18; *cf. Jones*, 174 F.3d at 1287 n.10 (rejecting liability for post-indictment detention because proving grand jury deception would require deposing even "grand jury members").

The Sixth and Eleventh Circuit decisions bear out that concern. That a single detective testified before a grand jury or previously had an improper motive in filing a criminal complaint, *see Radvansky*, 395 F.3d at 316-318 & n.20, does not reveal whether the grand jury had "all the facts." And where the record contains no evidence about what was presented to a grand jury, an indictment returned more than a year after issuance of a facially invalid arrest warrant may well be based on "additional inculpatory evidence," rather than "nothing at all." BIO 13-14; *see Garmon*, 878 F.2d at 1408.

Under the decision below, neither of those fact patterns would allow for the "affirmative[] show[ing]"—as opposed to "[m]ere allegations"—of taint sufficient to ward off summary judgment. Pet. App. 10a ("[T]hat an officer 'harbored ill-will toward' the defendant does not suffice."). Consequently, there is zero merit to respondents' assertion that, if those courts had applied "the Fifth Circuit's rule," the taint exception would have negated the immunizing effect of the independent intermediary doctrine.

II. THIS CASE PRESENTS AN IDEAL VEHICLE

None of respondents' made-up vehicle arguments poses any barrier to this Court's resolution of the question presented.

First, respondents proclaim (bizarrely) that "this case is a poor vehicle to consider whether an arrestee can bring a false arrest claim after being arrested pursuant to a *** grand jury indictment." BIO 16. Buehler is not asking the Court to consider that fact pattern. The question presented is whether the independent intermediary doctrine precludes a false-arrest claim where the indictment *follows* the arrest—a scenario common enough to have generated a deep (even if lopsided) circuit conflict, Pet. 23-24.

Second, respondents are correct that in this Court, Buehler does not challenge the finding below of no grand jury taint. BIO 17. But that is why this case presents a clean vehicle—not a poor one—for considering the dispositive legal question of the independent intermediary doctrine's viability. If the doctrine is upheld, the judgment in favor of respondents stands; if the doctrine is nullified, both the taint *exception* and the judgment below fall as well. Respondents again mistake this case as targeting the Fifth Circuit's taint exception, when it actually challenges whether a post-arrest grand jury indictment bars a false-arrest claim in the first instance. *See* pp. 6-8, *supra*; pp. 11-12, *infra*.

Third, respondents attack the underlying merits of Buehler's false-arrest claims, arguing that even absent the indictment, "ample evidence in the record establish[es] probable cause." BIO 17-19. Beyond

the fact that respondents' premature arguments are immaterial to the question presented and can be litigated on remand, Buehler's claims are anything but futile. In the summary judgment posture from which this petition arises, it is Buehler's version of the events—not respondents' preferred version—that is under review. Viewing the evidence in Buehler's favor, the record—corroborated by video—shows Buehler being arrested while backing away (or even leaving a scene) merely for videotaping, or for asking an officer for a badge number while other people stood closer to the scene. Pet. App. 27a-28a, 29a-30a. That evidence also shows the arresting officers, not Buehler, as the aggressors. *Id.* at 25a.

Respondents resort to painting (BIO 5, 18-19) Buehler as a serial law-breaker who has "admitt[ed] [to] the very charge for which he was indicted." Such gross overstatements blink reality. Buehler was *acquitted* of the only charge for which he was tried, and the other indictments were dismissed. Pet. 7. Moreover, the effect of magistrate warrant determinations (*post*-arrest here)—an issue respondents would be free to press on remand if this Court (like the courts below) does not consider it—is dubious under *Malley*. Pet. 18-20. Accordingly, if this Court removes the sole impediment to considering this case on its merits, on remand Buehler would have a firm basis for proving his claims.[2]

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[2] Respondents go one step further, citing extra-record "tweets" that post-date the district court proceedings. BIO 3-4 & nn.1-2, 4. No matter how distasteful one may find Buehler's

III. RESPONDENTS ARE WRONG ON THE MERITS

On the merits, respondents do not put up much of a fight. Their primary tack is to insist (BIO 20-22) that *Kaley* compels expansion of the independent intermediary doctrine to post-arrest grand jury indictments. But for the reasons explained (pp. 3-4, *supra*), *Kaley* has no bearing on that issue.

The limited scope of Buehler's claims confirms as much: Buehler does not contest that the grand jury's probable cause determination *prospectively* curtails a criminal defendant's freedom or other rights. *Kaley*, 134 S. Ct. at 1098-1099 (explaining that indictment "*immediately* depriv[es] the accused of her freedom" by "trigger[ing]" issuance of arrest warrant or "*eliminat[ing]*" ability to challenge basis for "*ensuing* detention") (emphasis added); *see also Jones*, 174 F.3d at 1287 (permitting section 1983 false-arrest claim up to post-arrest indictment). Instead, Buehler seeks damages for the false-arrest periods that *precede* the issuance of the grand jury indictments (by up to a year plus).

Allowing Buehler to prove that the facts then known to his arresting officers fell short of probable cause is no different than the inquiry conducted in

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choice of words in his advocacy efforts, it has no bearing on the question presented or this Court's ability to answer it. Respondents' assertion (BIO 4) that "if Buehler were merely a provocateur who wanted to film the police and tweet invective, he would be within his rights," only underscores the First Amendment implications raised by *amici* Cato Institute, the National Press Photographers Association, and other media organizations.

the suppression context notwithstanding a subsequent grand jury indictment. NAPD Br. 18. And it hardly undermines the grand jury's long-since-completed role in the criminal process.

Respondents maintain (BIO 23-26) that Buehler may be "technically correct that a subsequent indictment cannot break the prior causal chain that resulted in his arrest." Technically or not, causation is the reason this Court—not just "some courts," BIO 23—clarified in *Malley* (even in the pre-arrest determination context) that the independent intermediary doctrine is "inconsistent" with section 1983, 475 U.S. at 344 n.7; *see* Pet. 13-14. Respondents' retort—that because the grand jury takes up probable cause, the timing of the indictment is irrelevant, BIO 23-24—is a *non sequitur* that sidesteps the causation analysis altogether.

At a minimum, because Buehler was arrested *before* a probable cause determination was submitted to any intermediary, those determinations (even if untainted) cannot retroactively break a causal chain between the officers' actions and the arrests. Pet. 18-22; NAPD Br. 7-10. That commonsense holding has already been suggested by this Court: "If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process[.]" *Wallace v. Kato*, 549 U.S. 384, 390 (2007). The only open question—not at issue here—is whether a post-arrest indictment cuts off damages accruing *after* that indictment. *See Manuel v. City of Joliet*, No. 14-9496, slip op. at 9 n.4 (U.S. Mar. 21, 2017) (Alito, J., dissenting).

IV. THE RECURRING QUESTION PRESENTED IS UNQUESTIONABLY IMPORTANT

From the considered perspective of *amici* that participate in and document the criminal legal system every day, "[t]his case is of national importance." Cato Br. 2; *see* NAPD Br. 22-23.

Rather than disagree, respondents contend that countermanding the Fifth Circuit would "interfere with the legal regime that this Court has crafted over a period of decades" and incentivize "harmful" prosecutorial actions. BIO 26-29. Those arguments are misguided: qualified immunity already "provides ample protection" to law enforcement, which under the Fifth Circuit's font of absolute immunity would be incentivized to use post-arrest grand jury indictments as part of a long-decried "'arrest first, find evidence later' approach." NAPD Br. 19-21.

Although respondents turn a blind eye to the frequency with which the purportedly "rare[]" (BIO 10) question presented continues to arise, Pet. 23-24, their desire to preserve the judgment below cannot obscure the need for uniformity in section 1983 jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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