No. 14-9496

In the Supreme Court of the United States

ELIJAH MANUEL,

Petitioner,

v.

CITY OF JOLIET, ILLINOIS, ET AL.,

Respondents.

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

BRIEF OF SHELDON H. NAHMOD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF SHELDON H. NAHMOD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Sheldon H. Nahmod is Distinguished Professor of Law at IIT Chicago-Kent College of Law.[1] His principal field of study and teaching is the interrelationship of 42 U.S.C. § 1983 and constitutional law. In 1979, he wrote the first treatise devoted exclusively to § 1983, which is now a three-volume work in its fourth edition. In addition, he has written many articles addressing the proper interpretation and application of § 1983. He has lectured on § 1983 to federal judges under the auspices of the Federal Judicial Center. He has also consulted with numerous plaintiffs' and defendants' attorneys on § 1983 issues. Further, he has argued § 1983 cases before this Court and the Courts of Appeals for the First, Seventh, Eighth, and Tenth Circuits. See, *e.g.*, *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983). And this Court has cited his publications in § 1983 decisions. See, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 255 n.9 (1978).

Professor Nahmod's professional dedication to the proper understanding of § 1983 makes him particularly interested in the Court's decision in this case. He takes no position on the Fourth Amendment issue posed in the Question Presented. However, he wishes to impress upon the Court his conviction that the ultimate outcome in this case must be firmly

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

grounded on § 1983, rather than the common law of malicious prosecution, so that all persons have effective access to this vital tool for protecting their constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over twenty years ago, this Court acknowledged "an embarrassing diversity of judicial opinion" on "the extent to which a claim of malicious prosecution is actionable under § 1983." *Albright* v. *Oliver*, 510 U.S. 266, 270 n.4 (1994) (plurality opinion). This embarrassment continues, seriously impeding the vindication of the Fourteenth Amendment and other constitutional rights. The time has come to answer the fundamental issues raised by the Question Presented, which as the certiorari petition recognized (at 10-11, 21, 25-26) necessarily include whether the elements of the common law malicious prosecution tort—and the favorable termination element in particular—apply to Petitioner's § 1983 claim.

The only defensible answer to that crucial statutory interpretation question is that the common law elements of malicious prosecution should play no independent role in determining the scope of claims under 42 U.S.C. § 1983. Section 1983 created a federal statutory remedy for constitutional violations perpetrated by state actors, whereas malicious prosecution is a common law tort. To describe a § 1983 claim as "malicious prosecution" is a misnomer that directs attention away from the real inquiry—the elements of the constitutional provision underlying the particular § 1983 claim—and improperly focuses instead on the elements of the malicious prosecution tort. In this respect the Seventh Circuit gets it right while other circuits do not: "[I]f a plaintiff can estab-

lish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.'" *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

Attempts to analogize between so-called § 1983 "malicious prosecution" claims and the common law elements of malicious prosecution have caused a great deal of confusion in the lower courts. The *en banc* Fifth Circuit described its own "precedent governing § 1983 malicious prosecution claims" as "a mix of misstatements and omissions" that has led to "inconsistencies and difficulties." *Castellano* v. *Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (*en banc*). And the Fifth Circuit acknowledged that it is "not alone in this drift. Other circuits have traveled uneven paths as well, and numerous approaches have developed after *Albright*." *Ibid.*; see generally Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* §§ 3:66-3:67 (4th ed. 2015) (collecting and analyzing post-*Albright* cases in the circuits, and arguing that malicious prosecution law should not dictate scope of § 1983).

Petitioner tries to take advantage of this confusion to save his § 1983 "malicious prosecution" claim from dismissal on statute of limitations grounds. He maintains that § 1983 imports the "favorable termination" element of common law malicious prosecution, which would have prevented accrual of his claim until he was released and the charges against him dropped. Such a maneuver cannot be squared with § 1983 or this Court's precedents.

1. Contrary to the rule that Petitioner needs to prevail, the elements of common law torts like malicious prosecution do not dictate the elements of a

§ 1983 claim. Nothing in the text of § 1983, its legislative history, or its purposes indicates that Congress intended to merely duplicate common law torts. Section 1983 by its own language was enacted to enforce the "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Regardless of any superficial similarity between particular § 1983 actions and particular tort actions, the vital constitutional interests served by § 1983 are distinct from and independent of the principles that animate tort law.

The Court has consistently reaffirmed that constitutional deprivations are central to § 1983 claims. Thus, the statutory cause of action may be interpreted against the "background of tort liability," but only to implement § 1983, not to define its scope. *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds by Monell* v. *Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). At most, common law principles can fill gaps as necessary to effectuate a damages remedy for constitutional violations.

2. Importing the common law elements of malicious prosecution into § 1983 would be particularly ill-advised. The last two decades have demonstrated that attempts to do so result only in confusion. Indeed, the fundamental disconnect between the elements of a § 1983 claim and the elements of a common law malicious prosecution claim virtually guarantees confusion. In addition, the entire enterprise of attempting to interpret a supposedly uniform federal cause of action based on tort law that varies not only from one state to another, but from the time of § 1983's enactment in 1871 to the present day, is just not workable.

Finally, as a matter of § 1983 law and policy, there is no good reason to make any of the traditional elements of malicious prosecution into elements of Petitioner's § 1983 claim for unlawful pretrial detention. Several of the malicious prosecution elements (including the favorable termination requirement) contradict established § 1983 precedents. And others (such as the absence of probable cause) make sense only to the extent that the underlying constitutional right requires their consideration. In short, this Court's interpretation of § 1983 should not be governed by the common law tort of malicious prosecution.

ARGUMENT

I. SECTION 1983 DOES NOT FEDERALIZE STATE TORT LAW.

A. The Text, History, And Purposes Of § 1983 Demonstrate That Congress Did Not Intend To Duplicate Common Law Causes Of Action.

Section 1983 is a federal civil cause of action for the enforcement of rights granted by the Constitution and federal law. Nothing in its straightforward text, legislative history, or purposes indicates that it federalizes common law torts such as malicious prosecution.

1. The text of § 1983 does not mention state tort law: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983.

This language identifies a proper plaintiff and requires injury to the plaintiff. It also specifies that the defendant be a "person" who, while acting under color of state law, causes the plaintiff to be deprived of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. But nothing in § 1983's text directs courts to reflexively import state tort law. To the contrary, the statute tells courts to look to the Constitution and other federal law in defining the cause of action.

2. The legislative history of the provision enacting what is now § 1983—§ 1 of the Civil Rights Act of 1871—confirms that Congress had no intention of duplicating existing common law causes of action in § 1983. See 17 Stat. 13. "The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual," *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 934 (1982)—linking the cause of action to the Constitution, not the common law. See also *Monell* v. *Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 683-686 & n.45 (1978) (recounting history "corroborat[ing] that Congress . . . intended to give a broad remedy for violations of federally protected civil rights").

Proponents of § 1 of the Act consistently emphasized its relationship to the Constitution. One Senator described § 1 as a statute that "reënact[s] the Constitution." Cong. Globe, 42d Cong., 1st Sess. 569 (1871) (Sen. Edmunds). And the author of § 1 of the Fourteenth Amendment stated that the purpose of

§ 1983 is "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied [*sic*] to him by the Constitution." *Id.*, 1st Sess. App. 81 (Rep. Bingham); see *Monell*, 436 U.S. at 686 n.45. Even the Act's critics described § 1 of the Act as "authoriz[ing] any person who is deprived of any right, privilege, or immunity secured to him *by the Constitution* of the United States, to bring an action against the wrongdoer in the Federal Courts." Cong. Globe, 42d Cong., 1st Sess. App. 216 (1871) (Sen. Thurman) (emphasis added).

Thus, the legislative history demonstrates that a § 1983 claim is defined by the constitutional right, privilege, or immunity invoked.

3. Common law torts and § 1983 damages actions bear a superficial likeness because both use the compensatory and deterrent effects of monetary damages "to protect persons from injuries to particular interests." *Carey* v. *Piphus*, 435 U.S. 247, 254-257 (1978); see also *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-307 (1986). Indeed, the compensation function is "[t]he cardinal principle of damages in Anglo-American law." *Carey*, 435 U.S. at 254-255. But the "particular interests" protected by § 1983 typically diverge from the "particular interests" protected by tort law.

The unique interests protected by § 1983 are evident in the very title of its enacting statute: "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*" 17 Stat. 13 (1871); see also *Monroe*, 365 U.S. at 171 (§ 1983's "purpose is plain from the title" of the statute). Congress was concerned that "state laws might not be enforced" and constitutional

rights—particularly those enshrined in the newly adopted Fourteenth Amendment—"might be denied by the state agencies." *Monroe*, 365 U.S. at 180. Thus, § 1983 "provide[s] a remedy in the federal courts supplementary to any remedy any State might [provide]" because state law, including state tort law, does not adequately protect constitutional interests. *McNeese* v. *Bd. of Educ. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 671-672 (1963).

Specifically, § 1983 provides a means for individuals to vindicate equal protection interests in freedom from racial and other invidious discrimination and due process interests in fair process and in certain fundamental rights. See U.S. Const. amend. XIV. These are interests in the rights of individuals against state and local governments and those acting under color of state law, and they lack direct parallels with the common law tort system, which is primarily concerned with the competing interests of individuals. See *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.").

Unlike § 1983, state tort law focuses exclusively on mediating common law interests in persons and property. See, *e.g.*, *Sapp* v. *Ford Motor Co.*, 687 S.E.2d 47, 49 (S.C. 2009) ("Tort law . . . seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property."); 1 Dan B. Dobbs et al., *The Law of Torts* § 3, at 5 (2d ed. 2011) (hereinafter *Dobbs' Law of Torts*) (observing that tort law "give[s] the greatest protection to physical security of persons

and property," while also protecting emotional and economic security in limited circumstances).

The interests protected by common law torts are surely important and may overlap in some circumstances with § 1983's interest in protecting constitutional rights. But they will not always overlap, and common law interests may, in some situations, be inconsistent with constitutional principles. As the Court observed in a parallel context in *Bivens* v. *Six Unknown Named Agents*, "[t]he interests protected by state laws . . . and those protected by the Fourth Amendmen[t]" and other constitutional provisions "may be inconsistent or even hostile." 403 U.S. 388, 394 (1971) (giving as an example the different legal effect of consent in common-law trespass and the Fourth Amendment). To treat them as identical is to ignore § 1983's focus on enforcing the Constitution.

B. This Court Has Consistently Recognized That Tort Law Does Not Determine The Scope Of § 1983.

This Court has never held that tort law determines the elements of a § 1983 claim. To the contrary, the Court has emphasized that § 1983 must not be read to permit the Fourteenth Amendment (including incorporated provisions of the Bill of Rights) to become a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976); accord *Rehberg* v. *Paulk,* 132 S. Ct. 1497, 1504 (2012) (§ 1983 is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more"); *Screws* v. *United States*, 325 U.S. 91, 109 (1945) (interpreting the criminal counterpart to

§ 1983 and concluding that "Congress . . . did not undertake to make all torts of state officials federal crimes").

The Court has defined the two "essential elements" of a § 1983 claim, derived from the text, history, and purpose of the statute, as: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds by Daniels*, 474 U.S. 327. Common law tort requirements control neither of those elements.

To be sure, as discussed below, the Court has referred to background principles of tort law to help fashion a workable action for damages arising from constitutional violations by state actors. See Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 32 (1974) (hereinafter Nahmod, *Tort Liability*) ("To the extent that tort concepts of duty, proximate cause, and cause in fact, as well as various defenses such as consent may assist a court *by analogy* in deciding 1983 cases, well and good. But courts in 1983 cases must be careful not to let tort law alone determine 1983 liability . . . ."). However, the Court has repeatedly cautioned against unthinking importation of common law requirements, especially where § 1983 or the relevant constitutional provisions counsel against it. See *Wyatt* v. *Cole*, 504 U.S. 158, 164 (1992) ("irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions"); *Anderson* v. *Creighton*, 483 U.S. 635, 645

(1987) ("we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law").

1. In its seminal decision in *Monroe* v. *Pape*—which applied ordinary proximate causation principles to § 1983 actions while rejecting a specific intent requirement—this Court declared that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. The Court's reference to the "background of tort liability" unfortunately caused confusion in many courts, some of which treated it as an invitation to import tort law requirements of negligence and gross negligence. See Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L.J. 1441, 1447-1448 (1989) (noting that *Monroe* "led lower courts on a fool's errand"); Nahmod, *Tort Liability*, *supra*, at 12-13 (observing that lower courts have "seized upon" the language but given "little consideration . . . to the background of 1983 liability").

After twenty years of confusion, the Court clarified that § 1983 imposes no independent state-of-mind requirement as a matter of *statutory* interpretation. See *Parratt*, 451 U.S. at 535. Instead, any state-of-mind requirements come from the underlying constitutional provisions allegedly violated. See *Daniels*, 474 U.S. at 330-336 (violation of due process clause requires more than negligence). Importing any of the common law elements of malicious prosecution into § 1983 "malicious prosecution" claims would repeat the earlier mistake of importing common law negligence and gross negligence principles into § 1983 after *Monroe*.

2. When this Court has looked to common law tort principles in considering the elements of, and defenses to, a § 1983 action, it has been highly discriminating. The Court's borrowing from the common law occurs in areas such as causation, damages, and immunity where consideration of common law principles can be helpful in shaping a damages action against state actors for constitutional violations. But even in those areas, the Court has refused to incorporate many common law tort rules.

Thus, in *Carey* v. *Piphus*, 435 U.S. 247, 254-266 (1978), the Court ruled that § 1983 damages for a procedural due process violation shared the compensatory purpose of tort damages, but it refused to permit the kind of presumed damages that are available in some tort actions. The Court explained that "[i]t is not clear . . . that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case" because sometimes "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts." *Id.* at 258. "In order to further the purpose of § 1983," the Court therefore held that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Id.* at 258-259. In the Court's view, proof of actual damages best comported with the purposes of procedural due process protections.

Other damages and causation decisions have taken a similarly limited approach. See *Memphis Cmty.*, 477 U.S. at 310, 311 n.14 (1986) ("damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of

compensatory damages" in § 1983 cases notwithstanding common law decisions supporting such damages); *Hartman* v. *Moore*, 547 U.S. 250, 258-266 (2006) (declining to rely on common law analogues in adopting no-probable-cause requirement for *Bivens* First Amendment retaliatory prosecution claim: while "we certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations, . . . the common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts"); *Monell*, 436 U.S. at 691-695 (rejecting § 1983 municipal liability under common law *respondeat superior* theory as inconsistent with § 1983's purpose and history).

Section 1983 immunity rulings likewise borrow only selectively from common law tort rules. Only "[w]here the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act" has the Court read § 1983 to incorporate the immunity. *Owen* v. *City of Indep., Mo.*, 445 U.S. 622, 638 (1980); see also *Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976) (prosecutorial immunity case where Court asked "whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983").

Consistent with that approach, the Court has repeatedly refused to follow common law immunity principles in defining § 1983 immunities. See *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (recognizing that objective reasonableness standard for qualified immunity departs from common law malice requirement); *Owen*, 445 U.S. at 644, 647-650 (rejecting

immunity from compensatory damages liability for municipalities despite common law doctrines granting such immunity); *Imbler*, 424 U.S. at 424-427 (granting prosecutors absolute immunity even though some jurisdictions provided only qualified immunity under the common law); *Scheuer* v. *Rhodes*, 416 U.S. 232, 241-243 (1974) (rejecting absolute immunity for high-ranking executive officials even though they sometimes had absolute immunity under the common law).

3. Nothing in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), requires a different approach for § 1983 "malicious prosecution" claims. *Heck* analogized to the elements of common law malicious prosecution in adopting a favorable termination requirement for § 1983 suits that necessarily challenge a plaintiff's criminal conviction or sentence. *Id.* at 483-485. But the Court adopted that requirement not because it is an element of the common law tort. Rather, it did so because Congress determined that all challenges to a conviction or sentence—whatever their constitutional basis, and even when they seek damages—should be pursued through the specialized habeas corpus remedy available to convicted prisoners, not through general § 1983 remedies. See *id.* at 481-482, 484-485 & n.4; see also *Preiser* v. *Rodriguez*, 411 U.S. 475, 488-490 (1973) (recognizing same principle). *Heck* is emphatically *not* a § 1983 "malicious prosecution" case.

Indeed, when the Court subsequently ruled that the *Heck* favorable termination rule does not apply when there is no existing criminal conviction, it made clear that it was resolving "a question of federal law that is *not* resolved by reference to state law." *Wallace* v. *Kato*, 549 U.S. 384, 388 (2007). The Court

also reaffirmed that *Heck* rested on Congress's determination that federal habeas corpus is the appropriate remedy when prisoners attack their state court convictions or sentences. *Id.* at 392-393 (citing *Heck*, 512 U.S. at 482).

II. THIS COURT SHOULD NOT IMPORT THE ELEMENTS OF COMMON LAW MALICIOUS PROSECUTION INTO PETITIONER'S § 1983 CLAIM FOR UNLAWFUL PRETRIAL DETENTION.

There are no persuasive reasons for the Court to use the elements of common law malicious prosecution to define Petitioner's § 1983 "malicious prosecution" claim for unlawful pretrial detention. In fact, the opposite is true: importing those elements into § 1983 law would interfere with the vindication of constitutional rights, create a host of practical problems, and contradict established § 1983 law and policy. Accordingly, the Court should not permit Petitioner to invoke the favorable termination element of the malicious prosecution tort that his certiorari petition (at 21) acknowledges is necessary to save his § 1983 claim from dismissal on statute of limitations grounds.

A. Common Law Elements Of Malicious Prosecution Provide A Poor Foundation For A § 1983 Claim.

Slavish adoption of the common law elements of malicious prosecution improperly shifts the focus away from the constitutional rights, privileges, and immunities at the heart of any § 1983 action. At the same time, it creates hopeless indeterminacy given the differences in the common law across jurisdictions and time.

1. Even to speak in terms of a § 1983 "malicious prosecution" claim distorts the analysis and directs attention away from the real inquiry—the requirements of § 1983 and the underlying constitutional provision allegedly violated. Yet many lower courts have apparently misunderstood this Court's approach *permitting* consideration of background tort principles as an *instruction* that they must start with the tort elements of malicious prosecution before considering the constitutional right at issue. See, *e.g.*, *Castellano*, 352 F.3d at 945 ("we first look at the state law tort of malicious prosecution and then look to the enforcement of constitutional protections"). Indeed, several courts of appeals have held that plaintiffs in § 1983 "malicious prosecution" cases must establish all of the elements of the common law tort of malicious prosecution *and* a violation of their constitutional rights. See, *e.g.*, *Grider* v. *City of Auburn, Ala.*, 618 F.3d 1240, 1256 (11th Cir. 2010).

That approach leads to disturbing results completely at odds with § 1983's focus on the vindication of constitutional rights. It seriously *under-protects* constitutional rights because plaintiffs who can show a deprivation of their constitutional rights by a state actor causing compensable injury might nevertheless be unable to state a claim if they cannot establish all of the common law elements of malicious prosecution. As the United States acknowledges, the elements of malicious prosecution "are not a perfect fit" with claims for violations of constitutional provisions like the Fourth Amendment. See U.S. Br. 24 n.15; see also Alschuler Br. 16 ("confusion arises" because "the common-law tort and the constitutional provision address different injuries").

The far better and simpler approach is to deem irrelevant the malicious prosecution elements and instead ask: (1) what does the applicable constitutional provision require to establish unlawful pretrial detention?; and (2) what does § 1983 require to establish damages liability? It may turn out that something akin to a common law malicious prosecution element still must be pleaded and proved in a particular case. But that would be a consequence of constitutional law, not state tort law. In other words, "if a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.'" *Newsome*, 256 F.3d at 751.

2. In addition, it is inappropriate to use the common law of torts as the starting point for defining the elements of § 1983 claims because there is no *one* common law of torts from which to begin. Common law torts are creations of state law and their elements must therefore be determined with respect to the laws of a particular state. See, *e.g.*, *Swartz* v. *Insogna*, 704 F.3d 105, 111-112 (2d Cir. 2013) (drawing elements of § 1983 "malicious prosecution" claim from New York law). And the elements of malicious prosecution vary among the states.

For example, one element of malicious prosecution is the initiation of a criminal proceeding against the plaintiff by the defendant. Although a majority of states hold that this element is satisfied even if the prosecuting court had no jurisdiction over the plaintiff, some states do not. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 871 (5th ed. 1984) (hereinafter *Prosser and Keeton*). Thus plaintiffs whose constitutional rights are violated when they are detained, charged, and prosecuted for an of-

fense that is not recognized by the criminal law could satisfy the elements of malicious prosecution and state a claim under § 1983 in Arizona, but not in North Carolina. Compare *George* v. *Williams*, 222 P. 410, 411 (Ariz. 1924), with *Moser* v. *Fulk*, 74 S.E.2d 729, 731 (N.C. 1953).

States also vary in their approach to the favorable termination element of malicious prosecution. Some states require a termination suggesting innocence, while others find a favorable termination in any sort of dismissal, even on procedural grounds. See *Cordova* v. *City of Albuquerque*, 816 F.3d 645, 664 (10th Cir. 2016) (Gorsuch, J., concurring). It would be a strange rule indeed that would allow the substantive requirements for using a federal statute to assert federal constitutional rights to vary according to state substantive law.

The common law of malicious prosecution has changed over time as well. When § 1983 was enacted, a "defendant's conviction, under Reconstruction-era common law, dissolved his claim for malicious prosecution because the conviction was regarded as irrebuttable evidence that the prosecution never lacked probable cause." *Heck*, 512 U.S. at 496 (Souter, J., concurring). Thus, deriving the elements of a § 1983 claim for unlawful pretrial detention from the common law tort of malicious prosecution "would logically drive one to the position, untenable as a matter of statutory interpretation (and, to be clear, disclaimed by the Court), that conviction of a crime wipes out a person's § 1983 claim for damages for unconstitutional conviction or postconviction confinement." *Ibid.*

Looking instead to the modern law of malicious prosecution does not solve the problem either. Not

only would this modern law be completely outside the knowledge of the authors of § 1983, but, as the Petitioner's *amici* point out, many states have changed their approach to malicious-prosecution actions in recent years. See Nat'l Police Accountability Project Br. 6-19.

B. There Is No Sound Reason To Adopt, As A Matter Of § 1983 Law And Policy, Any Of The Common Law Elements Of Malicious Prosecution.

The common law elements of malicious prosecution often are defined as (1) initiation of legal proceedings against the plaintiff, (2) favorable termination of those proceedings, (3) absence of probable cause, and (4) malice. See 3 *Dobbs' Law of Torts* § 586, at 388-389. Contrary to the position that Petitioner takes to save his claim from the statute of limitations, none of these elements should, as a matter of § 1983 law and policy, be deemed an element of Petitioner's unlawful detention claim.

1. The initiation of legal proceedings is not an essential part of an unlawful detention claim. Some such claims are based on detention before legal proceedings. See, *e.g.*, *Parsons* v. *City of Pontiac*, 533 F.3d 492, 504 (6th Cir. 2008). Others are based on detention after legal proceedings. See, *e.g.*, *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 99-100 (1st Cir. 2013). To be sure, an issue in this case is whether the initiation of legal process affects the constitutional basis for an unlawful detention claim. But that fact merely confirms that any requirement of initiation of legal proceedings would come from the Constitution, not § 1983.

Adoption of such a requirement could also needlessly complicate the law. As discussed above, states disagree on whether the initiation of criminal proceedings without proper jurisdiction satisfies this element. See *Prosser and Keeton* 871. Importing this element from the common law tort would raise difficult questions of whether and how the initiation of an invalid prosecution could trigger § 1983 liability. See Part II.A, *supra*.

2. Making the termination of criminal proceedings in favor of the accused a prerequisite for all § 1983 "malicious prosecution" suits alleging unlawful pretrial detention would contradict established precedents of this Court. Under *Heck*, of course, a plaintiff who has been criminally convicted cannot assert a claim for unlawful detention that, if successful, would undermine that conviction, until he or she obtains a favorable termination of the criminal proceedings. But *Wallace* held that the *Heck* bar applies only to plaintiffs with existing convictions. 549 U.S. at 393. As the Court observed, "§ 1983 actions, unlike the tort of malicious prosecution which *Heck* took as its model, sometimes accrue before the setting aside of—indeed, even before the existence of—the related criminal conviction." *Id.* at 394 (citation omitted).

In this case—where Petitioner was never convicted of a crime related to his allegedly unlawful detention—adopting a favorable termination requirement would be inconsistent with *Wallace*.[2]

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[2] In its brief supporting Petitioner, the United States draws the wrong lessons from *Heck* (and, by extension, *Wallace*). See also Alschuler Br. 19 n.7 (adopting the same mistaken reading of *Heck).* The government argues that the common law rationales for a favorable termination requirement mean that favorable termination "similarly should be required before the claimant is

3. Absence of probable cause frequently is at issue in § 1983 cases alleging unlawful pretrial detention. But that is not because it is a common law element of malicious prosecution. Rather, *constitutional principles* may require consideration of probable cause. Thus, in an unlawful detention case based on the Fourth Amendment, the absence of probable cause would likely be an element. See, *e.g., Gerstein* v. *Pugh*, 420 U.S. 103, 126 (1975); see also *Hartman*, 547 U.S. at 258, 265-266 (requiring proof of no-probable-cause in *Bivens* First Amendment retaliatory prosecution case as a matter of constitutional tort causation policy, not because of any common law tort rule).

4. Adopting the malice element of common law malicious prosecution, as a matter of § 1983 law, would be flatly inconsistent with this Court's holding that, as a matter of statutory interpretation, "§ 1983 . . . contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels*, 474 U.S. at 329-330. Requiring § 1983 plaintiffs to establish the malice element of malicious prosecution would improperly inject malice into the constitutional analysis and would be inconsistent with the state-of-mind requirements of many constitutional rights. See, *e.g.*, *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) (Fourth Amendment analysis looks to objec-

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permitted to challenge the probable cause for his detention" pursuant to legal process. U.S. Br. 24-25 n.16. But it never explains why a rule founded on the conflict between § 1983 and federal habeas law when there is a state court "conviction or sentence," *Heck*, 512 U.S. at 486-487, should also apply when there has been no conviction or sentence. Where there is no conviction, *Wallace* makes abundantly clear that *Heck*'s accrual rule does not apply. See *Wallace*, 549 U.S. at 393-394.

tive reasonableness "without regard" to "underlying intent or motivation"); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (purposeful discrimination, not malice, required for equal protection violation).

Petitioner's *amici* who address the issue agree that the common law element of malice has no place in § 1983 claims. The United States, while advocating an "intent" requirement, concedes that this element "is not directly akin to the common-law element of 'malice.'" U.S. Br. 25 n.17. And the National Association of Criminal Defense Lawyers completely rejects the common law malice element. It correctly argues that "nothing in the text of the Constitution or § 1983 warrants importing a subjective inquiry into malice that is foreign to Fourth Amendment analysis." NACDL Br. 22.

5. Finally, it must be emphasized that eliminating malicious prosecution elements from the § 1983 analysis would treat § 1983 plaintiffs and § 1983 defendants in an evenhanded manner. Eliminating these elements would sometimes advantage § 1983 plaintiffs, sometimes § 1983 defendants, depending on the facts of the particular case. Plaintiffs would be relieved of the burdens of proving favorable termination, the absence of probable cause (unless the Fourth Amendment were involved), and malice. As a result, the protection of constitutional rights would be directly advanced.

At the same time, defendants in non-*Heck* cases would be able to focus on when the § 1983 cause of action accrued for statute of limitations purposes, without being concerned about a favorable termination requirement that unduly extended the limitations period. This would reduce the risk of overprotecting constitutional rights at the expense of the

important "policies of repose" furthered by statutes of limitation. See *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985) (describing those policies in § 1983 statute of limitations case: "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.").

Significantly, in *Heck* cases—where a § 1983 claim calls into question an existing conviction based on law enforcement misconduct or other grounds—eliminating malicious prosecution elements from the § 1983 analysis would not affect accrual. Under *Heck*, such claims do not ordinarily accrue in any event until after the conviction is overturned.

CONCLUSION

However the Court resolves the Fourth Amendment issue posed in the Question Presented, the Court should clarify and rationalize § 1983 jurisprudence by ending the § 1983 "malicious prosecution" guessing game. As a matter of sound § 1983 interpretation and policy, it should divorce the elements of the tort of malicious prosecution from analysis of the § 1983 claim. These elements should be sent back where they belong: to the common law of malicious prosecution.

Because Petitioner states that he needs a favorable termination requirement to prevail, the judgment of the court of appeals upholding dismissal of his claims should be affirmed.

Respectfully submitted.

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