No. 10-788

# In the Supreme Court of the United States

CHARLES A. REHBERG,
*Petitioner*,
v.
JAMES P. PAULK, ET AL.,
*Respondents*.

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

**BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* SUPPORTING RESPONDENTS**

LAWRENCE ROSENTHAL
*Counsel of Record*
Chapman University School of Law
One University Drive
Orange, CA 92866
(714) 628-2650
rosentha@chapman.edu

*Counsel for Amici Curiae*

September 16, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## QUESTION PRESENTED

Whether a law enforcement official sued for an allegedly unreasonable search and seizure resulting from testimony before a grand jury that allegedly failed to supply probable cause to arrest should be denied testimonial immunity on the theory that the official is properly analogized to a complaining witness who could be sued at common law for the tort of malicious prosecution.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:



Miscellaneous:

## INTEREST OF THE AMICI CURIAE

Amici are organizations that represent the interests of local governments throughout the United States.[1] The International Municipal Lawyers Association is a nonprofit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. The National League of Cities represents more than 19,000 cities, villages, and towns across the country. The National Association of Counties represents county governments throughout the United States, providing essential services to the nation's 3,068 counties.

Because local governments are frequently responsible for representing their employees when sued for actions undertaken within the scope of their employment, and often indemnify law enforcement officials employed by local law enforcement agencies for their legal costs, they bear the financial burden of defending law enforcement officials who are sued for activities undertaken within the scope of their employment. Moreover, because the threat of liability can inhibit law enforcement officials from the vigorous performance of their duties, it compromises the efforts of local governments to serve and protect their residents.

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

## STATEMENT OF THE CASE

From September 2003 through March 2004, petitioner Charles A. Rehberg sent a series of anonymous faxes to the management of Phoebe Putney Memorial Hospital, criticizing the management of the hospital. J.A. 11.[2] At the time, Kenneth B. Hodges was the District Attorney of Dougherty County, Georgia, and respondent James P. Paulk was the Chief Investigator for the District Attorney's office. J.A. 2-3. District Attorney Hodges and Chief Investigator Paulk subsequently initiated an investigation of petitioner as a "favor" to the hospital. J.A. 11-12. From October 2003 to February 2004, District Attorney Hodges and Chief Investigator Paulk prepared and issued a number of grand jury subpoenas on the District Attorney's letterhead for petitioner's telephone records and emails sent and received from one of petitioner's email accounts, even though no relevant information had yet been presented to the grand jury. J.A. 12-14. Chief Investigator Paulk provided the subpoenaed records to private investigators who provided payment for the records, in most cases directly to the subpoenaed parties, reimbursing them for the expense of production. J.A. 12-13, 14, 15-16.

After press coverage of his relationship with the hospital, District Attorney Hodges recused himself from the investigation, and Kelly R. Burke was named special prosecutor for the matter, although allegedly

---

[2] Because this case is before the Court on petitioner's complaint, we take all nonconclusory allegations in the complaint as true. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

District Attorney Hodges continued his involvement in the investigation. J.A. 17-18.

On December 14, 2005, a grand jury returned an indictment charging petitioner with aggravated assault, burglary, and five counts of "harassing phone calls," alleging that petitioner had assaulted and unlawfully entered the home of Dr. James Hotz and had made harassing phone calls to Dr. Hotz. J.A. 4-5. Chief Investigator Paulk was the only witness who testified before the grand jury, and was listed as the "complainant" in the indictment. J.A. 6. After petitioner contested the sufficiency of the indictment, Special District Attorney Burke agreed to dismiss the indictment. J.A. 7-8.

On February 15, 2006, a second grand jury, after hearing testimony from Chief Investigator Paulk and Dr. Hotz, returned an indictment charging petitioner with assault and five counts of harassing phone calls. J.A. 8. Petitioner contested the sufficiency of this indictment as well, and Special District Attorney Burke agreed to dismiss it at a hearing on April 10, 2006, and on July 7, the state trial court ordered the indictment dismissed. J.A. 9-10.

On March 1, 2006, Special District Attorney Burke and Chief Investigator Paulk appeared before a third grand jury and obtained an indictment charging petitioner with assault and harassing telephone calls. J.A. 9. On May 1, the state trial court dismissed these charges on the ground that they did not sufficiently allege an offense. J.A. 9-10.

At some point unspecified in the complaint, petitioner was arrested, fingerprinted, and

photographed pursuant to a warrant issued as a result of the second and third indictments. J.A. 26-27.[3]

After the criminal charges had been resolved, petitioner filed an action in federal court seeking damages from District Attorney Hodges, Special District Attorney Burke, Chief Investigator Paulk, and Dougherty County, Georgia, alleging a deprivation of his rights under federal law actionable under 42 U.S.C. § 1983 (2006), and advancing a number of state-law claims as well. Pet. App. 82a. The complaint alleged that District Attorney Hodges and Chief Investigator Paulk instituted an investigation and obtained indictments with malice and without probable cause, that petitioner was arrested, fingerprinted and photographed, and that the warrant for his arrest was based on Chief Investigator's Paulk's testimony that was made with reckless disregard for the truth, rendering the arrest warrant that issued pursuant to the indictment invalid under the Fourth Amendment to the United States Constitution. J.A. 7, 26-27. The complaint additionally alleged that District Attorney Hodges and Chief Investigator Paulk initiated the investigation and prosecution of petitioner in retaliation for petitioner's exercise of his right to free speech under the First Amendment, J.A. 31, and that they conspired with each other and with Special District Attorney Burke to violate petitioner's

---

[3] Chief Investigator Paulk has admitted that he never interviewed any witnesses or gathered any evidence indicating that petitioner had committed aggravated assault or burglary, and had never interviewed the recipients of the allegedly harassing faxes, adding that it is common for he and other investigators to testify "without adequate knowledge or preparation or personal knowledge of the facts being attested to as true." J.A. 6-7.

rights under the First, Fourth, and Fourteenth Amendments, J.A. 37.

The district court denied the individual defendants' motion to dismiss the complaint, while granting Dougherty County's motion to dismiss the action against it. Pet. App. at 104-08. The individual defendants took an appeal from the ruling of the district court to the extent that it denied their immunity defenses on the section 1983 claims, and the court of appeals affirmed in part and reversed in part. Pet. App. 7a-8a & n.5, 44a. On petitioner's allegations of a malicious prosecution in violation of the Fourth and Fourteenth Amendments to the Constitution, the court held that Chief Investigator Paulk was entitled to immunity from liability for his testimony before the grand jury. *Id.* at 12a-14a. The court concluded that testimonial immunity applied as well to the claim that District Attorney Hodges and Chief Investigator Paulk conspired to bring unwarranted charges against petitioner. *Id.* at 15a-18a. The court granted District Attorney Hodges absolute prosecutorial immunity on petitioner's claim of retaliatory prosecution in violation of the First Amendment, *id.* at 33a-34a, and granted Chief Investigator Paulk qualified immunity on that claim because of the unsettled state of the law on this theory of liability. *Id.* at 34a-36a, 42a-44a.[4] The court also granted Special District Attorney Burke prosecutorial immunity on claims of fabricating evidence, presenting Chief Investigator Paulk's

[4] On petitioner's claim arising from the issuance of subpoenas, the court held that the use of subpoenas to obtain telephone records did not violate petitioner's constitutional rights, Pet. App. 18a-20a, and petitioner's claims based on the acquisition of his email records was barred by qualified immunity. *Id.* at 20a-28a.

testimony to the grand jury, and making defamatory statements about petitioner to the media. *Id.* at 42a.

## SUMMARY OF THE ARGUMENT

Petitioner seeks damages for an allegedly unwarranted prosecution. Petitioner's claim is necessarily premised on Chief Investigator Paulk's testimony before a grand jury that, the complaint alleged, failed to supply probable cause to support his arrest as required by the Constitution. Witnesses, however, are entitled to immunity from civil liability so that they may testify free from the potentially chilling effects of civil litigation arising from their testimony. Under this rule, the judgment of the court of appeals should be affirmed.

Petitioner argues that Chief Investigator Paulk should be denied testimonial immunity, relying on the common-law rule recognizing the liability of a "complaining witness" for the tort of malicious prosecution. The common-law tort of malicious prosecution, however, is quite different from petitioner's claim, making application of the common-law liability rules for malicious prosecution fundamentally misconceived.

At the outset, it deeply misunderstands the contemporary criminal process to suggest that a law enforcement official with investigative responsibilities is akin to a complaining witness. Absent some a claim that the investigator somehow misled the prosecutor, the decision to prosecute is properly attributed to the prosecutor, not an investigator. Moreover, petitioner's false-arrest claim, based as it is on the Fourth Amendment's prohibition on unreasonable search and

seizure, has a fundamentally different character than the common-law tort of malicious prosecution; at common law, proof sufficient to support a Fourth Amendment claim would not have been sufficient to deny a witness testimonial immunity.

The policies that underlie the rule of testimonial immunity are fully applicable here. Testimonial immunity was developed to shield witnesses from the burdens of litigation arising from their testimony. These policies amply justify immunity for investigative officials sued for their grand jury testimony. Imposing liability on investigators for allegedly wrongful prosecutions is particularly anomalous because the decision to prosecute is made by prosecutors, not investigators, yet the former, on petitioner's view, retain absolute immunity. The remedy for a prosecution based on inaccurate testimony is a speedy, public, and fair trial, not suing the witnesses.

## ARGUMENT

In this Court, petitioner contests only the court of appeals' ruling on testimonial immunity. *See* Pet. i. The only claim against Chief Investigator Paulk that the court of appeals concluded was barred by testimonial immunity was what petitioner labels his "section 1983 malicious prosecution claim." Pet. Br. 8 (citation and footnote omitted).[5]

---

[5] As petitioner acknowledges, his claims against the prosecutors and his conspiracy and retaliatory prosecution claims are not before this Court. *See* Pet. Br. 3-4 n.2, 8 n.5. Moreover, the court of appeals rejected petitioner's claim for the allegedly wrongful use of grand jury subpoenas on grounds other than testimonial immunity. Pet. App. 18a-28a.

Section 1983 makes actionable "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983 (2006). Accordingly, "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979). It follows that an allegedly "malicious prosecution" is actionable only if it involves a deprivation of a right protected by section 1983.

The "malicious prosecution" count of petitioner's complaint invoked petitioner's rights under the Fourth Amendment's prohibition on unreasonable search and seizure and the Fourteenth Amendment's Due Process Clause. J.A. 25-27. A majority of this Court has concluded, however, that no claim is available under the Fourteenth Amendment's Due Process Clause based on a deprivation of liberty associated with the initiation of the criminal process because of the availability of Fourth Amendment claim for an allegedly unreasonable search and seizure. *See Albright v. Oliver*, 510 U.S. 266, 271-74 (1994) (plurality opinion); *id.* at 288-91 (Souter, J., concurring in the judgment).[6] A Fourth Amendment claim, in contrast, is available to petitioner. Even a facially valid warrant is subject to attack under the Fourth Amendment if it was issued on the basis of intentional

---

[6] Two additional Justices concluded that no due process claim is available when state law provides a tort remedy for malicious prosecution. *See* 510 U.S. at 283-86 (Kennedy, J., jointed by Thomas, J., concurring in the judgment). Here, Georgia law offers petitioner a tort remedy for an allegedly malicious prosecution. *See*, *e.g.*, *Bateast v. DeKalb County*, 258 Ga. App. 131, 572 S.E.2d 756 (2002).

or recklessly false statements material to the existence of probable cause to arrest. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Petitioner's complaint attacks the warrant authorizing his arrest on just this basis. J.A. 7, 26-27.[7] Nevertheless, testimonial immunity defeats petitioner's Fourth Amendment claim.

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held that a police officer sued for allegedly false testimony that produced a criminal conviction enjoyed absolute immunity from damages liability under section 1983. *See id.* at 326, 345-46. The Court reasoned that when Congress enacted section 1983 as part of the Civil Rights Act of 1871, "members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and . . . likely intended these common-law principles to obtain . . . ." *Id.* at 330 (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)). At the time, testimonial immunity was well established. *See id.* at 330-31. Finding no indication in the language or legislative history of section 1983 of an intent to repudiate the common-law immunity for testimony, the Court recognized testimonial immunity in actions under section 1983. *See id.* at 336-46.

---

[7] As petitioner notes, "[t]he Eleventh Circuit recognizes a valid § 1983 claim for malicious prosecutions in violation of the Fourth Amendment." Pet. Br. 6 n.3. Petitioner presumably presses only a Fourth Amendment claim because any other, even if ultimately deemed meritorious, would not describe a violation of clearly established law necessary to overcome a qualified immunity defense. *See*, *e.g.*, *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999).

Although the Solicitor General speculates that petitioner's claim can somehow be based on Chief Investigator Paulk's alleged misconduct prior to his grand jury testimony that played some role in producing the ensuing prosecution (U.S. Br. 29-30), if immunity could be defeated merely by pointing to a nonimmunized act that preceded an otherwise immunized tort, immunity could always be circumvented. *See*, *e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation . . . ."); *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976) ("A claim of using perjured testimony simply may be reframed and asserted as a claim for suppression of the evidence upon which the knowledge of perjury rested . . . . Denying absolute immunity from suppression claims could thus eviscerate . . . the absolute immunity from claims of using perjured testimony."). Instead, immunity is available when an essential element of a plaintiff's claim can only be established through proof of an immunized act. *See*, *e.g.*, *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009) (claims against supervisory prosecutors for failure to adopt adequate policies for disclosure of exculpatory evidence defeated by prosecutorial immunity because "an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim").

Here, petitioner's claim is inextricable from Chief Investigator Paulk's testimony. The Solicitor General agrees that petitioner's claim is necessarily premised on the Fourth Amendment (U.S. Br. 30-31), and as we

explain above, petitioner can establish a Fourth Amendment violation only if the indictment that produced his arrest was unsupported by probable cause and based intentionally or recklessly false statements. Accordingly, petitioner's claim cannot be sustained without consideration of the substance of Chief Investigator Paulk's grand jury testimony to determine whether it supplied probable cause. It follows that an essential element of petitioner's claim rests on immunized testimony.[8]

In his opening brief, petitioner does not argue that Chief Investigator Paulk's testimony is unnecessary to his section 1983 claim. Instead, he argues that testimonial immunity is inapplicable to "a complaining witness whose grand jury testimony trigger[ed] the issuance of an indictment . . . ." Pet. Br. 9. In the discussion that follows, we explain that the common-law liability of a complaining witness does not embrace the claim that petitioner presses.

---

[8] Although the complaint alleged that Chief Investigator Paulk did not gather any evidence or interview witnesses prior to his grand jury testimony, grand jury testimony relating the results of an investigation by others raises no constitutional concern. It has long been settled that an indictment may be based on hearsay testimony. *See*, *e.g.*, *Costello v. United States*, 350 U.S. 359, 362-64 (1956).

## I. THE COMPLAINING WITNESS DOCTRINE PROVIDES NO BASIS TO DENY IMMUNITY TO A LAW ENFORCEMENT OFFICER'S GRAND JURY TESTIMONY.

Petitioner likens Chief Investigator Paulk to a "complaining witness," who at common law could be held liable for the tort of malicious prosecution. *See* Pet. Br. 11-12. Petitioner's effort to equate a law enforcement official testifying about the results of an investigation to a complaining witness, who could be held liable at common law for an allegedly malicious prosecution, is deeply flawed.

### *A. At Common Law, Testimonial Immunity Was Limited Only By The Tort of Malicious Prosecution.*

The settled rule at the time of section 1983's enactment was that statements of witnesses in judicial proceedings enjoyed absolute immunity from defamation liability. *See*, *e.g.*, Joel Prentiss Bishop, Commentaries on the Non-Contract Law § 298 (1889); Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 211-13 (1880) (Fred B. Rothman & Co. 1993); 1 Francis Hilliard, The Law of Torts 319-22 (3d ed. rev. 1866); John Townshend, A Treatise on the Wrong Called Slander and Libel § 220 (3d ed. 1877); Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 476-77 (1909). This rule was fully applicable grand jury testimony. *See*, *e.g.*, *Kidder v. Parkhurst,* 393 Mass. 393, 396 (1862); *Sands v. Robison*, 20 Miss. (12 S&M) 704, 712 (1849); *Schultz v. Strauss,* 127 Wis. 325, 328, 106 N.W. 1066,

1067 (1906); *Lake v. King,* 1 Wms. Saund. 131, 132, 85 Eng. Rep. 137, 139 (K.B. 1679); *Rex v. Skinner,* 1 Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772); Hilliard, *supra* at 320. It was this common-law rule on which the Court relied when adopting the doctrine of testimonial immunity in *Briscoe*. *See* 460 U.S. at 330-32.

One responsible for instituting a criminal prosecution, in contrast, could be liable for the tort of malicious prosecution. *See* Cooley, *supra* at 180-81; Hilliard, *supra* at 413-14; Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and Abuse of Legal Process 6-7 (1892); Townshend, *supra* § 220.

Thus, at common law, "an ordinary witness could not be sued at all; a complaining witness (*i.e.*, the private party bringing the suit) could be sued for malicious prosecution but not for defamation." *Burns v. Reed*, 500 U.S. 478, 501 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). It follows that the critical question here is whether a section 1983 claim against a law enforcement official based on his grand jury testimony preceding an indictment bears sufficient resemblance to a common-law action for malicious prosecution to deny a witness the immunity that would otherwise recognized for defamatory statements made in the course of judicial proceedings.

*Briscoe* suggests a negative answer to that question; in that case, it was the dissenters who argued that a police officer who provides allegedly perjurious testimony in support of a prosecution should be likened to one who faced liability for

malicious prosecution at common law. *See* 460 U.S. at 350-52 (Marshall, J., dissenting).[9] Petitioner nevertheless claims that this Court has already twice answered this question in his favor, in *Malley v. Briggs*, 475 U.S. 335 (1986), and *Kalina v. Fletcher*, 522 U.S. 118 (1997). *See* Pet. Br. 18-21. Neither case, however, involved a claim of testimonial immunity.

In *Malley*, a state trooper argued that "he should be absolutely immune because his function in seeking an arrest warrant was similar to that of a complaining witness." 475 U.S. at 340. Thus, rather than denying that the section 1983 action fell within the scope of the common-law rule governing the liability of complaining witnesses, the trooper embraced the label of complaining witness. The trooper relied not on the doctrine of testimonial immunity, but rather contended that "th[e] function of applying to a magistrate for an arrest warrant was accorded immunity from tort actions at common law if the only allegation of misconduct was that the application was legally insufficient." Brief for Petitioners 19, *Malley v. Briggs* (No. 84-1586). In that context, the Court wrote: "In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously, and without probable

---

[9] Although the Court noted that only immunity for testimony at trial was before it, *see* 460 U.S. at 328 n.5, had the Court accepted the dissenters' argument – now embraced by petitioner – that the officer lacked immunity because he would have been liable for malicious prosecution at common law, it would follow that even the officer's trial testimony would lack immunity because the common law recognized no immunity for malicious prosecution, as the Solicitor General observes. *See* U.S. Br. 21-22.

cause." *Malley*, 475 U.S. at 340-41 (footnote omitted). The Court therefore rejected the claim that those who sought arrest warrants had blanket immunity from civil liability at common law, but did not discuss the applicability of testimonial immunity, on which the trooper had not relied.[10]

In *Kalina*, a prosecutor sought absolute prosecutorial immunity for executing a certification in which she swore to the truth of the facts alleged in a criminal complaint, arguing that "the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution." 522 U.S. at 130. The Court disagreed: "Testifying about the facts is the function of the witness, not the lawyer." *Id.* Thus, only a claim of prosecutorial immunity was before the Court; the decision resolved nothing about the scope of testimonial immunity.

Accordingly, the question whether a law enforcement official's testimony before a grand jury that results in an indictment is sufficiently akin to a common-law action for malicious prosecution to justify a denial of testimonial immunity was addressed by

---

[10] The Court also rejected the trooper's claim that he should receive "the same absolute immunity enjoyed by the prosecutor," finding "no comparable tradition of absolute immunity for one who causes a warrant to issue," and adding that a police officer's role in seeking a warrant "is further removed from the judicial phase of criminal proceedings than the act of prosecutor in seeking an indictment." 475 U.S. at 342, 342-43. It was only in this discussion that the Court, in passing, mentioned *Briscoe*, and then only for its discussion of prosecutorial immunity. *See id.* at 342 (citing *Briscoe*, 460 U.S. at 334-35).

neither *Malley* nor *Kalina*. To the extent that this question was not resolved by *Briscoe*, historical inquiry fails to support petitioner's submission, as we now explain.

### *B. Petitioner's Claim Does Not Fall Within The Common-Law Scope of Malicious Prosecution.*

The Restatement of Torts describes the tort of malicious prosecution:

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if:
>
> (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) the proceedings have terminated in favor of the accused.

Restatement (Second) of Torts § 653 (1977). The elements of this tort have changed little since the Civil Rights Act of 1871; in that era as well, malicious prosecution required proof that the defendant instituted a prosecution maliciously and without probable cause, which was terminated favorably to the accused. *See*, *e.g.*, Bishop, *supra* §§ 221-26; Cooley, *supra* at 180-81; Hilliard, *supra* at 416-18, 428-58; Newell, *supra* at 10-13; Townshend, *supra* §§ 420-21.

For fundamental reasons, petitioner's claim critically differs from the common-law tort of malicious prosecution. For that reason, the liability of a complaining witness for an allegedly malicious prosecution has no proper application to petitioner's claim.

*1. A Public Official with Investigative Responsibilities Is not Akin to a Complaining Witness.*

Liability for an allegedly malicious prosecution is appropriate only on one who "initiates or procures" the prosecution. Restatement (Second) of Torts § 653 (1977). Thus, liability for a malicious prosecution requires proof that the alleged complaining witness was responsible for bringing the prosecution. As this Court explained not long before the enactment of the Civil Rights Act of 1871: "To support an action for a malicious criminal prosecution the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement . . . ." *Wheeler v. Nesbitt*, 65 U.S. (24 How.) 544, 550 (1860).

When the common-law tort of malicious prosecution developed, nothing resembling modern police departments with investigative responsibilities existed. In England, until roughly the time of the American Revolution, the only public official engaged in law enforcement was the constable, an official charged with executing warrants and who appointed beadles responsible for clearing the streets of beggars and vagrants by day and keeping the community safe at night. *See* Elaine A. Reynolds, Before the Bobbies: The Night Watch and Police Reform in Metropolitan

London, 1720-1830, at 7-44 (1998). This system emerged in the colonies and remained in place in the framing era, with the duties of public officials engaged in law enforcement largely confined to the execution of warrants and responding to breaches of the peace. *See, e.g.*, Lawrence M. Friedman, Crime and Punishment in American History 28-29, 68 (1993). Not until the mid-nineteenth century did large cities begin establishing police forces. *See, e.g.*, David R. Johnson, Policing the Urban Underworld: The Impact of Crime on the Development of the American Police, 1800-1887, at 12-40 (1979); Thomas A. Repetto, The Blue Parade 2-23 (1978); James F. Richardson, Urban Police in the United States 6-15, 19-32 (1974); Samuel Walker, Popular Justice: A History of American Criminal Justice 49-51 (1980). Even so, by the time of the Civil Rights Act, policing was still in its infancy: "If we can believe the census figures, there were, all told, in 1880, 1,752 officers and 11,948 patrolmen in cities and towns with inhabitants of 5,000 or more." Friedman, *supra* at 149.

Public prosecutors were also a rarity in this period. Prosecution by private parties was the predominant method at common law and was only gradually displaced by public prosecution during the nineteenth century. *See* Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* 3 Encyclopedia of Crime and Justice 1286 (Sanford H. Kadish et al. eds., 1983). Nevertheless, "because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century." Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Leg. Hist. 43, 43

(1995) (footnote omitted). Indeed, "when § 1983 was enacted . . . there was generally no such thing as the modern public prosecutor." *Kalina*, 522 U.S. at 132 (Scalia, J., concurring).

It should therefore be unsurprising that virtually all of the cases describing the tort of malicious prosecution prior to 1871 considered the liability of private individuals for initiating a prosecution rather than the potential liability of public officials such as prosecutors or investigators. *See*, *e.g.*, Herbert Stephen, The Law Relating to Actions for Malicious Prosecution 16-25 (Horace M. Rumsey ed. 1889); Townshend, *supra* at 432. Indeed, none of the nineteenth-century cases that petitioner cites was brought against a public official. *See* Pet. Br. 14-16 (and cases cited therein).

Petitioner repeatedly cites *Wyatt v. Cole*, 504 U.S. 158 (1992), without acknowledging its description of the limitation on immunity at common law: "Respondents do not contend that *private* parties who instituted attachment proceedings and who were subsequently sued for malicious prosecution . . . were entitled to absolute immunity." *Id.* at 164 (emphasis supplied). Indeed, *Wyatt* considered only the immunity of private parties, not public employees. *See id.* at 161-62. Similarly, Justice Scalia characterized a complaining witness as "the *private* party bringing the suit," *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis supplied). *See also Kalina*, 522 U.S. at 132 (Scalia, J., concurring) ("A private citizen who initiated or procured a criminal prosecution could (and can still) be sued for the tort of malicious prosecution . . . ."). And, as we explain above, the Restatement of Torts

provides that malicious prosecution liability attaches to "[a] *private* person who initiates or procures the institution of criminal proceedings," Restatement (Second) of Torts § 653 (1977) (emphasis supplied); it makes no provision for the liability of a public official.

The common-law concept of a complaining witness legally responsible for the institution of a prosecution made sense in a system of private prosecution, but has little application to the liability of a public official who testifies to support a charge pressed by a public prosecutor in the contemporary system of public prosecution. In the contemporary criminal justice system, the decision to prosecute is made by the prosecutor, not a complaining witness. That is the case under Georgia law, where it is the responsibility of the district attorney to draw indictments and prosecute indictable offenses. *See* Ga. Code § 15-8-6(4) (2007). It is even more anomalous to treat a subordinate investigator such as Chief Inspector Paulk as legally responsible for the decision to prosecute. Chief Investigator Paulk worked for the District Attorney, not the other way around. *See id.* § 15-18-14.1. Even petitioner's complaint acknowledged this reality; it alleged that the prosecutor "directed Mr. Paulk to appear before the Grand Jury and to attest to the truth of [the] charges." J.A. 28.

It may be that the prosecutors were negligent or worse in pressing charges against petitioner, but under a ruling below that petitioner does not contest, the prosecutors are immune from liability. It seriously distorts reality, moreover, to regard an investigator as responsible for bringing an allegedly malicious prosecution. As Justice Ginsburg has put it, in a suit against an investigator, "a 'malicious prosecution'

theory . . . is anomalous. The principal player in carrying out a prosecution . . . is not police officer but prosecutor." *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring). *See generally* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 65 Chi.-Kent L. Rev. 127, 142-52 (2010) (criticizing efforts to circumvent prosecutorial immunity by attributing allegedly wrongful prosecutions investigators).

Under ordinary rules of proximate causation that this Court has held applicable to section 1983 litigation, *see*, *e.g.*, *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989), at least seven circuits have held that an investigator cannot be held liable for the course of a criminal prosecution because a prosecutor's independent litigating decision is a break in the chain of causation.[11] This Court has taken the same view; in

---

[11] *See, e.g.*, *Shields v. Twiss*, 389 F.3d 142, 150 (5th Cir. 2004) (decision to indict defeated Fourth Amendment malicious prosecution claim); *Evergary v. Young*, 366 F.3d 238, 246–51 (3d Cir. 2004) (judge's decision to authorize seizure of plaintiff's son defeated claim against attorney and officials who obtained order); *Townes v. City of New York*, 176 F.3d 138, 146–47 (2d Cir. 1999) (judge's ruling to admit evidence obtained in violation of the Fourth Amendment defeated claim against officer); *Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999) (grand jury's indictment defeated claim against officer based on illegal arrest); *Taylor v. Meacham*, 82 F.3d 1556, 1563–64 (10th Cir. 1996) (judge's finding of probable cause defeated Fourth Amendment claim against arresting officer); *Reed v. City of Chicago*, 77 F.3d 1049, 1053–54 (7th Cir. 1996) (indictment defeated Fourth Amendment claim against arresting officer); *Hand v. Gary*, 838 F.2d 1420, 1427–28 (5th Cir. 1988) (decision of federal agents, prosecutor, and grand jury to proceed on prosecution unsupported by probable cause defeated claim against officer); *Dellums v. Powell*, 566 F.2d 167, 192–93 (D.C. Cir. 1977) (decision by

a case involving an allegation that an unsuccessful prosecution was undertaken at the behest of postal inspectors in retaliation for the plaintiff's exercise of his constitutional rights, the Court wrote: "Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise." *Hartman v. Moore*, 547 U.S. 250, 263 (2006). Indeed, the role of the public prosecutor in this case provides yet another distinction from *Malley*; no prosecutor was involved in Trooper Malley's decision to seek an arrest warrant. *See* 475 U.S. at 337-38. As for *Kalina*, in that case, the official who was sued was the prosecutor herself. *See* 522 U.S. at 127-29.

To be sure, when investigators engage in some improper effort to mislead prosecutors or otherwise prevent them from making independent charging decisions, liability may be appropriate.[12] The complaint, however, does not allege that Chief Inspector Paulk misled or otherwise exercised undue or improper influence over the prosecutor's decision to seek petitioner's indictment. Nothing in the complaint remotely suggests that the prosecutor here was merely the cat's paw in Investigator Paulk's scheme to bring

---

prosecutor to charge defeated malicious prosecution action against police).

[12] For cases embracing a rule along these lines, *see*, *e.g.*, *Burke v. McDonald*, 572 F.3d 51, 58 (1st Cir. 2009); *Dominguez v. Hendley*, 545 F.3d 585, 589–90 (7th Cir. 2008); *Harper v. City of Los Angeles*, 533 F.3d 1010, 1027 (9th Cir. 2008); *White v. McKinley*, 519 F.3d 806, 813–14 (8th Cir. 2008); *Clemmons v. Armontrout*, 477 F.3d 962, 966 (8th Cir. 2007); *Villasana v. Wilhoite*, 368 F.3d 976, 980 (8th Cir. 2004).

wrongful charges against petitioner. There is accordingly no basis to treat him as legally responsible for an allegedly wrongful prosecution.

*2. A Fourth Amendment False-Arrest Claim Is not Akin to an Action for Malicious Prosecution.*

Beyond the anomaly of treating an investigator as legally responsible for the decision to prosecute, there are fundamental differences between a Fourth Amendment false-arrest claim of the type petitioner presses and a malicious prosecution claim that falls outside the rule of testimonial immunity.

First, unlike a malicious prosecution claim, a Fourth Amendment claim is not dependent on the outcome of an antecedent prosecution. As we explain above, one element of malicious prosecution is that the antecedent prosecution terminated favorably to the criminal-defendant-turned-civil-plaintiff. Indeed, relying on "malicious prosecution's favorable termination requirement," this Court has held that when "a judgment for the [section 1983] plaintiff would necessarily imply the invalidity of his conviction or sentence . . . the complaint must be dismissed until the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 486 n.4, 487 (1994). A Fourth Amendment claim, in contrast, is not dependent on the outcome of an antecedent criminal prosecution, nor does it necessarily imply the invalidity of a conviction that may result from an arrest without probable cause. As this Court has explained, "[t]he wrong condemned by the Fourth Amendment is 'fully accomplished' by the unlawful

search or seizure itself." *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)). Thus, the fact that the arrestee was subsequently prosecuted or even convicted as a consequence of an arrest unsupported by probable cause is no bar to a Fourth Amendment claim under section 1983; even those who are convicted following an allegedly unconstitutional arrest are entitled to seek compensation for a wrongful arrest.

Indeed, in *Heck*, the Court explained that "a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." 512 U.S. at 487 n.7. An example is *Haring v. Prosise*, 462 U.S. 306 (1983); this Court held that a prisoner's action to recover for illegal search and seizure was not barred by his plea of guilty to possessing items found in the search because the conviction was "simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under § 1983." *Id.* at 316. Similarly, in *Wallace v. Kato*, 549 U.S. 384 (2007), this Court concluded that a Fourth Amendment false-arrest claim accrues as soon as an arrestee appears before a judicial officer, even if he faces criminal charges arising from the arrest. *See id.* at 391, 397. Accordingly, a Fourth Amendment claim fundamentally differs from a malicious prosecution claim, which requires proof of a favorable outcome in an antecedent prosecution.

Second, any analogy between a Fourth Amendment false-arrest claim and malicious prosecution is flawed

because the Fourth Amendment addresses "unreasonable searches and seizures," U.S. Const. amend. IV, not unwarranted prosecutions.

As we explain above, the legal wrong addressed by the Fourth Amendment is fully accomplished by the unreasonable search or seizure itself – in this case, an arrest allegedly without probable cause. Even the "use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *Leon*, 468 U.S. at 906 (quoting *Calandra*, 414 U.S. at 354 (brackets in original)). Accordingly, the Fourth Amendment simply does not address the decision to prosecute; indeed, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court rejected the view that the Fourth Amendment entitles "the accused . . . to judicial oversight or review of the decision to prosecute." *Id.* at 119. *See also Albright*, 510 U.S. at 282 (Kennedy, J., concurring in the judgment) ("The specific provisions of the Bill of Rights neither impose a standard for the initiation of a prosecution, nor require a pretrial hearing to weigh evidence according to a given standard.") (citations omitted). As Judge Posner put it, "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." *Gauger v. Hendle*, 349 F.3d 354, 363 (7th Cir. 2003), *overruled in part on other grounds by Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006), *aff'd sub nom. Wallace v. Kato*, 549 U.S. 384 (2007).[13] Thus, a claim

---

[13] On this basis, five circuits have concluded that no damages associated with a criminal prosecution are recoverable on a Fourth Amendment claim. *See Gauger*, 349 F.3d at 362-63; *Hector v. Watt*, 235 F.3d 154, 157-60 (3d Cir. 2000); *Townes*, 176 F.3d at 147-48; *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181-82 (4th Cir. 1996); *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st

for malicious prosecution stands outside the Fourth Amendment.

Third, although the common-law tort of malicious prosecution required proof of malice, a Fourth Amendment claim does not. As we explain above, in addition to the absence of probable cause, a malicious prosecution claim requires proof of malice, defined in the Restatement of Torts as bringing the case "primarily for a purpose other than that of bringing an offender to justice . . . ." Restatement (Second) of Torts § 653(a) (1977). Leading commentators in the era of section 1983's enactment, while acknowledging that malice may be inferred from an absence of probable cause, nevertheless stressed that malice was an independent element of the tort requiring a separate finding of improper motive. *See*, *e.g.*, Melville M. Bigelow, Leading Cases on the Law of Torts 203-04 (1875); Bishop, *supra* §§ 231-35; Cooley, *supra* at 185; Hilliard, *supra* at 446-48; Newell, *supra* at 236-49.

Fourth Amendment claims, in contrast, are judged by an objective test in which the motive of the investigator is irrelevant. *See*, *e.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006). To be sure, as we explain above, to invalidate a warrant, there must be proof of material misstatements or omissions made at least recklessly, but this stops well short of the common-law requirement of malice. Thus, at common law, proof

---

Cir. 1995). *See generally* John C. Jeffries, *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1472-77 (1989) (arguing that Fourth Amendment claims should not permit damages associated with prosecution and conviction).

sufficient to establish Chief Investigator Paulk's liability on the Fourth Amendment claim that petitioner presses would constitute no more than the tort of defamation, on which immunity was recognized.

Accordingly, the common-law immunity regime supplies no basis to deny Chief Investigator Paulk testimonial immunity.

## II. THE POLICIES THAT JUSTIFY TESTIMONIAL IMMUNITY APPLY WITH FULL FORCE TO A LAW ENFORCEMENT OFFICER'S GRAND JURY TESTIMONY.

Analogies between section 1983 and common-law tort claims are perilous. As this Court has observed, section 1983 "ha[s] no precise counterpart in state law . . . . [I]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (internal quotations and citation omitted). Thus, the policies underlying immunity law are often more instructive than historical analogies to common-law torts. For example, because prosecutorial immunity developed only after the office of public prosecutor became common only after 1871, in incorporating prosecutorial immunity within section 1983, the Court "drew guidance both from the first American cases addressing the availability of malicious prosecution actions against public prosecutors, and perhaps more importantly, from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and jurors." *Kalina*, 522 U.S. at 124 n.11. Thus, we turn to the pertinent policy considerations.

### *A. Grand Jury Witnesses Should Receive Testimonial Immunity.*

In *Briscoe*, the Court identified the policy considerations supporting the common-law rule of testimonial immunity, explaining that if they were under a threat of damages liability, "witnesses might be reluctant to come forward and testify." *Id*. at 333. Or, "[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony . . . ." *Id.* Moreover, "if the defendant official 'could be made to answer in court each time [a previous criminal defendant] charged him with perjury, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.'" *Id.* at 343-44 (quoting *Imbler*, 424 U.S. at 425). Thus, "[s]ubjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties." *Id.* at 343.

Accordingly, it is not a policy of protecting false testimony, but of avoiding the chilling effect of allegations that may prove meritless but which must be defended nevertheless, that justifies testimonial immunity. As perhaps the classic account explained,

> The rule exists, not because the malicious conduct of such persons ought not to be actionable, but because, if their conduct were actionable, actions would be brought against them in cases in which they had not spoken falsely and maliciously; it is not a desire to prevent actions from being brought in cases

> where they ought to be maintained, but the fear that if the rule were otherwise, numerous actions would be brought against persons who were acting honestly in discharge of a duty.

Veeder, *supra* at 469-70 (footnote omitted).

This rationale is fully applicable to investigators testifying before grand juries. There is a strong policy favoring the ability of the grand jury to obtain unfettered access to all potentially relevant testimony. *See*, *e.g.*, *United States v. R Enterprises*, 498 U.S. 292, 297-98 (1991); *United States v. Calandra*, 414 U.S. 338, 342-45 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 686-88 (1972). If public officials had to assume the costs of defending litigation and paying settlements or judgments arising from their grand jury testimony, however, the chilling effect on the vigorous performance of their duties would be quite real.

To be sure, public employers can avoid this problem by offering indemnification; which is common in public employment. *See Board of County Commissioners v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting). By shifting the costs of litigation onto the taxpayers, however, indemnification imposes burdens on innocent third parties – the taxpayers and those dependent on government services. At best, indemnification may create a political incentive on the part of elected officials to induce their employees to avoid liability-inducing conduct, but given the political incentives for vigorous law enforcement, the likelihood of deterrence operating in this fashion is highly uncertain, especially given the limited control that elected officials responsible for budgeting decisions generally have over the separately-elected prosecutors

responsible for charging decisions. *See* Rosenthal, *supra* at 152-54.

Thus, the policies underlying testimonial immunity have plain application to grand jury testimony.

### *B. The Policies Underlying Malicious-Prosecution Liability Have Little Application To The Public Sector.*

As this Court observed in *Kalina*, cases "decided after 1871 . . . granted a broader immunity to public prosecutors than had been available in malicious prosecution actions against private persons who brought prosecutions at early common law." 522 U.S. at 124 n.11. When the Court relied on these cases to recognize absolute prosecutorial immunity under section 1983, earlier cases were not regarded as dispositive because they "were decided before the office of public prosecutor in its modern form was common." *Id.* The same problem infects petitioner's effort to impose the common-law liability rules for malicious prosecution onto public officials with investigative responsibilities. As we explain above, the tort of malicious prosecution developed before public prosecutors or police forces with investigative responsibilities became common. In an era of private prosecution, it made sense to impose malicious prosecution liability on private parties who may press charges to advance their own interests. Even today, there may be reason to impose liability on private parties who endeavor to hijack the criminal process for private ends; it therefore may be fair here to characterize Dr. Hotz, for example, as a "complaining witness." The rules governing the liability of private

parties, however, should not readily be transported to the public sector.

As this Court has observed, damages liability is less likely to produce deterrence in the public sector because public officials and employers operate within a system of political accountability rather than as profit-maximizers with an economic incentive to make cost-justified investments in liability reduction. *See Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997). Thus, the Court has concluded that the policy arguments for immunity have little application to the private sector. *See id.* at 407-12; *Wyatt*, 504 U.S. at 166-69. In particular, liability imposes special burdens on government because government internalizes the costs of litigation, while the benefits of aggressive law enforcement are externalized to the public at large. *See* Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 348-57 (2000).

For his part, petitioner claims that the threat of liability will deter unwarranted prosecutions. *See* Pet. Br. 25. Given the political incentive of those engaged in law enforcement to enforce the law with vigor, however, the need for an additional deterrent through damages liability is questionable. Deterrence is particularly unlikely under the holding that petitioner seeks, which would impose liability only on investigators even though, in reality, the decision to bring charges is made by prosecutors, who enjoy absolute immunity. Under petitioner's theory, "the star player is exonerated, but the supporting actor is not." *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring).

Petitioner also argues that there is no reason to grant immunity for arrests based on an indictment supported by grand jury testimony as opposed to those initiated by filing an information or complaint supported by affidavit. *See* Pet. Br. 23-24. In light of the constitutional requirement that all warrants be "supported by Oath or affirmation," U.S. Const. amend. IV, however, testimonial immunity for an arrest authorized by warrant is available regardless whether the warrant was based on grand jury testimony or affidavit. Indeed, petitioner acknowledges that at common law, witnesses "who testified in person w[ere] treated identically to one who submitted an affidavit." Pet. Br. 15.

To be sure, in *Malley*, the Court stated that qualified immunity usually grants public officials sufficient protection from liability. *See* 475 U.S. at 341. As we explain above, however, no claim of testimonial immunity was made in that case, and historically testimony has been afforded absolute immunity outside the specific context of malicious prosecution. When it comes to liability for testimony, the policies favoring the ability of witnesses to testify without fear of liability powerfully support absolute immunity, as we also explain above.

Conversely, the safeguards enjoyed by an accused are substantial without need of a damages remedy. Although, as petitioner stresses, grand jury proceedings are not adversarial, *see* Pet. Br. 25-26, an indictment begins a process that affords considerable protection against unwarranted charges. In light of safeguards such as judicial review of extended pretrial detention, and the right to a speedy and fair trial at which the prosecution must prove its case beyond

reasonable doubt, the Constitution has never been understood to require judicial review of the decision to prosecute. *See*, *e.g.*, *Albright*, 510 U.S. at 282-83 (Kennedy, J., concurring in the judgment). The efficacy of political accountability should also be apparent; there is, after all, no prosecute-the-innocent lobby. Not only do overreaching law-enforcement officers risk criminal liability for perjury (*e.g.*, Ga. Code. § 16-10-70 (2007)); but such overreaching also generates political pressure that can produce more effective supervision and discipline. It can lead to systemic reform as well; since the wave of DNA exonerations of recent years, there has been a wave of reform legislation, with 46 states and the Federal Government enacting legislation granting accused or convicted individuals access to DNA evidence. *See District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2316-17, 2322 (2009).

Thus, the safeguards accompanying the criminal justice system, coupled with the process of political accountability, are far more likely to deter investigative misconduct than the possibility of a damages remedy against investigators, who play at most a highly subordinate role in prosecutive decisionmaking, and who are likely to be indemnified. Liability for a Fourth Amendment claim based on grand jury testimony poses additional difficulties; as the court of appeals suggested, the need to parse grand jury testimony to determine if an indictment was supported by probable cause has the potential to undermine the secrecy of grand jury proceedings. Pet. App. 14a n.9.

To be sure, imposing liability would provide compensation to the exonerated, but a regime of

compensation without an effective measure of deterrence would amount to a system of wrongful conviction insurance, not tort liability. This Court, in turn, "ha[s] repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability, and ha[s] interpreted the statute in light of the background of tort liability . . . ." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (internal quotations and citations omitted) (brackets in original). Imposing liability for reasons of compensation alone creates a system of social insurance, not a tort liability regime within the ambit of section 1983.

There may be sound arguments for providing wrongful prosecution or conviction insurance; indeed, the federal government and twenty-two states have statutes that require that compensation be paid to the exonerated, although many of these statutes contain important limitations on who can make claims and the amount of compensation available that limit their budgetary impact. *See* Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. Rev. 227, 233-35, 250-51 (2008). Yet, the policy decision whether to devote scarce public resources to the wrongfully prosecuted or convicted, instead of allocating them other urgent public responsibilities, is surely one for the legislature, equipped as it is to weigh competing budgetary priorities, not a decision for judges or juries.

For these reasons, the policies underlying testimonial immunity have plain application to the testimony of investigators before a grand jury. The common-law rule of complaining witness liability, in contrast, is based on quite distinct policy

considerations have little application here. Under the Constitution, the remedy for an unwarranted prosecution is a speedy, public, and fair trial, not suing the witnesses.

## CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

LAWRENCE ROSENTHAL
*Counsel of Record*
Chapman University School of Law
One University Drive
Orange, CA 92866
(714) 628-2650
rosentha@chapman.edu

*Counsel for Amici Curiae*