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 FOR THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANNA BENVENUTTI HOFFMANN
Counsel of Record
ALEXANDRA LAMPERT
NEUFELD SCHECK & BRUSTIN, LLP
99 Hudson Street, 8th Floor
New York, New York 10013
anna@nsbcivilrights.com

Counsel for Amicus Curiae

265733

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

STATUTES AND OTHER AUTHORITIES

Page

Page

Page

Page

INTEREST OF THE *AMICUS CURIAE*

The National Police Accountability Project (NPAP) is a nonprofit public interest organization dedicated to protecting the rights of individuals in their encounters with law enforcement. Founded in 1999 by members of the National Lawyers Guild, NPAP has more than five hundred attorney members throughout the United States who represent victims of police misconduct and other civil rights violations. NPAP provides public education and information on issues relating to police misconduct, and supports reform efforts aimed at increasing police accountability. NPAP often presents the views of victims of civil rights violations through amicus curiae filings in cases raising issues that transcend the interests of the parties. One of the central missions of NPAP is to promote the accountability of police officers and their employers for violations of the Constitution or laws of the United States.[1]

SUMMARY OF ARGUMENT

The National Police Accountability Project agrees with Petitioner that pretrial detention in the absence of probable cause violates the Fourth Amendment—and that, as a result, 42 U.S.C. § 1983 provides a remedy for that violation. We write to flesh out, from the practical perspective of civil rights practitioners litigating police

1. Pursuant to Supreme Court Rule 37, the parties have lodged blanket consents for the filing of amicus briefs on behalf of Petitioner or Respondents. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae*, its members and its counsel, made a monetary contribution to the preparation or submission of this brief.

misconduct cases, how this § 1983 remedy is necessary to allow for the full compensation and deterrence § 1983 was enacted to provide. We highlight the many state laws and practices—such as sovereign immunity bars on malicious prosecution claims, strict notice of claim requirements, the unavailability of attorney's fees, caps on damages, and difficulties collecting state court judgments—which alone and in combination preclude or severely restrict the viability of malicious prosecution claims under state law. Absent a federal remedy under § 1983, many victims of this serious police misconduct would not be able to seek recourse, leaving them uncompensated and the misconduct undeterred.

ARGUMENT

I. Section 1983 provides a critical safeguard against official abuse, by deterring civil rights violations and, when that deterrence fails, compensating victims.

As this Court has repeatedly recognized, "[t]he central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Owen v. City of Indep.*, 445 U.S. 622, 650 (1980) (quoting *Monroe v. Pape*, 365 U.S. 167, 184 (1961)).

One of the archetypical "misuse[s] of power . . . made possible only because the wrongdoer is clothed with the authority of state law," *id.*, is the unwarranted detention of a person in violation of the Fourth Amendment, which "imposes limits on search-and-seizure powers in

order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). The rights protected by the Fourth Amendment have long been viewed as "indispensable to the full enjoyment of personal security, personal liberty and private property . . . [and] the very essence of constitutional liberty." *Gouled v. United States*, 255 U.S. 298, 304 (1921) (internal quotation and citation omitted). Indeed, as Justice Kennedy has noted, "incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference . . . [and] freedom from this restraint is essential to the basic definition of liberty . . . ." *Foucha v. Louisiana*, 504 U.S. 71, 90 (1992) (Kennedy, J., dissenting).

In enacting § 1983, Congress recognized that providing a remedy for such constitutional violations benefited not only civil rights plaintiffs, but the broader public. "When a plaintiff succeeds in remedying a civil rights violation . . . he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2213 (2011) (internal citation and quotation marks omitted); *see also City of Riverside v. Rivera*, 477 U.S. 561, 574–75 (1986) ("Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by [§ 1983], over and above the value of a civil rights remedy to a particular plaintiff.") (internal citation and quotation marks omitted).

As a result, the statute was drafted broadly, and "is to be accorded a sweep as broad as its language." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (internal citation and quotation marks omitted). It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , 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 . . . .

42 U.S.C. § 1983. Thus, under the plain language of § 1983, if an officer causes a deprivation of a constitutional right—such as the Fourth Amendment right not to be seized without probable cause—Section 1983 provides a federal cause of action.

The creation of an individual civil rights cause of action is a critical safeguard against official abuse. "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen*, 445 U.S. at 651. Such a remedy acts both "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). "This deterrent effect is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable." *City of Riverside*, 477 U.S. at 575.

And in Congress' judgment it was crucial that this be a *federal* remedy. At the time § 1983 was enacted, "the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. . . . '[T]he very purpose of

§ 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.'" *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 503 (1982) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)). "Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. A plaintiff, for example, may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common law remedies for trespass and conversion. . . . [I]n many cases there is 'no quarrel with the state laws on the books'; instead, the problem is the way those laws are or are not implemented by state officials." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Monroe*, 365 U.S. at 176).[2]

---

2. In other words, a federal § 1983 malicious prosecution suit based on the Fourth Amendment does not depend in any way on the adequacy or inadequacy of potential state remedies. The same is not true, however, under the rule adopted by the Seventh Circuit below—which held both that a § 1983 malicious prosecution remedy could *only* be based on a procedural due process theory, and that, under *Parratt v. Taylor*, 451 U.S. 527 (1981), a state that provides an adequate post-deprivation remedy has not violated procedural due process. *See* J.A. 102. We agree with Petitioner that the Seventh Circuit was wrong on both counts. *See* Petitioner's Br. at 32–33. A claim for unwarranted pretrial detention is plainly covered by the Fourth Amendment, regardless of whether the Due Process Clause provides protection as well, and, in any event, *Parratt* has no place in the analysis. But under the Seventh Circuit's rule, courts would need to conduct a detailed analysis of the limitations of the state-law malicious prosecution remedy as applied to each individual suit, making the existence of a

II. State laws and practices limit or eliminate malicious prosecution remedies.

The common law has long recognized a cause of action for malicious prosecution, which "permits damages for confinement imposed pursuant to legal process." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). As this Court has instructed, any claim for damages based on detention after the "issuance of process or arraignment . . . must be based on a malicious prosecution claim." *Wallace v. Kato*, 549 U.S. 384, 390 (2007) (internal citation and quotation marks omitted).

In theory, such common law malicious prosecution claims could be brought in state court against state and local law enforcement officers who have wrongfully used legal process to detain a person without probable cause. But in reality, a number of legal and practical impediments to such claims make this state law remedy at best woefully incomplete, and at worst completely illusory.

"Section 1983 . . . creat[es] a form of liability that, by its very nature, runs only against a specific class of defendants: government bodies and their officials." *Felder*, 487 U.S. at 141. Any state law remedy that could

---

federal malicious prosecution claim in any particular case both complicated and unpredictable. And despite the many legal and practical restrictions on the accessibility of state law remedies discussed in this brief, a federal § 1983 malicious prosecution claim would still often be unavailable. *See, e.g.*, *Easter House v. Felder*, 910 F.2d 1387, 1406 (7th Cir. 1990) (en banc) (holding *Parratt* bars a § 1983 cause of action "unless the remedy which an injured party may pursue in state court can readily be characterized as inadequate to the point that it is meaningless or nonexistent").

provide an alternative to § 1983 necessarily runs against the same governmental defendants. But where state and local governments both enact the rules determining the viability of such claims and defend and ultimately pay for judgments against officers sued under these claims, they have an incentive directly counter to that of victims of police misconduct: "to minimize governmental liability." *Id.* at 141. This incentive to limit government liability is reflected in state laws burdening or impeding such claims—including, in a number of states, laws fully immunizing state and local officials from malicious prosecution suits. *See infra* I.A. Even in states that do not completely immunize officers for malicious prosecution, state laws still restrict malicious prosecution claims in a variety of ways, providing what this Court has described in like contexts as "effectively an immunity statute cloaked in [other] garb." *Haywood v. Drown*, 556 U.S. 729, 742 (2009).

And any states that have not yet enacted restrictions on malicious prosecution suits under state law are free to do so at any time. Indeed, in most states there is currently little incentive to restrict malicious prosecution suits under state law because, given the existence of a federal remedy recognized by nearly all of the federal courts of appeal, state law restrictions would have limited effect; victims of civil rights violations can simply proceed under federal law. But if no federal remedy is available, states and municipalities will have even more incentive to limit or completely eliminate malicious prosecution suits against state and local officers, an option history tells us at least some localities will be certain to take. Without a federal remedy, then, the availability of effective deterrence of malicious prosecutions—and compensation of victims

when deterrence fails—will be subject to the vagaries of local law. Nothing would prevent any given municipality or state from enacting laws shielding its officers from liability or otherwise restricting the viability of malicious prosecution claims.

This brief provides background about how malicious prosecution claims are actually litigated in state courts throughout the country, describing the many limitations that currently exist—and which more states and municipalities are free to enact in the future—based on the experiences of the civil rights litigators in the National Police Accountability Project. As these experiences demonstrate, a federal remedy is necessary to fulfill the aims that motivated Congress to enact § 1983: compensating the victims of unwarranted police detentions, as well as deterring future misconduct, to the benefit of the greater public:

> "It is unthinkable that there would be no constitutional remedy when a state actor incarcerates a person maliciously and without probable cause, depriving him of liberty without justification—the exact kind of wrongful state action the Fourth Amendment was designed to prevent."

Craig Futterman, director of the Civil Rights and Police Accountability Project at the University of Chicago Law School, who has been litigating criminal defense and civil rights cases for 25 years and been a clinical law professor for 16 years at the University of Chicago.

> "Federal civil rights suits under § 1983 provide the last and best protection against malicious prosecution by state actors—where the deck is stacked in favor of the police and against the poor, ethnic minorities, and the socially disadvantaged."

John Burris, an NPAP board member, who has litigated federal civil rights cases for over 30 years in Oakland, California.

> "Effective protection of civil rights relies largely on the efforts of private citizens whose rights have been violated, mostly poor and disenfranchised private citizens. The state has hedged its responsibility for reparation to those whose rights its officers have abused. The citizen cannot safely rely on the state itself to protect adequately against the abuses of state power. Section 1983 provides a uniform, consistent and powerful remedy for the protection of federal constitutional and statutory rights from malefactors clothed with state power."

Julia Yoo, an NPAP board member, who has had a civil rights practice in Denver and San Diego for 18 years.

> "In the real world rogue police officers, on occasion, initiate charges against subjects for improper reasons—love triangles, the use of confiscated drugs by the officer himself, desire for advancement in the department, or the like. People harmed by such misconduct deserve a remedy and in some such situations

> malicious prosecution will be the only viable cause of action. But in a state like Missouri where the offending officer is judgment proof and sovereign immunity eliminates recovery against the municipality, state law does not provide that remedy. Only a federal malicious prosecution claim would offer these plaintiffs access to justice."

W. Bevis Schock, an NPAP member who has been litigating § 1983 police misconduct suits in St. Louis, Missouri for 30 years.

A. In many states, sovereign immunity precludes or limits state law remedies for malicious prosecution.

"[A] State cannot immunize an official from liability for injuries compensable under federal law." *Howlett v. Rose*, 496 U.S. 356, 360 (1990). Whenever a state has attempted to do so, this Court has held that those attempts violate the Supremacy Clause. *See, e.g.*, *Haywood*, 556 U.S. at 729–30 ("Whatever its merits, New York's policy of shielding correction officers from liability when sued for damages arising out of conduct performed in the scope of their employment is contrary to Congress' judgment that all persons who violate federal rights while acting under color of state law shall be held liable for damages."); *Howlett*, 496 U.S. at 383 ("[A]s to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage."); *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law.").

But there is no limit on a state's ability to immunize its own officers, or those of local municipalities, for claims arising under state law. Unsurprisingly, given the financial and political incentives states have to limit their own liability in such suits, many states have already done so.

Several states specifically immunize government employees, including state and local police officers, from liability for common law malicious prosecution claims. For example, in California, a "public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, *even if he acts maliciously and without probable cause*." *Asgari v. City of Los Angeles*, 937 P.2d 273, 278 (Cal. 1997) (emphasis added) (quoting CAL. GOV'T CODE § 821.6). Other states have similar provisions, completely immunizing malicious prosecution no matter how egregious the underlying police misconduct.[3]

---

3. *See, e.g.*, IND. CODE ANN. § 34-13-3-3(6), amended by Pub. L. No. 220–2013 § 2 (effective July 1, 2016) (Indiana's Tort Claims Act immunizes officers from any liability arising out of the "initiation of a judicial or administrative proceeding."); *Dickerson v. Mertz*, 547 N.W.2d 208, 212–13 (Iowa 1996) (Iowa's Tort Claims Act immunizes malicious prosecution claims against state officials, such as state police.); *Dall v. Caron*, 628 A.2d 117, 119 (Me. 1993) (Maine Tort Claims Act "confers immunity on the police officers for their decision to prosecute the criminal charges on which the malicious prosecution claims are based."); *McKenna v. Julian*, 763 N.W.2d 384, 389–90 (Neb. 2009) (Nebraska's Political Subdivisions Tort Claims Act immunizes any officer, agent, or employee of a political subdivision for claims "arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."); *Gedrich v. Fairfax Cty. Dep't of Family Servs.*, 282 F. Supp. 2d 439, 477 (E.D. Va.

By operation and design, these statutes prevent victims of malicious prosecution from seeking redress under state law and insulate officers from any liability for their misconduct. In those states, the only available remedy when an officer causes a person to be seized and prosecuted without probable cause is a suit under § 1983 for vindication of federal rights. As Michael Seplow, an NPAP member who has practiced civil rights law in Los Angeles for over 24 years, explains:

> "An innocent person may spend months or even years in pretrial detention before he is exonerated. But under California law, no damages are recoverable for any of the time in detention after arraignment—which typically occurs within a few days after arrest. Without a federal remedy, many innocent persons who were denied their liberty will be left with no recourse whatsoever."

John Burton, President of the NPAP Board of Directors, and who has also practiced civil rights law in California for over 32 years, agrees:

> "In California we must depend on § 1983 as the sole remedy for harms and losses sustained

---

2003) (Virginia immunizes officers from "'[a]ny claim arising out of the institution or prosecution of any judicial or administrative proceeding, even if without probable cause.'" (citing Virginia Tort Claims Act, VA. CODE § 8.01–195.3(6))); *see also Hall v. Washington Metro. Area Transit Auth.*, 468 A.2d 970, 973 (D.C. 1983) (holding that interstate compact approved by Congress immunized transit police officers operating in Washington D.C., Maryland, and Virginia from liability for malicious prosecution).

> after the wrongful arrest itself because of the immunity from claims of malicious prosecution provided by California statute, and the state appellate decisions broadly interpreting that statute."

B. State law notice of claim requirements prevent many meritorious suits.

Many states also impede viable civil rights claims by enacting stringent procedural hurdles, most notable of which are notice of claim and exhaustion requirements. These provisions require claimants to serve the government entity with a formal statement of their claim, often within a very short period of time.[4] As this Court recognized in *Felder v. Casey*, "[s]uch statutes are enacted primarily for the benefit of governmental defendants," because "these requirements further the State's interest in minimizing liability and the expenses associated with it." 487 U.S. 131, 142–43 (1988). They do so in part by making it much more difficult for plaintiffs to bring

4. For examples of notice of claim provisions in state law, *see, e.g.*, Ala. Code § 11-47-23 (6 months); Ariz. Rev. Stat. Ann. § 12-821.01(A) (180 days); Cal. Gov't Code § 911.2(a) (6 months); Colo. Rev. Stat. Ann. § 24-10-109(1) (182 days); D.C. Code § 12-309(a) (6 months); Ga. Code Ann. § 36-33-5(a) (6 months); Idaho Code Ann. §§ 6-905–906 (180 days); Ind. Code Ann. § 34-13-3-6(a) (270 days); Me. Rev. Stat. Ann. tit. 14, § 8107(1) (180 days); Mich. Comp. Laws Ann. § 600.6431(3) (6 months); Minn. Stat. Ann. § 466.05(1) (180 days); N.J. Stat. Ann. § 59:8-8 (90 days); N.M. Stat. Ann. § 41-4-16(A)–(B) (90 days); N.Y. Gen. Mun. Law § 50-e(1)(a) (90 days); Or. Rev. Stat. Ann. § 30.275(2) (180 days); 42 Pa. Const. Stat. Ann. § 5522(a) (6 months); Tex. Civ. Prac. & Rem. Code Ann. § 101.101(a) (6 months); Va. Code Ann. § 15.2-209(A) (6 months); Wis. Stat. Ann. § 893.80(1d)(a) (120 days).

claims against a government official: In Wisconsin, for example, whose laws were at issue in *Felder*, "[w]hile the State affords the victim of an intentional tort two years to recognize the compensable nature of his or her injury, the civil rights victim is given only four months to appreciate that he or she has been deprived of a federal constitutional or statutory right." *Id.* at 141–42. In some states, this time period is even shorter. *See, e.g.*, N.J. STAT. ANN. 59:8-8 (90 days); N.M. STAT. ANN. §41-4-16 (90 days); N.Y. GEN. MUN. LAW § 50-e (90 days).

And civil rights victims, who are likely continuing to experience trauma and injury stemming from an officer's misconduct, must do more than appreciate that they may have a viable claim. They must then adequately fill out a notice of claim: they must comply with strict form and content requirements, identifying all potential defendants and describing the violation and injuries in sufficient detail; they must then identify the appropriate location or specific local official who needs to be served with the claim; and they must actually serve it. Failure to correctly follow any of those steps can be fatal. *See, e.g.*, *Chidel v. Hubbard*, 840 A.2d 689, 695 (D.C. 2004) (explaining that "strict compliance with the terms of § 12-309 is 'mandatory as a prerequisite to filing suit against the District'" and that the "notice statute is construed narrowly against claimants") (quoting *District of Columbia v. Dunmore*, 662 A.2d 1356, 1359 (D.C. 1995)).

For most civil rights victims the assistance of a lawyer who is experienced in filing notice of claims and understands local requirements is crucial. But this means that the victim must find a lawyer, and actually retain a lawyer, and the lawyer must then sufficiently investigate the case to draft an adequate notice of claim—all before

the notice of claim deadline runs. Finally, a notice provision "operates, in part, as an exhaustion requirement, in that it forces claimants to seek satisfaction in the first instance from the governmental defendant." *Felder*, 487 U.S. at 142.

This Court has made clear that, given the burdens state notice of claim requirements place on litigants, they cannot apply to claims brought under § 1983 whether in state or federal court: "however understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation." *Felder*, 487 U.S. at 142–43. But nothing prevents states from strictly applying their own notice of claim provisions against a plaintiff's *state law* claim, thereby precluding many plaintiffs with valid claims from redress.

Andrew Celli, Jr., a founding partner of Emery Celli Brinkerhoff & Abady, LLP, who has practiced in the field of civil rights for 23 years and served as Chief of the Civil Rights Bureau at the Office of the New York Attorney General from 1999 to 2003, has seen firsthand over his career that

> "the notice-of-claim requirement is a trap for the unwary—or, in actuality, for the uneducated and the disconnected. Here in New York, the deadline for filing is 90 days after the 'favorable termination' of criminal charges. That concept is difficult enough for lawyers to sort out; for a lay person who has just been dragged through the criminal justice system, the last thing they are thinking of is filing a notice of claim. Clients regularly come to us with some or all of their

> state law claims extinguished for lack of such a filing. Without the federal remedy, our clients would have no remedy at all."

C. Many states cap damages far below actual damages that may be caused by malicious prosecution.

State law restrictions on damages are another significant way that states prevent victims of malicious prosecution from fully vindicating their rights, even when a state-law malicious prosecution suit is not immunized.

As this Court has recognized, the availability of compensatory damages under § 1983 furthers the purposes of § 1983 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Compensating all of the injuries a victim actually suffers due to a violation both helps make a victim whole and, by putting potential wrongdoers on notice that they will pay for any damages they cause, "deter[s] the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 256–57 (1978); *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.").

State law, however, embodies different policy judgments. States often seek to shield officers from liability; they may prioritize state budgets over compensation of victims of civil rights violation by restricting the amount

of damages an individual can recover, even if the actual damages incurred exceed that amount. Nevada, for example, limits damages in cases brought "against a present or former officer or employee of the State or any political subdivision" to $100,000. Nev. Rev. Stat. Ann. § 41.035. Wisconsin's limit is even lower: it caps damages in any claim against a "political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employees" at $50,000. Wis. Stat. Ann. § 893.80(3). Many other states have similar limitations.[5]

5. *See, e.g.*, Ala. Code § 11-93-2 (Alabama limits damages on claims for bodily injury against a governmental entity to $100,000 per person, or $300,000 for two or more persons, arising out of a single occurrence); Alaska Stat. Ann. § 09.17.010 (except in cases of "severe permanent physical impairment or severe disfigurement," limits noneconomic damages for personal injury or wrongful death to "$400,000, or the injured person's life expectancy in years multiplied by $8,000, whichever is greater"); Ind. Code Ann. § 34-13-3-4 (Indiana limits combined aggregate liability of all governmental entities and all public employees to $700,000 per person, per occurrence); Kan. Stat. Ann. § 75-6105 (Kansas limits damages in claims under Kansas Tort Claims Act to $500,000 for any claims arising out of a single occurrence); La. Rev. Stat. Ann. 13:5106 (Louisiana limits damages on claims against political subdivisions, which includes Sheriffs, to $500,000 per person, exclusive of property damages, medical care, and lost earnings); Me. Rev. Stat. Ann. tit. 14 § 8105 (Maine limits damages, including costs, against "either a governmental entity or its employees, or both," to "$400,000 for any and all [tort] claims arising out of a single occurrence"); Md. Code Ann. Cts. & Jud. Proc. § 5-303 (Maryland limits the liability of local governments to $400,000 per individual claim or $800,000 for total claims arising out of the same occurrence); Miss. Code Ann. §11-46-15 (Mississippi limits damages in "any [tort] claim or suit for damages against a governmental entity or its employee" to $500,000 for "all claims arising out of a single occurrence"); N.D. Cent. Code Ann.

These state law caps on damages not only prevent sufficient compensation in many cases, they perversely affect those who have suffered most—and who therefore have sustained the highest damages. Juries and judges across the country have recognized that the actual damages incurred when a person is unjustly imprisoned for weeks, months, or even years can easily reach 10 to 20 times these lowest state caps. *See, e.g.*, *Sykes v. Anderson*, 419 Fed. App'x 615, 616–17 (6th Cir. 2011) (recognizing evidence supported jury's substantial damages award where plaintiffs incarcerated for 56 and 77 days both suffered considerable lost wages and PTSD, and where one was separated from her infant son for over 2 months); *Manganiello v. City of New York*, 612 F.3d 149, 168–69 (2d Cir. 2010) (upholding substantial damages award where 4-year malicious prosecution caused plaintiff to permanently lose job in law enforcement and develop agoraphobia, PTSD and depression).

As NPAP member Chris Mills, who has been litigating civil rights cases in South Carolina for over 25 years, explains:

---

§32-12.2-02 (North Dakota limits state liability and limits state indemnification of employees to $250,000 per person, or $1,000,000 for all claims arising from a single occurrence); R.I. Gen. Laws Ann. § 9-31-3 (Rhode Island limits claims against cities and towns to $100,000, except where the municipality "was engaged in a proprietary function in the commission of the tort"); S.C. Code Ann. § 15-78-120 (South Carolina limits the amount a person can recover to $300,000); *see also Noneconomic Damages Reform*, American Tort Reform Association (May 5, 2016 1:21 PM), http://www.atra.org/issues/noneconomic-damages-reform (collecting state law damages limitations and advocating that states impose a $250,000 limit on noneconomic damages in tort claims).

> "Given the overlapping immunities in South Carolina law, someone whose only claim is for malicious prosecution under state law is limited to $300,000 even if he proves liability. In cases with egregious facts—for example, I have a client who has been wrongfully incarcerated for 7 years—this is woefully inadequate."

D. State claims do not permit attorney fee awards.

Congress and this Court have recognized that attorney's fees are critical to enable a victim of official misconduct to vindicate her rights through § 1983. "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so." *City of Riverside v. Rivera*, 477 U.S. 561, 577 (1986). Victims of civil rights violations "ordinarily cannot afford to purchase legal services at the rates set by the private market," and even "the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *Id.* at 576–77. "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court." *Hensley v. Eckerhart*, 461 U.S. 424, 445 (1983) (quoting S. Rep. No. 94-1011 at 2).

In enacting § 1988, Congress "authorized courts to deviate" from the standard rule, which "generally

requires each party to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses. Indeed, this principle is so firmly entrenched that it is known as the 'American Rule.'" *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 2213 (2011). Section 1988 enables plaintiffs to remedy civil rights violations by acting "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.* (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam)).

States, however, do not necessarily share these same priorities. The myriad problems that prevent plaintiffs with successful civil rights claims from pursuing those claims, which led Congress to create the fee-shifting regime of § 1988, would still prevent plaintiffs from vindicating those injuries if plaintiffs were limited to pursuing state law actions alone.

Howard Friedman, an NPAP board member who has represented plaintiffs in civil rights litigation in Massachusetts for over 30 years, notes:

> "Most people we represent cannot afford to advance money to cover the costs of litigation, let alone any attorney's fee. For cases where the plaintiff's damages are not large—like malicious prosecution cases where the client was in custody for several days—we could not accept the case without the prospect of an attorney fee award under Section 1988 if we are successful. Without attorney's fees we would turn people away, even though they lost their liberty without legal justification."

E. State judgments may prove difficult to collect.

Even if a plaintiff successfully proves a violation of her rights and obtains an award of damages, government defendants, like the law enforcement officers in a malicious prosecution suit, may simply refuse to ever pay a judgment. For example, Louisiana's constitution prohibits enforcement of judgments against the state or a municipal subdivision, other than from funds appropriated by the legislature, or by the political subdivision against which a judgment was won. La. Const. art. XII, § 10(C). A state statute makes the same prohibition applicable to settlements. *See* La. Rev. Stat. § 13:5109(B)(2).

As the Supreme Court of Louisiana has noted, these provisions "create[] a frustrating dichotomy for the state's judgment creditors." *Newman Marchive P'ship, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1266 (La. 2008). "[T]he judicial branch is empowered to render judgments against the state. However, the constitution does not provide the judiciary with the ability to execute those judgments." *Id.* at 1265; *see also id.* ("[T]he apparent liberality of abolishing most immunity from suit was offset by the continuation of a severe limitation on a private citizen's ability to enforce a judgment against the state, a state agency, or a local governmental entity.") (quoting Lee Hargrave, "*Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974,* 43 La. L. Rev. 647, 653 (1983)).

The same provision cannot prevent a federal court, however, from enforcing a judgment under federal law against a municipal officer. *See, e.g.*, *Bowman v. City of New Orleans*, 914 F.2d 711, 712–13 (5th Cir. 1990)

(affirming district court order, under Fed. R. Civ. P. 69, to enforce civil rights judgment by seizing New Orleans bank account).

The inability of civil rights litigants to enforce judgments under state law has real consequences: It renders any successful suit illusory and effectively immunizes government actors for their misconduct. Mary Howell, a New Orleans civil rights attorney for nearly forty years and NPAP advisory board member, noted that the City of New Orleans currently has millions of dollars in unpaid state court judgments against it, which date back many years[6]:

> "Civil rights lawyers know that it's not a viable alternative to sue New Orleans law enforcement officers in state court for state torts. Even if you win, you won't be able to enforce a judgment."

---

6. *See also* Robert McClendon, *Man Who Lost Leg After Being Struck by NOPD Cruiser Among Hundreds Awaiting Payment*, Times Picayune, Dec. 3, 2014, *available at* http://www.nola.com/politics/index.ssf/2014/12/man_who_lost_his_leg_thanks_to.html (explaining that there are "more than 600 people waiting on a check from the city after winning a judgment or settling for damages," totaling nearly $35 million); Jeff Adelson, *Judge Hints at Possible Contempt Judgment if New Orleans Doesn't Make Overdue Payments to Firefighters Pension Fund*, New Orleans Advocate, Oct. 6, 2015, *available at* http://www.theneworleansadvocate.com/news/13640241-171/judge-hints-at-possible-contempt (reporting arguments made by New Orleans at recent hearing that the city could not pay a judgment in that case in part due to "the roughly $35 million in other unpaid judgments the city faces that stretch back to the 1990s.").

F. State courts may be less hospitable to malicious prosecution plaintiffs.

Litigants with only state law claims cannot bring those claims in federal court; instead, they are limited to seeking redress in state court. *See Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6 (2003).[7] However, "[i]t is abundantly clear that one reason [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

Congress recognized that "state officers might, in fact, be antipathetic to the vindication of those rights, and it believed that these failings extended to the state courts." *Mitchum v. Foster*, 407 U.S. 225, 240 (1972). Not only was this a possibility, it had occurred: state courts had been "used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Id.* Thus, "[t]he very purpose of § 1983 was to interpose the *federal courts* between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive,

7. There could of course be diversity jurisdiction allowing a state law malicious prosecution claim to be brought in federal court. That would be unusual, however, as victims of police misconduct are typically abused where they live.

legislative, or judicial.'" *Id.* at 242 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

The same risks apply today, particularly in the context of suits against law enforcement officers such as local sheriffs or police. Without questioning the good faith of many state-court judges, there are unique pressures on local courts that may make it more difficult for judges to hold police officers accountable when they cross the line. For one, most local judges, unlike federal judges, are elected; as such, they face pressures to appear "tough on crime" and pro-law enforcement which often disfavors victims of police misconduct. *See, e.g.*, Kate Berry, Brennan Ctr. for Justice, How Judicial Elections Impact Criminal Cases (2015), *available at* http://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf. And state and local judges are often closely connected with law enforcement themselves—many were law enforcement officers or prosecutors before taking the bench—and so may even personally know the officers being sued for malicious prosecution. *See, e.g.*, Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. Rev. 509, 566 (1994) (explaining that "[a]pproximately 85% of the gubernatorial appointments to the state bench in the last ten years have been former state court prosecutors," and noting the concern that "[i]ndividuals who earn appointment to the bench because of their dedication to law enforcement may feel uncomfortable criticizing police actions, especially in a close case").

Accordingly, state and local judges do not always function as the neutral and detached arbiters required

to effectively hold law enforcement officers accountable for misconduct. And in some places, local judges may themselves be part of the problem, operating with some of the same biases that underlie law enforcement abuses as well. *See, e.g.*, UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3, 5 (Mar. 4, 2015), *available at* https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (explaining that "[t]he municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct" and finding "substantial evidence of racial bias among police and court staff in Ferguson").

In other words, at least in some communities, the same concerns that, in Congress's judgment, necessitated the passage of § 1983 continue to exist today: State courts may and in some cases are "antipathetic to the vindication of [civil] rights." *Mitchum*, 407 U.S. at 240. This underscores why it remains critical for victims of police misconduct to continue to be able to seek redress for violations of their rights in federal court.

CONCLUSION

NPAP agrees with petitioner that the seizure and detention of a person without probable cause, whether accomplished with legal process or without, violates the Fourth Amendment. Section 1983 thus provides a remedy for that violation. And as the practical experiences of civil rights litigators demonstrates, a federal remedy under § 1983 is critical to ensure that victims of such serious official misconduct can be compensated and that officers will be deterred from committing such misconduct in the first place, to the benefit of us all.

Respectfully submitted,

Anna Benvenutti Hoffmann
Counsel of Record
Alexandra Lampert
Neufeld Scheck & Brustin, LLP
99 Hudson Street, 8th Floor
New York, New York 10013
anna@nsbcivilrights.com

Counsel for Amicus Curiae

May 9, 2016