No. 14-9496

In the Supreme Court of the United States

ELIJAH MANUEL, PETITIONER

v.

CITY OF JOLIET, ILLINOIS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner may bring a Fourth Amendment claim, pursuant to 42 U.S.C. 1983, seeking damages for his pretrial detention pursuant to criminal process where no probable cause existed because the criminal charge was predicated on deliberately fabricated evidence.

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INTEREST OF THE UNITED STATES

The United States detains individuals awaiting criminal prosecutions and thus has a substantial interest in the scope of constitutional rights affecting such detention.

The United States also has a substantial interest in the circumstances in which federal officers can be liable in civil actions for alleged violations of constitutional rights and in the rules of pleading and proof for such suits. Although this case involves a claim against state officers under 42 U.S.C. 1983, this Court has invoked its Section 1983 jurisprudence in cases involving the implied cause of action against federal officers for the deprivation of constitutional rights, recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The United States prosecutes government employees and officials—mostly state and local law-

enforcement officers—who willfully violate individuals' constitutional rights under color of law, in violation of 18 U.S.C. 241 and 242. The United States also brings civil actions against state and local law-enforcement agencies under 42 U.S.C. 14141, which authorizes the Attorney General to seek appropriate relief to remedy a pattern or practice of law enforcement officers' violations of constitutional rights. Accordingly, the United States has a strong interest in ensuring that these rights are carefully safeguarded and clearly defined.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

Section 1983 of Title 42 of the United States Code provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

1. On March 18, 2011, during a traffic stop, respondent police officers for the City of Joliet, Illinois, arrested petitioner for possession of ecstasy, a controlled substance, after discovering a bottle of pills during a pat down. First Am. Compl. ¶¶ 20-24 (J.A. 62, 64). According to the allegations in the complaint, the bottle contained only vitamins, and the officers at the scene conducted a field test that showed that the pills did not contain any controlled substances.[1] *Id.* ¶¶ 38, 112-113 (J.A. 64, 69). Although the officers knew the negative field-test results, petitioner was arrested anyway. *Id.* ¶¶ 114-117 (J.A. 69-70). Back at the police station, another officer again tested the seized bottle of pills and again found that the pills were not ecstasy or any other controlled substance. *Id.* ¶¶ 121-122 (J.A. 70-71). The police reports nonetheless stated that the officers knew from their "training and experience" that the pills seized from petitioner were ecstasy; the reports further stated that an evidence technician tested the pills and the result was positive for ecstasy. J.A. 91-92.

Later that same day, a City of Joliet police officer swore out a criminal complaint charging petitioner with unlawful possession of methylenedioxymethamphetamine (ecstasy), a controlled substance, in violation of the Illinois Controlled Substances Act, 720 Ill. Comp. Stat. 570/402(c) (2010).[2] See J.A. 57. Petition-

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[1] Because the case comes to this Court on an appeal from the district court's order granting respondent's motion to dismiss, the complaint's factual allegations must be taken as true. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

[2] Illinois law requires that, within 48 hours of arrest, an arrestee be brought before a judge who will determine whether probable

er remained in jail following his arrest. First Am. Compl. ¶¶ 132, 139 (J.A. 72).

On March 31, 2011, one of the respondent police officers testified to the positive ecstasy test result during grand jury proceedings. J.A. 93-96 (grand jury minutes). That same day, the grand jury returned an indictment charging petitioner with unlawful possession of a controlled substance. J.A. 54-55.

On April 1, 2011, the drug laboratory issued a report that the pills seized from petitioner were not ecstasy and that they contained no controlled substances. J.A. 51. Petitioner was nonetheless arraigned on April 8, 2011, and the drug charge against him was not dismissed until May 4, 2011. Pet. App. A2; see J.A. 48 (court order dismissing the drug charge). Petitioner was released the next day. Pet. App. A2. In all, petitioner was detained for some 48 days, from the date of his traffic stop and arrest (March 18, 2011) until the day after charges were dismissed (May 5, 2011).

2. On April 10, 2013, petitioner instituted this action pro se under 42 U.S.C. 1983 against the City of Joliet and various City of Joliet police officers. Petitioner alleged, *inter alia*, that the officers violated his Fourth Amendment rights by arresting him without probable cause, by searching his car without probable cause, and by using excessive force in carrying out the arrest. Petitioner further alleged that the officers "falsely imprison[ed] [him] beyond a preliminary hear-

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cause exists for the arrest and ensure that the defendant is provided a copy of the charges and advised of his right to counsel. See 725 Ill. Comp. Stat. 5/109-1 (2010); *People* v. *Williams*, 230 Ill. App. 3d 761 (1st Dist. 1992). An initial bail determination is also made at that time. 725 Ill. Comp. Stat. 5/109-1(b)(4) (2010).

ing," First Am. Compl. ¶ 165 (J.A. 77), and unlawfully "continue[d] detaining him in police custody," even though there "was no probable cause" to do so, *id.* at ¶¶ 174, 179 (J.A. 79-80).[3]

3. The district court dismissed petitioner's claims. Pet. App. B1-B3. The court held that the applicable two-year statute of limitations barred petitioner's false arrest and excessive force claims relating to the arrest itself. Those claims accrued on March 18, 2011 (the day of petitioner's arrest), at the time of petitioner's initial appearance on the criminal complaint, see *Wallace* v. *Kato*, 549 U.S. 384, 388-390 (2007), and petitioner waited more than two years after that date to file his civil complaint in district court. Pet. App. B1-B2; see also *id.* at A2.[4]

The district court also dismissed petitioner's "malicious prosecution" claim that challenged his pretrial detention following the institution of criminal charges. The court understood petitioner to bring that claim solely under the Fourth Amendment. Pet. App. B2. Applying Seventh Circuit precedent, the court held

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[3] Petitioner's complaint challenged his pretrial detention under both the Due Process Clause and the Fourth Amendment. See First Am. Compl. ¶¶ 165-167 (Count V) (J.A. 77-78); *id.* ¶¶ 174, 176 (Count VII) (J.A. 79); see also Pl.'s Modified Resp. in Opp. to Defs.' 12(b)(6) Mot. to Dismiss 2 ("Plaintiff has a non-time-barred Fourth Amendment or Due Process claim."). He disclaimed reliance on due process in subsequent district court proceedings, see Pet. App. B2, and did not pursue a due process claim in his petition for a writ of certiorari, see Pet. i.

[4] For petitioner's Section 1983 claims, the district court adopted Illinois's two-year statute of limitations for personal injuries, which petitioner did not dispute below. See *Wallace*, 549 U.S. at 388-390 (state statute of limitations applies in a Section 1983 federal cause of action).

that such a claim is not cognizable under the Fourth Amendment, and that any due process claim is unavailable where state law provides an adequate remedy (which, the court concluded, Illinois law does). *Ibid.* (citing *Newsome* v. *McCabe*, 256 F.3d 747 (7th Cir. 2001)).

4. The court of appeals affirmed, holding that petitioner's Fourth Amendment claim was properly dismissed. Pet. App. A1-A4. The court found that, under circuit precedent, the Fourth Amendment does not apply to detention after arraignment.[5] *Id.* at A3-A4. Rather, the court explained, "once detention by reason of arrest turns into detention by reason of arraignment * * * the Fourth Amendment falls out of the picture and the detainee's claim that the detention is improper becomes a claim of malicious prosecution violative of due process." *Id.* at A4 (quoting *Llovet* v. *City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014), cert. denied, 135 S. Ct. 1185 (2015)). Even though ten other courts of appeals had "recognized federal malicious-prosecution claims under the Fourth Amendment," the court found no "compelling reason to overrule" its precedent barring such claims. *Id.* at A3-A4.

In *Newsome* and *Llovet*, the court of appeals had applied the reasoning of *Parratt* v. *Taylor*, 451 U.S.

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[5] The Seventh Circuit uses the term "arraignment" as shorthand for the proceeding at which "the person arrested becomes detained pursuant to legal process," whereby "a judicial officer determines that there is probable cause to hold him for trial unless he makes bail." *Llovet* v. *City of Chicago*, 761 F.3d 759, 760 (7th Cir. 2014), cert. denied, 135 S. Ct. 1185 (2015). "Arraignment" in this case occurred on March 18, 2011, the same day as petitioner's arrest, when petitioner had his first appearance on the criminal complaint. On April 8, 2011, petitioner was arraigned on the indictment. Pet. App. A2.

527, 535-544 (1981), to hold that a federal due process claim for malicious prosecution "is not actionable * * * as long as the state provides an adequate remedy for the wrongful act of its employee." *Llovet*, 761 F.3d at 761; *Newsome*, 256 F.3d at 750-751 (citing *Albright* v. *Oliver*, 510 U.S. 266, 281-286 (1994) (Kennedy, J., joined by Thomas, J., concurring)). Applying this rule, the court concluded that petitioner could not bring his malicious prosecution claim under the Due Process Clause because "Illinois has an adequate remedy." Pet. App. A4.

SUMMARY OF ARGUMENT

This Court has "never explored the contours of a Fourth Amendment malicious-prosecution suit under [Section] 1983," *Wallace* v. *Kato*, 549 U.S. 384, 390 n.2 (2007), and has noted "an embarrassing diversity of judicial opinion" on the subject, *Albright* v. *Oliver*, 510 U.S. 266, 270 n.4 (1994) (plurality opinion) (citations omitted). The Court should now resolve the uncertainty and hold that the Fourth Amendment establishes the minimum constitutional "standard[] and procedure[]," *Gerstein* v. *Pugh*, 420 U.S. 111 (1975), for pretrial detention pursuant to legal process—a determination by a magistrate or grand jury of probable cause of a criminal violation.

1. Petitioner's claim, as it is narrowly drafted, falls under the Fourth Amendment: it seeks damages only for his pretrial detention predicated on findings of probable cause that were based on respondent officers' alleged fabrication of evidence.

The court of appeals incorrectly concluded that the start of legal process necessarily alters that analysis. The institution of formal criminal charges or the issuance of a judicially-authorized arrest warrant initiates

criminal proceedings. If founded on a valid judicial or grand jury determination of probable cause, that legal process will also satisfy, rather than eliminate, the Fourth Amendment prerequisites for pretrial detention. See *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). The Fourth Amendment does not govern the decision to pursue criminal charges, but only any resulting detention. Similarly, the Fourth Amendment sets the minimum standard for pretrial detention even if a jurisdiction adopts additional or more rigorous procedures for detention or for the institution or continuation of criminal charges, including indictment by grand jury.

Application of the Fourth Amendment to pretrial detention is consistent with *Wallace*, which used the start of legal process to distinguish the common-law tort of false imprisonment from the common-law tort of malicious prosecution for purposes of determining a claim's accrual date and calculating the statute of limitations. 549 U.S. at 388-390. That analogy to common-law torts had no bearing on the applicable constitutional right, the violation of which is the foundation of any Section 1983 claim.

2. This Court should also provide guidance on the elements of and pleading requirements for a Fourth Amendment claim of unlawful pretrial detention—issues that have proved more vexing for the lower courts than the identification of the applicable constitutional right. Indeed, with the exception of the Seventh Circuit, the courts of appeals have broadly agreed after *Albright* that the Fourth Amendment applies to pretrial detention beyond the start of legal process, yet have struggled with the precise elements of a damages claim to vindicate that right.

This Court should further clarify that liability can be imposed only in limited circumstances. Specifically, a plaintiff must prove that the defendant caused him to be seized pursuant to legal process that was unsupported by probable cause, and that the criminal proceedings terminated in his favor. And, to overcome the presumption of probable cause established by a grand jury's indictment or a magistrate judge's neutral determination, a plaintiff must also prove that the defendant acted with intent to deceive or with reckless disregard as to the absence of probable cause. For example, a plaintiff might overcome the presumption of probable cause by demonstrating, as petitioner alleges here, that officers deliberately fabricated the evidence on which criminal charges and pretrial detention were predicated.

The plaintiff further must plead these elements with sufficient specificity. Defenses of immunity, absolute or qualified, may also shield defendants from liability, and operate with particular force to protect from suit the exercise of prosecutorial discretion, *Imbler* v. *Pachtman*, 424 U.S. 409, 424-430 (1976), and testimony before a grand jury, *Rehberg* v. *Paulk*, 132 S. Ct. 1497, 1502-1505 (2012).

ARGUMENT

I. PRETRIAL DETENTION BASED ON FABRICATED EVIDENCE AND ABSENT PROBABLE CAUSE VIOLATES THE FOURTH AMENDMENT

The Fourth Amendment governs petitioner's narrow claim, which alleges that his pretrial detention pursuant to a judicial finding of probable cause was based on deliberately fabricated information.

A. Section 1983 establishes a federal cause of action for "the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws" by any person acting under color of state law. 42 U.S.C. 1983. Section 1983, therefore, "is not itself a source of substantive rights"; rather, the first step in evaluating a Section 1983 claim is to identify the specific constitutional right allegedly infringed. See *Albright* v. *Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion) (citation omitted); see also *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979) ("The first inquiry in any [Section] 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged."). As narrowly pleaded, petitioner's claim falls under the Fourth Amendment.

Petitioner remained in jail from March 18, 2011 (the date of petitioner's arrest, the filing of the sworn criminal complaint, and the magistrate judge's initial bail determination), until May 5, 2011 (the day after charges were dismissed). Petitioner challenges his pretrial detention under the Fourth Amendment on the ground that probable cause to detain never existed, because the respondent officers allegedly fabricated the evidence against him.[6] And he seeks damages

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[6] Petitioner neither preserved his due process theory below, see Pet. App. B2, nor presented a due process claim in his petition for a writ of certiorari, see Pet. i. This Court therefore need not decide whether petitioner could have also brought his challenge as a procedural due process claim, see *Soldal* v. *Cook Cnty.*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."), or whether the Fourth Amendment provides the exclusive textual source of constitutional protection in these circumstances, cf. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989); see also *Albright*, 510 U.S. at 275 (plurality opinion) (declining to decide "whether petitioner's claim would succeed under the Fourth

for the harms caused by that detention. Pet. App. A1-A2. Petitioner's allegations do not involve detention based on other findings, such as dangerousness, flight risk, or actual guilt. Nor does petitioner seek damages for lesser restraints on liberty, such as release on bail or restrictions on travel.[7] See *Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.26 (1975); see also Pet. Br. 13 ("[T]he gravamen of the claim is unlawful detention, not the mere filing of baseless charges.").

Finally, petitioner alleges that the respondent officers fabricated the critical evidence against him deliberately. See First Am. Compl. ¶¶ 114-117, 121-122 (J.A. 69-70). This case therefore does not involve a claim that the officers collected evidence negligently or believed mistakenly that probable cause existed.

The Fourth Amendment speaks directly to pretrial detention authorized solely because of a judicial finding of probable cause. A magistrate judge's affirmance of the existence of probable cause constitutes the "standard[] and procedure[]" dictated by the Fourth Amendment for "arrest *and detention*." *Gerstein*, 420 U.S. at 111 (emphasis added). This Court in *Gerstein* therefore held that "a State * * * must provide a fair and reliable determination of probable cause as a condition for any significant *pretrial restraint of liberty*." *Id.* at 125 (emphasis added); *Bell* v.

Amendment," when petitioner did "not present[] that question in his petition for certiorari").

[7] This Court therefore need not resolve whether pretrial restrictions on liberty short of physical detention, even if predicated solely on a finding of probable cause, implicate the Fourth Amendment. Cf. *Albright*, 510 U.S. at 280 (Ginsburg, J., concurring) (arguing that, for purposes of the Fourth Amendment, plaintiff "remained effectively 'seized' for trial so long as the prosecution against him remained pending").

Wolfish, 441 U.S. 520, 536 (1979) ("A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.'") (brackets in original) (quoting *Gerstein*, 420 U.S. at 114).

Application of the Fourth Amendment under such circumstances also is consistent with the view advanced by the plurality in *Albright*, which observed that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." 510 U.S. at 274. Relying on *Gerstein*, the plurality "noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." *Ibid.* And although "the accused is not 'entitled to judicial oversight or review of the decision to prosecute,'" the plurality found that the Fourth Amendment has significance where a defendant is "not merely charged," but is also arrested and detained.[8] *Ibid.* (quoting *Gerstein*, 420 U.S. at 118-119). In other words, what is actionable under the Fourth Amendment is not the decision to pursue criminal charges, but only petitioner's detention absent a valid probable cause determination.[9] Except in the Seventh Circuit, there is

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[8] Justice Souter provided a fifth voice in *Albright* in support of the Fourth Amendment's application to an unlawful "arrest or other Fourth Amendment seizure" that follows the "formality of filing an indictment, information, or complaint." 510 U.S. at 290 (Souter, J., concurring).

[9] This Court has never determined that probable cause is a constitutional prerequisite to prosecution, and left that question open in *Albright*. See 510 U.S. at 274 (plurality opinion); *id.* at 282

"broad consensus among the circuits that the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period." *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) (collecting cases).

B. Contrary to the decision below, the Fourth Amendment does not "fall[] out of the picture," Pet. App. A4, after the start of legal process. A defendant is held pursuant to legal process "when, for example, he is bound over by a magistrate or arraigned on charges." *Wallace* v. *Kato*, 549 U.S. 384, 389 (2007) (citation omitted); *Lem Woon* v. *Oregon*, 229 U.S. 586, 589 (1913) ("When we speak of charging a person with the commission of a crime, we ordinarily mean the commencement of the proceeding, by the filing of a written complaint or accusation.") (citation omitted); see also 3 Dan B. Dobbs et al., *The Law of Torts* § 587 (2d ed. 2011) (updated 2015) ("[A] criminal proceeding must be formally begun by issuance of criminal process, by an indictment, or at least by an official arrest on a criminal charge. Almost any kind of criminal proceeding will qualify.").

A valid criminal charge—whether instituted by sworn complaint or by return of an indictment supported by probable cause—does not *displace* the Fourth Amendment, but rather *satisfies* it. As *Gerstein* recognized, the same Fourth Amendment standard and procedure that may be used to secure an

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(Kennedy, J., concurring) ("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."); *Gerstein*, 420 U.S. at 119 ("[A] judicial hearing is not prerequisite to prosecution.") (citations omitted).

arrest warrant also justifies pretrial detention. 420 U.S. at 120 ("The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. * * * The standard is the same as that for arrest."); see *Baker*, 443 U.S. at 143 ("[T]he probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial.").[10] If officers cause detention by intentionally misleading a magistrate or grand jury into concluding that probable cause exists, that basic Fourth Amendment standard is violated, whether the officers' misconduct occurred while procuring an arrest warrant, a *Gerstein* determination, or an indictment unsupported by probable cause.

The Fourth Amendment's role in setting that threshold standard for pretrial detention is not eliminated because *additional* factors may also bear on whether a defendant will remain detained or be released on conditions pending trial, see, *e.g.*, *United*

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[10] The Court in *Baker*, for example, found no constitutional violation where a suspect was detained for nine days pursuant to a facially valid warrant notwithstanding his claims of innocence and mistaken identity. 443 U.S. at 143-144. The Fourth Amendment was satisfied by the initial probable cause determination and, "[a]bsent an attack on the validity of the warrant under which he was arrested," this Court found no constitutional violation had been alleged for the defendant's continued pretrial detention. *Ibid.* *Baker* observed that pretrial detention normally will be constitutional if a person was detained pursuant to a warrant "conforming * * * to the requirements of the Fourth Amendment," and if he were afforded the right to a speedy trial. *Id.* at 144-146.

States v. *Salerno*, 481 U.S. 739 (1987); 18 U.S.C. 3142, 3144 (requiring detention hearing and enumerating factors governing pretrial detention and release conditions in federal cases), or because a subsequent proceeding—including an adversarial preliminary hearing, see, *e.g.*, Fed. R. Crim. P. 5.1, or indictment by grand jury, see U.S. Const. Amend. V—is required for charges to proceed to trial. Establishing a consistent role for the Fourth Amendment in authorizing pretrial detention is particularly important because "state systems of criminal procedure vary widely" in their processes for determining probable cause.[11] *Gerstein*, 420 U.S. at 123; see, *e.g.*, 1 Nancy Hollander et al., *Wharton's Criminal Procedure* § 7.2 (14th ed. 2015). Jurisdictions are free to go beyond the constitutional minimum, but such additional measures supplement, rather than supplant, the Fourth Amendment right to a neutral determination of probable cause, which is the basic prerequisite for pretrial detention. See *Gerstein*, 420 U.S. at 124-125 ("*What-*

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[11] In the federal system, the initial probable cause determination may be made in one of three ways: (1) a defendant may be charged by an indictment, Fed. R. Crim. P. 6, 7(a) and (c), after which an arrest warrant must issue (unless the government requests a summons), Fed. R. Crim. P. 9(a); (2) a defendant may be charged by criminal complaint, resulting in the issuance of an arrest warrant if the complaint is supported by an affidavit establishing probable cause for the offense, Fed. R. Crim. P. 3, 4(a); or (3) a defendant may be arrested without warrant, upon probable cause alone, in which case, a criminal complaint "must be promptly filed." Fed. R. Crim. P. 5(b). Regardless of the procedure justifying the arrest, upon seizure, a defendant must be brought before a magistrate judge for an initial appearance "without unnecessary delay" to be informed, *inter alia*, of the charges against him. Fed. R. Crim. P. 5(a) and (d).

ever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty.") (emphasis added); see also *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55 (1991) ("*Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures.").

A subsequent and independent determination of probable cause nonetheless may have substantial relevance to the pleading and proof of a Fourth Amendment claim for unlawful pretrial detention. For example, a plaintiff must allege a causal link connecting the malfeasance (here, the fabrication of evidence), the institution of process, and his detention. See Pt. II.A, *infra*. If independent and untainted evidence sufficient to establish probable cause of a criminal violation were presented before the grand jury or at a subsequent preliminary hearing, the elements of a Fourth Amendment claim would not be satisfied. Cf. *Hartman* v. *Moore*, 547 U.S. 250, 252 (2006) (The "want of probable cause must be alleged and proven" by a plaintiff bringing a *Bivens* or Section 1983 claim for retaliatory prosecution.). Relatedly, the Fourth Amendment does not govern allegations that a government agent subverted other pretrial procedures not mandated by the Fourth Amendment; nor does it pertain to the falsification of evidence that is not essential to the probable cause determination. See, *e.g.*, *Salerno*, 481 U.S. 739 (evaluating the federal detention statute under the Due Process Clause and the Eighth Amendment); *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978) (no evidentiary hearing required on Fourth Amendment challenge to a search warrant if "material that is the subject of the

alleged falsity or reckless disregard is set to one side" and "there remains sufficient content in the warrant affidavit to support a finding of probable cause"); see also *Gerstein*, 420 U.S. at 119-120 (observing that a preliminary hearing in "some jurisdictions * * * may approach a prima facie case of guilt" and may entail complex and adversarial proceedings beyond the informal, ex parte procedure required by the Fourth Amendment).

The Fourth Amendment may also be implicated by arrest and pretrial detention predicated on an indictment returned by a grand jury that was based on deliberately fabricated evidence. To be sure, the right to indictment by grand jury for federal felony offenses is found in the Fifth Amendment, not the Fourth Amendment.[12] U.S. Const. Amend. V; see *Stirone* v. *United States*, 361 U.S. 212, 215 (1960). Nonetheless, an indictment "'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause." *Gerstein*, 420 U.S. at 117 n.19 (citation omitted). As a result, "a grand jury's judgment" may "substitute for that of a neutral and detached magistrate" to justify the de-

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[12] The Grand Jury Clause of the Fifth Amendment provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. The Grand Jury Clause, however, has not been incorporated into the Fourteenth Amendment applicable to the States. See *Hurtado* v. *California*, 110 U.S. 516, 537-538 (1884); see also *Beck* v. *Washington*, 369 U.S. 541, 545 (1962) ("[T]his Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions."). Only a minority of States require indictment by grand jury for all felony offenses. See 2 Sara Sun Beale et al., *Grand Jury Law and Practice* § 8:2 (2d ed. 2015).

fendant's arrest and detention under the Fourth Amendment. *Ibid.*; accord *Kaley* v. *United States*, 134 S. Ct. 1090, 1098 (2014) ("[A]n indictment eliminates [a defendant's] Fourth Amendment right to a prompt judicial assessment of probable cause to support any detention" because "[that body's] judgment substitute[s] for that of a neutral and detached magistrate.") (quoting *Gerstein*, 420 U.S. at 117 n.19). In a federal case, a returned indictment thus serves a dual constitutional purpose: it constitutes a probable cause determination by a neutral factfinder for purposes of the Fourth Amendment, and it fulfills the Fifth Amendment guarantee of indictment by grand jury for felony offenses. See *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972) ("[T]he ancient role of the grand jury * * * has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.").

Absent the sort of intentional malfeasance by a government affiant or witness alleged by petitioner, the threshold Fourth Amendment requirements for pretrial detention normally will be fulfilled at the outset of the legal process by virtue of an arrest warrant, *Gerstein* hearing, or indictment. But where that initial probable cause determination is subverted, pretrial detention may violate the Fourth Amendment.

C. *Wallace* is consistent with this framework. *Wallace* held that the start of legal process demarcates the time when the common-law tort of false imprisonment ends and the separate common-law tort of malicious prosecution begins. See 549 U.S. at 389-390 ("[F]alse imprisonment" is "detention *without*

legal process," while "malicious prosecution" "remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process.") (citation omitted). The distinction between these common-law torts was relevant in *Wallace* only because common-law tort principles inform the accrual of the claim and determine whether the statute of limitations has expired.[13] *Id.* at 388. That distinction had no bearing, however, on the applicable constitutional right, and the Court in *Wallace* expressly declined to decide whether "such a claim is cognizable under [Section] 1983." *Id.* at 390 n.2.

Petitioner's claim may, under *Wallace*, be most closely analogous to the common-law tort of "malicious prosecution," but petitioner does not seek damages for his "prosecution" standing alone. Instead, he seeks damages for his pretrial detention pursuant to criminal charges. And although the common-law tort of malicious prosecution may, by analogy, inform the elements and prerequisites of a Section 1983 claim, see Pt. II.A, *infra*, the term "malicious prosecution" nonetheless tends to obscure rather than elucidate the *constitutional* basis for petitioner's claim, and pro-

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[13] For this reason, the district court correctly dismissed as time-barred petitioner's allegations challenging his warrantless arrest, since that claim, akin to common-law "false arrest," accrued when legal process began. See *Wallace*, 549 U.S. at 389-390. Petitioner was charged with a criminal offense the same day as his arrest—March 18, 2011—more than two years before his April 22, 2013, complaint was filed (and thus beyond the applicable statute of limitations under Illinois law). See Pet. App. A2, B1. Petitioner's claim for unlawful pretrial detention after the initiation of criminal process was timely, however, because it did not accrue until the drug charge was dismissed on May 4, 2011. See *Wallace*, 549 U.S at 389-390; see also Pet. App. A2.

vides no insight into whether that claim is properly scrutinized under the Fourth Amendment. See *Castellano* v. *Fragozo*, 352 F.3d 939, 953-954 (5th Cir. 2003) (en banc) ("The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example, * * * they are not claims for malicious prosecution and labeling them as such only invites confusion."), cert. denied, 543 U.S. 808 (2004); see also *Rehberg* v. *Paulk*, 132 S. Ct. 1497, 1504-1505 (2012) ("[T]he Court has not suggested that [Section] 1983 is simply a federalized amalgamation of pre-existing common-law claims.").

The fact that distinct claims may arise under Section 1983 as vehicles for the vindication of constitutional rights—*e.g.*, false arrest, false imprisonment, excessive force, or malicious prosecution—does not mean that each of those claims must be supported by a different constitutional amendment; all may fall under the Fourth Amendment if properly pleaded. See *Lambert* v. *Williams*, 223 F.3d 257, 261-262 (4th Cir. 2000) (Even where a claim was "styled * * * as a [Section] 1983 malicious prosecution claim," the court would "not treat [it] as separate and distinct from the appellant's constitutional allegations"; "rather, the foundation for his claim was a seizure that was violative of the Fourth Amendment.") (citation and internal quotation marks omitted), cert. denied, 531 U.S. 1130 (2001); see also *Albright*, 510 U.S. at 277 n.1 (Ginsburg, J., concurring) ("[T]he constitutional tort 42 U.S.C. § 1983 authorizes stands on its own, influenced by the substance, but not tied to the formal categories and procedures, of the common law.").

Similarly, not every claim relating to pretrial detention necessarily invokes the Fourth Amendment. Close scrutiny of the nature of the claim, including examination of what process was undermined by the government agent's alleged bad acts, will determine what, if any, constitutional amendment will apply. See *Graham* v. *Connor*, 490 U.S. 386, 393-394 (1989); see also *Baker*, 443 U.S. at 140 ("The first inquiry in any [Section] 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged."). A plaintiff may, for example, allege that the use of fabricated evidence at trial violated his constitutional rights, *Briscoe* v. *LaHue*, 460 U.S. 325, 326 n.1 (1983) ("knowing use of perjured testimony violates due process");[14] or he may challenge excessive use of force against him as a pretrial detainee, see *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (Due Process Clause), a ban on hardcover books for pretrial detainees, see *Bell*, 441 U.S. at 548-552 (First Amendment), denial of release on bail pending trial, see *Salerno*, 481 U.S. 739 (due process and Eighth Amendment), or the nature of his punishment after conviction, see *Whitley* v. *Albers*, 475 U.S. 312 (1986) (Eighth Amendment).

Petitioner's claim for damages here targets only his pretrial detention and is predicated on allegations that probable cause never existed to justify that detention because the evidence against him was intentionally fabricated from the outset of legal proceedings. That claim specifically invokes the Fourth Amendment. The court of appeals erred by foreclos-

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[14] A damages action against the prosecutor for using fabricated evidence at trial would be barred by absolute immunity. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

ing that claim as not cognizable under the Fourth Amendment, and its decision should therefore be reversed.

II. THIS COURT SHOULD CLARIFY THAT LIABILITY FOR A FOURTH AMENDMENT CLAIM OF UNLAWFUL PRETRIAL DETENTION UNDER SECTION 1983 CAN BE IMPOSED ONLY IN LIMITED CIRCUMSTANCES

Whether petitioner's claim is cognizable depends not only on the locus of the constitutional right, but also on the elements of a Fourth Amendment claim for unlawful pretrial detention under Section 1983. This Court has addressed individual elements of the common-law malicious prosecution tort. See, *e.g.*, *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994) (favorable termination of prior criminal prosecution required if successful Section 1983 suit would imply invalidity of a prior conviction); *Hartman*, 547 U.S. at 261-266 (absence of probable cause a necessary element of a First Amendment "retaliatory-prosecution" claim). But the Court has thus far declined to resolve "the contours of a Fourth Amendment malicious-prosecution suit under [Section] 1983." *Wallace*, 549 U.S. at 390 n.2; see *Albright*, 510 U.S. at 275 (plurality opinion) ("express[ing] no view as to whether petitioner's claim would succeed under the Fourth Amendment").

Since *Albright*, the courts of appeals have struggled to translate the constitutional right under the Fourth Amendment into the elements of a constitutional tort under Section 1983. See *Hernandez-Cuevas*, 723 F.3d at 99 ("[T]he circuits are divided over the elements of such a claim."); *Castellano*, 352 F.3d at 945 ("We have been inexact in explaining the elements of a claim for malicious prosecution brought

under the congressional grant of the right of suit under 42 U.S.C. § 1983. We are not alone."); *Lambert*, 223 F.3d at 261 (observing that "[i]n the wake of *Albright*, the courts of appeals have diverged" on the existence of a Section 1983 "malicious prosecution" claim and its elements).

The Court should now provide guidance to the courts below and clarify the limited circumstances in which liability is appropriate and the rigorous pleading requirements that apply to such claims.

A. A Section 1983 Fourth Amendment Claim For Unlawful Pretrial Detention Requires Proof That Defendants Caused Plaintiff's Seizure, Pursuant To Legal Process, By Conduct That Intentionally Or Recklessly Disregarded The Lack Of Probable Cause

Section 1983 permits a claim only "for injuries caused by the deprivation of constitutional rights," *Carey* v. *Piphus*, 435 U.S. 247, 254 (1978), and therefore "does not provide a federal cause of action for every violation of state common law," *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1285 (10th Cir. 2004). See *Rehberg*, 132 S. Ct. at 1504-1505. Nonetheless, "[i]n some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right." *Carey*, 435 U.S. at 258. For that reason, common-law tort principles provide the "starting point" for "defining the elements of damages and the prerequisites for their recovery" under federal law, *id.* at 257-258, including accrual and tolling, see *Wallace*, 549 U.S. at 388; *Heck*, 512 U.S. at 489-490, and immunities from suit, see *Wyatt* v. *Cole*, 504 U.S. 158, 163-164 (1992). See generally *Rehberg*, 132 S. Ct. at 1502 ("[T]his Court has long recognized that [Section

1983] was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits."); *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976) ("[Section] 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."). In other words, common-law principles guide the inquiry, but do not control it. *Hartman*, 547 U.S. at 258 ("[T]he common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts.").[15]

The courts of appeals largely agree that a plaintiff can establish liability under Section 1983 for a Fourth Amendment claim for unlawful pretrial detention pursuant to legal process only by showing that the defendants (1) caused (2) a seizure of the plaintiff (3) pursuant to legal process initiated against the plaintiff (4) that was unsupported by probable cause, and (5) that resolved in the plaintiff's favor.[16] See *Hernan-*

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[15] Notwithstanding the strong association between the Fourth Amendment and the common-law tort of malicious prosecution, they are not a perfect fit. Most prominently, a common-law claim of malicious prosecution does not have seizure as an element—a necessary component of a Fourth Amendment claim. See William P. Keeton et al., *Prosser and Keeton on the Law of Torts* 874-885 (5th ed. 1984) (elements of prima facie malicious-prosecution claim include (1) the initiation or maintenance of a proceeding against the plaintiff by the defendant; (2) termination of that proceeding in favor of the accused; (3) an absence of probable cause for the charges; and (4) the defendant's actual malice).

[16] This Court in *Heck* provided good reasons for imposing a favorable termination requirement in a malicious-prosecution action. *Heck* held that a Section 1983 claim for unconstitutional conviction or imprisonment does not accrue until termination of criminal proceedings (or invalidation of a final criminal conviction) if the tort action would impugn the validity of that proceeding, convic-

dez-Cuevas, 723 F.3d at 99 (describing the courts of appeals' views on the elements of the claim); *Sykes* v. *Anderson*, 625 F.3d 294, 309 (6th Cir. 2010) (same).

A plaintiff in petitioner's position must also establish that the defendant officers acted with intent to deceive or with reckless disregard of the absence of probable cause. To be sure, "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances," and "subjective concepts like 'malice'" generally "have no proper place in that inquiry." *Graham*, 490 U.S. at 399. But a bad-faith requirement in this context does not improperly inject subjective intent into the Fourth Amendment analysis; rather, proof of intentional or reckless falsehood is required to overcome the presumption of probable cause afforded to a magistrate judge's neutral determination.[17] See *Malley* v. *Briggs*, 475 U.S. 335, 351

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tion, or sentence. See 512 U.S. at 486. To do otherwise would "permit a collateral attack on [a criminal] conviction through the vehicle of a civil suit." *Id.* at 484 (citation omitted). The favorable termination requirement also "avoids parallel litigation over the issues of probable cause and guilt." *Ibid.* (quoting 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:5, at 24 (1991)). And it prevents "the creation of two conflicting resolutions arising out of the same or identical transaction" by "preclud[ing] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Ibid.* (citation omitted). These considerations apply with equal force to a Fourth Amendment claim under Section 1983 for unlawful pretrial detention pursuant to legal process: Favorable termination of the underlying criminal proceedings similarly should be required before the claimant is permitted to challenge the probable cause for his detention.

[17] The intent required for a Section 1983 Fourth Amendment claim of unlawful pretrial detention is not directly akin to the common-law element of "malice," which in a malicious prosecution

(1986) (Powell, J., concurring) ("In cases where a criminal defendant has asserted claims of unconstitutional search and seizure, this Court has consistently accorded primary evidentiary weight to a magistrate's determination of probable cause."); *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983) ("A magistrate's determination of probable cause should be paid great deference by reviewing courts.") (citation omitted).

To an even greater degree, an indictment "conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry." *Gerstein*, 420 U.S. at 117 n.19. This presumption of probable cause is based on "the whole history of the grand jury institution," and is so "inviolable" that an indictment "triggers 'issuance of an arrest warrant without further inquiry" into the case's strength." *Kaley*, 134 S. Ct. at 1097-1098 (quoting *Gerstein*, 420 U.S. at 117 n.19) (citation omitted); see Fed. R. Crim. P. 9(a). During a criminal proceeding, "a challenge to the reliability or competence of the evidence supporting a grand jury's finding of probable cause will not be heard." *Kaley*, 134 S. Ct. at 1097 (citation omitted). In a subsequent civil action, an

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suit broadly encompasses any improper "purpose in instituting the criminal claim other than bringing the offender to justice." *Miller* v. *Sanilac Cnty.*, 606 F.3d 240, 248 (6th Cir. 2010) (citation omitted); see *Heck*, 512 U.S. at 494 (Souter, J., concurring) (defining the "malice" element at common law). By contrast, the intent required to challenge a neutral probable cause determination under the Fourth Amendment pertains only to the defendant's intent to deceive or reckless disregard for the absence of probable cause. See *Franks*, 438 U.S. at 171-172; cf. *Hernandez-Cuevas*, 723 F.3d at 102 (The submission of a warrant with deliberate falsehoods is the "kind of reprehensible behavior [that] seems indistinguishable from the common law element of malice.").

indictment is therefore typically treated as prima facie evidence of probable cause that may be overcome only by a showing that the defendant misrepresented, withheld, or falsified evidence when procuring it.[18] *White* v. *Frank*, 855 F.2d 956, 961-962 (2d Cir. 1988), overruled on other grounds, *Rehberg*, 132 S. Ct. 1497; *Moore* v. *Hartman*, 571 F.3d 62, 67 (D.C. Cir. 2009) (collecting cases).

The framework of *Franks* v. *Delaware*, 438 U.S. 154, is instructive. *Franks* held that a criminal defendant moving to suppress evidence seized pursuant to a warrant may obtain an evidentiary hearing only if the supporting affidavit contained deliberate or reckless falsehoods essential to the finding of probable cause.[19] *Id.* at 171-172. *Franks* derived its intent

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[18] Petitioner obtained a copy of the grand jury transcript in this case. See J.A. 94-96. Nonetheless, in future cases, challenges to the grand jury's probable-cause determination may not warrant breaching the secrecy of grand jury proceedings. *Rehberg*, 132 S. Ct. at 1509. To protect that "vital secrecy," this Court not only granted absolute immunity to grand jury witnesses from civil liability, but also precluded the use of grand jury testimony as "the basis for, or * * * as evidence supporting, a [Section] 1983 claim." *Ibid.*

[19] Lower courts broadly agree that the principles of *Franks* should also extend to Section 1983 damages claims based on arrest warrants. See, *e.g.*, *Hawkins* v. *Gage Cnty.*, 759 F.3d 951, 958 (8th Cir. 2014) ("This rule applies equally to an affidavit supporting an arrest warrant.") (citations omitted); see also *Hernandez-Cuevas*, 723 F.3d at 101-102; *Wilson* v. *Russo*, 212 F.3d 781, 786 (3d Cir. 2000); *United States* v. *Colkley*, 899 F.2d 297, 299-303 (4th Cir. 1990); *United States* v. *Martin*, 615 F.2d 318, 327-329 (5th Cir. 1980); *Wolford* v. *Lasater*, 78 F.3d 484, 489 (10th Cir. 1996); *Kelly* v. *Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994); but see *United States* v. *Awadallah*, 349 F.3d 42, 64 n.17 (2d Cir. 2003) ("The *Franks* doctrine arose in the context of a search warrant, and

requirement from "language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise." *Id.* at 164. The Court explained that "when the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." *Ibid.* (quoting *United States* v. *Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966)) (emphasis added). The Court thereby recognized that any challenge to a warrant must acknowledge the limits inherent in a probable cause determination: A "truthful" affidavit does not mean that "every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." *Id.* at 165; see *Heien* v. *North Carolina*, 135 S. Ct. 530, 536 (2014) ("[S]earches and seizures based on mistakes of fact can be reasonable."). Therefore, a warrant (and, *a fortiori*, an indictment) must withstand challenge to its validity so long as "the information put forth is believed or appropriately accepted by the affiant as true."[20] *Franks*, 438 U.S. at 165.

Proof of reckless or intentional conduct in the institution of a criminal proceeding is therefore necessary

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neither the Supreme Court nor this Court has extended it to arrest warrants.") (citations omitted), cert. denied, 543 U.S. 1056 (2005); cf. *Walczyk* v. *Rio*, 496 F.3d 139, 157-158 (2d Cir. 2007) (conducting *Franks* analysis of an arrest warrant).

[20] Moreover, an allegation of intentional or reckless falsehood essential to probable cause parallels the qualified immunity standard, which "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley,* 475 U.S. at 341, 343.

to overcome the presumption of regularity and good faith that inheres in an indictment returned by a grand jury or a determination of probable cause by a neutral magistrate judge. As a result, to establish liability for a Fourth Amendment claim under Section 1983 for unlawful pretrial detention, a plaintiff must allege "deliberate falsehood" or a "reckless disregard for the truth," that is necessary to the determination of probable cause. *Franks*, 438 U.S. at 171.

B. Any Claim For Unlawful Pretrial Detention Should Be Pleaded With Specificity, And May Be Barred By Immunity Or Precluded By "Special Factors"

To adequately plead a claim, a Section 1983 complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). The factors bearing on that inquiry "will vary with the constitutional provision at issue." *Id.* at 676. Because claims of unlawful intent and deliberate fabrication are "easy to allege and hard to disprove," *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998); see also *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 175 (2004), the pleading standard in cases such as this one should be scrupulously enforced. Any allegations of deliberate falsity or reckless disregard for the truth must be nonconclusory. *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citation omitted); accord *Franks*, 438 U.S. at 171 (The complaint "should point out specifically the portion of the warrant affidavit that is claimed to be false; and [it] should be accompanied by a statement of supporting

reasons," including [a]ffidavits or sworn or otherwise reliable statements of witnesses * * * , or their absence satisfactorily explained.").

A claim such as petitioner's will also often fail due to the defendant's immunity, absolute or qualified. For example, any action against the prosecutor herself will be barred by prosecutorial immunity. *Imbler*, 424 U.S. 409. As noted above, respondent police officers may likewise be shielded by qualified immunity. *Malley*, 475 U.S. at 341. In addition, to the extent a plaintiff seeks to establish liability by relying on an officer's grand jury testimony, absolute immunity applies. See *Rehberg*, 132 S. Ct. at 1506. This absolute-immunity rule "may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness's testimony to support any other [Section] 1983 claim concerning the initiation or maintenance of a prosecution." *Ibid.*

Finally, Section 1983 applies solely to state actors; the federal analog is a claim brought pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Iqbal*, 556 U.S. at 675 ("In the limited settings where *Bivens* does apply, the implied cause of action is the federal analog to suits brought against state officials under 42 U.S.C. § 1983.") (citation and internal quotation marks omitted). However, a *Bivens* remedy is an implied cause of action; "it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). Courts will not imply a *Bivens* remedy where "special factors" counsel hesitation, and "in most instances," the Supreme Court has "found a

Bivens remedy unjustified." *Ibid.* (citation omitted). Recognition of a Fourth Amendment seizure claim, on the facts presented here, does not necessarily justify an implied cause of action under *Bivens*, because special factors, including alternative remedies, may counsel hesitation. See *ibid.* ("[A]lternative, existing process for protecting the interest" may "amount[] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.") (citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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