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### **Brief of the Boston University Center for Antiracist Research as Amicus Curiae in Support of Petitioner in Larry Thompson v. Police Officer Pagiel Clark, Shield #28472; Police Officer Paul Montefusco, Shield #10580; Police Officer Phillip Romano, Shield #6295; Police Officer Gerard Bouwmans, Shield #2102, Respondents**

Angela Onwuachi-Willig

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**In the Supreme Court of the United States**

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LARRY THOMPSON,

*Petitioner,*

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472;  
POLICE OFFICER PAUL MONTEFUSCO, SHIELD #10580;  
POLICE OFFICER PHILLIP ROMANO, SHIELD #6295;  
POLICE OFFICER GERARD BOUWMANS, SHIELD #2102,

*Respondents.*

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

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**BRIEF OF THE BOSTON UNIVERSITY CENTER  
FOR ANTIRACIST RESEARCH  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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JASMINE B. GONZALES ROSE  
*PROFESSOR OF LAW AND  
ASSOCIATE DIRECTOR OF POLICY*

NEDA A. KHOSHKHOO  
*LAW & POLICY FELLOW*

CAITLIN GLASS  
*LAW & POLICY FELLOW*

BOSTON UNIVERSITY CENTER  
FOR ANTIRACIST RESEARCH  
ONE SILBER WAY, EIGHTH FLOOR  
BOSTON MA 02215

ANGELA ONWUACHI-WILLIG\*  
*DEAN AND RYAN ROTH GALLO &  
ERNEST J. GALLO PROFESSOR OF LAW*  
BOSTON UNIVERSITY SCHOOL OF LAW  
765 COMMONWEALTH AVENUE  
BOSTON, MA 02215  
(617) 353-3112  
AOW@BU.EDU

JUNE 11, 2020

*\*COUNSEL OF RECORD FOR AMICUS CURIAE*

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Boston University Center for Antiracist Research (the “Center”) is a nonpartisan, nonprofit university-based research institution that convenes researchers, scholars, and policy experts across disciplines to find novel and practical ways to understand, explain, and solve seemingly intractable problems of racial injustice and inequity. The Center’s interest in this case arises from its expertise in researching and understanding the harms of policies, practices, and actions that produce and sustain racial inequities, and in advancing antiracist alternatives that promote racial equity.

The Second Circuit’s interpretation of the so-called “favorable termination rule,” which imposes an “indications-of-innocence” standard, is precisely the type of policy the Center is concerned about because it produces, maintains, and exacerbates racial inequities. The indications-of-innocence standard ignores how police officers disproportionately and routinely target Black, Indigenous, and other People of Color (BIPOC) with false criminal charges to cover up their abuses of power or to retaliate against BIPOC who assert their constitutional rights. Most importantly, the standard enables police officers who pursue false charges to escape accountability for such misconduct when prosecutors decide to dismiss false charges

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<sup>1</sup> Amicus certifies that no counsel for a party has authored this brief in whole or part and that no one other than Amicus has made any monetary contribution to the preparation and submission of this brief. All parties received timely notice of intent to file this brief and have consented to the filing of this brief.

against innocent defendants who never had an opportunity to prove their innocence.



## SUMMARY OF ARGUMENT

This case presents an opportunity to close a procedural loophole that shields police officers from accountability for pursuing false criminal charges against BIPOC. As this Court has explained, a person cannot bring an action under 42 U.S.C. § 1983 alleging unreasonable seizure pursuant to legal process unless they demonstrate that the prior criminal proceeding against them terminated in their favor.<sup>2</sup> The favorable termination rule is “rooted in pragmatic concerns with avoiding parallel criminal and civil litigation[,] . . . conflicting civil and criminal judgments[, and] collateral attacks on criminal judgments through civil litigation.”<sup>3</sup> The Second Circuit maintains that the favorable termination rule requires claimants to show that the criminal proceedings against them concluded with an affirmative indication of their innocence.<sup>4</sup> This indications-of-innocence standard is underinclusive and does not comport with the Court’s rationale for the favorable termination rule or with logic and common sense. Rather, it enables police officers to escape evaluation of their decision to pursue unfounded charges simply by ensuring that the

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<sup>2</sup> *McDonough v. Smith*, 139 S.Ct. 2149, 2156 (2019) (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)).

<sup>3</sup> *Id.* at 2157 (citations omitted).

<sup>4</sup> *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018).

charges are later dismissed. More so, it ensures that those most vulnerable to biased and racist policing practices have no ability to assert their constitutional rights because police officers can deem them to be “resisting arrest,” “disturbing the peace,” or “obstructing justice,” with full knowledge that a later dismissal of such nonmeritorious and, often retaliatory, charges precludes redress. Indeed, victims of false criminal charges, many of whom are BIPOC, receive few, if any, opportunities to affirmatively demonstrate their innocence, particularly when those false charges are rightfully dismissed. The foreclosure of civil rights claims arising from the pursuit of false charges removes a critical check on racially biased police practices and contravenes the purpose of Section 1983, which is to hold state actors accountable for constitutional rights violations.

The indications-of-innocence standard should not be affirmed because it perpetuates racial inequity by precluding judicial oversight of potentially meritorious claims arising from police officers’ racially biased and disparate pursuit of false criminal charges. Meaningful data reveal that police frequently pursue false charges of “resisting arrest,” “obstruction of justice,” and the like to cover up their own use of excessive force against BIPOC. Additional data, specifically from the U.S. Department of Justice (DOJ) investigation in Ferguson, Missouri, show that police officers have pursued false charges against BIPOC who assert their constitutional rights in the face of racially discriminatory, revenue-generating police tactics. The Ferguson Police Department’s practice of pursuing false charges may easily be replicated in other parts of the U.S. Finally, information and reports collected from large-scale

policing scandals reveal that police officers systematically target BIPOC with false drug and gun charges. These examples are illustrative of police officers' pursuit of false criminal charges against BIPOC, but they are not exhaustive. When these charges are dismissed due to their falsity, the indications-of-innocence standard bars these victims from seeking civil redress under Section 1983.

The indications-of-innocence standard should also not be affirmed because it perpetuates racial inequity by ignoring the realities of the criminal legal system that make it difficult for BIPOC to prove their innocence. Petitioner Larry Thompson's case demonstrates that people facing false criminal charges have few, if any, opportunities to affirmatively demonstrate innocence. By their nature, false charges are likely to be dismissed because they are not supported by any evidence. When prosecutors rightfully dismiss false charges, they do not affirm the innocence of the accused. Under the indications-of-innocence standard, a dismissal of false charges thus generally precludes claimants from bringing a Section 1983 claim. This creates an absurd result in which perhaps the most meritorious Section 1983 claims—those involving false charges that were dismissed due to lack of evidentiary support—are shielded from judicial review. This is a particular problem for BIPOC, who face additional hurdles in litigating their innocence due to structural barriers and racial bias in the criminal legal system.

The very purpose of Section 1983 is to provide a mechanism that holds state actors accountable for civil rights violations such as the pursuit of false charges against BIPOC. Section 1983 review is necessary because the dismissal of false charges does not

make the victims of such charges whole or deter police from bringing false charges in the future. The harms caused by false charges include not only wrongful arrest and detention, but also physical, emotional, financial, professional, reputational, and other setbacks. These harms are particularly acute for BIPOC, who are more likely to be detained pretrial, and who already face racial discrimination when seeking housing or employment. The criminal legal system also does not deter such police abuse, as it rarely investigates, indicts, or convicts police officers for engaging in racialized misconduct. Where the criminal legal system falls short in redressing harm or holding police accountable, civil remedies are necessary.

This Court should invalidate the indications-of-innocence standard and endorse the Eleventh Circuit's approach, which requires Section 1983 claimants to show that the criminal proceedings against them were terminated in a way that is not inconsistent with their innocence.<sup>5</sup> The Eleventh Circuit's approach comports with the purpose of the favorable termination rule while ensuring that potentially meritorious claims are heard by a trier of fact. This approach provides a path to redress for BIPOC and other victims of false criminal charges and maintains Section 1983 as an effective mechanism to hold police accountable for racialized violence and oppression.

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<sup>5</sup> *Laskar v. Hurd*, 972 F.3d 1278, 1293 (11th Cir. 2020), *appeal docketed*, No. 20–351 (U.S. Mar. 22, 2021).



## ARGUMENT

### I. THE INDICATIONS-OF-INNOCENCE STANDARD PREVENTS FACTFINDERS FROM REVIEWING POTENTIALLY MERITORIOUS SECTION 1983 CLAIMS AGAINST OFFICERS WHO FABRICATE CHARGES AGAINST BIPOC.

The Second Circuit requires that, in order to bring a Section 1983 action regarding unreasonable seizure pursuant to legal process, an alleged victim of false charges must demonstrate that the criminal proceedings against them terminated with an affirmative indication of their innocence.<sup>6</sup> This indications-of-innocence standard, adopted in other Circuit Courts,<sup>7</sup> needlessly forecloses potentially meritorious claims that arise from false criminal charges because falsely accused persons are rarely given an opportunity to affirmatively demonstrate their innocence. False charges are likely to be preemptively dismissed by prosecutors because those charges are inherently unsupported by any evidence. This is a particular concern for BIPOC, who are frequent targets of false charges. For example, Harvard University Professor Henry Louis Gates, Jr. was arrested for “disorderly

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<sup>6</sup> *Lanning*, 908 F.3d at 22.

<sup>7</sup> *Salley v. Myers*, 971 F.3d 308, 309–10 (4th Cir. 2020); *Jones v. Clark Cnty.*, 959 F.3d 748, 763 (6th Cir. 2020); *Jordan v. Town of Waldoboro*, 943 F.3d 532, 545 (1st Cir. 2019); *Lanning*, 908 F.3d at 22; *Cordova v. City of Albuquerque*, 816 F.3d 645, 651 (10th Cir. 2016); *Kossler v. Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009) (en banc); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004).



conduct” after he stepped outside of his home in Cambridge.<sup>8</sup> Sergeant James Crowley, who came to Professor Gates’s house to respond to a reported potential breaking-and-entering, arrested Professor Gates, even after he had questioned him, saw his identification, and knew he was the homeowner, because Professor Gates allegedly continued to yell. Like so many other unwarranted criminal charges, the charges against Professor Gates were eventually dismissed, but not without costs to him.<sup>9</sup> Moreover, BIPOC victims of false charges face structural barriers and racial bias in the criminal legal system which often prevent them from affirmatively demonstrating their innocence, meaning they are barred from seeking redress under the indications-of-innocence standard. The indications-of-innocence standard thus creates a loophole through which police can continue to pursue false criminal charges against BIPOC with little chance of accountability under Section 1983.

Three wide-scale examples of police misconduct involving false charges against BIPOC, described below, illustrate the need to abrogate the indications-of-innocence standard and ensure that police are held accountable for such constitutional violations.

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<sup>8</sup> Cambridge Police Report, Incident #9005127 (July 16, 2009, 13:21:34 PM); *see also* Angela Onwuachi-Willig, *An Officer and a Gentleman*, in *THE NEW BLACK: WHAT HAS CHANGED—AND WHAT HAS NOT—WITH RACE IN AMERICA* 146–62 (Kenneth W. Mack & Guy-Uriel E. Charles eds., 2013) (discussing the role of racism and implicit bias in the arrest of Professor Gates).

<sup>9</sup> Chris Arnold, *Charges Against Henry Louis Gates Dropped*, NAT’L PUB. RADIO (July 21, 2009, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=106860000>.

### A. Police Officers Have Routinely Pursued False Charges to Cover Up Their Use of Excessive Force Against BIPOC.

False charges are a convenient tool for police officers to cover up their use of excessive force against BIPOC. It is well-documented that across the country, police officers have pursued fabricated charges such as “resisting arrest,” “obstruction of justice,” “disorderly conduct,” and “assault of a police officer” against BIPOC to provide a false justification for the officers’ use of excessive force against them.<sup>10</sup> These charges are colloquially referred to as “cover charges,” meaning that officers use them to cover up their own misconduct.<sup>11</sup> Cover charges are often dismissed,<sup>12</sup> but not before

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<sup>10</sup> A recent example illustrates how police pursue fabricated charges to insulate themselves from accountability. Former Officer Joe Gutierrez pepper-sprayed Second Lieutenant Caron Nazario, a uniformed Black and Latinx man, during a traffic stop in Windsor, Virginia, and attempted to cover up his wrongs by threatening Lieutenant Nazario with cover charges. *See* Kofo Lasaki, *Former Windsor Officer Asks Judge to Dismiss Portion of Army Lieutenant’s Lawsuit After Traffic Stop*, 3WTKR (May 17, 2021, 11:27 PM), <https://www.wtkr.com/news/former-windsor-officer-asks-judge-to-dismiss-army-lieutenants-lawsuit-after-traffic-stop>; Neil Vigdor, *Officer Who Pepper-Sprayed a Black Army Officer Is Fired*, N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2021/04/12/us/virginia-police-officer-gutierrez-pepper-spray.html>.

<sup>11</sup> Paul Chevigny, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* 142–46 (Pantheon Books 1969); Jonah Newman, *Chicago Police Use “Cover Charges” to Justify Excessive Force*, CHI. REP. (Oct. 23, 2018), <https://www.chicagoreporter.com/chicago-police-use-cover-charges-to-justify-excessive-force>.

<sup>12</sup> *See, e.g.*, Mandy Locke, *The D Squad: Some Harnett Deputies Bring Harm, Residents Say*, NEWS & OBSERVER (May 3, 2016, 5:09 PM), <https://www.newsobserver.com/news/local/crime/>

they have caused severe harm. As discussed below, cover charges, particularly for resisting arrest, are “not used to protect officer safety or promote public safety, but instead [are] . . . a discretionary tool to suppress dissent and penalize vulnerable arrestees.”<sup>13</sup> They “epitomize[] the way that policing of poor people and people of color is more about social control than public safety.”<sup>14</sup> Under the indications-of-innocence standard, BIPOC with potentially meritorious claims based on cover charges will generally not be able to seek redress if those charges are later dismissed.

There is a strong relationship between cover charges and police violence.<sup>15</sup> Cover charges conveniently hide an officer’s use of excessive force because they can be, and often are, pursued as a stand-alone charge or paired with a minor or petty offense.<sup>16</sup> In 2017, the DOJ uncovered cases in which police officers in Chicago, Illinois pursued false assault and battery

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article74990327.html; Eric Nalder et al., “*Obstructing*” *Justice: Blacks Are Arrested on “Contempt of Cop” Charge at Higher Rate*, SEATTLE POST INTELLIGENCER (Feb. 28, 2008), [https://web.archive.org/web/20080302164032/http://seattlepi.nwsourc.com/local/353020\\_obstructmain28.asp](https://web.archive.org/web/20080302164032/http://seattlepi.nwsourc.com/local/353020_obstructmain28.asp); Newman, *supra* note 11.

<sup>13</sup> Scott Holmes, *Resisting Arrest and Racism—the Crime of “Disrespect,”* 85 UMKC L. REV. 625, 628–29 (2017).

<sup>14</sup> *Id.* at 629.

<sup>15</sup> *Id.* at 629–31.

<sup>16</sup> See, e.g., Christina Davidson & Patrick Madden, WAMU, *Assault on Justice*, <https://wamu.org/projects/assault-on-justice/> (last visited June 5, 2021); Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>; Nalder et al., *supra* note 12.

charges against victims of police violence and witnesses to that violence.<sup>17</sup> Investigative reporting in Chicago in 2018 showed that two-thirds of cases involving officer use of force since 2004 also involved cover charges.<sup>18</sup> In San Jose, California, investigative reporting from 2009 revealed that 70% of cases involving cover charges also involved officer use of force.<sup>19</sup> The connection between cover charges and officer misconduct is so strong that some police departments and prosecutors' offices internally monitor resisting arrest charges due to concerns that officers may falsely pursue these charges to cover up their violence against the accused.<sup>20</sup>

Research and investigative reporting between 2008 and 2020 has further revealed that in many parts of the country, BIPOC are disproportionately victims of cover charges. In Seattle, Washington, Black people

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<sup>17</sup> C.R. Div., U.S. Dep't of Just., *Investigation of the Chicago Police Department* 82 (2017), <https://www.justice.gov/opa/file/925846/download>.

<sup>18</sup> Newman, *supra* note 11.

<sup>19</sup> Sean Webby, *Mercury News Investigation: San Jose Police Often Use Force in Resisting-Arrest Cases*, MERCURY NEWS (Aug. 13, 2016, 11:08 PM), <https://www.mercurynews.com/2009/10/31/mercury-news-investigation-san-jose-police-often-use-force-in-resisting-arrest-cases/>; *see also* Kathryn E. Scarborough & Craig Hemmens, *Section 1983 Suits Against Law Enforcement in the Circuit Courts of Appeal*, 21 T. JEFFERSON L. REV. 1, 11 (1999) (an earlier study finding that 40% of cases against police contained false arrest and excessive force claims, which were frequently used to cover up abuse.).

<sup>20</sup> Mark Joseph Stern, *The Police Lie. All the Time. Can Anything Stop Them?*, SLATE (Aug. 4, 2020, 11:51 AM), <https://slate.com/news-and-politics/2020/08/police-testilying.html>; Webby, *supra* note 19.

were eight times more likely than white people to be arrested for the sole crime of obstructing justice, and prosecutors dropped nearly half of the cases in which obstructing justice was a stand-alone charge.<sup>21</sup> In San Jose, California, although less than one-third of the city's population is Latino/a/x, about 57% of those charged with resisting arrest and more than 70% of those charged with disturbing the peace were Latino/a/x.<sup>22</sup> In San Diego, California, Black people were ten times more likely than white people to be charged with resisting arrest.<sup>23</sup> In Washington, D.C., 90% of those charged with assaulting a police officer were Black, while only half the city's population is Black.<sup>24</sup> In nearly two-thirds of those cases, assaulting a police officer was a stand-alone charge.<sup>25</sup> In New York, compared to white suspects, a Black suspect was 64.9% more likely to be charged with resisting arrest in a disorderly conduct case; 85.4% more likely to be charged with resisting arrest in a misdemeanor drug possession case; and 109.4% more likely to be

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<sup>21</sup> Nalder et al., *supra* note 12.

<sup>22</sup> Sean Webby, *Policing in San Jose: Strict Enforcement of 'Conduct Crimes': Are Latinos Targeted?*, MERCURY NEWS (Aug. 14, 2016, 1:22 AM), <https://www.mercurynews.com/2009/04/04/policing-in-san-jose-strict-enforcement-of-conduct-crimes-are-latinos-targeted/>.

<sup>23</sup> Mari Payton & Dorian Hargrove, *African-Americans Arrested for Resisting Arrest at a Larger Rate in San Diego*, NBC7 NEWS (Feb. 9, 2020, 7:31 PM), <https://www.nbcsandiego.com/news/local/african-americans-arrested-for-resisting-arrest-at-a-larger-rate-in-san-diego/2260289/>.

<sup>24</sup> Davidson & Madden, *supra* note 16.

<sup>25</sup> *Id.*

charged with resisting arrest in a petty theft case.<sup>26</sup> In Greensboro, North Carolina, “more than four times as many blacks as whites [were] arrested on the sole charge of resisting, obstructing or delaying an officer.”<sup>27</sup> In Durham County, North Carolina, 90% of those charged with “resisting, delaying, or obstructing an officer” as a stand-alone charge or paired with a petty offense were BIPOC, and only 23% were convicted.<sup>28</sup> And in Asheville, North Carolina, though Black people make up 12% of the population, they accounted for 35% of those who faced cover charges and 34% of those who faced stand-alone cover charges.<sup>29</sup> As frequent victims of cover charges, BIPOC must be permitted to seek civil redress even when those charges are dismissed.

To suggest that police often pursue cover charges against BIPOC because BIPOC show more resistance than other people is a notion rooted in racial stereotype and myth, and one that is contradicted by data. In 2019, data released by the Chicago Police Department dispelled the “dreadful myth” that racialized police violence had anything to do with the rate at which

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<sup>26</sup> Robert Lewis & Noah Veltman, *Resisting Arrest in Black and White*, WNYC NEWS (Dec. 12, 2014), <https://www.wnyc.org/story/resisting-arrest-black-white/>.

<sup>27</sup> LaFraniere & Lehren, *supra* note 16.

<sup>28</sup> Holmes, *supra* note 13, at 632.

<sup>29</sup> Joel Burgess, *Racial Disparity Shown in Resisting Arrest Charges by Asheville Police*, CITIZEN TIMES (Jan. 22, 2019, 5:29 PM), <https://www.citizen-times.com/story/news/local/2019/01/22/analysis-finds-asheville-police-racial-disparity-resisting-arrest-charges-johnnie-rush/2208040002/>.

Black people comply with police orders.<sup>30</sup> This data, which spanned more than 60,000 incidents from 2004 to 2016, demonstrated that “Chicago police officers used more force against black citizens, on average, than any other race—even though black citizens tended to exercise less resistance than whites.”<sup>31</sup> Another study of 990 fatal police shootings that took place in the U.S. in 2015 found that Black people were “no more or less likely” than white people to have been attacking police officers or other people when they were fatally shot by police, and that Latino/a/x, Asian, Pacific Islander, and mixed race people were “significantly more likely” than white people to not have been attacking officers or other civilians when fatally shot by police.<sup>32</sup> Cover charges are a tool that police officers use to target and oppress BIPOC and sustain racial inequity. If BIPOC victims of cover charges are precluded from seeking civil redress for such practices, police will not be deterred from continuing to target them.

The need for judicial oversight of false cover charges is further demonstrated by police officers’ attempts to use false allegations of resistance or assault to justify deadly force against Black men. The murder

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<sup>30</sup> Rob Arthur, *New Data Shows Police Use More Force Against Black Citizens Even Though Whites Resist More*, SLATE (May 30, 2019, 2:41 PM), <https://slate.com/news-and-politics/2019/05/chicago-police-department-consent-decree-black-lives-matter-resistance.html>.

<sup>31</sup> *Id.*

<sup>32</sup> Justin Nix et al., *A Bird’s Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias*, 16 CRIMINOLOGY & PUB. POL’Y 309, 325, 328 (2017).

of George Floyd is a powerful example. Police claimed that Mr. Floyd resisted arrest, but video footage later showed that these claims were false; on the contrary, former Officer Derek Chauvin pressed his knee into Mr. Floyd's neck for 9 minutes and 29 seconds, while Mr. Floyd was handcuffed, and killed him.<sup>33</sup> After officers shot fifteen-year-old Jordan Edwards in the head, they falsely claimed that he was in a car that was moving aggressively toward them, but video footage showed that the car was moving in the opposite direction.<sup>34</sup> And after an officer shot seventeen-year-old Laquan McDonald sixteen times, video footage contradicted police accounts claiming that Mr. McDonald was “supposedly engaging in aggravated assault of a police officer with a knife.”<sup>35</sup> These are but a handful of

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<sup>33</sup> Dakin Andone, *Surveillance Video Does Not Support Police Claims That George Floyd Resisted Arrest*, CNN (May 29, 2020, 5:02 PM), <https://www.cnn.com/2020/05/28/us/video-george-floyd-contradict-resist-trnd/index.html>; Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html>.

<sup>34</sup> Ryan Tarinelli, *Prosecutor: Officer Who Shot Black Teen Was “Trigger Happy,”* ASSOCIATED PRESS (Aug. 16, 2018), <https://apnews.com/article/25379e541b15420fbd1d5c5f43a4f1ac>; see also Mitch Smith, *Four Chicago Police Officers Fired for Cover-Up of Laquan McDonald Shooting*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/us/chicago-police-fired-laquan-mcdonald.html>.

<sup>35</sup> Neill Franklin, *The Video Doesn't Lie—Even if the Officer Did*, Marshall Project (Oct. 16, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/10/16/the-video-doesn-t-lie-even-if-the-officer-did>; Josh Sanburn, *Chicago Releases Video of Laquan McDonald Shooting*, TIME (Nov. 24, 2015, 8:33 PM), <https://>



instances in which police officers claimed that Black victims were resisting or assaulting officers in order to justify their use of excessive force. The favorable termination rule must be applied so that all potentially meritorious claims arising from false criminal charges against BIPOC may advance to a factfinder.

**B. Police Officers Have Pursued False Charges Against BIPOC Who Assert Their Constitutional Rights When Faced with Revenue-Generating Tactics Targeting BIPOC Communities.**

Police officers have also pursued false charges to arrest BIPOC who assert their constitutional rights when faced with unconstitutional, revenue-generating tactics targeting BIPOC communities. The city of Ferguson, Missouri, provides an illustrative example.<sup>36</sup> After the 2014 police killing of Michael Brown, a DOJ investigation revealed that the Ferguson Police Department (FPD) engaged in a pattern of unconstitutional policing to generate revenue from criminal fines and

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[time.com/4126670/chicago-releases-video-of-laquan-mcdonald-shooting/](https://time.com/4126670/chicago-releases-video-of-laquan-mcdonald-shooting/).

<sup>36</sup> See U.S. Comm’n on C.R., *Targeted Fees Against Communities of Color: Civil Rights and Constitutional Implications* 19–30, 72 (2017), [https://www.usccr.gov/pubs/2017/Statutory\\_Enforcement\\_Report2017.pdf](https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf) (discussing fines and fees schemes across the country); Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. RACIAL & ETHNIC JUST. 1, 16 (2018) (noting that “Ferguson is by no means an anomaly” and finding, based on a study of multiple municipalities, that the overuse of revenue-generating fines and fees is concentrated in Black communities).

fees.<sup>37</sup> Among other tactics, FPD officers stopped people without reasonable suspicion and arrested them without probable cause.<sup>38</sup> These practices were concentrated in Black communities and targeted Black people.<sup>39</sup>

In the context of the FPD's racially discriminatory revenue-generating practices, FPD officers pursued false charges in order to wrongfully arrest people who asserted their constitutional rights. DOJ investigators found that FPD officers "arrest[ed] people for a variety of protected conduct" including "talking back to officers, recording public police activities, and lawfully protesting perceived injustices."<sup>40</sup> Officers pursued charges such as failure to comply against people who refused to do what officers asked, "even when refusal [was] not a crime. . . . resulting in many unlawful arrests."<sup>41</sup> FPD officers also improperly made arrests in "response to disrespect" by pursuing charges such as failure to comply, disorderly conduct, interference with an officer, or resisting arrest.<sup>42</sup> Similarly, when people tried to walk away from unlawful police encounters, "believing it within their rights to do so," FPD officers frequently responded with violence, and then arrested the victims

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<sup>37</sup> C.R. Div., U.S. Dep't of Just., *Report on the Investigation of the Ferguson Police Department 2* (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>38</sup> *Id.* at 16–19.

<sup>39</sup> *Id.* at 62–63.

<sup>40</sup> *Id.* at 28.

<sup>41</sup> *Id.* at 19.

<sup>42</sup> *Id.* at 25.

of their violence for supposedly failing to comply, or resisting.<sup>43</sup> The DOJ's report describes several examples illustrating the pursuit of such false charges against BIPOC.<sup>44</sup>

The investigation of Ferguson illustrates how police pursue false criminal charges to maintain racial subordination. The DOJ investigators found that the “FPD’s suppression of speech reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism.”<sup>45</sup> Ferguson’s revenue-generating law enforcement practices disproportionately harmed Black people, and that harm involved “intentional discrimination.”<sup>46</sup> Racial bias was evident from, among other things, “historical opposition to having African Americans live in Ferguson, which lingers among some today.”<sup>47</sup> Moreover, the “FPD appear[ed] to bring certain offenses almost exclusively against African Americans.”<sup>48</sup> At the time of the DOJ’s report, Black people accounted for 94% of all failure to comply charges, 92% of all resisting arrest charges, 92% of all peace disturbance charges, and 89% of all failure to obey charges.<sup>49</sup> In addition to the “the consistency and magnitude of the racial disparities throughout Ferguson’s police and court enforcement

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<sup>43</sup> *Id.* at 34–35.

<sup>44</sup> *Id.* at 24–28, 34–35.

<sup>45</sup> *Id.* at 28.

<sup>46</sup> *Id.* at 62.

<sup>47</sup> *Id.* at 63.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Id.* at 62.

actions,” the DOJ’s report also found “explicit racial bias in the communications of police and court supervisors and that some officials apply racial stereotypes, rather than facts, to explain the harm African Americans experience due to Ferguson’s approach to law enforcement.”<sup>50</sup> Since the FPD’s unconstitutional practices, as a whole, were “shaped by the City’s focus on revenue rather than by public safety needs,”<sup>51</sup> and since many cities impose fines and fees in a similarly racially discriminatory manner,<sup>52</sup> the FPD’s practice of pursuing false charges against BIPOC

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<sup>50</sup> *Id.* at 63.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> U.S. COMM’N ON C.R., *supra* note 36, at 19 (discussing “the extent of fines and fees practices across states and municipalities, and how these practices disproportionately impact communities of color, the poor, and persons with disabilities”); Angela LaScala-Gruenewald et al., *Fines & Fees Just. Ctr., New York’s Ferguson Problem—How the State’s Racist Fee System Punishes Poverty, Lacks Transparency, and Is Overdue for Reform* 1 (2020), [https://noprisonjustice.org/wp-content/uploads/2020/09/New\\_York\\_Ferguson\\_Problem\\_NPJ\\_Report.pdf](https://noprisonjustice.org/wp-content/uploads/2020/09/New_York_Ferguson_Problem_NPJ_Report.pdf) (“Police acting as armed debt collectors risk Black and Brown lives and extract wealth from New York’s poorest communities.” (citations omitted)); Rebecca Goldstein et al., *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 URB. AFFS. REV. 5, 22 (2018) (“Fines and fees that generate municipal revenue are often implemented in a dramatically racially discriminatory fashion.”); Eric Holder, U.S. Att’y Gen., Dep’t of Just., *Update on Investigations in Ferguson, Missouri* (Aug. 26, 2015), <https://www.justice.gov/opa/speech/attorney-general-holder-delivers-update-investigations-ferguson-missouri> (“[A]lthough the concerns we are focused on today may be particularly acute in Ferguson—they are not confined to any one city, state, or geographic region. They implicate questions about fairness and trust that are national in scope.”).

who assert their rights may be replicated in other police departments.

The Ferguson investigation also reinforced that state civil and criminal systems are an insufficient check on racist policing. The DOJ found that the FPD lacked “systems to detect and hold officers responsible” for such misconduct, reflecting “the department’s focus on revenue generation at the expense of lawful policing.”<sup>53</sup> The state’s failure to hold police accountable for their racist pursuit of false criminal charges underscores the need for access to redress under Section 1983 in these circumstances.

### **C. Police Officers Have Targeted BIPOC in Large-Scale Scandals Involving False Drug and Gun Charges.**

Between 1995 and 2017, there were at least fifteen major policing scandals across thirteen cities in which police falsely arrested more than 1,800 people.<sup>54</sup> The false charges were primarily for drug and gun possession, and were often based on evidence planted by police.<sup>55</sup> The victims of these false charges were “overwhelmingly” Black and Latino/a/x.<sup>56</sup>

These false charges, which resulted in wrongful convictions and subsequent exonerations, illustrate

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<sup>53</sup> C.R. Div., U.S. Dep’t of Just., *supra* note 37, at 15.

<sup>54</sup> Samuel R. Gross et al., Nat’l Registry of Exonerations, *Race and Wrongful Convictions in the United States* 22 (2017), [http://www.law.umich.edu/special/exoneration/Documents/Race\\_and\\_Wrongful\\_Convictions.pdf](http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf).

<sup>55</sup> *Id.* at 20–24.

<sup>56</sup> *Id.* at 22.

that police pursuit of false charges against BIPOC is a systemic problem, and not the result of a few “bad apples.” In 1999, for example, an investigation revealed that a group of police officers in Los Angeles, California framed innocent people by planting drugs and guns on them and pursuing false charges against them, sometimes after the officers had used excessive force.<sup>57</sup> The “great majority” of the 156 victims of these charges were Latino/x men.<sup>58</sup> In another example, in 2003, thirty-five men, almost all Black, were pardoned by the Texas governor after a judge concluded that a corrupt undercover narcotics officer had pursued false charges against them for selling cocaine that he had actually taken from a personal drug stash.<sup>59</sup> And in Philadelphia, Pennsylvania which had a high concentration of these group exonerations, “at least 95%’ of the more than 1,000 exonerated defendants [were] minorities, and the vast majority [were] black.”<sup>60</sup>

Police systematically target BIPOC communities with false charges because they can. Scholars at the National Registry of Exonerations who studied these policing scandals explain that “[t]he most powerful reason the officers who carry out these outrages focus on African Americans is simple: That’s what they always do.”<sup>61</sup> Moreover, “many black defendants—especially poor, inner-city dwellers in Philadelphia, Camden, Oakland, and elsewhere—have limited resour-

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<sup>57</sup> *Id.* at 20–21.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 21.

<sup>60</sup> *Id.* at 26.

<sup>61</sup> *Id.*

ces and little political clout” and “are unlikely to be able to defend themselves successfully, even if innocent.”<sup>62</sup> BIPOC who face false charges must be able to assert Section 1983 claims arising from such charges without having to affirmatively prove their innocence, otherwise such racialized police misconduct and abuse will endure.

**D. False Charges Against BIPOC Are Likely to Result in Dismissal, and Thus Would Be Shielded from Judicial Review Under the Indications-of-Innocence Standard.**

The examples set forth above demonstrate that there is a well-documented need to hold police officers accountable under Section 1983 for pursuing false criminal charges against BIPOC. Yet the indications-of-innocence standard shields police from accountability when those charges are later dismissed. Because false charges are not supported by any evidence, it stands to reason that they are particularly likely to be dismissed before reaching a criminal trial. Prosecutors generally dismiss cases without making an affirmative statement about the accused person’s guilt or innocence because they have neither reason nor incentive to do so. Criminal proceedings that end in such dispositions do not affirmatively indicate innocence and therefore do not satisfy the indications-of-innocence standard. BIPOC are especially disadvantaged by this procedural bar, since false criminal charges are regularly used to target BIPOC. The indications-of-innocence standard perpetuates racial inequity by foreclosing BIPOC from seeking redress for dismissed false criminal

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<sup>62</sup> *Id.*

charges, and by ignoring the added barriers BIPOC face when trying to demonstrate their innocence.

The Petitioner’s case illustrates that it can be impossible for a falsely charged person to affirmatively demonstrate their innocence as required by the indications-of-innocence standard. Mr. Thompson, a Black man, was arrested and charged with resisting arrest and obstructing justice after he declined to allow police to enter his home late at night without a warrant.<sup>63</sup> Mr. Thompson spent months fighting these charges. The prosecution offered him an “adjournment in contemplation of dismissal” two months later, and did not dismiss the charges until three months after Mr. Thompson was charged.<sup>64</sup> All the while, Mr. Thompson maintained that he had done nothing wrong and sought to fight the charges.<sup>65</sup> Because of the Second Circuit’s indications-of-innocence standard, however, Mr. Thompson was barred from pursuing a Section 1983 claim because the prior criminal proceedings never reached a stage that could affirmatively indicate his innocence, and the prosecutor did not provide a reason for dismissing the charges against him beyond simply stating that the dismissal was in the interest of justice.<sup>66</sup>

Data regarding dismissal rates of cover charges are illustrative of the likelihood that cases arising from false criminal charges will be dismissed. For example, in Chicago, Illinois, between 2012 and 2016, more than

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<sup>63</sup> Petition for Writ of Certiorari Appendix 18a [hereinafter Pet. App.].

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 18a–19a.



half of the stand-alone charges of resisting arrest resulted in dismissal.<sup>67</sup> In Harnett County, North Carolina, between 2014 and 2015, more than half of the charges for resisting arrest were dismissed.<sup>68</sup> In Seattle, Washington, between 2002 and 2008 prosecutors dropped nearly half of all cases in which obstructing justice was a stand-alone charge.<sup>69</sup> As demonstrated in the preceding sections, BIPOC are frequently the targets of cover charges, meaning that such dismissals will disproportionately bar many BIPOC from asserting potentially meritorious Section 1983 claims under the indications-of-innocence standard.

Research supports that criminal cases against BIPOC are more likely to result in dismissal than criminal cases against similarly situated white people. A study of over 58,000 felony cases from fifty-four of the country's seventy-five most populous counties between 1990 and 1998 "reveall[ed] a pattern whereby black arrestees are more likely than white arrestees to have the charges against them dropped prior to trial for crimes where the arresting officer has more discretion in decisions whether or not to detain the suspect."<sup>70</sup> According to the researchers who conducted the analysis, this pattern "suggests the additional dismissals are caused by higher rates of false arrest

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<sup>67</sup> Newman, *supra* note 11.

<sup>68</sup> Locke, *supra* note 12.

<sup>69</sup> Nalder et al., *supra* note 12.

<sup>70</sup> Aleksandar Tomic & Jahn K. Hakes, *Case Dismissed: Police Discretion and Racial Differences in Dismissals of Felony Charges*, 10 AM. L. & ECON. REV. 110, 111 (2008).

rather than general prosecutorial overzealousness or systematic bias by juries.”<sup>71</sup> Similarly, an analysis of New York County criminal records between 2010 and 2011 revealed that, compared to similarly situated white defendants, Black and Latino/a/x defendants were 9% more likely to have their cases dismissed for felonies and misdemeanors.<sup>72</sup> Another study of felony cases from large counties in California between 1990 and 2000 found that “[c]harges [were] least likely to be dismissed for white arrestees (8%), and most likely to be dismissed for black arrestees (12%). Latino[/a/x] arrestees [fell] in between; 9% of their arrests [resulted] in dismissed charges.”<sup>73</sup> Such dismissals are unlikely to be a result of leniency toward BIPOC;<sup>74</sup> rather, the data suggests that charges are more frequently dismissed against BIPOC because they are more often targets of charges that are unsupported by evidence. The higher rate of dismissals means that BIPOC are more often barred from seeking Section 1983 relief under the indications-of-innocence standard than similarly situated white defendants. The indications-of-innocence standard thus perpetuates racial inequity.

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<sup>71</sup> *Id.*

<sup>72</sup> Besiki Luka Kutateladze & Nancy R. Andiloro, Nat’l Inst. of Just., *Prosecution and Racial Justice in New York County—Technical Report*, at vii (2014), <https://www.ojp.gov/pdffiles1/nij/grants/247227.pdf>.

<sup>73</sup> Elsa Chen, *Cumulative Disadvantage and Racial and Ethnic Disparities in California Felony Sentencing*, in 3 RACIAL AND ETHNIC POLITICS IN CALIFORNIA 251, 259 (Bruce Cain, Jaime Regalado & Sandra Bass eds., 2008).

<sup>74</sup> Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 787 (2018).

The indications-of-innocence standard further perpetuates racial inequity by ignoring the additional barriers that falsely charged BIPOC face when trying to demonstrate their innocence. The specter of a racialized criminal process would likely deter BIPOC from objecting when a prosecutor wants to dismiss their case. Because BIPOC are more likely to be denied bail, waiting for a criminal trial to affirmatively prove their innocence might mean longer pretrial incarceration.<sup>75</sup> Even if BIPOC are granted bail, they may not be able to pay it. And even if they can pay it, the number and frequency of pretrial court appearances might cause them to lose their job or interfere with their family responsibilities.<sup>76</sup> Additionally, BIPOC might rightfully doubt the ability of a jury to fairly adjudicate innocence. Research shows that many people uncon-

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<sup>75</sup> Kutateladze & Andiloro, *supra* note 72, at vii, 94; *The Sentencing Project, Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* 6 (2018), <http://raceandpolicing.issuelab.org/resources/30726/30726.pdf>; Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, Prison Pol’y Initiative (Oct. 9, 2019), [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/); *Presumption of Guilt*, Equal Just. Initiative, <https://eji.org/issues/presumption-of-guilt/> (last visited June 5, 2021).

<sup>76</sup> See, e.g., N.Y. State Off. of the Att’y Gen., C.R. Bureau, *A Report on Arrests Arising from the New York City Police Department’s Stop and Frisk Practices* 20–21 (2013), [https://ag.ny.gov/pdfs/OAG\\_REPORT\\_ON\\_SQF\\_PRACTICES\\_NOV\\_2013.pdf](https://ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf); Lisa Cacho & Jodi Melamed, *How Police Abuse the Charge of Resisting Arrest*, BOS. REV. (June 29, 2020) (quoting Malcolm M. Feely, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1992)), <http://bostonreview.net/race-law-justice/lisa-cacho-jodi-melamed-how-police-abuse-charge-resisting-arrest>; Newman, *supra* note 11.

sciously and unwarrantably associate Blackness with criminality.<sup>77</sup> These associations are derived, in large part, from a long history of racial inequity in the criminal legal system.<sup>78</sup> Faced with the real risk of racially biased juries, BIPOC wrongfully accused of a crime might see dismissal as a relatively favorable outcome, even though that outcome would not be considered “favorable” under the indications-of-innocence standard. And even when BIPOC reject an offer of dismissal and seek to fight the charges against them—as Mr. Thompson did—prosecutors may unilaterally decide to dismiss the case, precluding a determination on the merits.

For these reasons, the favorable termination rule should not bar claims based on criminal charges that were ultimately dismissed. The indications-of-innocence standard should not be affirmed because it prevents BIPOC who had false criminal charges against them dismissed from bringing potentially meritorious Section 1983 claims, thereby creating a loophole through which police can continue to target BIPOC with false criminal charges without consequence.

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<sup>77</sup> See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 878, 889–91 (2004).

<sup>78</sup> See, e.g., Khalil Gibran Muhammad, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 4 (2010) (noting that in the early twentieth century, “African American criminality became one of the most widely accepted bases for justifying prejudicial thinking, discriminatory treatment, and/or acceptance of racial violence as an instrument of public safety”); accord Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 270 (2021).

## II. THE ELEVENTH CIRCUIT’S FINALITY-BASED STANDARD IS ESSENTIAL TO FULFILL THE PURPOSE OF SECTION 1983 AND ADEQUATELY ADDRESS AND DETER THE RACIALIZED PRACTICE OF PURSUING FALSE CHARGES AGAINST BIPOC.

In contrast to the Second Circuit, the Eleventh Circuit requires that Section 1983 claimants demonstrate that the former criminal proceedings against them “formally ended in a manner not inconsistent with [their] innocence.”<sup>79</sup> This approach ensures the finality of the underlying criminal proceedings, and comports with the reality that criminal proceedings involving false charges do not always terminate with affirmative indications of innocence. The Eleventh Circuit’s approach is necessary to make victims of false charges whole and deter future racialized police misconduct.

The Eleventh Circuit’s approach is consistent with the purpose of Section 1983, which was specifically designed to “protect the people from unconstitutional action under color of state law,”<sup>80</sup> including unconstitutional criminal proceedings.<sup>81</sup> Section 1983 “has, as its provenance, Reconstruction-era policies aiming to secure to former slaves federal rights and to ward off state and local incursion on those rights.”<sup>82</sup> The legislative history of the Ku Klux Klan Act of 1871, which gave rise to Section 1983, demonstrates that

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<sup>79</sup> *Laskar*, 972 F.3d at 1293 (emphasis added).

<sup>80</sup> *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

<sup>81</sup> See, e.g., *McDonough*, 139 S.Ct. at 2156; *Manuel v. City of Joliet*, 137 S.Ct. 911, 918–19 (2017).

<sup>82</sup> *Hernandez v. Mesa*, 140 S.Ct. 735, 759 (2020) (Ginsburg, J., dissenting).

Congress was aware of state actors' complicity in racial violence, and was concerned not only that state actors would fail to protect the rights of BIPOC, but "might, in fact, be antipathetic to the vindication of those rights."<sup>83</sup> The indications-of-innocence standard contravenes the purpose of Section 1983 by foreclosing potentially meritorious claims regarding false charges, and allowing state prosecutors to unilaterally preclude federal courts' review of such claims by dismissing cases.

The Eleventh Circuit's approach also satisfies the purpose of the favorable termination rule, which is to avoid parallel criminal and civil litigation and potentially conflicting criminal and civil judgments.<sup>84</sup> Under the Eleventh Circuit's standard, a person who has been found guilty of a charge, or accepted guilt for that charge, could still not assert a successful Section 1983 claim. At the same time, the Eleventh Circuit's approach does not bar those with dismissed criminal charges from bringing potentially meritorious Section 1983 claims before a neutral factfinder.

Judicial review of claims arising from dismissed false criminal charges is necessary because the criminal

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<sup>83</sup> *Mitchum*, 407 U.S. at 242; see also *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 505 (1982) ("A major factor motivating the expansion of federal jurisdiction . . . was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights."); *Allen v. McCurry*, 449 U.S. 90, 98 (1980) ("The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States.").

<sup>84</sup> *McDonough*, 139 S.Ct. at 2156–57.

legal system does not offer mechanisms to compensate victims for the harms they suffer from false criminal charges, even when those charges are dismissed. This is particularly true for BIPOC. Evidence shows that BIPOC are more likely to be denied bail and to be subject to pretrial detention than their white counterparts.<sup>85</sup> No matter how short, pretrial detentions are often disruptive to a person's employment, housing, family life, and reputation. Additionally, the time spent fighting false charges—which could be months or years before a case is dismissed—can be harmful to their mental, emotional, and social well-being.<sup>86</sup> In Mr. Thompson's case, he maintained his innocence and fought the charges against him for three months before the prosecution dismissed them.<sup>87</sup>

Furthermore, even when false charges are dismissed, they may remain on the accused person's criminal record and harm their future employment or housing prospects.<sup>88</sup> The negative effects of a criminal

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<sup>85</sup> The Sentencing Project, *supra* note 75, at 6; Sawyer, *supra* note 75.

<sup>86</sup> See, e.g., Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> (telling the story of Kalief Browder, a teenager who spent three years in jail before the charges against him were dropped; endured solitary confinement and violent abuse during his detention; and tragically killed himself after his release).

<sup>87</sup> Pet. App. 18a.

<sup>88</sup> U.S. Comm'n on C.R., *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* 60 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf?eType=EmailBlastContent&eId=d37030a2-bfe6-4784-866a-7db61d64f357>; Benjamin D. Geffen, *The Collateral*

charge are particularly pronounced for BIPOC, who already experience racialized housing and employment discrimination.<sup>89</sup>

Additionally, existing police oversight mechanisms and the criminal legal system do not adequately deter racialized police misconduct. In Ferguson, for example, local police oversight and court systems did not hold officers accountable for bringing false charges; on the contrary, Ferguson’s courts and FPD supervisors encouraged revenue-generating arrests in Black communities, and privileged this particular form of “productivity” over actual public safety.<sup>90</sup> Some state laws protect police department internal investigation information from being released to the public, or require that police departments be in charge of investigating alleged internal wrongdoing and have full discretion over how to discipline officers for misconduct, which substantially decreases public accounta-

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*Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 82 (2017).

<sup>89</sup> Margery Austin Turner et al., U.S. Dep’t of Hous. & Urb. Dev., *Housing Discrimination Against Racial and Ethnic Minorities*, at xi–xvii (2012) (discussing racial discrimination in housing); The Sentencing Project, *supra* note 75, at 10 (discussing racial discrimination in employment).

<sup>90</sup> See C.R. Div., U.S. Dep’t of Just., *supra* note 37, at 22 (“FPD supervisors are more concerned with the number of citations and arrests officers produce than whether those citations and arrests are lawful or promote public safety.”); see also *id.* at 42 (“The Ferguson municipal court handles most charges brought by FPD, and does so not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue.”).



bility.<sup>91</sup> Moreover, criminal prosecutions of police officers who have engaged in racial violence are rare, and convictions are even rarer.<sup>92</sup> From 2005 to September of 2020, only 121 officers were charged with murder or manslaughter and out of ninety-five officers whose cases concluded, only forty-four were convicted, many of a lesser charge.<sup>93</sup> The few recent high-profile police killings that have resulted in criminal charges against officers do not demonstrate any statistically significant change in prosecutor willingness to charge police officers.<sup>94</sup> In reality, when “officers are accused of illegal behavior, the department itself usually investigates, then conceals its findings and

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<sup>91</sup> Dayvon Love, *Police Accountability*, Am. Bar Ass’n (Jan. 12, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/police-accountability/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/police-accountability/).

<sup>92</sup> Cassandra Chaney & Ray V. Robertson, *Armed and Dangerous? An Examination of Fatal Shootings of Unarmed Black People by Police*, 8 J. PAN AFR. STUD. 45, 56–58 (2015); Javonte Anderson, *White Cops Have Been Convicted of Killing a Black Person Before, But It’s Rare*, USA TODAY (Apr. 22, 2021, 2:15 PM), <https://www.usatoday.com/story/news/2021/04/22/white-cops-convicted-of-killing-black-people/7316914002/>; Rachel Treisman, *Where the Chauvin Verdict Fits in the Recent History of High-Profile Police Killings*, NAT’L PUB. RADIO (Apr. 20, 2021, 6:26 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/989292294/where-the-chauvin-verdict-fits-in-the-recent-history-of-high-profile-police-kill>.

<sup>93</sup> Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Apr. 12, 2021), <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html>.

<sup>94</sup> *Id.*

imposes, at worst, a slap on the wrist, like brief paid leave.”<sup>95</sup>

The need for greater judicial accountability for racist policing is also evident from the fact that even police who know their actions are being recorded by bystanders or on body cameras are not regularly deterred from oppressing and brutalizing BIPOC and then lying about those interactions.<sup>96</sup> For example, in 2020, body cameras did not deter Minneapolis officers, including Derek Chauvin, from falsely asserting that George Floyd resisted arrest and then murdering him.<sup>97</sup> Body cameras are likely ineffective at increasing accountability because police officers are not routinely held accountable for the recorded instances of abuse. In 2018, for example, NYPD officer Henry Daverin falsely claimed that Christopher Parham, a Black nineteen-year-old, had resisted arrest, but the district attorney dropped all charges against Parham after his attorney released a video showing that Daverin had lied.<sup>98</sup> “Daverin, who had been named in at least

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<sup>95</sup> Stern, *supra* note 20.

<sup>96</sup> Harmeet Kaur, *Videos Often Contradict What Police Say in Reports. Here’s Why Some Officers Continue to Lie*, CNN (June 6, 2020, 8:55 AM), <https://www.cnn.com/2020/06/06/us/police-reports-lying-videos-misconduct-trnd/index.html>; Ethan Zuckerman, *Opinion, Why Filming Police Violence Has Done Nothing to Stop It*, MIT TECH. REV. (June 3, 2020), <https://www.technologyreview.com/2020/06/03/1002587/sousveillance-george-floyd-police-body-cams/>.

<sup>97</sup> Louise Matsakis, *Body Cameras Haven’t Stopped Police Brutality. Here’s Why*, WIRED (June 17, 2020, 12:41 PM), <https://www.wired.com/story/body-cameras-stopped-police-brutality-george-floyd/>.

<sup>98</sup> Stern, *supra* note 20.

10 other misconduct lawsuits,” was never disciplined for brutalizing Parham or lying about it, and he remained on the force.<sup>99</sup>

Accordingly, civil remedies like Section 1983 claims are necessary to ensure adequate redress for victims of false criminal charges and to deter police officers from targeting BIPOC with such charges. The ability to seek judicial review of false criminal charges through Section 1983 contributes to the actual and perceived fairness of the courts. Paths to judicial review are already limited by doctrines like qualified immunity, which requires the alleged victim of a civil rights violation to show that the violated right was “clearly established” by a prior judicial decision involving the same conduct.<sup>100</sup> Like the doctrine of qualified immunity, the indications-of-innocence standard creates an unnecessarily high bar for those who seek judicial review of alleged civil rights violations. The Eleventh Circuit’s finality-based standard achieves the purpose of the favorable termination rule while preserving a critical mechanism for reviewing and addressing meritorious challenges to racialized police misconduct.

The indications-of-innocence standard is but one of many legal policies that perpetuate racial inequity. It is part of a larger system of racial subordination, in which the criminal legal system and policing play a substantial part. Indeed, “[a]s long as police misconduct has existed in this country, its victims have primarily

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<sup>99</sup> *Id.*

<sup>100</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

been people of color.”<sup>101</sup> The prevailing indications-of-innocence standard illustrates that existing legal structures are inadequate to ensure police accountability, and highlights the need for judicial oversight and civil remedies to deter racialized police misconduct.

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<sup>101</sup> Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 986 (2017).



## CONCLUSION

Accordingly, amicus curiae urges this Court to reverse.

Respectfully submitted,

ANGELA ONWUACHI-WILLIG\*

*LAW SCHOOL DEAN AND*

*RYAN ROTH GALLO & ERNEST J. GALLO*

*PROFESSOR OF LAW*

BOSTON UNIVERSITY SCHOOL OF LAW

765 COMMONWEALTH AVENUE

BOSTON, MA 02215

(617) 353-3112

AOW@BU.EDU

JASMINE B. GONZALES ROSE

*PROFESSOR OF LAW AND*

*ASSOCIATE DIRECTOR OF POLICY*

NEDA A. KHOSHKHOO

*LAW & POLICY FELLOW*

CAITLIN GLASS

*LAW & POLICY FELLOW*

BOSTON UNIVERSITY CENTER FOR

ANTIRACIST RESEARCH

ONE SILBER WAY, EIGHTH FLOOR

BOSTON MA 02215

*\* COUNSEL OF RECORD FOR AMICUS CURIAE*

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