CASE NO. 23-11452

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PAMELA FLORENCE, ET AL.,
Plaintiffs-Appellants,

v.

DESHAWN GERVIN,
Defendant-Appellee.

Appeal from a Judgment of the U.S. District Court for the Middle District of Georgia, Case No. 1:21-CV-67

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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August 8, 2023

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule No. 26.1(a)(6), *amicus* certifies that the following persons have an interest in the outcome:

1. Cato Institute, *amicus curiae*
2. Matthew P. Cavedon, counsel for *amicus curiae*

The Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amicus*'s participation.

Respectfully submitted,

Dated: August 8, 2023

/s/ Matthew P. Cavedon

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

ARGUMENT

The district court correctly held that an arrest for a probation violation can serve as the basis for a malicious prosecution claim.[2] Malicious prosecution is a Fourth Amendment claim brought under 42 U.S.C. § 1983 and is sometimes also known as a "claim for unreasonable seizure pursuant to legal process."[3] It protects against wrongful incarceration.[4]

Last year in *Thompson v. Clark*, the Supreme Court held that the three elements of malicious prosecution today align with the elements of that tort as it existed in 1871, when Section 1983 was enacted[5]: (1) "the suit or proceeding" must lack probable cause; (2) it must be "malicious," meaning not just instituted without

[2] *See* Order, *Gervin v. Florence*, Case No. 1:21-CV-67, at *11–12 & n.4 (M.D. Ga. Mar. 31, 2023).

[3] *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022).

[4] *See id.* at 1338; *see also Blue v. Lopez*, 901 F.3d 1352, 1359–60 (11th Cir. 2018) ("Section 1983 . . . is not a disfavored cause of action. Rather, it was designed to provide a broad remedy for violations of federally protected civil rights such as those secured by the Fourth Amendment—including the right against unlawful seizure as embodied in a malicious-prosecution claim.").

[5] *See Thompson*, 142 S. Ct. at 1337; *see also id.* at 1340; *Heck v. Humphrey*, 512 U.S. 477, 484 (1994); *Luke v. Gulley*, 50 F.4th 90, 97 (11th Cir. 2022) (per curiam) ("A district court errs when it relies on modern tort law or the law of the forum state—for example, of Alabama, Georgia, or Florida—to resolve a claim . . . ."); *Blue*, 901 F.3d at 1358 ("[A] § 1983 malicious-prosecution claim is . . . governed by federal law, so it will produce the same outcome, regardless of the state in which it is brought.").

probable cause but "for a purpose other than bringing the defendant to justice," and (3) the proceeding must end "in the acquittal or discharge of the accused."[6]

Can the first element be satisfied by an arrest for a probation violation? Yes, based on the 1871 law of malicious prosecution—regardless of whether probation revocation is deemed civil or criminal (which the parties dispute). In its 1878 decision in *Stewart v. Sonneborn*, concerning a malicious prosecution claim arising out of a bankruptcy suit, the Supreme Court rejected "a distinction between actions for criminal prosecutions and civil suits" because both had "substantially the same elements."[7]

Earlier case law did reflect disagreement as to whether malicious prosecution was actionable for groundless civil suits, but even the narrower decisions recognized the claim where (as here) proceedings led to the plaintiff's arrest or the seizure of property. Very early American precedent adopted the broader approach: in 1808, Massachusetts's highest court accepted malicious prosecution claims based on groundless civil actions.[8] Riding circuit in 1816, Justice Bushrod Washington faced a narrower set of facts and held that malicious prosecution could be brought for a

[6] *Thompson*, 142 S. Ct. at 1338 (citation omitted). This Court has held that malice is established if the defendant violated the plaintiff's "Fourth Amendment right to be free from seizures pursuant to legal process." *Luke v. Gulley*, 975 F.3d 1140, 1144 (11th Cir. 2020).

[7] *Stewart v. Sonneborn*, 98 U.S. 187, 192 (1878).

[8] *White v. Dingley*, 4 Mass. 433, 435 (1808); *see also Lindsay v. Larned*, 17 Mass. 190 (1821).

civil suit where the plaintiff was held "to excessive bail."[9] But in 1828, New York's highest court adopted the broader approach and held that a malicious prosecution claim could be brought based on a civil-trespass summons because "an arrest and holding to bail are not indispensably necessary" for a malicious prosecution action.[10] A decade later, the same court held that a civil settlement did not preclude a malicious prosecution claim where the plaintiff had been arrested in connection with the purportedly baseless civil suit.[11] In 1836, Connecticut's highest court held that a malicious prosecution claim was available where there was a "malicious arrest, or a holding to bail for too large a sum, and for maliciously suing out and levying a writ of *fieri facias*," as well as for property attachment.[12]

In 1852, Illinois's highest court noted that while the term "malicious prosecution" might have "been more generally applied" to criminal cases, it had also "been often used . . . as applying to prosecutions of civil suits, in which the party has been maliciously arrested"; it was "undoubtedly true that the same rules apply in redressing the wrong, whether the injury complained of was a malicious arrest, either on a civil or a criminal charge."[13] "[T]he most technical authorities" of that era

[9] *Ray v. Law*, 20 F. Cas. 330, 331 (C.C. D. Pa. 1816).

[10] *Pangburn v. Bull*, 1 Wend. 345, 350 (1828) (N.Y. 1828).

[11] *See Burhans v. Sanford*, 19 Wend. 417, 418 (N.Y. 1838).

[12] *Whipple v. Fuller*, 11 Conn. 582, 584–85 (1836).

[13] *Burnap v. Marsh*, 13 Ill. 535, 541 (1852); *see also Collins v. Hayte*, 50 Ill. 353, 354 (1869).

sometimes declined to draw even any "nominal distinction."[14] In 1869—a mere two years before the advent of Section 1983—Vermont's highest court followed the broad approach and held that a malicious prosecution claim could be brought regardless of whether any property was attached.[15]

Claims based on civil suits remained available after the enactment of Section 1983 as well, with the only disagreement continuing to be whether malicious prosecution required an arrest or property attachment. In 1873, Kansas's highest court held that malicious prosecution could be brought even if a groundless civil proceeding had been voluntarily dismissed.[16] In 1877, Indiana's highest court held that malicious prosecution was available for guardianship suits alleging the plaintiff's insanity.[17] The next year, Kentucky's highest court upheld a malicious prosecution claim based on incarceration arising from a civil suit.[18] In 1884, Iowa's highest court limited malicious prosecution claims arising from civil suits to those causing arrest or property seizure.[19] The same year, California's highest court similarly rejected malicious prosecution claims based on civil actions if "no process

[14] *Burnap*, 13 Ill. at 541.

[15] *See Closson v. Staples*, 42 Vt. 209, 221–22 (1869).

[16] *See Marbourg v. Smith*, 11 Kan. 554, 563 (1873).

[17] *See Lockenour v. Sides*, 57 Ind. 360, 365 (1877).

[18] *See Woods v. Finnell*, 76 Ky. 628, 632 (1878).

[19] *Wetmore v. Mellinger*, 64 Iowa 741, 744 (1884).

other than the summons was issued."[20] But the more permissive approach sometimes prevailed as well; in 1889, Minnesota authorized malicious prosecution actions based on civil suits causing "no interference with [the plaintiff's] person or property."[21]

Summarizing the state of the law as of that year, the Ohio Supreme Court noted that there was disagreement among courts only as to cases "where there has been no deprivation of liberty, or of the possession, use, or enjoyment of property."[22] But "where there has been an unjustifiable and malicious seizure of the property of the complaining party, as well as of the person," there was "no question" that malicious prosecution was available.[23]

Not surprisingly, learned commentators agreed. Thomas Cooley's 1879 treatise on tort law recognized malicious prosecution suits based on civil arrests.[24] A dozen years later, Martin Newell wrote that malicious prosecution refers to criminal cases "commonly, *but not necessarily*."[25] He saw "no question" as to

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[20] *Eastin v. Bank of Stockton*, 66 Cal. 123, 126 (1884).

[21] *McPherson v. Runyon*, 41 Minn. 524, 525 (1889).

[22] *Pope v. Pollock*, 21 N.E. 356, 356 (Ohio 1889).

[23] *Id.*

[24] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 187 (Chicago: Callaghan & Co., 1879), *available at* https://bit.ly/457Kest.

[25] MARTIN L. NEWELL, A TREATIES ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS 6 (Chicago: Callaghan & Co., 1892) (emphasis added), *available at* GOOGLE BOOKS, https://bit.ly/45aZ8xE.

whether malicious prosecution could be brought for "an unjustifiable and malicious seizure."[26]

Of course, government-prosecuted criminal proceedings of any sort, including probation revocations, were rarer in 1871 than they are today.[27] Moreover, the line between civil and criminal proceedings was less clear when malicious prosecution's forebears first started developing in medieval English law.[28]

But even assuming that probation revocation were properly denominated as a civil proceeding for present purposes,[29] malicious-prosecution doctrine as of 1871

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[26] *Id.* at 35. The Appellant's brief cites Newell's language about malicious prosecution being generally unavailable for the baseless prosecution of an "ordinary" civil proceeding, but even one of the authorities he cites distinguished suits alleging "special damage." Appellant's Br. at 21 (citing *id.* at 32 (citation omitted)). The specific language about arrests is found three pages later.

[27] *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1367 (2021).

[28] *See* Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine*, 97 NW. U.L. REV. 439, 446 n.39 (2002); *see also Williams v. Aguirre*, 965 F.3d 1147, 1160 (11th Cir. 2020); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1221–27 & n.65 (1979).

[29] *But see Washington v. Durand*, 25 F.4th 891, 909 (11th Cir. 2022) ("A criminal prosecution was defined [in 1871] as '[t]he means adopted to bring a supposed offender to justice and punishment by due course of law.' . . . [A] prosecution was the instrument used to pursue punishment through the due course of law." (internal citation omitted)); *Gulley*, 975 F.3d at 1144 ("If a plaintiff establishes that a defendant violated his Fourth Amendment right to be free from seizures pursuant to legal process, he has also established that the defendant instituted criminal process against him . . . ."); *Black v. Wigington*, 811 F.3d 1259, 1267 (11th Cir. 2016) ("[T]he tort of malicious prosecution requires a seizure 'pursuant to legal process.' Legal process includes an arrest warrant." (internal citation omitted)); *Carter v. Gore*, 557 Fed. App'x 904, 906 (11th Cir. 2014) (per curiam) ("The issuance of a warrant—even an invalid one . . . —constitutes legal process, and thus, where an individual has been arrested pursuant to a warrant, his claim is for malicious prosecution . . . ."); *Whiting v. Traylor*, 85 F.3d 581, 585 (11th Cir. 1996) ("Obtaining an arrest warrant is one of the initial steps of a criminal prosecution. . . . [W]here seizures are pursuant to legal process, we agree with those circuits that say the common law tort 'most closely analogous' to this situation is that of malicious prosecution." (punctuation

would have covered the kind of claim that Appellee DeShawn Gervin seeks to assert in complaining of being arrested and jailed for 104 days without arguable probable cause.[30]

CONCLUSION

This Court should uphold the judgment below.

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omitted)); *cf. Manuel v. City of Joliet*, 580 U.S. 357, 367 (2017) ("If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.").

[30] *See* Order, *Gervin v. Florence*, Case No. 1:21-CV-67, at *2, 10, 13 (M.D. Ga. Mar. 31, 2023); *accord Johnson v. Shannon*, 484 F. Supp. 3d 1344, 1349 (N.D. Ga. 2020); *Williams v. Ga. Dep't of Corr.*, No. 1:11-CV-01296-AT, 2012 WL 12895637, at *10–12 (N.D. Ga. Dec. 18, 2012).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,036 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman typeface

/s/ Matthew P. Cavedon

Dated: August 8, 2023 *Counsel for Amicus Curiae Cato Institute*

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on August 8, 2023, he electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the Eleventh Circuit using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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