

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RODGER WAYNE PARKER,

Plaintiff-Appellee,

v.

COUNTY OF RIVERSIDE, ET AL.,

Defendant-Appellants.

On Appeal from the United States District Court
for the Central District of California, Riverside
No. 5:21-cv-01280-JDB-KK, Hon. Jesus G. Bernal

**BRIEF OF THE LAW ENFORCEMENT
ACTION PARTNERSHIP AS *AMICUS CURIAE*
SUPPORTING PLAINTIFF-APPELLEE**

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TABLE OF CONTENTS

	<u>Page(s)</u>
IDENTITY AND INTERESTS OF <i>AMICUS CURIAE</i>	1
INTRODUCTION	2
ARGUMENT	4
A. Blocking claims like Mr. Parker’s will corrode public trust and belief in the criminal justice system, delegitimize the system, and impair its functioning.....	4
B. The prosecutors in this case violated their public trust and did not objectively seek justice.....	7
C. Prosecutors must be held accountable for their misdeeds.	10
D. A conviction is not a prerequisite for a Section 1983 claim for wrongful incarceration resulting from a prosecutor suppressing exculpatory evidence.....	14
CONCLUSION.....	17

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Albright v. Oliver</i> , 510 U.S. 266 (1994)	15
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	7
<i>Biemel v. State</i> , 37 N.W. 244 (Wis. 1888).....	9
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	16
<i>Burnett v. Grattan</i> , 468 U.S. 42 (1984)	11
<i>Carrillo v. Cty. of LA</i> , 798 F.3d 1210 (9th Cir. 2015)	2, 5
<i>City of Riverside v. Rivera</i> , 477 U.S. 561 (1986)	12
<i>Frost v. New York City Police Department</i> , 980 F.3d 231 (2d Cir. 2020).....	16
<i>Herrera v. Zumiez, Inc.</i> , 953 F.3d 1063 (9th Cir. 2020)	2, 4
<i>Meister v. People</i> , 31 Mich. 99 (1875)	9
<i>Smith v. Almada</i> , 640 F.3d 931 (9th Cir. 2011)	16
<i>Smith v. Almada</i> , 623 F.3d 1078 (9th Cir. 2010)	15
<i>Soo Park v. Thompson</i> , 851 F.3d 910 (9th Cir. 2017)	16
<i>Tatum v. Moody</i> , 768 F.3d 806 (9th Cir. 2014)	14, 15

TABLE OF AUTHORITIES: (continued)

Page(s)

Statutes

42 U.S.C. § 1983..... 2, 3, 4, 17

Other Authorities

A Fiduciary Theory of Prosecution,
69 AM. U. L. REV. 805 (2020) 5, 8, 9

*Civil Rights Without Remedies: Vicarious Liability Under Title
VII, Section 1983, and Title IX,*
7 WM. & MARY BILL RTS. J. 755 (1999)..... 13

How Governments Pay: Lawsuits, Budgets, and Police Reform,
63 UCLA L. REV. 1144 (2016)..... 13

Inmate Litigation,
116 HARV. L. REV. 1555 (2003) 13

*Prosecutorial Discretion, Justice, and Compassion: Reestablishing
Balance in Our Legal System,*
52 STETSON L. REV. 31 (2022)..... 6, 8

Robert H. Jackson, *The Federal Prosecutor,*
31 J. CRIM. L. & CRIMINOLOGY 3 (1940) 7

The Liability Rule For Constitutional Torts,
99 VA. L. REV. 207 (2013) 13

*The Supreme Court Assumes Errant Prosecutors Will Be
Disciplined by Their Officers or the Bar: Three Case Studies
That Prove That Assumption WRONG,*
80 FORDHAM L. REV. 537 (2011) 11

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Law Enforcement Action Partnership (LEAP) is a nonprofit organization composed of former prosecutors, law enforcement officials, judges, corrections officials, and other criminal-justice professionals who seek to heal relations between the community and police, improve public safety, promote alternatives to arrest and incarceration, and address the root causes of crime all through sensible changes to the criminal-justice system.

LEAP holds a steadfast belief that the criminal justice system is compromised when the public cannot trust central figures of the system, such as prosecutors and law enforcement officers. In order to maintain the integrity of the system, the public must see and trust that those within the system are held accountable for wrongdoing. When communities believe that a prosecutor has acted duplicitously without facing repercussions, enforcing criminal laws becomes universally more difficult and dangerous for all criminal justice professionals. LEAP believes that the system requires more transparency and consistent accountability.

LEAP believes that the prosecutors' actions in this case fell short and undermined the immense power and responsibility prosecutors have. Criminal defendants facing deprivation of significant liberties deserve to have their Constitutional rights strictly respected. LEAP submits this brief in support of Plaintiff-

Appellee pursuant to Federal Rule of Appellate Procedure 29. All parties to this appeal have consented to the filing of this brief.¹

INTRODUCTION

This case will help determine whether victims of prosecutorial misconduct in the Ninth Circuit are afforded a mechanism to seek redress in Court. The legitimacy of the criminal justice system depends on allowing meritorious claims of wrongful incarceration resulting from the withholding of exculpatory evidence by prosecutors to go forward under 42 U.S.C. § 1983.

In the present case, this Court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1068 (9th Cir. 2020). This construction includes drawing “all reasonable inferences in favor of the non-moving party.” *Carrillo v. Cty. of LA*, 798 F.3d 1210, 1218 (9th Cir. 2015). Affirming the district court’s denial of judgment does not mean that Mr. Parker wins his civil rights claims; rather, a jury could still find in Defendant-Appellant’s favor. Affirming the district court’s denial simply allows Mr. Parker to make his case.

¹ No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person contributed money that was intended to fund the preparation or submission of this brief.

LEAP is concerned about pretrial detainees, including Plaintiff-Appellee Mr. Parker, who are wrongfully held in custody because a prosecutor withheld exonerating information from the defense. When prosecutors know that suppressing exculpatory evidence gives rise to potential liability, regardless of whether they achieve a conviction, prosecutors will be deterred from making such harmful choices.

The true role of a prosecutor is as an advocate for justice. Accordingly, LEAP considers it of singular importance that the law, which already compels prosecutors to disclose potentially exculpatory evidence, also provide a remedy for defendants wrongfully incarcerated due to prosecutors' deliberate failure to disclose material exculpatory information.

Providing defendants with a meaningful opportunity to pursue Section 1983 exculpatory evidence-based claims, with or without a conviction, affects every stakeholder in the criminal justice system. Regaining balance and rebuilding public trust in the legal system may be achieved through different reforms that help reestablish the reputation of prosecutors as the justice-seekers they are sworn to be. But critically, establishing meaningful, fair, and consistent repercussions for misconduct is perhaps the most obvious and straightforward solution. Such accountability is essential to maintaining trust between communities and the criminal justice system. Without that trust, communities will not turn to law enforcement when they are victimized, nor cooperate with legal authorities when perpetrators are brought to justice.

This Court should affirm the district court's denial of judgment of the Section 1983 claim and related pendant *Monell* claims.

ARGUMENT

A. Blocking claims like Mr. Parker's will corrode public trust and belief in the criminal justice system, delegitimize the system, and impair its functioning.

Mr. Parker was a completely innocent man held in custody for years on serious murder charges while supervisory prosecutors knew that he was likely innocent. As if that was not bad enough, when dispositive exculpatory evidence was discovered in the form of a full confession by the true killer, supervisory prosecutors ordered the trial prosecutor to suppress that evidence for months. If individuals like Mr. Parker have no redress for these wrongs, the already shaky public trust in the criminal justice system will further corrode, and understandably so. Without that trust, the public is less likely to cooperate with the system when necessary.

It is not necessary for this Court to decide whether or not Mr. Parker is likely to win on the merits of his claims. The Court need only decide whether Mr. Parker's claims survive Defendant-Appellant's motion for judgment. Here, the Court must review *de novo* the order on the motion for judgment. *Zumiez*, 953 F.3d at 1068. In doing so, the Court must "accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party." *Id.* "Where disputed issues of material

fact exist, [the Court] assume[s] the version of the material facts asserted by the non-moving party” and “draw all reasonable inferences in favor of the non-moving party.” *Carrillo*, 798 F.3d at 1218.

Research and experience show that when community members see civil rights violations go unremedied, their faith and trust in the criminal justice system plummets. Prosecutors and prosecutorial agencies must reflect on what it means for prosecutors to perform their work with care. Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 826 (2020). When prosecutors violate a community member’s civil rights and are not held legally accountable, no such reflection occurs and misconduct continues on undeterred.

Trust is the cornerstone of legitimacy. See Mike Hough et al., *Procedural Justice, Trust, and Institutional Legitimacy*, 4 POLICING: J. POL’Y & PRAC. 203, 204-05 (2010) (arguing that public trust in policing is needed because it results in institutional legitimacy and public commitment to rule of law); J. A. Hamm, R. Trinkner & J. D. Carr, *Fair Process, Trust, and Cooperation: Moving Toward an Integrated Framework for Police Legitimacy*, 44 CRIM. JUST. & BEHAV. 1183-1212 (2017) (describing trust as a critical contributor to administration of justice). If the public sees an imbalance of power in favor of unscrupulous prosecutors, this imbalance becomes “a threat to the legitimacy of the justice system as a whole because legitimacy is a natural outgrowth of trust, and trust is an outgrowth of perceived balance and fairness within the

system.” Anna D. Vaynman & Mark R. Fondacaro, *Prosecutorial Discretion, Justice, and Compassion: Reestablishing Balance in Our Legal System*, 52 STETSON L. REV. 31, 32 (2022).

Holding prosecutors accountable for civil rights violations builds trust with the community. Across institutional contexts (courts, businesses, schools), researchers have demonstrated consistent findings: public conclusions regarding legitimacy are tied most closely to judgments about the fairness of actions. Tracey L. Meares, *Trust & Models of Policing*, DAEDALUS, 165 (2022). People place much more weight on how authorities exercise power than the ends for which that power is exercised. *Id.* When people perceive that legal authorities are treating them fairly, they say they are more likely to comply, cooperate, and engage with the law and authorities’ directives. *Id.* Recent reforms support this idea that emphasizing trust and legitimacy with the public is an efficient, expansive, cost-effective way to achieve the goals of the criminal justice system, such as crime reduction and law compliance. *Id.* at 171.

Allowing claims like Mr. Parker’s to proceed is an important piece of the trust and legitimacy puzzle. When prosecutors are unaccountable for wrongful conduct like suppressing exculpatory evidence, the public will conclude that prosecutors cannot be trusted in general, the system will not protect their constitutional rights, and the legitimacy of that very system will corrode. The public will not want to engage or cooperate with authorities within

the system and the overall goals of crime reduction and administration of justice will fail.

B. The prosecutors in this case violated their public trust and did not objectively seek justice.

Mr. Parker suffered years of pretrial detention, for a crime that he did not commit because prosecutors flippantly disregarded their duty to the public and were instead motivated by their own political self-interests. Parker Answering Brief at 3-4. Rather than objective fact analysis and pursuit of the truth and justice, supervisory prosecutors worried only about the effect that a dismissal of the charges against Mr. Parker would have on their careers. *Id.* at 3-7. This is in direct conflict with the great trust the public places in prosecutors.

Prosecutors are not agents of convictions, but instead are “the servant[s] of the law,” tasked to both punish the guilty and ensure that the innocent do not suffer. *See Berger v. United States*, 295 U.S. 78, 88 (1935). In pursuing their role, prosecutors should be “diligent, strict, and vigorous in law enforcement,” but should also approach their “task with humility” and—above all—“be just.” *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4-6 (1940). Prosecutors must ensure that the “tremendous” discretion afforded to them be used responsibly. *Id.* at 3-6.

The primary duty of a prosecutor is not to convict, but to seek justice within the bounds of the law. Criminal Justice Standards for the Prosecution Function § 3-1.2(b) (Am. Bar Ass’n 2017),

https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/. Prosecutors serve “the public interest and should act with integrity and balanced judgment to increase public safety.” *Id.* Increasing public safety is accomplished not only by “pursuing appropriate criminal charges of appropriate severity,” but also by “exercising discretion to not pursue criminal charges in appropriate circumstances.” *Id.*

Prosecutors wield immense power and discretion in determining whether to charge an individual, how to investigate a crime, and what evidence to produce. This discretion, actionable in different ways at each stage of a case from investigation to prosecution, is increasingly seen by scholars and practitioners as far too extensive and easily abused for a system that purports to be balanced. Anna D. Vaynman & Mark R. Fondacaro, *Prosecutorial Discretion, Justice, and Compassion: Reestablishing Balance in Our Legal System*, 52 STETSON L. REV. 31, 31-32 (2022). The abuse in Mr. Parker’s case epitomizes these fears.

Prosecution was not always a public role. For centuries, prosecutions were conducted by private lawyers hired by aggrieved parties. Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 814 (2020). As a system of public prosecution developed, prosecutions “were thought to be brought in the public interest: the prosecutor ‘has as much a public duty to discharge as the sovereign himself, and has a public trust to exercise.’” *Id.* at 814.

In the older system of private prosecution, “[w]hen the defendant’s guilt was uncertain, a private lawyer might vigorously prosecute out of fidelity to the victim-client, if not as a matter of self-interest.” *Id.* at 815. However, public prosecutors are expected “to refrain from doing so to avoid convicting an innocent person.” *Id.*

In the transition from private prosecution to public prosecution, courts explicitly recognized this paramount concern. When declaring private prosecution unconstitutional, a court in Wisconsin explained, “[t]he prosecuting officer represents the public interests, *which can never be promoted by the conviction of the innocent.* His object, like that of the court, should be simply justice; and *he has no right to sacrifice this to the pride of professional success.*” *Biemel v. State*, 37 N.W. 244, 247 (Wis. 1888) (emphasis added); *see also Meister v. People*, 31 Mich. 99, 103-04 (1875) (arguing that prosecutors owe a “[d]uty of impartiality” that is inconsistent with the privately funded prosecution).

Since the very beginning of public prosecution in this country, courts have recognized that a prosecutor’s duty to *not prosecute or convict the innocent* is an integral part of his or her role in seeking justice. Unfortunately for Mr. Parker, the decision-making prosecutors in his case not only violated this duty, but actively worked against it. First, by ignoring the recommendations of trial-level prosecutors to dismiss the case; then worse, later by ordering the trial-level prosecutor to suppress critical dispositive

exculpatory evidence: the confession of the true killer. Parker Answering Brief at 3-7.

C. Prosecutors must be held accountable for their misdeeds.

It is extremely difficult to hold prosecutors accountable when they abuse their power. In the rare scenario that a prosecutor's misdeeds surface, criminal defendants have no agency to right those wrongs. Instead, they must rely upon the justice system itself to self-correct. Because of this difficulty, it is important that any and all avenues of holding prosecutors accountable remain available to those whose rights are violated through prosecutorial misconduct.²

“Prosecutorial misconduct can be so difficult to detect because when a prosecutor deliberately hides evidence of innocence from the defense, that evidence is intended to stay hidden, and too often does. But consequences for prosecutorial misconduct are also rare

²To bring a claim for malicious prosecution, Mr. Parker must allege that the government charged him without probable cause or initiated the prosecution with malice. Parker Answering Brief at 38. Mr. Parker has never alleged either of these. Instead, Mr. Parker alleges that material, exculpatory evidence was discovered and suppressed by prosecutors after the criminal charges were already filed. *Id.* Should this Court determine that the factual allegations are better suited to a malicious prosecution claim, then LEAP agrees with Mr. Parker's request that this Court remand with instructions to the district court to reconsider its decision to grant judgment on the pleadings as to the malicious prosecution claim. *Id.* at 37-40.

because the legal system as a whole makes it so difficult to impose meaningful sanctions on prosecutors, even when egregious misconduct is discovered.” Daniele Selby, *Only one prosecutor has ever been jailed for misconduct leading to a wrongful conviction*, The Innocence Project (Nov. 11, 2020), <https://innocenceproject.org/ken-anderson-michael-morton-prosecutorial-misconduct-jail/>. Study after study and report after report supports the harsh reality that prosecutors are very rarely subject to professional discipline, either internally within district attorney’s offices or externally by bar disciplinary committee, even for flagrant misconduct. See Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Officers or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 *FORDHAM L. REV.* 537, 539-543, 572 (2011) (summarizing various studies and reports concluding that discipline of prosecutors is very rare). A recent study of wrongful conviction cases found that only 4% of prosecutors were even mildly disciplined for their roles in wrongful conviction cases. Conviction Integrity Units, Nat’l Registry of Exonerations (June 14, 2022), <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx>.

Filing a civil rights claim is one avenue available for holding prosecutors accountable. But Section 1983 is a notoriously complex law, full of traps for the unwary. The Supreme Court recognized this in *Burnett v. Grattan*, 468 U.S. 42, 50-51 (1984):

Litigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel, or prepare to proceed pro se. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed in forma pauperis, and file and serve his complaint. At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery.

For persons wrongfully incarcerated who have standing to bring a civil rights claim, the difficulty is magnified. Such individuals may be dealing with loss of employment or income, loss of community support, loss of stable housing, and mental or physical health concerns arising from being incarcerated. Resolving these issues will, out of necessity, take priority over finding an attorney and considering litigation.

Allowing individuals like Mr. Parker to pursue 1983 relief where they were wrongfully detained because prosecutors suppressed exculpatory information will help reign-in this massive gap in accountability. Civil rights litigation in these contexts, whether ultimately successful or not, can fix areas rife with misconduct.

“[T]he damages a plaintiff recovers contribute[] significantly to the deterrence of civil rights violations in the future” by forcing government actors to internalize the costs of misconduct. *City of*

Riverside v. Rivera, 477 U.S. 561, 575 (1986). Government agencies naturally wish “to minimize the amount of their budget that is lost to paying damages,” and 1983 claims “give[] [these agencies] a greater incentive to monitor, supervise, and control the acts of their employees” to ensure that they are hewing to constitutional strictures. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 796 (1999); see also John C. Jeffries, Jr., *The Liability Rule For Constitutional Torts*, 99 VA. L. REV. 207, 240 (2013) (“[D]amages for constitutional violations . . . heighten the disincentives for governments to engage in conduct that might result in constitutional violations.”).

Furthermore, 1983 claims, and the information they uncover, “can trigger bad publicity” that puts pressure on policymakers to prevent constitutional violations. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1681 (2003). Indeed, “even for an agency that doesn’t care about payouts (perhaps because those payouts come from some general fund rather than the agency’s own budget), media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses.” *Id.*; see also Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1151 (2016) (noting that *Bivens* actions can put critical “nonfinancial pressures” on policymakers “by generating publicity about allegations of misconduct and by revealing

previously unknown information about the details of that misconduct”).

Holding prosecutors accountable for misdeeds is difficult. Numerous studies reveal the unfortunate fact that prosecutors are rarely held accountable for their misconduct, even when the misconduct leads to wrongful incarceration and wrongful convictions. Allowing individuals like Mr. Parker to pursue 1983 relief where they were wrongfully detained because prosecutors suppressed exculpatory information will help reign-in this massive gap in accountability.

D. A conviction is not a prerequisite for a Section 1983 claim for wrongful incarceration resulting from a prosecutor suppressing exculpatory evidence.

The government incorrectly urges the Court to rule that failure to disclose exculpatory evidence only be actionable under 1983 *where a conviction results*. However, this narrow reading of 1983 is flawed and fails to effectuate the protections contemplated by the statute. The more accurate and protective reading of the statute is that whenever an individual suffers a deprivation of liberty as a result of the suppression of exculpatory evidence, including pretrial suppression, there is a valid claim under 1983. *Tatum v. Moody*, 768 F.3d 806, 814-15 (9th Cir. 2014) (holding that the Fourteenth Amendment Due Process Clause protects plaintiff “from prolonged detention when the police, with deliberate indifference to, or in the face of a perceived risk that, their actions

will violate the plaintiff's right to be free of unjustified pretrial detention, withhold from the prosecutor's information strongly indicative of his innocence.”).

Lengthy pretrial incarceration that results from the suppression of exculpatory evidence is a denial of liberty without due process. *Id.* A due process claim arising from wrongful pretrial incarceration does not require that plaintiff have been subjected to trial or conviction. *Id.*

As the Supreme Court explained in *Albright v. Oliver*, 510 U.S. 266, 271 (1994), “Section 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’ The first step in any such claim is to identify the specific constitutional right allegedly infringed.” Mr. Parker’s constitutional right, infringed by the prosecutor’s suppression of exculpatory evidence, was his right to be free; the prosecutors violated his right to be free from unlawful and unreasonable detention.

Far from being a decided issue in this Circuit, this Court has thus far purposefully left this exact question open. In *Smith v. Almada*, 623 F.3d 1078, 1088 (9th Cir. 2010), this Court held that a defendant who is ultimately acquitted could not bring a 1983 claim for alleged *Brady* violations. However, shortly thereafter, the Court withdrew that opinion and superseded with a new opinion. 623 F.3d 1078 (9th Cir. 2010), *withdrawn and superseded by* 640 F.3d 931 (9th Cir. 2011). In that opinion, the Court explicitly

declined to decide whether a conviction is a prerequisite to a 1983 *Brady* based claim. *Smith v. Almada* 640 F.3d 931, 941-45 (9th Cir. 2011) (Gould, J., concurring) (noting that the majority opinion declined to decide whether “a conviction is a prerequisite to a *Brady* claim” partly because colleagues “urged that the issue be left open”).

Mr. Parker was subjected to serious criminal charges, incarceration, and a complete deprivation of his liberty for nearly four years for a crime that he did not commit while prosecutors failed to dismiss his case for self-interested reasons and suppressed exculpatory evidence. Parker Answering Brief at 3-4. His constitutional rights were clearly violated. The right to the disclosure of exculpatory evidence is not a minor one. In fact, it is so vital to ensuring that a criminal defendant has a fair trial that a prosecutor’s suppression of such evidence violates due process “irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This Court must not deny Mr. Parker and plaintiffs like him a 1983 remedy for the deprivation of his liberty caused by the suppression of exculpatory evidence.

This Court and others have recognized that lack of a conviction does not invalidate claims for this type of misconduct. *See Soo Park v. Thompson*, 851 F.3d 910, 923 (9th Cir. 2017) (“acquittal does not bar a Section 1983 action based on a due process violation during an underlying criminal proceeding”); *see also Frost v. New York City Police Department*, 980 F.3d 231 (2d Cir. 2020)

(“Notwithstanding the nomenclature, a criminal defendant’s right to a fair trial protects more than the fairness of the trial itself. Indeed, a criminal defendant can bring a fair trial claim even when no trial occurs at all.”).

Section 1983 is an effective tool for protecting these vital liberty rights. The Constitution provides for much more than a mere right to a fair trial. It ensures that the government cannot deprive an individual of his liberty without due process of law. It is beyond dispute that Mr. Parker was in fact wrongly deprived of his liberty without due process of law. Creating a requirement of a conviction before allowing him and others like him to bring a 1983 claim undermines the Constitution.

CONCLUSION

This Court should affirm the district court’s denial of the motion for judgment on the pleadings with respect to Mr. Parker’s 1983 claim based on the suppression of exonerating evidence and the related pendant *Monell* claims. Doing so merely allows Mr. Parker to pursue his claims. It is necessary for the legitimacy of the criminal justice system to allow meritorious claims of wrongful incarceration resulting from the withholding of exculpatory evidence by prosecutors to go forward under 42 U.S.C. § 1983. Victims of prosecutorial misconduct in the form of the suppression of exonerating evidence in the Ninth Circuit must be afforded a mechanism to seek redress in Court. Such a mechanism is necessary to maintain the legitimacy of the criminal justice system

in the eyes of the public and to hold prosecutors accountable to the public that they serve.

Dated: January 3, 2023

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE TO
FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 22-55614**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 4794 words as counted by the Microsoft Word 2007 word processing program used to generate this brief

Dated: January 3, 2023

/s/ Garrison M. Giali
Garrison M. Giali

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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BRIEF OF THE LAW ENFORCEMENT ACTION PARTNERSHIP AS
AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE

Signature /s/ Garrison M. Giali **Date** January 3, 2023
(use "s/[typed name]" to sign electronically-filed documents)