NO. 23-0210

IN THE UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

TRISTON JAX,

Plaintiff-Appellant,

v.

STANLEY M. WILDWOOD, IN HIS INDIVIDUAL CAPACITY,
AND TOWN OF SEA PINES,

Defendants-Appellees.

ON APPEAL FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

REPLY BRIEF FOR PLAINTIFF-APPELLANT

The Charles J. Ogletree, Jr. Memorial Team

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MARCH 5, 2024, 6:30 P.M.
THE AMES COURTROOM
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Oral Argument

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

ARGUMENT

I. This Court has jurisdiction.

Courts of appeals have jurisdiction over all "final decisions" of district courts. 28 U.S.C. § 1291. Building on this limited guidance, appellate courts have necessarily assessed finality using a functional, pragmatic approach. *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848). Equipped with "plain meaning," Appellee's Br. 8, Wildwood proposes replacing centuries of judicial experience with three underinclusive, unsupported theories. This Court should decline his invitation to innovate.

A. Jax dismissed the Town under Rule 41(a)(1)(A)(i).

Wildwood argues that Federal Rule of Civil Procedure 41(a)(1) does not permit plaintiffs to dismiss individual defendants. *Id.* at 9–10. On that view, Jax's claim against the Town "remains pending before the district court." *Id.* at 10. However, Rule 41(a)(1) allows a plaintiff to dismiss an action. And, unlike the other, separate federal rules on which Wildwood relies, Rule 41 consistently uses the word "action" to refer to all claims against a party.

"A word or phrase is presumed to bear the same meaning throughout a text." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012). Rule 41(b) and 41(a)(2) use the word "action" to mean all claims against a party.

Rule 41(b) permits a defendant to move to "dismiss the action or any claim against it" for failure to prosecute. If action means all claims against one party, Rule 41(b) allows the defendant to seek dismissal of all or some claims against it. That makes sense. But if action means the entire lawsuit, moving defendants could seek "dismissal of the action as to the nonmoving defendants." *Mantin v. Broad. Music, Inc.*, 248 F.2d 530, 531 (9th Cir. 1957). That is absurd. The moving defendant has "no standing" over claims not against himself. *Id.*

Rule 41(a)(2) also uses action to mean all claims against a party. Wildwood does not contest that district courts have the power to dismiss fewer than all defendants. Appellee's Br. 11. He suggests the power "originates in 41(b)." *Id.* But Rule 41(b) would provide the power *only* when the plaintiff fails to prosecute. Wildwood then suggests the power might not "derive[] from the text" at all. *Id.* The logical, textual approach, however, is to locate the power to dismiss fewer than all defendants in the relevant section of the federal rule entitled "Dismissal of Actions." Fed. R. Civ. P. 41. And that is Rule 41(a)(2).

Wildwood suggests that the majority view fails to uphold Rule 41's purpose: permitting early disengagement before the defendant invests significantly in the litigation. Appellee's Br. 11. But the case he cites says that a dismissed defendant is prejudiced only if he has "filed any responsive pleadings." *Exxon Corp. v. Md. Cas. Co.*, 599 F.2d 659,

662 (5th Cir. 1979). The Town has not filed any responsive pleadings, just a one-sentence motion to dismiss. JA-9. Rule 41 promotes early, low-cost disengagement. That is what happened here.

Wildwood maintains the Second and Sixth Circuits support his theory. Appellee's Br. 10. However, the Second Circuit abandoned this position decades ago. *Wakefield v. N. Telecom, Inc.*, 769 F.2d 109, 114 n.4 (2d Cir. 1985); *see Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (disregarding Wildwood's rule). The Sixth Circuit is internally split on 41(a). *See Banque de Depots v. Nat'l Bank of Detroit*, 491 F.2d 753, 757 (6th Cir. 1974).

Jax dismissed the Town under Rule 41(a)(1)(A)(i). The district court was left with nothing to do; judgment was final. Finding otherwise would drive federal claims into state court, where plaintiffs would enjoy an effective right to appeal. Wildwood's sole response is his unsound interpretation of Rule 41(a)(1).

B. Jax's claim against the Town is effectively excluded from federal court.

Wildwood concedes that voluntarily dismissing all claims against a defendant can confer finality if those claims are effectively excluded from federal court. Appellee's Br. 17. But Wildwood adds that such claims must have been effectively excluded *at the time of dismissal*. *Id.*

His approach misconceives appellate jurisdiction and fails to construe § 1291 practically.

"Jurisdiction is power to declare the law." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Under § 1291, "finality either exists at the time an appellate court decides the appeal or it does not." *Page Plus of Atlanta, Inc. v. Owl Wireless, LLC,* 733 F.3d 658, 662 (6th Cir. 2013). It follows that post-dismissal events can effectively exclude a claim from federal court, and thus render judgment final. The Supreme Court has implicitly endorsed this conclusion. In *The Three Friends*, the Court found a trial court's dismissal with leave to amend "not final" until the plaintiff "waive[d] the right to amend." 166 U.S. 1, 49 (1897) (predecessor statute).

Courts of appeals agree. Refusing to amend a claim dismissed with leave to amend can render an earlier order final. *See, e.g.*, *In re GNC Corp.*, 789 F.3d 505, 511 & n.3 (4th Cir. 2015). Renouncing the right to refile a dismissed claim, even at oral argument, can render an earlier order final. *See, e.g.*, *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776–77 (7th Cir. 1999). And dismissing a pendent state claim can render an earlier order final, even when jurisdiction existed at the time of dismissal under 28 U.S.C. § 1367(c). *Nation v. Piedmont Indep. Sch. Dist. No. 22*, No. 21-6123, 2022 WL 4075595, at *2 (10th Cir. Sept. 6, 2022).

Here, Jax's claim against the Town was effectively excluded from federal court upon dismissal. The claim lacks independent subject matter jurisdiction. Additionally, it is effectively excluded from *any* court. When Jax dismissed the Town, he risked that the statute of limitations would expire on his negligence claim. It will expire within two days of this Court hearing argument. Despite Wildwood's assertion otherwise, voluntarily dismissed state law claims are not subject to tolling under § 1367(d). *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 545–46 (2002). That is enough to confer finality.

C. This Court independently evaluates its jurisdiction under § 1291.

Wildwood claims that a district court's blessing is "mandatory" for finality. Appellee's Br. 12. Not so. It is the exclusive province of appellate courts to ensure that a district court order is final. *See Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

Section 1291 appeals require district court involvement to the extent that there must be some order for a final order to exist. When Congress wanted more from the district court, it spoke clearly. *See* 28 U.S.C. § 1292(b); Fed. R. Civ. P. 54(b). This was not an appeal under § 1292(b) or Rule 54(b).

Wildwood's reliance on *Page Plus* for the proposition that "district court involvement is a *necessary* condition for finality," Appellee's Br. 15, is misplaced. The sentence after the one Wildwood cites reads: "The

district court's views on finality at any rate matter *only* when expressed through a Rule 54(b) determination." 733 F.3d at 661 (emphasis added).

Wildwood also cites *Blue v. District of Columbia Public Schools*. Appellee's Br. 21–22. However, the case states: "[E]very circuit permits a plaintiff, in at least some circumstances, voluntarily to dismiss remaining claims or remaining parties from an action as a way to conclude the whole case in the district court and ready it for appeal." 764 F.3d 11, 17 (D.C. Cir. 2014).

In fact, a district court's blessing can even preclude finality. In *Horwitz v. Alloy Automotive Co.*, the court indicated that a voluntary dismissal may have conferred finality if the judge and parties had not schemed to "devise" a final order. 957 F.2d 1431, 1433 (7th Cir. 1992); *accord Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 688–90 (8th Cir. 1999). At bottom, "[a]ppealability under § 1291 often requires nothing remotely like entry of judgment," let alone the district court's approval. *Loc. P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1071 n.7 (7th Cir. 1981).

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If this Court wants a bright-line rule, it has one: Jax dismissed the remaining defendant and thus concluded the case. Additionally, and

independently, this Court can exercise jurisdiction because Jax's voluntarily dismissed claims are effectively excluded from federal court.

II. The district court erred by dismissing Jax's claim.

Jax and Wildwood agree: to ultimately recover damages on a Fourth Amendment malicious prosecution claim, a plaintiff must prove a lack of probable cause and an unlawful seizure. *Thompson v. Clark*, 596 U.S. 36, 43 n.2, 44 (2022). But the parties disagree as to the standards governing these elements. Wildwood's proposed rules are untested, ignore binding precedent, and wrongly exclude plaintiffs at the pleading stage.

A. No court has ever applied Wildwood's new rule.

Under the charge-specific rule advanced by Jax, if a single charge lacked probable cause, the lack-of-probable-cause requirement is satisfied. Wildwood first counters with the any-crime rule, under which malicious prosecution claims can never proceed where there was probable cause for at least one charge. Appellee's Br. 31–32. However, he retreats to an untested rule allowing malicious prosecution claims under the same circumstances if the plaintiff proves seizure at the pleading stage. *Id.* at 32–33, 52.

Wildwood's new rule supposedly comes from a footnote in *Howse v. Hodous*, 953 F.3d 402, 409 & n.3 (6th Cir. 2020). Not only does *Howse* itself not apply this rule, but no court reads *Howse* that way. *See, e.g.*, *Peterson v. Smith*, No. 18-12838, 2021 WL 1556863, at *11–13 (E.D.

Mich. Feb. 1, 2021). Under *Howse*, "probable cause for a single charge automatically" defeats a malicious prosecution suit. Brief for the United States as Amicus Curiae Supporting Vacatur at 11, *Chiaverini v. City of Napoleon*, No. 23-50 (Feb. 7, 2024). Crucially, Wildwood cannot point to a single case applying his new rule.

B. Neither the any-crime rule nor Wildwood's new rule follow *Thompson*.

To define a tort under 42 U.S.C. § 1983, a court must first look to the most analogous tort as of 1871 and then consider the values and purposes of the relevant constitutional amendment. *Thompson*, 596 U.S. at 48. Only the charge-specific rule satisfies *Thompson*'s command.

1. History supports the charge-specific rule.

Wildwood's discussion of the modern tort of false arrest, Appellee's Br. 32, ignores the Supreme Court's demand for historical analysis. He thus concedes that common law malicious prosecution is the appropriate historical analogue. *Id.*

Wildwood makes no attempt to prove that either of his rules governed malicious prosecution claims in 1871. Instead, he attacks the applicability of the historical charge-specific rule to modern cases. Wildwood argues that the charge-specific rule was "developed in the context of faulty civil suits." *Id.* at 40. But the charge-specific rule governed cases arising from criminal charges. J.I. Hare & H.B. Wallace, American Leading Cases 208 (4th ed. 1857) (citations omitted) (noting

malicious prosecution claims may proceed even "[i]f some, only, of the charges in an indictment for felony are without probable cause"). Wildwood acknowledges that Jax cited a case for this proposition. *See* Appellee's Br. 40; *Boogher v. Bryant*, 86 Mo. 42, 50 (1885). And his argument that the tort addressed reputational harms, not unreasonable seizures, Appellee's Br. 41, contradicts *Thompson*. There, the Supreme Court declared that the "malicious prosecution tort protected against injury to the person[] as connected with false imprisonment *and* against a wrong to character or reputation." 596 U.S. at 44 (emphasis added) (citations and internal quotation marks omitted).

2. The charge-specific rule protects the values of the Fourth Amendment.

Preventing the arbitrary exercise of government power and protecting law enforcement from excessive litigation are values of the Fourth Amendment. *Id.* at 48–49. Contrary to Wildwood's suggestion, *see* Appellee's Br. 36–37, the Supreme Court has always held the Fourth Amendment protects against "arbitrary power." *Carpenter v. United States*, 585 U.S. 296, 305 (2018) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). *Thompson* recognized this principle, explaining that an individual's "ability to seek redress for a wrongful prosecution cannot reasonably turn on the fortuity of whether the prosecutor" explains the dismissal of false charges. 596 U.S. at 48.

Wildwood mistakes the valid exercise of discretion for arbitrariness under the Fourth Amendment. He notes that a prosecutor is permitted to drop valid charges to expedite trial or institute new, substantiated charges during plea bargaining without explanation. Appellee's Br. 36. Those are valid exercises of discretion. The institution of false charges is not.

The charge-specific rule also keeps law enforcement protected. Wildwood does not dispute that, under the charge-specific rule, plaintiffs must still prove the absence of probable cause and that officers retain qualified immunity. *See id.* at 34–38.

C. *Twombly* forecloses Wildwood's pleading standard.

Wildwood demands plaintiffs provide "plausible proof of an unreasonable seizure" to state a claim. *Id.* at 52. That standard contravenes *Bell Atlantic Corp. v. Twombly*, which only requires a claim "plausible on its face." 550 U.S. 544, 570 (2007). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." *Id.* at 556. Additionally, a plaintiff need not plead each element of the claim and allege corresponding facts. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014). Nor is "heightened fact pleading of specifics" required. *Twombly*, 550 U.S. at 570. Accordingly, a plaintiff states a Fourth Amendment claim by alleging a false charge and pretrial detention.

1. Wildwood's pleading standard is underinclusive.

Wildwood has created an almost impossible standard. He wants Jax to know (1) whether he would have been detained pretrial without the fabricated resisting arrest charge; and (2) if he had, what bail would have been set. *See* Appellee's Br. 50. The record contains no publicly available guidance about bail in Ames. Without discovery, Jax could not make factual allegations about whether or for how long he would have been detained without the false charge. Any assertions that the resisting arrest charge was the but-for cause of Jax's detention would have been struck as conclusory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

With discovery, plaintiffs can prove their claims. They can depose prosecutors and discern their bail recommendations. *See, e.g.*, *Colonies Partners LP v. County of San Bernardino*, No. 5:18-cv-00420, 2019 WL 7905894, at *4–5 (C.D. Cal. Dec. 5, 2019). Plaintiffs can also obtain bail hearing transcripts, depose court staff, and secure relevant emails. *See, e.g.*, *Dixon v. City of St. Louis*, No. 4:19-cv-0112, 2021 WL 4709749, at *3 (E.D. Mo. Oct. 8, 2021). With such evidence, plaintiffs can estimate what bail would likely have been. *See id.* at *5. Ultimately, a plaintiff must establish—by a preponderance of the evidence—that the false charge caused an incremental seizure. If after discovery he cannot show a genuine issue of material fact, only then should his claim fail.

Wildwood implies that courts can determine incremental seizure without evidence when the false charge is more "serious." Appellee's Br.

50. He gestures at *Williams v. Aguirre*, where the plaintiff spent longer in pretrial detention than the maximum sentence of the justified charge. 965 F.3d 1147, 1162 (11th Cir. 2020). Turning the facts of *Williams* into a new rule would be substantially underinclusive. There is "no bright-line limit" on the length of pretrial detention. *Mushwaalakbar v. Commonwealth*, 169 N.E.3d 184, 192 (Mass. 2021). Additionally, even when pretrial detention is shorter than the possible sentence for legitimate charges, a false charge can plausibly create or extend seizure. At any rate, *Williams* applied the charge-specific rule and explicitly rejected Wildwood's heightened pleading standard. 965 F.3d at 1161.

Without explanation, Wildwood claims that a false murder charge tacked onto a justifiable jaywalking charge would be cognizable under his rule. Even if that were true, he ignores all offenses between these two extremes, because his rule cannot accommodate them. How a court would navigate, at the pleading stage, cases involving several misdemeanors, felonies, or both under Wildwood's standard remains unclear.

2. Jax plausibly alleged seizure.

Jax faced a fabricated resisting arrest charge, satisfying the lack-of-probable-cause element under the charge-specific rule. He also spent thirty-seven days in pretrial detention because he could not afford bail. JA-6. Alleging these facts together produces the reasonable inference of incremental seizure. That is enough to state a claim. Citing only the

offenses charged, Wildwood maintains that $10,000 bail was discretionary and thus reasonable, indicating no incremental seizure occurred. Appellee's Br. 50. This argument fails.

Wildwood addresses the wrong question. The issue is not whether bail was reasonable but whether, absent Wildwood's fraud on the court, it could plausibly have been low enough for Jax to afford. Wildwood charged Jax with a violent crime that also indicated flight risk. Therefore, it is more than plausible a judge would have used her discretion to set a lower bail absent the false charge.

Wildwood's bare reliance on the punishments associated with Jax's other charges is unavailing. *Id.* at 49–50. First, Wildwood identifies no jurisdiction where bail only depends on sentences and fines attached to charged crimes. *See id.* He does not address Jax's point that bail and punishment serve entirely distinct purposes. *Id.* Second, Wildwood does not rebut that violence and flight risk drive bail determinations. *Id.* at 50–52. He concedes the only violent charge Jax faced was the false resisting arrest charge. *See id.* And he has no response to the fact that courts specifically invoke resisting arrest as at least one factor indicating flight risk. *See id.* Third, Wildwood does not contest the empirical evidence that each additional charge, regardless of its nature, increases bail. *See id.* at 49–52.

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It is more than plausible that without the fabricated resisting arrest charge, Jax may not have been detained at all. He should be given discovery to prove it.

CONCLUSION

This Court should reverse and remand for additional proceedings.

February 26, 2024

Respectfully submitted,

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