No. 122654

IN THE
SUPREME COURT OF ILLINOIS

ALAN BEAMAN,

Plaintiff-Appellant,

v.

TIM FREESMEYER, Former Normal Police Detective; DAVE WARNER, Former Normal Police Detective; FRANK ZAYAS, Former Normal Police Lieutenant; and TOWN OF NORMAL,

Defendants-Appellees.

On Appeal From The Appellate Court of Illinois, Fourth District,
No. 4-16-0527,
There Heard On Appeal From the Circuit Court of McClean County, Illinois,
No. 14 L 51,
The Honorable Richard L. Broch, Judge Presiding

BRIEF OF *AMICI CURIAE* CITY OF CHICAGO, ILLINOIS MUNICIPAL LEAGUE, ILLINOIS PROSECUTORS BAR ASSOCIATION, ILLINOIS STATE'S ATTORNEYS ASSOCIATION, INTERGOVERNMENTAL RISK MANAGEMENT AGENCY, AND CITY OF PEORIA IN SUPPORT OF DEFENDANTS-APPELLEES TIM FREESMEYER, ET AL.

EDWARD N. SISKEL
Corporation Counsel
of the City of Chicago
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-0746
kerrie.maloney_laytin@cityofchicago.org
appeals@cityofchicago.org

BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
KERRIE MALONEY LAYTIN
Assistant Corporation Counsel
Of Counsel*

[*Additional Counsel Listed Inside Cover]

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Carolyn Taft Grosboll
SUPREME COURT CLERK

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

Illinois Municipal League:
Patrick W. Hayes
General Counsel
Illinois Municipal League
500 East Capitol Avenue,
P.O. Box 5180
Springfield, IL 62705
(217) 525-1220
phayes@iml.org

Illinois Prosecutors Bar Association:
Lee Roupas
President
Illinois Prosecutors Bar Association
P.O. Box 114
Wheaton, IL 60187
(708) 204-7951
illinoispba@gmail.com

Illinois State's Attorneys Association:
John Milhiser
President
Illinois State's Attorneys Association
P.O. Box 115
Springfield, IL 62705
(217) 753-6398
ilstatesattorneysassociation@gmail.com

Intergovernmental Risk Management Agency:
Margo Ely
Executive Director, IRMA
4 Westbrook Corporate Center
Westchester, IL 60154
(708) 236-6333
margoe@irmarisk.org

City of Peoria:
Donald B. Leist
Corporation Counsel
City of Peoria Legal Department
City Hall
419 Fulton Street, Room 200
Peoria, IL 61602-1276
(309) 494-8592
dleist@peoriagov.org

POINTS AND AUTHORITIES

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INTEREST OF *AMICI CURIAE*

The City of Chicago is the largest municipality in the State of Illinois. With over 12,000 police officers, Chicago has the largest police department in the State and second largest police department in the country. See Chicago Police Department Annual Report, 2010: A Year in Review, at 54; U.S. DOJ, Bureau of Justice Statistics, Census of State and Local Law Enforcement Agencies, 2008, at 14 (July 2011).[1]

The City of Peoria has a population of 114,269 as of 2016 and a police department with approximately 215 sworn members. The men and women of the Peoria Police Department are dedicated to building a strong Peoria through the delivery of exemplary service with a focus on problem solving and are committed to enhancing the quality of life in Peoria's neighborhoods by building a partnership with the community they serve.

The Illinois Municipal League ("IML") is a not-for-profit, non-political association of 1,262 municipalities in the State of Illinois. State statute designates IML as the instrumentality of its members. See 65 ILCS 5/1-8-1. IML's mission is to articulate, defend, maintain, and promote the interests and concerns of Illinois municipalities. IML regularly files *amicus curiae* briefs in cases that present questions of interest and concern to IML's members. Both Chicago and Peoria are members of IML.

[1] Reports available at https://home.chicagopolice.org/wp-content/uploads/2014/12/2010-Annual-Report.pdf (last visited April 19, 2018) and https://www.bjs.gov/content/pub/pdf/csllea08.pdf (last visited April 19, 2018).

The Illinois Prosecutors Bar Association is an organization created to advance the professional interests of prosecutors through membership services, publications, advocacy and philanthropy; to promote justice and fairness; and to safeguard victim's rights.

The Illinois State's Attorneys Association is a professional association that provides legal training and legislative support to all Illinois State's Attorneys.

The Intergovernmental Risk Management Agency is a non-profit, member-owned joint self-insurance risk pool consisting of 72 local governments and special service districts in northeastern Illinois, which provides comprehensive insurance coverage and risk management and training services to its members.

Each of the municipal and prosecutorial *amici* has a direct interest in the meaning of the "commence or continue" element of a malicious prosecution action, which is the primary issue presented in this appeal. The court's resolution of that issue has the potential to affect the manner of conducting police investigations and the way in which municipal police departments and prosecutors cooperate with each other in criminal investigations and prosecutions. In addition, Illinois municipalities regularly face malicious prosecution claims against their police officers. Chicago, in particular, is often involved in litigation on this issue, and its familiarity with malicious prosecution claims can assist the court in resolving the issues presented here.

The *amici* also offer a unique perspective by presenting the collective views of law enforcement officers and currently active Illinois prosecutors, who must work together every day in criminal matters, and who, accordingly, can offer the court important insights that will be helpful to the resolution of this case.

ISSUES PRESENTED

Amici curiae address the following issues:

1. Whether the appellate court's formulation of the standard for the "commence or continue" element of a malicious prosecution claim fits comfortably within the historical meaning of this element, which has always required the malicious prosecution plaintiff to prove that the defendant's conduct was the legal cause of the commencement or continuation of the prosecution.

2. Whether this court should reject the broader standard proposed by plaintiff-appellant Alan Beaman and his *amici curiae*, under which any defendant who plays a "significant role" in a prosecution satisfies the "commence or continue" element, because it departs from the historical meaning, is unnecessarily broad, and would be bad public policy.

ARGUMENT

Illinois law has consistently required a showing that a malicious prosecution defendant's actions be the legal cause of the commencement or continuation of a criminal proceeding to satisfy the first element of the claim.

Beaman and his *amici* seek to substantially broaden this standard. They urge a standard that applies to any police officer who simply plays "a significant role in a prosecution." Brief Of Former Prosecutors As *Amici Curiae* In Support Of Plaintiff-Appellant Alan Beaman 5 [hereafter, "Former Prosecutors Br."]; see also Brief Of Plaintiff-Appellant Alan Beaman 21 [hereafter "Beaman Br."] (anyone who "set[s] the trajectory of a wrongful prosecution"). Thus, police officers could potentially be held liable for malicious prosecution regardless whether their conduct is the cause, in the legal sense, of the commencement or continuation of the prosecution. But contrary to the assertions made by Beaman and his *amici*, the amorphous "significant role" test is not a longstanding test, and their interpretation of it would radically depart from the historical framework.

Below, we first trace the history of the "commence or continue" element to demonstrate that Illinois law has consistently required strict legal causation. Next, we explain that Beaman's broader standard is unnecessary to address police misconduct, is unworkable, would impede criminal investigations, and would deter cooperation between law enforcement officers and prosecutors.

I. THE HISTORY OF THE "COMMENCE OR CONTINUE" ELEMENT DEMONSTRATES THAT ILLINOIS LAW REQUIRES STRICT LEGAL CAUSATION.

Despite variations in wording for the "commence or continue" element of malicious prosecution claims, Illinois courts have hewed closely to the

requirement for legal causation and have not permitted actions to proceed where it was absent. The entirety of Illinois case law can be harmonized within this framework. The "significant role" test, on the other hand, is of relatively new origin and was never intended to depart from the remainder of Illinois law. Indeed, cases using that test also always required strict legal causation. We explain each point in turn.

A. The "Commence Or Continue" Element Has Always Required The Defendant's Conduct To Be The Legal Cause Of The Commencement Or Continuation Of Criminal Proceedings.

Historically, what is now the "commence or continue" element was originally stated as two separate elements: "(1) the commencement or continuance of an original criminal or civil judicial proceeding, [and] (2) its legal causation by the present defendant against [the] plaintiff who was the defendant in the original proceeding." Freides v. Sani-Mode Manufacturing Co., 33 Ill. 2d 291, 295 (1965); accord, e.g., Geisberger v. Vella, 62 Ill. App. 3d 941, 943 (2d Dist. 1978); Pratt v. Kilborn Motors, Inc., 48 Ill. App. 3d 932, 933 (4th Dist. 1977); see also Jones-Huff v. Hill, 208 F. Supp. 3d 912, 923 n.3 (N.D. Ill. 2016) (citing Freides for this proposition). Stating the requirements this way highlighted that the defendant's actions must be the legal cause of either the commencement or continuation of the criminal proceeding before the plaintiff has satisfied this element of the claim. Over time, these two elements collapsed into what is now universally stated as a single element: "the commencement or continuance of an original criminal or civil judicial

proceeding by the defendant." E.g., Swick v. Liautaud, 169 Ill. 2d 504, 512 (1996). Despite this shift in wording, the requirement to demonstrate that the defendant's actions legally caused the commencement or continuation of the proceeding has remained.

Commencing a criminal proceeding requires some official action, such as "a complaint, an information, or an indictment." Randall v. Lemke, 311 Ill. App. 3d 848, 850 (2d Dist. 2000); accord, e.g., Mulligan v. Village of Bradley, 131 Ill. App. 3d 513, 516 (3d Dist. 1985); see also 725 ILCS 5/111-1 (defining methods of commencing criminal proceedings); 720 ILCS 5/2-16 (defining criminal prosecution as "commencing with the return of the indictment or the issuance of the information"). Thus, the historical formulation requires the plaintiff to show that the malicious prosecution defendant's actions legally caused the official action (the complaint, information, or indictment) that instituted proceedings.

In cases where the malicious prosecution defendant is the one who directly issued the complaint, information, or indictment, there is no difficulty in determining the person responsible for commencing the prosecution, and legal causation is plainly present. In the 1800s, "it was common for criminal cases to be prosecuted by private parties." Rehberg v. Paulk, 566 U.S. 356, 364 (2012). Accordingly, the common law recognized that "a private complainant who procured an arrest or prosecution could be held liable in an action for malicious prosecution if the complainant acted with malice and

without probable cause." Id. Indeed, in one of this court's earliest cases on this topic, Hurd v. Shaw, 20 Ill. 354 (1858), this court rejected a malicious prosecution claim, in part, because "[i]t nowhere appear[ed] from the evidence that [the private defendant] was the prosecutor of this charge, or that he originated the indictment." Id. at 355. The defendant instead was the principal witness, id., and to avoid discouraging "set[ting] on foot a criminal prosecution," this court required a showing "that the defendant was the prosecutor," id. at 356; see also id. ("[A]ll proper guard and protection should be thrown around those who, in obedience to the mandates of duty, may be compelled to originate and carry on a criminal prosecution, which may, from any cause, terminate in favor of the accused.").

Whether someone who did not personally take the official action instituting proceedings should be responsible for causing a prosecution is less clear cut, and that is the situation presented in this case. In Gilbert v. Emmons, 42 Ill. 143 (1866), this court confronted whether a defendant who did not directly initiate the criminal proceedings could be liable where it was his business partner who began the prosecution by swearing out the affidavit needed to issue the warrant and "direct[ing] the officer in its execution." Id. at 146. The court explained that the defendant could be liable only if "he either directly participated in causing the arrest, or advised it to be made." Id. As the court explained, the defendant's merely having knowledge of or consenting to the actions of his business partner was insufficient unless that

"'consent' should be of so active and positive a character as to amount to advice and co-operation." Id. at 147. In other words, if the defendant took some affirmative action to "advise and encourage the arrest" effectuated by his business partner, which in turn led to the prosecution, then the defendant could be liable. Id. But if he merely allowed his partner "to follow the dictates of his own judgment, without interference on his part," then he would not be liable. Id. The court remanded for a new trial to decide that question. Id. Thus, in a case in which someone else took the official action initiating the proceedings, this court endorsed the requirement that the defendant's actions must legally cause the initiation of the criminal proceeding. Moreover, Gilbert is the origin of the test requiring "active and positive" consent or cooperation.

In the decades after 1871, "the prosecutorial function was increasingly assumed by public officials," and the common law began recognizing that "public prosecutors, unlike their private predecessors" have absolute immunity "from the types of tort claims that an aggrieved or vengeful criminal defendant was most likely to assert, namely, claims for malicious prosecution or defamation." Rehberg, 566 U.S. at 365. This shift required the aggrieved criminal defendant to seek other defendants to hold responsible besides the person who took the official action instituting proceedings. Thus, today, most malicious prosecution defendants are either private individuals whose conduct led to the criminal proceeding in some manner, or law

enforcement officers. And with regard to law enforcement officers, they may either directly institute criminal proceedings or simply perform the investigatory functions necessary to inform a prosecutor's decision to initiate criminal proceedings. When they serve in this latter capacity, there is no reason to treat law enforcement defendants differently from private individuals. Instead, the question should be the same for both types of defendants – whether their conduct legally caused the official to take the action that instituted the criminal proceedings.

Indeed, with respect to both private individuals and law enforcement officers, Illinois courts have never strayed from requiring that the defendant's actions must have been the legal cause of the official action instituting the proceeding. In Freides, for example, this court plainly stated the requirement to prove "legal causation [of the criminal action] by the present defendant." 33 Ill. 2d at 295. Applying that principle, the court allowed a jury verdict for the plaintiff to stand, in part, because the jury could have concluded that the private defendant satisfied this requirement by acting on his own suspicion in contacting the State's Attorney, id. at 297, and falsely claiming that the plaintiff had converted his property, id. at 293. In other words, the State's Attorney would not otherwise have had a basis to initiate the prosecution but for the defendant's false claim.

Since Freides, Illinois appellate courts likewise have adhered strictly to the legal causation requirement, and this is so despite variations in wording

for the test, and regardless whether the defendant was a private individual or a law enforcement officer. In De Correvant v. Lohman, 84 Ill. App. 2d 221 (1st Dist. 1967), the defendants were three deputy sheriffs, only one of whom had signed the complaint charging the plaintiff with assault and battery. Id. at 224-26. The First District applied this court's test from Gilbert – requiring proof that the defendant either "initiated the criminal proceeding or . . . his participation . . . was of so active and positive a character as to amount to advice and co-operation" – to determine whether each defendant legally caused the initiation of the criminal proceeding. Id. at 228 (citing Gilbert, 42 Ill. at 147). The answer was clear for the deputy sheriff who actually signed the criminal complaint, and the claim against him was sent back for a new trial. Id. at 230-31. As to the others, one deputy only testified about events "irrelevant to the offense charged," and there was no evidence he urged bringing the prosecution or "was instrumental in [its] initiation." Id. at 229. Likewise, the other deputy "did not arrest the plaintiff or sign the complaint[,] . . . and there [was] no evidence that he directly participated in causing the prosecution or advising it to be made." Id. The court rejected liability for both. Id.

Subsequently, Pratt and Geisberger addressed private defendants who provided information about the crime to the official (either prosecutor or police officer) who, in turn, charged the underlying offense. Geisberger, 62 Ill. App. 3d at 942; Pratt, 48 Ill. App. 3d at 934. Each court followed Freides in

requiring a showing that the defendant's actions were "the legal caus[e]" of the criminal proceeding. Geisberger, 62 Ill. App. 3d at 943; accord Pratt, 48 Ill. App. 3d at 933.

In Pratt, the Fourth District looked to the Restatement of Torts to articulate legal causation requirements, 48 Ill. App. 3d at 935-36, and this is the origin of the "direct, request, or pressure" formulation. The court explained that "'if it is left entirely to [the prosecutor's] discretion to initiate the proceedings,'" then merely supplying information to the prosecutor is insufficient, "'even though the information proves to be false'" and "'a reasonable man'" would not have believed it. Id. at 935 (quoting Restatement of Torts, Explanatory Notes § 653, comment g, at 386 (1938)). In contrast, the defendant can be held responsible "'for the initiation of proceedings by a public official'" if "'his desire to have the proceedings initiated[,] expressed by direction, request, or pressure of any kind[,] was the determining factor in the official's decision,'" or if he supplied information "'known to be false'" that made it impossible for the official to intelligently exercise independent discretion in charging the offense. Id. at 936 (quoting Restatement of Torts, Explanatory Notes § 653, comment g, at 386 (1938) (emphasis added)). Because the Pratt defendants did not "contro[l] the discretion of the prosecutor," and "the legal cause" was "the act of the prosecutor in bringing the information on the mistaken belief that the facts stated to him by the defendants constituted a deceptive practice," the defendants were not liable.

Id.

Likewise, in Geisberger, the Second District cited Pratt for the proposition that attributing the official's actions in instituting the criminal proceeding to the defendant required "a showing that [the defendant] requested, directed, or pressured the officer into swearing out the complaint for the plaintiff's arrest or . . . knowingly gave false information to the police." 62 Ill. App. 3d at 943. Because there were no such allegations in the complaint, the plaintiff failed to state a claim. Id. at 943-44.

The First District, in Denton v. Allstate Insurance Co., 152 Ill. App. 3d 578 (1st Dist. 1986), similarly adhered to Freides's requirement that the defendant must legally cause the official action instituting the criminal proceeding, but it fleshed out that requirement by combining all the various formulations for legal cause the courts had articulated to date. Id. at 583. In so doing, it relied without distinction on cases with both private and law enforcement defendants. Id. It relied on the formulation from Gilbert requiring that either the defendant initiate the proceeding or his "participation" in initiating the proceeding must be "of so active and positive a character as to amount to advice and cooperation." Id. (citing De Correvant, which, in turn, cited Gilbert, see De Correvant, 84 Ill. App. 2d at 228). It also cited the Restatement's formulation requiring that the defendant "requested, directed, or pressured an officer into swearing out a complaint for plaintiff's arrest, or that [the] defendan[t] knowingly gave false information to the

police." Denton, 152 Ill. App. 3d at 583 (citing Geisberger, which adopted that test from Pratt, see Geisberger, 62 Ill. App. 3d at 943, which, in turn, adopted it from the Restatement of Torts, see Pratt, 48 Ill. App. 3d at 936). Applying these tests, the court held that the defendant could not be held responsible for commencing the criminal proceeding because there was no evidence he knowingly supplied false information to the officer who swore out the complaint, and he did not request, direct, or pressure the officer into filing the complaint. Denton, 152 Ill. App. 3d at 583-84.

Crucial to all these various formulations of legal cause is that the defendant's intentional conduct must interfere with the independent discretion of the official whose actions initiated the prosecution – with the result that the official action could be considered based on or directly caused by the defendant's conduct. Illustratively, in Randall, the Second District explained that if a defendant "*knowingly* gives false information" to the official causing him to "swea[r] out a complaint," the official's actions instituting the proceeding are attributable to the defendant. 311 Ill. App. 3d at 850 (emphasis in original). Thus, it is fair to say that a prosecution "'*based upon*'" false information is caused by the person providing the false information, and not by the prosecutor, where the prosecutor does not know the correct facts to exercise independent discretion whether to initiate the prosecution. Id. at 851 (quoting Restatement (Second) of Torts § 653, comment g, at 409 (1977)) (emphasis in original); accord Pratt, 48 Ill. App. 3d

at 936 (quoting Restatement and requiring conduct "negat[ing] the prosecutor's exercise of discretion"). But this did not occur in Randall, because the charges filed "had nothing to do with the [false] information that defendant allegedly reported to the police." 311 Ill. App. 3d at 851. There was no linkage between the defendant's conduct, however wrongful, and the official action commencing the prosecution, because the prosecution was not "'based upon'" the false information the defendant supplied, but "upon separate information" about a different offense. Id. (quoting Restatement (Second) of Torts § 653, comment g, at 409 (1977)). Significantly, the court rejected the argument "that but for defendant's alleged [false] report, the police would not have investigated plaintiff, and plaintiff would not have been prosecuted," as a basis for liability, because the investigation had independently gathered information leading to the charges. Id. Thus, Randall supports that even investigatory misconduct, such as supplying false information leading to an investigation, is insufficient for a malicious prosecution claim unless that false information, in turn, is the basis for the official's decision to commence the prosecution.

Federal cases addressing Illinois law are in accord with this understanding of legal causation as requiring a showing that but for the defendant's intentional misconduct, the official action instituting proceedings would not have occurred. E.g., Lindsey v. Orlando, 232 F. Supp. 3d 1027, 1032 (N.D. Ill. 2017) (prosecution must be based upon defendant's false

report); Jones-Huff, 208 F. Supp. 3d at 924 (even knowing false statements are not enough "if the prosecution is based upon separate or independently developed information") (internal quotation marks omitted); Mutual Medical Plans, Inc. v. County of Peoria, 309 F. Supp. 2d 1067, 1081 (C.D. Ill. 2004) ("commence or continue" element not satisfied although investigator "obviously played a significant role," and "arguably withheld potentially exculpatory evidence from the grand jury," because "there is nothing to suggest that he concealed any such information from the State's attorney" who initiated proceedings); Cervantes v. Jones, 23 F. Supp. 2d 885, 891 (N.D. Ill. 1998) ("alleged fabricated evidence must influence the decision to indict") (internal quotation marks omitted).

No case decided after Randall has rejected these strict legal causation requirements. In Allen v. Berger, 336 Ill. App. 3d 675 (1st Dist. 2002), the defendants allegedly "knowingly ma[d]e false statements to the FBI and/or U.S. Attorney," implicating the plaintiff, their former business partner, in a criminal scheme. Id. at 677. The First District cited Randall for the proposition that knowingly supplying false information that results in a prosecution constitutes initiation of the proceedings. Id. at 678. In addition, the court cited Geisberger, Pratt, and the Restatement (Second) of Torts, § 653, for the proposition that, alternatively, taking "an active part in instituting criminal proceedings, by requesting, directing, or pressuring the prosecuting officer into instituting the proceedings," 336 Ill. App. 3d at 678,

could be the cause of the initiation of proceedings. The plaintiff stated a claim by alleging that the defendants' "knowingly false accusations were the cause" of the prosecution. Id. at 679. But for these "intentional fabrications," id. at 680, the plaintiff would not have been prosecuted, id. at 679-80.

Similarly, in Szczesniak v. CJC Auto Parts, Inc., 2014 IL App (2d) 130636, the Second District cited Randall for the proposition that the defendant "must do more than give false information to the police in order to be deemed responsible for commencing a prosecution"; he must "knowingly provid[e] false information," and the prosecution must be based on that information and not on "separate or independently developed information." Id. ¶ 11. The claim failed because the defendant had not lied to the police, id. ¶ 12, and, regardless, an independent investigation followed, and "the arrest was based on separate and independent information" developed during the investigation, id. ¶ 13.[2]

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[2] Two other cases bear mention as consistent with the cases requiring strict legal causation discussed above. In Fabiano v. City of Palos Hills, 336 Ill. App. 3d 635 (1st Dist. 2002), the court used Gilbert's formulation for the "commence or continue" element, requiring a showing that the defendant initiated the criminal proceeding or provided "participation . . . of so active and positive a character as to amount to advice and cooperation." Id. at 647 (internal quotation marks omitted). The court denied defendants summary judgment because the prosecutors' affidavits – submitted to support that it was the prosecutors' independent decision to press charges – were inadmissible. Id. at 647-51. But the court did not doubt that if admissible evidence showed the prosecutors had acted independently in bringing the charges, the "commence or continue" element would not be satisfied.

In Aguirre v. City of Chicago, 382 Ill. App. 3d 89 (1st Dist. 2008), a jury had found the defendant officers liable for malicious prosecution where the evidence showed they crafted false confessions that were the basis for

Illinois law applies the same requirements for strict legal causation to decide whether the defendant is responsible for continuing the prosecution. In Denton, the court explained that attributing responsibility for continuing the prosecution to someone besides the prosecutor would require a showing that the defendant took "an active part in [the] prosecution after learning there is no probable cause for believing the accused guilty" or actively "insist[ed] upon or urg[ed] further prosecution." 152 Ill. App. 3d at 584 (internal quotation marks omitted; some alternation in original) (citing Restatement (Second) of Torts § 655, comment c (1977)). Indeed, once the control of a prosecution passes to a public prosecutor, this "active part" is not satisfied even where the defendant testifies as a witness and "knows [the charges] to be groundless." Restatement (Second) of Torts § 655, comment c (1977); see also id. § 655, comment b; accord 54 C.J.S. Malicious Prosecution § 20 (no liability generally "attaches merely by reason of testifying as a witness for the prosecution"); id. (no liability for giving grand jury testimony, "unless pertinent information is withheld, misrepresentations are made as to the facts, or undue influence is used by the defendant," and that, in turn, must have "bearing on the charges brought"). Applying these principles, the Denton court held that the defendant had not continued the prosecution because he had no obligation to update the police with new information once

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charging plaintiffs with murder. Id. at 98-100. Because the appeal concerned favorable termination and malice (in the context of an evidentiary challenge), id. at 96-101, the court did not consider the "commence or continue" element expressly. But it was plainly satisfied on those facts.

criminal proceedings had begun. 152 Ill. App. 3d at 584-85.

Likewise, in Geisberger, the court rejected the argument that defendant had "maintained" the criminal proceeding "by not going to the prosecutor with information that showed the plaintiff was innocent." 62 Ill. App. 3d at 944. The court refused "to impose [an] affirmative duty" to correct mistakes made by the officials controlling the prosecution or to ensure they "do not misapply or misinterpret the information that [the defendant] has honestly given them." Id. That approach would deter cooperation in criminal investigations and "be repugnant to public policy." Id.

And in Szczesniak, the court noted that Pratt, in dicta, had suggested that a defendant could be liable for continuing the prosecution if he negates the prosecutor's discretion by knowingly failing to give information that would "stop the prosecution" with the "intent" to mislead the prosecutor and "continue the prosecution." 2014 IL App (2d) 130636, ¶ 14 (citing Pratt, 48 Ill. App. 3d at 936). But that principle did not apply because the defendant was not required to provide false exculpatory information. Id. Again, once the prosecutor has the case, liability requires active interference that can be considered the legal cause of the prosecutor's continuation of proceedings.

As we now explain, the cases Beaman and his *amici* cite that use the "significant role" language fit comfortably within this historical framework, and, indeed, are entirely consistent with the remainder of Illinois law we discuss above.

B. The "Significant Role" Language Was Not Intended To Depart From Strict Legal Causation Requirements.

It was not until 1988 that the appellate court first mentioned the "significant role" test that Beaman and his *amici* urge this court to adopt. In Frye v. O'Neill, 166 Ill. App. 3d 963 (4th Dist. 1988), an investigator for the Illinois Secretary of State's office reported information he thought was true that implicated the plaintiff in a drug sale to a state trooper who was conducting an undercover drug investigation. Id. at 968-70. Based on this information, the state trooper completed an affidavit alleging the plaintiff was the person who had sold the trooper drugs, which, in turn, led to a grand jury indictment and the plaintiff's arrest. Id. at 970. Later, after the trooper saw a photograph of the plaintiff, he realized he was mistaken, and the prosecution was dropped. Id. The court rejected summary judgment for the trooper, but affirmed summary judgment for the investigator. Id. at 980.

The investigator had argued that he could not be liable for malicious prosecution because the connection between his actions and the prosecution "was too attenuated" and lacked a "sufficient casual connection." 166 Ill. App. 3d at 973; see also id. at 972. The investigator "did not urge [the state trooper] to file charges," and the decision "whether to seek prosecution of [the plaintiff] on the basis of the information" he provided was entirely the trooper's. Id. at 974. The court agreed that on these facts, the investigator did not, "as a matter of law, instigate" the prosecution, where he had only responded to the trooper's request for information and was not otherwise

involved. Id. at 974-75. This was a straightforward application of the legal causation requirements we discuss above, although not stated in those terms. The court essentially relied on the absence of evidence that there had been any interference with the independent discretion of the official instituting the prosecution.

Turning to the state trooper, the court explained that malicious prosecution claims are "not confined to situations where the defendant signed a complaint against the plaintiff. Rather, liability extends to all persons who played a significant role in causing the prosecution of the plaintiff, provided all of the elements of the tort are present." 166 Ill. App. 3d at 975. This statement, of course, was a truism based on the case law to date – as we explain above, many cases had held that claims could proceed against defendants who had not signed the criminal complaint. The court did not explain what was required to show a "significant role," nor did it actually apply this language in the context of deciding the "commence or continue" element, because the state trooper had not challenged that element of the claim. Instead, the court addressed only malice and probable cause. Id. at 975-78. Moreover, it was unnecessary to decide that element because, clearly, the trooper was the legal cause of the prosecution – the only evidence that the plaintiff had committed a crime was the trooper's false accusation that the plaintiff had sold him drugs. Id. at 969-70. Indeed, the same appellate court justice who authored Frye wrote the decision below. That court distinguished

Frye on the basis that the "commence or continue" element was not in dispute in Frye, and the "significant role" language had included the qualifier, "so long as '*all of the elements of the tort are present*,'" which showed that the "significant role" standard was not intended as the definition of the "commence or continue" element in particular. A15-A16 ¶¶ 51-52 (quoting Frye) (emphasis in appellate court opinion).[3]

Thus, the "significant role" standard was, at most, dicta, and plainly was not intended to expand the requirements for legal causation articulated in Illinois law to date. Nor, in any event, could the appellate court in Frye expand the elements as explained by this court. Frye's adherence to legal causation principles is evident from the authority it cited for the "significant role" formulation. The court relied on two sections from *Corpus Juris Secundum*, 166 Ill. App. 3d at 975, which are entirely consistent with the case law we explain above requiring strict adherence to legal causation. In section 18, the treatise states that a defendant can be liable for malicious prosecution if he "knowingly giv[es] false information to authorities," or if "the indictment is . . . induced by fraud, subornation of witnesses, suppression of testimony, or other like misconduct on the part of the defendant." 54 C.J.S. Malicious Prosecution § 18 (emphasis added). Alternatively, the defendant can be liable if he "insisted that the plaintiff should be prosecuted" or "has brought pressure of any kind to bear upon the public officer's decision to commence the

[3] We cite the three-volume appendix to Beaman's opening brief as "A__."

prosecution," so long as "the defendant's persuasion was the determining factor in inducing the officer's decision to instigate" the proceeding. Id. (emphasis added). Section 19, in turn, states that someone who "makes a knowingly false report" to a law enforcement official, which causes the prosecution, may be liable for malicious prosecution, but "[t]here must . . . be proof that the prosecutor acted based on the false information and that but for such false information the decision would not have been made." Id. § 19 (emphasis added).

Conversely, the defendant is not liable for providing false information "when the prosecutor relies upon his or her own discretion in deciding whether to prosecute." 54 C.J.S. Malicious Prosecution § 19. Likewise, even knowingly giving false information is insufficient for liability "if the prosecution is based upon separate information" because in that case, "the informer does not affect the officer's discretion." Id. (citing Randall). See also 54 C.J.S. Malicious Prosecution § 13 ("[T]he plaintiff . . . must establish a chain of causation linking the defendant's actions with the initiation of the underlying criminal proceedings."); id. (test requires defendant be "actively instrumental" in causing prosecution "and but for the person's actions, the prosecution would not have occurred"; if defendant "is not the proximate and efficient cause . . . but rather the state's attorney or an officer of the law pushes the prosecution forward, that defendant is not liable"); id. ("It is a complete defense . . . that the defendant was not the determining factor in the

decision to prosecute."); 54 C.J.S. Malicious Prosecution § 17 (no liability where defendant "states the facts to the prosecuting attorney," but leaves to prosecutor "the propriety of proceeding with the charge," and prosecutor moves forward "on his or her own initiative"). These formulations are no different from the formulations expressed by Illinois appellate courts since Gilbert and Freides. Thus, Frye did not depart from preexisting case law nor craft a new standard for the "commence or continue" element.

Following Frye, the cases that used the "significant role" language also continued to require strict legal causation linking the defendant's conduct to the official action instituting proceedings, as they were bound to do. In Rodgers v. Peoples Gas, Light & Coke Co., 315 Ill. App. 3d 340 (1st Dist. 2000), for example, the defendants were private investigators who allegedly knowingly gave false information to the State's Attorney, which led to the plaintiff's indictment. Id. at 346-47. The court cited Frye's "significant role" language. Id. at 348-49. Yet, it also cited sections 18 and 19 of *Corpus Juris Secundum*, id. at 349, and Geisberger, id. at 346, 349, for the proposition that a defendant who knowingly gives false information that is the basis for the criminal complaint can be held responsible for the official action commencing the prosecution. Because the defendants had orchestrated a "scheme to entrap plaintiff into the delivery of narcotics," id. at 349, and knowingly provided false information to the prosecutor, id. at 346, they "were instrumental in instituting and pursuing the criminal prosecution" for a

wrongful purpose, id. at 349. Indeed, they manufactured the very crime itself in order to develop cause to fire plaintiff. Id. at 344.

Likewise, in Bianchi v. McQueen, 2016 IL App (2d) 150646, the plaintiffs alleged that the defendants had fabricated evidence that they presented to the grand jury and "used the false evidence that they manufactured to dupe [the prosecutor] into bringing charges," which "defendants knew plaintiffs did not commit," and that "as a direct result of defendants' false evidence," the prosecutor brought charges against plaintiffs. Id. ¶ 73 (internal quotation marks omitted). The court quoted the "significant role" language, id. ¶ 72, but plainly the allegations satisfied the strictest formulation of legal cause because the defendants knowingly provided false evidence that interfered with the prosecutor's discretion and that was the basis for the prosecution.

Finally, in Barnett v. Baker, 2017 IL App (1st) 152443-U, the court cited Bianchi's "significant role" language, but also applied strict legal causation requirements in holding that the defendant's conduct had caused the prosecution because the defendant "knowingly gave false information" leading to the charges. Id. ¶ 40. Notably, the court also quoted Denton's "requested, directed or pressured" language and expressed no intent to broaden legal causation requirements. Id.[4]

[4] Beaman cites this unpublished decision but does not contend that it falls within an exception under this court's Rule 23. Beaman Br. 24. We cite it simply to respond to Beaman's argument.

As the analysis above shows, the entirety of Illinois case law can be harmonized as requiring a showing that the defendant's actions were the legal cause of the commencement or continuation of the prosecution in the sense that the defendant's actions must have interfered with the prosecutor's independent judgment such that bringing the prosecution would not otherwise have occurred. The appellate court's holding in this case fits comfortably within this framework. After tracing the "significant role" language from Frye, A15-A17 ¶¶ 51-53, the court "question[ed] the propriety of limiting consideration of the commencement element to only the significance of one's role in instituting the prosecution," A17 ¶ 54. Instead, it cited Denton and Geisberger approvingly for the proposition that the "commence or continue" element requires active participation in initiating the prosecution, such as requesting, directing, or pressuring the official who initiates the prosecution, or knowingly giving false information that directly leads to the prosecution. A18 ¶ 56. It also relied on Seventh Circuit decisions – Colbert v. City of Chicago, 851 F.3d 649, 655 (7th Cir. 2017), Snodderly v. R.U.F.F. Drug Enforcement Task Force, 239 F.3d 892, 902 (7th Cir. 2001), and Reed v. City of Chicago, 77 F.3d 1049, 1053 (7th Cir. 1996) – in which that court had observed that "'the chain of causation is broken by an indictment'" unless the police officers pressure the prosecutor or influence the decision to indict with knowingly false statements. A18-A19 ¶ 57 (quoting Colbert, 851 F.3d at 655, which quoted Reed, 77 F.3d at 1053) (emphasis omitted). The appellate court

explained that this same test should be used for assessing whether a defendant is the legal cause of the initiation of the prosecution, regardless whether that defendant is a law enforcement official or private individual. A19-A20 ¶ 58. The court accordingly held that "in order to find a police officer usurped the State's Attorney's decision-making role and that officer is responsible for commencing or continuing a criminal action against a plaintiff, the plaintiff must establish that officer pressured or exerted influence on the prosecutor's decision or made knowing misstatements upon which the prosecutor relied." A20 ¶ 58. This holding is consistent with the remainder of Illinois law, and it correctly requires adherence to the legal causation requirements this court first articulated in Gilbert and Freides. This court should not stray from this history to adopt the formulation urged by Beaman and his *amici*.

In support of their argument to the contrary, Beaman and his *amici* claim that "the significant role test is by far the majority rule." Beaman Br. 25; accord id. at 23 ("[t]he predominant rule in Illinois's lower courts"); see also Former Prosecutors Br. 9 (arguing "[u]ntil now, appellate courts have adhered consistently" to "significant role" standard). That is plainly false in light of the history above. Beaman cites only four Illinois cases applying this test – Frye, Bianchi, Rodgers, and Barnett. Beaman Br. 23-24; see also Former Prosecutors Br. 9 (citing three of these cases and 54 C.J.S. Malicious Prosecution §§ 18, 19). But as we explain, despite using the "significant role"

language, these cases, like the appellate court below, required strict legal causation – meaning some conduct that overrides the prosecutor's independent discretion must be the basis for the decision to prosecute. Beaman also cites federal cases and jury instructions that use the "significant role" language, Beaman Br. 24 & nn. 3, 4, but those decisions cite these same Illinois cases and accordingly do not support a broader interpretation of Illinois law. Regardless, even Beaman concedes that "[t]his Court is the arbiter of state law." Id. at 28.

Beaman further argues that the "significant role" standard "is useful and effective" and has never "produced an unfair result." Beaman Br. 25. But Beaman and his *amici* have not actually cited a case in which strict legal causation tying the defendant's conduct to the initiation of the prosecution was absent and instead a "significant role" alone sufficed. As we explain, every Illinois case, including the four that use the "significant role" language, required this direct causal linkage.

The linkage also was present in every federal case Beaman cites. Beaman Br. 24 n.3. In the federal cases in which the "commence or continue" element was satisfied, there was some conduct that legally caused the official action initiating criminal proceedings. See Mitchell v. City of Elgin, No. 14 CV 3457, 2016 WL 492339, at *8 (N.D. Ill. Feb. 9, 2016) (defendants signed complaint, provided false information, or wrote false reports "intended to cause Plaintiff's arrest and prosecution"); Collier v. City of Chicago, No. 14 C

2157, 2015 WL 5081408, at *9 (N.D. Ill. Aug. 26, 2015) (defendants made "knowingly false statements" that influenced decision to prosecute and "planted" evidence "bilk[ing] the prosecutor") (internal quotation marks omitted); Mosley v. Pendarvis, No. 13 C 5333, 2015 WL 2375253, at *4 (N.D. Ill. May 15, 2015) (one defendant "signed the criminal complaint," and another helped "fabricate inculpatory statements that were communicated to the prosecutor," which were "dispositive" in "decision to proceed"); Fields v. City of Chicago, No. 10 C 1168, 2014 WL 477394, at *12 (N.D. Ill. Feb. 6, 2014) (two defendants "swore out the complaint" and another "caused witnesses to fabricate testimony" that led to prosecution); Starks v. City of Waukegan, 946 F. Supp. 2d 780, 794-95 (N.D. Ill. 2013) (defendants filed "reports that falsely attributed inculpatory statements to" plaintiff, which "directly brought about [plaintiff's] prosecution"); Padilla v. City of Chicago, 932 F. Supp. 2d 907, 929 (N.D. Ill. 2013) ("two officers supplied the only evidence on which the prosecutors relied," which was false, and signed criminal complaint); Hunt v. Roth, No. 11 C 4697, 2013 WL 708116, at *8 (N.D. Ill. Feb. 22, 2013) (defendant drafted felony complaint, and whether he signed it was "a question for the jury"); Brown v. Navarro, No. 09 C 3814, 2012 WL 1986586, at *7 (N.D. Ill. June 4, 2012) (officers "prepared the charging documents," and, regardless, did not dispute "any element of the claim" besides probable cause); Phipps v. Adams, No. 11-147-GPM, 2012 WL 686721, at *3 (S.D. Ill. Mar. 2, 2012) (criminal charges for resisting arrest

were based on defendants' allegedly "fabricat[ed] allegations that were presented to the . . . prosecutor's office in an attempt to 'cover' for their abuse of" plaintiff); Montgomery v. City of Harvey, No. 07 C 4117, 2008 WL 4442599, at *7 (N.D. Ill. Sept. 29, 2008) (defendant "signed a criminal complaint charging Plaintiff"); Bruce v. Perry, No. 03-CV-558-DRH, 2006 WL 1777760, at *2, *8 (S.D. Ill. June 23, 2006) (charge was resisting police officer, which turned on the facts of arrest; plaintiff claimed that officers "falsely" charged him); Montes v. Disantis, No. 04 C 4447, 2005 WL 1126556, at *12 (N.D. Ill. May 10, 2005) (defendant allegedly charged plaintiff falsely with offense he did not commit, which "actually caused" filing of charges) (internal quotation marks omitted); Patterson v. Burge, 328 F. Supp. 2d 878, 900-01 (N.D. Ill. 2004) (requiring "legal causation," and holding claim could proceed against defendants who allegedly suppressed evidence and falsified findings, because that constituted "active conduct that had a causal effect on the continuation of the proceedings"); Harris v. City of Harvey, No. 97 C 2823, 2000 WL 1468746, at *6, *9 (N.D. Ill. Sept. 29, 2000) (element satisfied where defendants were complaining witnesses charging plaintiff).

In contrast, in the federal cases Beaman cites where the courts found the "commence or continue" element was lacking, that was because direct legal causation was absent. See Mitchell, 2016 WL 492339, at *8 (defendant's allegedly false report concerned different crime); Green v. City of Chicago, No. 11 C 7067, 2015 WL 2194174, at *6 (N.D. Ill. May 7, 2015) (officer did not

write complaint or arrest report, and no other evidence showed he commenced charges); Fields, 2014 WL 477394, at *12 (several defendants "played relative minor roles"; "[m]ere testimony as a witness is insufficient"); Padilla, 932 F. Supp. 2d at 929 (no evidence that officers "took actions that led to . . . criminal prosecution"); Hunt, 2013 WL 708116, at *8 (detective "did not discuss [plaintiff's] case with an assistant state's attorney," or draft or sign complaint); Brown, 2012 WL 1986586, at *7 (officer played "no role in the prosecution . . . other than to review . . . documents drafted by his subordinates"); Swanigan v. Trotter, 645 F. Supp. 2d 656, 686 (N.D. Ill. 2009) (no evidence one defendant "had any role in causing the prosecution"; another defendant initiated proceedings but had probable cause); Lipscomb v. Knapp, No. 07 C 5509, 2009 WL 3150745, at *12 (N.D. Ill. Sept. 30, 2009) (proofreading arrest report or interrogating plaintiff did not cause prosecution; even working with state's attorney as witness is insufficient, unless officer committed "some act of misconduct," like "falsifying information or evidence"); Montgomery, 2008 WL 4442599, at *7 (no evidence defendants "played any role in causing Plaintiff's prosecution").[5] Thus, Beaman lacks

[5] Beaman also cites Reno v. City of Chicago, No. 10 C 6114, 2012 WL 2368409, at *6 n.2 (N.D. Ill. June 21, 2012), Beaman Br. 24 n.3, but the court did not address the "commence or continue" element because the "parties d[id] not discuss" it, 2012 WL 2368409, at *6 n.2. He likewise cites Johnson v. Arroyo, No. 09 C 1614, 2010 WL 1195330, at *3 (N.D. Ill. Mar. 22, 2010), Beaman Br. 24 n.3, but the court rejected the claim there based on lack of favorable termination and, thus, did not decide whether the "commence or continue" element was satisfied, 2010 WL 1195330, at *3. Regardless, one defendant had signed the criminal complaint. Id. at *1.

authority to support his claim that a significant role alone, without direct legal causation, has ever been the test.

Beaman also overstates the necessity of distinguishing between cases involving private and law enforcement defendants. He claims that before the decision below, "no court of this State had ever applied the pressure, influence, or misstatement test to a malicious prosecution claim against a police officer." Beaman Br. 28. This overlooks that, as we explain, Illinois courts have uniformly treated both private and law enforcement defendants identically where the official action initiating criminal proceedings was taken by someone other than the defendant himself, and because the legal question is the same for both, there is no reason to treat them differently. Indeed, Beaman cites no case recognizing a distinction between private defendants on the one hand, and law enforcement defendants who were not the official instituting the prosecution on the other. Nor has he cited a case permitting a claim to proceed against law enforcement defendants under lesser standards for legal causation than required for private defendants. We, too, have not located any such case. To the contrary, De Correvant required "active and positive" participation in initiating proceedings, although the defendants were law enforcement officers. 84 Ill. App. 2d at 228. And the court permitted the claim to proceed only against the deputy sheriff who actually signed the criminal complaint, id. at 225-26, 230-31, not the deputy sheriffs who testified about other events besides "the offense charged" and did not "directly

participat[e] in causing the prosecution or advising it to be made," id. at 229. Moreover, Denton, which Beaman claims has "nothing to do with malicious prosecution by a police officer," Beaman Br. 28, actually relied on both De Correvant, involving law enforcement defendants, and Geisberger, involving private defendants, for legal causation standards. 152 Ill. App. 3d at 583. Plainly, Illinois courts have not considered the employment status of the defendant significant on this point. Even Beaman's *amici* agree that the meaning of the element should "not focus at all on the job title of a particular defendant." Former Prosecutors Br. 9. Police officers should not stand apart from other defendants whose conduct is similar. Cf. Rehberg, 566 U.S. at 367-69 (refusing to distinguish between law enforcement and lay witnesses for purposes of testimonial immunity).

Finally, Beaman is simply wrong in claiming that the appellate court below should not have cited Colbert because that case relied on precedent concerning "a federal cause of action under 42 U.S.C. § 1983," and supposedly "did not really construe state law." Beaman Br. 28. In addition to a section 1983 claim, Colbert brought a state-law malicious prosecution claim, and the court examined the elements of the claim "under Illinois law" and cited Illinois cases. Colbert, 851 F.3d at 654-55 (internal quotation marks omitted). Although the court also cited federal cases, such as Reed and Snodderly, id. at 655, these, too, concerned Illinois law: Reed addressed a section 1983 malicious prosecution claim, which required "satisf[ying] the requirements of

[the Illinois] state law cause of action for malicious prosecution." 77 F.3d at 1051. And Snodderly relied on Reed. 239 F.3d at 901. These cases are persuasive authority demonstrating that federal courts have recognized Illinois's strict adherence to legal causation requirements in malicious prosecution cases. As the Seventh Circuit observed, under Illinois law, a prosecutor's official action instituting criminal proceedings breaks "'the chain of causation'" between a police officer's conduct and the commencement of proceedings "'absent an allegation of pressure or influence . . . or knowing misstatements." Colbert, 851 F.3d at 655 (quoting Reed, 77 F.3d at 1053). Absent "'some postarrest action which influenced the prosecutor's decision to indict,'" there is simply insufficient legal causation to hold a police officer responsible for the official action instituting criminal proceedings. Id. (quoting Snodderly, 239 F.3d at 902).

In sum, Illinois law is settled and uniform. Historically, to satisfy the first element of the malicious prosecution claim, the plaintiff must show that the defendant's actions were the legal cause of the official action that commenced or continued the criminal proceedings. As we now explain, that rule is the most sensible approach, and this court should continue to adhere to it.

II. THE TEST URGED BY BEAMAN AND HIS *AMICI* WOULD ALTER SETTLED LAW REGARDING LEGAL CAUSATION AND WOULD BE BAD PUBLIC POLICY.

As this court has explained, "[p]ublic policy favors the exposure of

crime," and thus the circumstances where malicious prosecution actions are appropriate "have been rather narrowly circumscribed." Joiner v. Benton Community Bank, 82 Ill. 2d 40, 44-45 (1980). This is reflected in the strict legal causation requirements Illinois courts historically employ, as we have discussed. Yet, the "significant role" test urged by Beaman and his *amici* would work an unprecedented expansion of liability contrary to the public interest. The expansion they urge is unnecessary because the current standard already addresses all the misconduct that a malicious prosecution action properly should reach, and other claims are available to address additional malfeasance. Finally, expanding liability beyond those whose conduct legally causes the official action initiating or continuing the prosecution would run counter to public policy. It would discourage police officers from taking significant roles in criminal investigations and impede cooperation between law enforcement officers and prosecutors, to the detriment of our societal interest in fighting crime. We examine these points below.

A. The "Significant Role" Test Urged By Beaman And His *Amici* Would Improperly Expand The Tort.

Beaman and his *amici* seek to substantially expand the "commence or continue" element to reach any "significant role" in commencing or continuing a prosecution, regardless whether the defendant's conduct was the legal cause of the initiation or continuation of criminal proceedings. They hope to expand malicious prosecution claims to address "investigative misconduct." Beaman

Br. 26; see also Former Prosecutors Br. 9 (arguing formulation adopted by appellate court below was "far too restrictive" because it does not reach "biased investigations"); id. at 6 (claiming "conviction was the product of a biased investigation"); id. at 10, 14 (same); id. at 12 (urging broader standard "to promote legitimate investigations"). But the tort is not malicious investigation. Unless the alleged investigatory misconduct is directly responsible for the official action that commences proceedings or for the continuation of proceedings, then a malicious prosecution action is not the appropriate claim.

As the history above reflects, and contrary to Beaman's assertion, malicious prosecution has never before been considered the state-law remedy "for investigative misconduct." Beaman Br. 26. Indeed, no Illinois court has permitted a malicious prosecution claim to proceed based on investigative misconduct alone. As we have explained, Illinois courts uniformly hold that misconduct without legal causation is not enough – even where the defendant's wrongful conduct causes the police to open an investigation that would otherwise never have occurred. E.g., Randall, 311 Ill. App. 3d at 851. Likewise, it has never been relevant to a malicious prosecution claim whether the defendant's conduct may have prevented "someone else [from being] . . . indicted," or whether the defendant could have done more to investigate a different suspect or catch "the murderer." Beaman Br. 29-30; see also Former Prosecutors Br. 6 ("John Murray was the far more likely suspect"). The

malicious prosecution claim addresses whether the defendant's conduct legally caused the initiation or continuation of the criminal proceedings brought against the plaintiff, not whether someone else is more likely guilty of the underlying crime.

A standard reaching so-called investigative misconduct divorced from legal causation would lead to absurd results, as Beaman's arguments amply demonstrate. He contends that his claim should proceed against Lt. Frank Zayas simply because Lt. Zayas "ran the detective division during the investigation" and "supervised the detectives working on the case." Beaman Br. 32. As for Lt. Zayas's misconduct, Beaman claims that he "participated in the . . . meeting" where the prosecutor decided to bring charges, and apparently "there is no evidence to suggest that he tried to stop the arrest." Id. A standard that permits a malicious prosecution claim to proceed simply because the defendant attended a meeting and did not (or could not) stop the prosecutor from moving forward with charges would significantly expand malicious prosecution claims and unfairly lead to liability for ordinary police work. Indeed, the only reason there is not yet "one example where the ['significant role'] test actually" created "liability for ordinary police work," Beaman Br. 28, is precisely because the courts never before have allowed a significant role in an investigation alone to be the basis for liability. Under Beaman's "significant role" standard, this case would be the first.

Similarly, Beaman is concerned about identifying a defendant to hold

responsible for "wrongful convictions." Beaman Br. 25; see also Former Prosecutors Br. 14. He wants the standard for commencing or continuing a prosecution to reach any conduct that could "convict an innocent person." Beaman Br. 27. But, again, the tort is malicious prosecution, not wrongful conviction. Malicious prosecution requires commencing or continuing a criminal proceeding without probable cause and with malice, and, accordingly, not every wrongful conviction gives rise to a malicious prosecution claim. If the proceeding is brought with probable cause, with a legitimate belief in the plaintiff's guilt, and for the purpose of bringing him to justice, no malicious prosecution claim will lie, regardless how wrongful the conviction or innocent the plaintiff turned out to be. It likewise follows that if a wrongful conviction results from a criminal proceeding that the defendant did not legally cause to commence or continue, that defendant should not be vulnerable to damages – no matter how significant a role he played – for a conviction resulting from a proceeding commenced or continued by someone else who lacked probable cause or acted with malice. That, too, would be wrongful.

As for Beaman's *amici*, they do not hide their intent to broaden the standard substantially beyond even the "significant role in commencing or continuing the prosecution" standard stated by Beaman. Beaman Br. 27. Instead, *amici* would write out "commencing or continuing" altogether, and instead expand the first element to reach any "significant role in a prosecution" whatsoever. Former Prosecutors Br. 10. Their standard would

reach all "police officers who play a significant role in the criminal case," id. (emphasis added), apparently no matter at what point during the proceedings that may have occurred. Under this broad approach, anyone who "materially influenced the criminal proceeding," in some undefined manner, could potentially be a malicious prosecution defendant, id., no matter whether the defendant's role had any bearing on the decision to initiate or continue the prosecution. Again, the *amici*'s goal is to broaden the standard to ensure any and all "actual participants in criminal prosecutions are subject to liability if they engage in investigative misconduct." Id. at 15. And *amici* never state that, in future litigation, these "actual participants" would be limited to law enforcement officers. Prosecutors performing investigatory functions also are susceptible to malicious prosecution claims, e.g., Buckley v. Fitzsimmons, 509 U.S. 259, 273-76 (1993), and could be sued over their "significant roles" during investigations. As we explain, this broad formulation is a significant departure from Illinois law to date. Illinois law rejects malicious prosecution claims, even against defendants who commit investigatory or other misconduct, where the defendant's conduct has no causal connection to the charges filed or the continuation of the proceeding.

Beaman and his *amici* claim that expanding the "commence or continue" element as they propose will not harm defendants who are not blameworthy because other elements of the malicious prosecution claim will protect them. E.g., Beaman Br. 27-28; id. at 28-29; Former Prosecutors Br. 5,

15. To begin, that argument renders the "commence or continue" element essentially superfluous as a means to screen out those who should not be subjected to malicious prosecution suits. And practically speaking, the result would be a great increase in the number of claims filed. The courts have required strict legal causation for a reason – it reflects an essential principle of tort law that "an actor's conduct must not only be tortious in character but it must also be a legal cause of the invasion of another's interest," meaning "a substantial factor in bringing about the harm." Restatement (Second) of Torts § 9, comments a & b (1965).

Moreover, Beaman and his *amici* are simply wrong that the other elements of the claim, standing alone, will protect law enforcement defendants. To the contrary, there is a grave risk they will be held vicariously liable for the conduct of others in the context of joint criminal investigations. That is because eliminating the requirement for a direct linkage between the defendant's conduct and the initiation or continuation of proceedings would allow malicious prosecution plaintiffs to pursue a mix-and-match approach, whereby they can satisfy all elements of the tort simply by pairing one defendant's "significant role" with someone else's culpable conduct on the other elements. Thus, the "significant role" standard would permit recovery against law enforcement officers (and prosecutors performing investigatory functions), even though someone else – such as a prosecutor who is immune from suit – actually brought charges while lacking probable cause and

harboring malice.

Again, Beaman's own arguments illustrate this danger perfectly. Beaman argues Lt. Zayas played a significant role merely because he was in charge of the investigation and participated in the meeting where the prosecutor decided to proceed with charges. Beaman Br. 32; see also id. at 31 (arguing Tim Freesmeyer played a significant role because he "was the lead investigator"). And for the probable cause element, Beaman focuses on the evidence available at the time of the arrest. Id. at 36-37. But as Beaman acknowledges, Lt. Zayas testified to doubts about whether enough work had been done on the case by that time. Id. at 46. Thus, under Beaman's "significant role" test, a claim could proceed against a defendant, even though he personally might not have moved forward with the prosecution, had it been within his control. Moreover, remarkably, Beaman believes these same doubts demonstrate Lt. Zayas's malice – "Zayas knew that the case was not ready . . . but he let it happen anyway," id., regardless whether Lt. Zayas had any control over the prosecutor's decisions. Plainly, probable cause and malice would not suffice to protect un-blameworthy defendants under Beaman's "significant role" standard.

Similarly, under Beaman's standard, the defendant's significant role itself is enough to satisfy the other elements. Again, supervisors and lead investigators play a significant role, according to Beaman. And he attributes lack of probable cause and malice to Lt. Zayas because he was "the boss" of

the investigation and "despite his direct authority" over the other officers, did nothing to stop the arrest. Id. at 45-46. If all the elements are satisfied whenever a police defendant plays a significant role in the prosecution, no officer will be able to escape liability.

Beaman's approach is nothing more than vicarious liability. That is an unacceptable basis for liability in a malicious prosecution claim. Public officials are not liable for malicious prosecution based on their subordinate's intentional misconduct. E.g., De Correvant, 84 Ill. App. 2d at 226-28. It is not even an acceptable basis for liability in conspiracy claims, which cannot proceed based on supervisory liability. E.g., Bell v. City of Milwaukee, 746 F.2d 1205, 1255 (7th Cir. 1984) (person's "supervisory position" cannot be sole basis to infer "participation in a conspiracy"), overruled on other grounds by Russ v. Watts, 414 F.3d 783 (7th Cir. 2005); Beaman v. Souk, 7 F. Supp. 3d 805, 828 (C.D. Ill. 2014). Nor can conspiracy claims proceed based on "[j]oint pursuit of an investigation based on a belief a suspect is guilty." Beaman, 7 F. Supp. 3d at 828. A supervisory or other significant role in a joint investigation should not be sufficient, standing alone, for a malicious prosecution claim, either.

In sum, this court should reject the radical expansion of the "commence or continue" element urged by Beaman and his *amici* as out-of-step with long-standing Illinois law and basic tort principles.

B. It Is Unnecessary To Adopt The Broad "Significant Role" Test Urged By Beaman And His *Amici*.

Ultimately, there is no need to depart from the historical standard, which ensures that culpable conduct legally causing the initiation or continuation of criminal proceedings may be redressed. The current standard sufficiently addresses all the concerns raised by Beaman and his *amici*.

To begin, Beaman and his *amici* want prosecutors to receive the information they need to do their jobs. E.g., Beaman Br. 26 ("To indict the right people, prosecutors rely on police officers to conduct investigations based on the facts, not based on malice and bias directed against a particular suspect."); Former Prosecutors Br. 4-5 (prosecutors need "accurate information" and the "[f]ull disclosure of evidence" so they may avoid "inadvertently obtain[ing] improper indictments"); id. at 11 ("prosecutors depend heavily on information provided to them by the police" and need "candor and forthrightness from police investigators"); id. at 13 (prosecutors need "accurate evidence" from police); id. at 14 (police should be incentivized "to disclose all relevant evidence to prosecutors"). Without question, police officers and prosecutors must – and do – work together in a properly functioning criminal justice system, and this requires a forthright exchange of information. But the current standard already addresses the most significant information breakdown – where a police officer's conduct, such as "manufacturing false evidence," id. at 13, is enough to "supplant [the] prosecuto[r] as the prosecutorial decision make[r]," id., by interfering with the

prosecutor's independent ability to assess whether to bring charges. As we explain, the "commence or continue" element is satisfied where the defendant knowingly supplies false information to the prosecutor or in some other culpable manner (such as undue pressure or influence) negates the ability of the prosecutor to intelligently exercise independent discretion in charging the offense. E.g., Pratt, 48 Ill. App. 3d at 935-36 (citing Restatement of Torts, Explanatory Notes § 653, comment g, at 386). In those circumstances, the defendant is the legal cause of the malicious prosecution, and thus is culpable for commencing or continuing it.

Meanwhile, other claims besides malicious prosecution exist to address information breakdowns and other misconduct in an investigation. For example, Beaman and his *amici* are concerned about the suppression of evidence. E.g., Beaman Br. 31-32; Former Prosecutors Br. 10 (arguing police "suppressed important evidence"); id. at 10 n.3 (claim should reach withholding "material" or "key evidence"); id. at 13 (same); id. ("critical investigative information is suppressed"); id. at 14 ("key alternative suspect was suppressed"). But police officers have a duty under Brady v. Maryland, 373 U.S. 83 (1963), to turn over exculpatory evidence to the prosecutor. Thus, if "all of the evidence is [not] turned over to [prosecutors] by police," Former Prosecutors Br. 11, in any particular case, and that suppressed evidence is material and exculpatory, a federal Brady claim will lie against the officer. E.g., Carvajal v. Dominguez, 542 F.3d 561, 566-67 (7th Cir. 2008); Harris v.

Kuba, 486 F.3d 1010, 1014 (7th Cir. 2007); Beaman, 7 F. Supp. 3d at 821. Alternatively, a police officer who manufactures evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of liberty and thus that conduct could give rise to an "evidence fabrication" due process claim. E.g., Petty v. City of Chicago, 754 F.3d 416, 421-23 (7th Cir. 2014); Patrick v. City of Chicago, 213 F. Supp. 3d 1033, 1046 (N.D. Ill. 2016). And if an officer testifies falsely, perjury charges can be brought, which provides a sufficient deterrent. E.g., Rehberg, 566 U.S. at 367. Even Beaman acknowledges that other state-law claims exist to redress wrongful police conduct, such as claims for intentional infliction of emotional distress, failure to intervene, conspiracy, and respondeat superior liability. Beaman Br. 26. There is, accordingly, no need to expand malicious prosecution claims because wrongful conduct is already covered by either the current standard or other claims.

In addition, the arguments raised by Beaman and his *amici* premised on the information flow between police officers and prosecutors are faulty because they undervalue the role that prosecutors play in criminal investigations. The Former Prosecutors are concerned about a "disparity in access to evidence." Former Prosecutors Br. 11. And Beaman claims that police are better than prosecutors are at investigating crimes. Beaman Br. 26. But while police officers are generally the primary investigators in criminal investigations, prosecutors play a significant role in directing the officers, can

function as investigators themselves, and, moreover, have independent duties as well. Indeed, in this very case, this court explained that under Brady, "the prosecutor has a duty to learn of favorable evidence known to other government actors, including the police." People v. Beaman, 229 Ill. 2d 56, 73 (2008). For that reason, the U.S. "Supreme Court has . . . noted 'the special role played by the American prosecutor in the search for truth in criminal trials.'" Id. (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999)). Thus, prosecutors are fully capable of pursing, and indeed do pursue, the evidence and ask the questions necessary to fulfill their duties in order to ensure that "[a]t trial" they "have a complete understanding of the nature and extent of the investigation performed by the police." Former Prosecutors Br. 12. Given the professionalism prosecutors bring to their jobs every day, the suggestion that they easily can be "induce[d] . . . to charge and prosecute the wrong suspects," id., is surprisingly misguided. And as we explain, if wrongful law enforcement conduct, such as creating false evidence, truly negates the prosecutor's independent discretion, a malicious prosecution suit, or other remedy, will be available. This argument is no basis to expand liability for malicious prosecutions that the defendant did not legally cause or continue.

Finally, Beaman and his *amici* are concerned that police officers will never be liable for malicious prosecution under the appellate court's standard and, in light of prosecutorial immunity, there will be no one left to blame for mistaken convictions. E.g., Beaman Br. 30 ("police who cause wrongful

convictions can never be liable for malicious prosecutions simply because they are not prosecutors,"); see also Former Prosecutors Br. 15 (arguing "set of people who may be liable for malicious prosecution [should not be defined] so narrowly that police are never included"); id. at 5 (same); id. at 9 ("police who conduct biased investigations [will] rarely if ever [be] liable for malicious prosecution"); id. at 13 n.5 (same); id. at 14 (police defendants are "immune for their misconduct"). But "[t]he fact that the prosecutor enjoys absolute immunity from suit should not, by itself, expose a police officer to greater liability in his place. There is little wonder why suits for malicious prosecution in Illinois are not favored." Mutual Medical Plans, 309 F. Supp. 2d at 1081. As we have explained, police officers already can be liable for malicious prosecution where their conduct does legally cause the official action commencing or continuing proceedings in the sense that it is the basis for that action. Indeed, again, numerous cases have allowed claims to proceed against law enforcement defendants whose wrongful conduct prevents prosecutors from exercising independent discretion. That is the kind of conduct that malicious prosecution claims should deter. See Former Prosecutors Br. 9 (tort law should "deter wrongful conduct"). Conversely, where there is no direct linkage between the police officer's conduct and the initiation of the prosecution, the threat of a lawsuit against a police officer would not deter a prosecutor from bringing a malicious prosecution. And it is simply unfair to punish conduct that does not legally cause the harm. It is

also unfair to hold police officers (or investigating prosecutors) liable solely because the prosecutors bringing charges are not. As the Seventh Circuit observed, where other actors in the prosecution are the ones causing harm, "the solution should not be to punish the police officers." Beaman v. Freesmeyer, 776 F.3d 500, 513 (7th Cir. 2015).

In short, there is no warrant to abandon the historical standard requiring strict legal causation because that standard adequately addresses the wrongful conduct malicious prosecution claims should remedy.

C. Adopting The Broad "Significant Role" Test Urged By Beaman And His *Amici* Would Be Bad Public Policy.

As we have explained, the "significant role" standard would substantially broaden what has, until now, been a disfavored tort. Besides being unnecessary, this approach also would be unworkable. In addition, it would undermine cooperation between law enforcement officers and prosecutors by deterring officers from playing significant roles in criminal investigations if they can be held liable solely because of that significant role even though they lack control over the decision to commence or continue criminal proceedings. In short, it would be bad policy.

To begin, the "significant role" standard would be detrimental to police investigations because it would unfairly turn malicious prosecution claims into a means to second-guess these investigations, years after the fact, and with the luxury of hindsight that was unavailable to the investigators. Where the defendants did not legally cause the prosecution, such second-guessing

should not be permitted. Beaman and his *amici*, for example, complain that the investigation in this case was "biased," e.g., Beaman Br. 27; Former Prosecutors Br. 6, 10, 12, and too quickly developed a "singular focus" on Beaman, e.g., Former Prosecutors Br. 11; see also Beaman Br. 27 (defendants "select[ed] [Beaman] as their man on Day One"). They argue that other suspects were "more likely" responsible. E.g., Former Prosecutors Br. 6-7; see also Beaman Br. 6-9, 29-30 (suggesting others should have been indicted instead of Beaman). And they criticize investigators for discounting certain witnesses or evidence along the way. E.g., Beaman Br. 13-14. But the relevant question is whether the defendant's conduct legally caused the decision to prosecute. Where, as here, the prosecutor knows the evidence and decides to proceed anyway, the plaintiff should not be heard to pick apart the investigation preceding that decision where that is not what caused the prosecution.

As *amici* acknowledge, "[c]riminal investigations are difficult work and police must not be chilled in their pursuit of suspects during legitimate investigations." Former Prosecutors Br. 15. And "[i]n any investigation, there are likely to be leads that are not pursued," and "[i]nvestigators must make decisions about how to use their resources to investigate cases." Beaman, 7 F. Supp. 3d at 822. That "[p]olice may focus on one lead to the exclusion of other evidence," Former Prosecutors Br. 11, is simply how they do their jobs. They follow the evidence where it goes and regularly decide that some evidence is

stronger than other evidence or that some witnesses are more worthy of belief. Police officers should be free to use their discretion to focus in on certain suspects and rule out others without fear that, years later in malicious prosecution litigation, they will have to defend the timing of each and every such decision. In this case, in fact, the prosecutor knew about the other suspects, e.g., Beaman, 776 F.3d at 512-13; Beaman, 7 F. Supp. 3d at 821-23, 826, 831-32, and yet still pursued Beaman. That is reason alone to refuse to revisit why and when certain suspects were ruled out in favor of Beaman or certain evidence was deemed more or less significant – it did not affect the prosecutor's decision. Indeed, underlying every malicious prosecution claim is an investigation that eventually narrowed to focus on a single person, who then was prosecuted. Thus, under the "significant role" standard, there essentially would be strict liability for everyone with a significant role in a prosecution in which the State was unable to sustain its burden beyond a reasonable doubt.

Moreover, the parties and court in any malicious prosecution case are ill equipped to decide what should or should not have happened during the original investigation. Often, decades have elapsed since the investigation. The passage of time plainly can adversely affect memories and evidence. On the other hand, new evidence that was unavailable at the time can become available. It is unfair to disparage an investigation based on what was unknown and unknowable back then.

Beaman's and his *amici*'s proposed focus on the investigation also permits malicious prosecution plaintiffs to craft unfair arguments that pay no heed to the facts available at the time. Indeed, under their standard, plaintiffs can have it both ways – they can ignore later events in favor of hypothetical arguments about what should have happened during an investigation when it suits them, but rely on subsequently discovered evidence when that is better to make their case. If investigators discount a lead based on what they know at the time because it is improbable or other evidence calls it into question, this should not later be fodder for an argument that they rejected "important evidence about a key alternative suspect." Former Prosecutors Br. 10. For example, Beaman and his *amici* rely heavily on the argument that investigators should have focused more on Murray as a suspect. E.g., Beaman Br. 7-9, 29-30; Former Prosecutors Br. 6-7. Yet, the same DNA testing conducted years after-the-fact that Beaman contends excludes him as the perpetrator, Beaman Br. 16, also apparently excludes Murray, A3363-A3366. In essence, the argument they make to benefit Beaman's case today is that the officers should be liable because they did not pursue a suspect back then who, at that time, they did not think was the likely culprit, even though that decision later turned out to be exactly right. No doubt if the investigation had focused on Murray instead of Beaman, Murray would have had grounds to complain. A standard that would encourage self-serving counter-factual hypothetical arguments of this kind

should be rejected.

Similarly, the standard would make it all too easy to shade the evidence to make rhetorical points – for example, claiming that, on the one hand, other suspects should have been pursued, because that makes the investigation seem nefarious, e.g., Beaman Br. 5 (suggesting the "potential kille[r]" could have been the "new paramour [who] had moved in with her" or "another man [she had broken up with] who wanted her back"), while, on the other hand, downplaying evidence, such as alibis, that demonstrate these same suspects were correctly eliminated, id. at 6 (admitting that defendants "confirmed alibis for [these] two suspects, Stacey Gates and Michael Swaine").[6] Police officers should not have to defend against speculative and misleading arguments of this nature. The proper focus of a malicious prosecution claim is not on what lawyers can dream up about what should have happened during the investigation. Instead, it is solely on whether the defendant's conduct legally caused the prosecutor to bring the prosecution.

The "significant role" standard is also impractical. Years after the fact, the attempt to determine whether, in any particular investigation, the police played a "*legitimate* role," Former Prosecutors Br. 15, or instead improperly "color[ed] all the evidence . . . even though nothing has been withheld from

[6] The district court deciding Beaman's federal claims rejected similar arguments about what unlikely suspects the police should have pursued instead of Beaman. Beaman, 7 F. Supp. 3d at 822 (rejecting that Rob Curtis "was a more likely suspect" because Lockmiller "once stood him up for a date," and "he has tortured animals in the past").

prosecuting authorities," id. at 11, is likely to be based on the jury's guesswork or sympathy. Likewise, using so-called legitimacy versus improper "color[ing]" during the investigation as the standard for malicious prosecution asks the wrong question. Malicious prosecution litigation should not focus on whether "on Day One," Beaman Br. 27; see also id. at 31 ("the first day"), the investigation should or should not have considered someone the primary suspect, when that was not the point in time when the decision to prosecute was made. Beaman's standard would ignore the decision to prosecute in favor of the months preceding it, id. 30-31, but that would result in burdensome discovery and mini-trials about each step in the investigation, to show that police officers correctly ruled out each suspect. Day One might be important in some investigations, whereas, in others, Day Twenty or Day Ninety could be when the investigators ruled out or focused in on a particular suspect. Police should not have to stand trial, decades later, about each and every decision. Instead, they should be able to exercise their discretion freely in weighing evidence and pursuing leads without fear that years later, those decisions will be second-guessed in pursuit of tort damages.

The "significant role" standard also would flood the courts with malicious prosecution claims. Indeed, the Former Prosecutors argue that expanding the standard is necessary precisely because, given the heavy criminal case load in Cook County (30,000 felonies), 1,000 prosecutors cannot sufficiently monitor 12,000 police officers to "ensure that this huge number of

police officers all accurately and completely report investigative findings to prosecuting authorities." Former Prosecutors Br. 12. But the notion that the courts are better equipped to oversee 30,000 investigations to ensure that investigators follow the correct leads and do not discount the wrong suspects is quite fanciful, not to mention burdensome. Indeed, no doubt the overwhelming number of investigations is partly why this court has considered malicious prosecution claims disfavored, as we have explained. Instead, malicious prosecution claims should continue to be limited to redressing wrongful conduct that directly causes the harm the malicious prosecution claim exists to remedy – the prosecution – and should not be a means of employing the courts to oversee police operations.

In addition, a broad standard that allows a claim to proceed even though the defendant's conduct did not cause the prosecutor to initiate the proceedings would damage the relationship between police and prosecutors, and thereby hamper the criminal justice system. If malicious prosecution claims can proceed against police officers based solely on their "significant role" in an investigation, this could discourage officers from working closely with prosecutors to avoid playing a significant role in the criminal prosecution. It likewise would discourage prosecutors from assisting police officers by performing investigative functions that could be considered a "significant role." And it could lead to destructive strife between police officers and prosecutors if police officers must attempt to assert control

somehow over whether and when prosecutors exercise their independent discretion to bring charges. Again, in this case, Beaman argues that Lt. Zayas should be liable because he did not stop the prosecutor from moving forward. This would impair the smooth functioning of criminal investigations by hindering robust cooperation. But "complex police investigations and prosecutions" require collaboration "to solve the case," and when officers work closely with prosecutors "they [are simply] doing their job." Beaman, 7 F. Supp. 3d at 829.

Similarly, the expanded rule has the potential to create disruption and discord within investigative teams themselves. Serving as lead investigator or taking a supervisory role in an investigation would be discouraged. Or to avoid liability, a member of an investigative team with a significant role would have to review and possibly second-guess the work of other team members, which could bog down the investigation as the same work is done more than once, or else lead to unnecessary and counterproductive conflict. Tort law should not deter the kinds of important leadership roles and efficient operations that would be most beneficial to solving crimes. After all, as this court has explained, investigating and prosecuting crime are among the most fundamental public policies in Illinois. E.g., Palmateer v. International Harvester Co., 85 Ill. 2d 124, 132-33 (1981); Joiner, 82 Ill. 2d at 44-45; see also, e.g., Illinois State Police v. Fraternal Order of Police Troopers Lodge No. 41, 323 Ill. App. 3d 322, 328-29 (4th Dist. 2001) (effective law enforcement is

important Illinois public policy).

In addition, some of the same policy reasons that support affording immunity to prosecutors and witnesses also support adhering to strict legal causation requirements for the liability of police officers. Broadening the standard could lead to a risk of "harassment by unfounded litigation [that] would cause a deflection of . . . energies from . . . public duties," as the U.S. Supreme Court has explained in the context of discussing prosecutorial immunity. Rehberg, 566 U.S. at 365 (internal quotation marks omitted). If police officers must routinely defend against malicious prosecution claims, "their energy and attention would be diverted from the pressing duty of enforcing the criminal law." Id. at 368-69 (discussing testimonial immunity) (internal quotation marks omitted). That would undermine crime fighting. Similarly, constant exposure to vexatious litigation that questions every decision could cause police officers to become overly hesitant during criminal investigations instead of exercising the independent judgment so crucial for solving crimes. Cf. id. at 369 (discussing "risk of injecting extraneous concerns" into decision-making) (internal quotation marks omitted).

The notion that the current standard "incentivizes . . . biased investigations by bad police officers," Former Prosecutors Br. 14, is untrue, not to mention insulting to the police officers who *amici* admit overwhelmingly conduct legitimate investigations, id. at 12. Concerns about justice for wrongfully convicted defendants, Beaman Br. 25-26, and providing

a "deterrent" for investigative misconduct, Former Prosecutors Br. 5, 15, should not lead to a rush to expand what, again, is a disfavored tort to reach conduct it never reached historically, when that would have such negative repercussions on the prosecution of criminal offenses. The absurd result in this case would be that the prosecutor who made the charging decision – despite being urged to keep investigating instead, A4-A5 ¶ 13 – is cloaked with immunity, whereas the law enforcement defendants and the local government would face liability. But the pendulum would swing too far if the burden for wrongful convictions is placed on those participants in an investigation or prosecution who did not legally cause the commencement or continuation of the prosecution. "[P]olice accountability," Beaman Br. 25, however important a goal, is no reason to abandon long-standing tort principles requiring that the defendant's conduct legally cause the harm before recovery is permissible.

Under the current standard requiring strict legal causation, all the proper incentives are in place. Law enforcement officers are incentivized to solve crimes and work cooperatively with prosecutors. They know that a significant role in an investigation is not alone enough to subject them to liability for the decisions of prosecutors, which are outside their control. On the other hand, they know that if their conduct dupes the prosecutor into bringing charges against the wrong person – for example, by intentionally fabricating evidence or pressuring the prosecutor – they can face the

consequence of a malicious prosecution claim. They also understand that other malfeasance, such as suppressing evidence, can subject them to Brady or other claims. But officers should not be discouraged by the threat of tort liability from exercising their judgment during criminal investigations or playing significant roles in those investigations, including cooperating with prosecutors. Accordingly, this court should adhere to the current standard mandating strict legal causation requirements for malicious prosecution defendants to ensure that only those defendants whose conduct legally causes the commencement or continuation of the prosecution should be required to face claims for malicious prosecution.

CONCLUSION

This court should hold that the "commence or continue" element of a malicious prosecution action requires showing the defendant was the legal cause of the commencement or continuation of the prosecution. Under that standard, the court should affirm the judgment of the lower courts.

Respectfully submitted,

EDWARD N. SISKEL
Corporation Counsel

/s/ Kerrie Maloney Laytin
BY: KERRIE MALONEY LAYTIN
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-0746
kerrie.maloney_laytin@cityofchicago.org
appeals@cityofchicago.org

Counsel for Illinois Municipal League:

/s/ Patrick W. Hayes
Patrick W. Hayes
General Counsel
Illinois Municipal League
500 East Capitol Avenue,
P.O. Box 5180
Springfield, IL 62705
(217) 525-1220
phayes@iml.org

Counsel for Illinois Prosecutors Bar Association:

/s/ Lee Roupas
Lee Roupas
President
Illinois Prosecutors Bar Association
P.O. Box 114
Wheaton, IL 60187
(708) 204-7951
illinoispba@gmail.com

Counsel for Illinois State's Attorneys Association:

/s/ John Milhiser
John Milhiser
President
Illinois State's Attorneys Association
P.O. Box 115
Springfield, IL 62705
(217) 753-6398
ilstatesattorneysassociation@gmail.com

Intergovernmental Risk Management Agency:

/s/ Margo Ely
Margo Ely
Executive Director, IRMA
4 Westbrook Corporate Center
Westchester, IL 60154
(708) 236-6333
margoe@irmarisk.org

Counsel for City of Peoria:

/s/ Donald B. Leist
Donald B. Leist
Corporation Counsel
City of Peoria Legal Department
City Hall
419 Fulton Street, Room 200
Peoria, IL 61602-1276
(309) 494-8592
dleist@peoriagov.org

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms with the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14,321 words.

/s/ Kerrie Maloney Laytin
Kerrie Maloney Laytin, Attorney

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements set forth in this instrument are true and correct and that the foregoing brief was electronically filed with the Illinois Supreme Court using the Odyssey eFileIL system and was served by emailing a PDF copy to the persons named below at the email addresses indicated on April 27, 2018.

/s/ Kerrie Maloney Laytin
Kerrie Maloney Laytin, Attorney

Persons served:

Counsel for Plaintiff-Appellant:
David M. Shapiro
(david.shapiro@law.northwestern.edu)
Locke E. Bowman
(locke.bowman@law.northwestern.edu)
Roderick and Solange MacArthur Justice Center
Northwestern Pritzker School of Law
375 E. Chicago Avenue
Chicago, IL 60611

Jeffrey Urdangen
(jeffrey.urdangen@law.northwestern.edu)
Bluhm Legal Clinic
Northwestern Pritzker School of Law
375 E. Chicago Avenue
Chicago, IL 60611

Counsel for Defendants-Appellees:
Thomas G. DiCianni
(tdicianni@ancelglink.com)
Lucy B. Bednarek
(lbednarek@ancelglink.com)
Ancel, Glink, Diamond, Bush DiCianni & Krafthefer, P.C.
140 S. Dearborn St., 6th Floor
Chicago, IL 60603

Counsel for *Amici Curiae* Former Prosecutors:
Arthur Loevy (arthur@loevy.com)
Jon Loevy (jon@loevy.com)
Steven Art (steve@loevy.com)
Loevy & Loevy
311 N. Aberdeen Street, 3rd Floor
Chicago, IL 60607

Counsel for *Amicus Curiae*
The Innocence Network:
Thomas McDonell
(thomas.mcdonell@quarles.com)
E. King Poor
(king.poor@quarles.com)
James I. Kaplan
(james.kaplan@quarles.com)
An Nguyen
(An.nguyen@quarles.com)
Quarles & Brady LLP
300 N. LaSalle Street, Suite 4000
Chicago, Illinois 60654

Counsel for *Amici Curiae* FOP
Labor Council, et al.:
Tamara L. Cummings
(tcummings@fop.org)
General Counsel
IFOP Labor Council
5600 S. Wolf Road
Western Springs, IL 60558

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5/7/2018 2:10 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK