No. 16-846

In the Supreme Court of the United States

ROBERT POMPONIO,
Petitioner

v.

MICHELE OWEN BLACK, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS MONTGOMERY COUNTY AND DET. JOHN T. FALLON IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a criminal defendant who was charged, but never confined or subjected to any non-standard pretrial restrictions, rely on the "continuing seizure" doctrine to state a Fourth Amendment malicious prosecution claim against investigating law enforcement officers and the local governments that employ them?

2. Has a criminal defendant suffered a deprivation of liberty to which procedural due process attaches if that defendant remained at liberty pending trial, was not subject to any non-standard pretrial restrictions, and was acquitted at trial?

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SUMMARY OF ARGUMENT

Pursuant to Rule 12.6 of the Rules of this Court, Respondents Montgomery County, Pennsylvania and Detective John T. Fallon (the "Montgomery County Respondents") submit this brief in support of the petition of Pennsylvania State Trooper Robert Pomponio ("Petitioner") for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit in this case.[1] In addition to joining the Petitioner's reasons for granting certiorari, the Montgomery County Respondents wish to highlight the following reasons why this Court should grant certiorari to review the decision of the Court of Appeals.[2]

In determining that a criminal defendant who remains free while awaiting trial and is then acquitted may maintain a Fourth Amendment malicious prosecution suit against investigating law enforcement personnel and their local government employers under 42 U.S.C. § 1983, the Court of Appeals relied upon the "continuing seizure" theory first articulated by Justice Ginsburg in her concurrence in *Albright v. Oliver*, 510 U.S. 266, 277-79 (1994) (Ginsburg, J., concurring). Pet. App. 12a-14a. Under this theory, a criminal defendant facing

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[1] The opinion of the Court of Appeals is reported at 835 F.3d 358 (3d Cir. 2016). Pet. App. 1a-27a.

[2] The Montgomery County Respondents adopt and incorporate by reference the Parties to the Proceedings, Pet. ii, the Statement of Jurisdiction, Pet. 1, and the Statement of the Case, Pet. 2-10, submitted by Petitioner in the petition for a writ of certiorari.

serious charges is presumed to have suffered a Fourth Amendment seizure of the person even when the defendant is not subjected to confinement or other non-standard pre-trial restrictions. The "continuing seizure" theory thus elevates virtually any state law claim for malicious prosecution of a serious criminal charge to the level of a constitutional violation. There is a sharp split among the circuits concerning the viability of this "continuing seizure" theory. *See* Pet. 16-20. Further, *Albright*, which was a plurality decision, only suggested that a § 1983 malicious prosecution claim could be grounded upon the Fourth Amendment without delineating the contours of an actionable violation – thus leading to uncertainty and inconsistency surrounding recurrent questions in an important area of the law. The Court should grant the requested writ to resolve the circuit split and other ambiguities currently clouding this aspect of Fourth Amendment jurisprudence.

There also is a split among the circuits, discussed by the Court of Appeals, Pet. App. 22a-23a, concerning the viability of a Fourteenth Amendment procedural due process claim predicated on the alleged fabrication of evidence where the criminal defendant is never convicted and confined on the basis of that evidence. A criminal defendant faced with fabricated evidence who obtains an acquittal at trial has received the procedural process that is due. The Court of Appeals erred by siding with those circuits that permit a procedural due process claim for the alleged fabrication of evidence in the absence of a conviction. This Court now has the opportunity to resolve a split in the circuits, correct the error of the Court of Appeals below, and clarify that a Fourteenth Amendment due process claim for the alleged

fabrication of evidence may not be maintained in light of an acquittal.

REASONS FOR GRANTING THE PETITION

A person who is criminally charged, but who remains free awaiting trial and is then acquitted, should not be permitted to maintain a § 1983 damages suit, such as the one Respondent Michele Owen Black has brought, against the law enforcement officers and entities involved in investigating those criminal charges. The Third Circuit decided to the contrary in this matter, but other Courts of Appeals have reached divergent legal conclusions in analogous cases. This Court thus should clarify that neither a Fourth Amendment malicious prosecution claim nor a Fourteenth Amendment due process claim lies against investigating law enforcement in favor of an accused who is at liberty at all times and, ultimately, secures acquittal.

I. The Circuits Are Divided On Whether Law Enforcement Officers Who Investigated Criminal Charges Can Be Held Accountable Under The Fourth Amendment For Malicious Prosecution, By Application Of The "Continuing Seizure" Theory Or Otherwise.

The Fourth Amendment issue presented here is whether Ms. Black, who at all times was at liberty while charges were pending against her, nevertheless had a right, once acquitted, to pursue a § 1983 malicious prosecution claim against the law enforcement officers and entities which investigated the case. The question of whether a Fourth Amendment cause of action for malicious prosecution

exists at all in this context – and, if so, the scope of any such claim – are maters of uncertainty and inconsistency in the Courts of Appeals.

A. The circuits are sharply divided regarding the viability of a Fourth Amendment malicious prosecution claim grounded upon a "continuing seizure" theory.

The opinion of the Court of Appeals reaffirms, as the law in the Third Circuit, that a person facing serious criminal charges is subjected to a "continuing seizure" for Fourth Amendment purposes simply by virtue of having to respond to those criminal charges. Pet. App. 11a-15a. This position was first articulated by Justice Ginsburg in her concurrence in *Albright*:

> A person facing serious criminal charges is hardly free from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. ... Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges.

Id., 510 U.S. at 278-79.

Well before the present case, the Court of Appeals had adopted and adhered to Justice Ginsburg's "continuing seizure" theory of the Fourth Amendment in *Gallo v. City of Philadelphia,* 161 F.3d 217, 222-24 (3d Cir. 1998) and *Schneyder v. Smith,* 653 F.3d 313, 319-22 (3d Cir. 2011). As the Court of Appeals explained:

> under this view, '[p]re-trial restrictions of liberty aimed at securing a suspect's court attendance are all 'seizures' … [because] the difference between detention in jail, release on bond, and release subject to compliance with other conditions is in the degree of restriction on the individual's liberty, not in the kind of restriction.'

Pet. App. 14a (quoting *Schneyder*, 653 F.3d at 320). Thus, when applying the "continuing seizure" view, a criminal defendant facing serious charges is presumed to be "seized" for Fourth Amendment purposes by any pre-trial condition, no matter how standard, that is intended to secure the defendant's attendance at trial.[3] Two other circuits – the Second Circuit and the Fifth Circuit – share this expansive view of Fourth Amendment seizures that is championed by the Third Circuit. *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997) (restricting accused citizen's right to travel outside state and ordering accused to make periodic court appearances amounts to seizure)[4]; E*vans v. Ball*, 168 F.3d 856, 861-862 (5th Cir. 1999) (pretrial requirements "diminished [the accused's] liberty enough to render him seized").

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[3] Where criminal defendants, however, were issued only a summons for a minor offense, the Court of Appeals did not find a Fourth Amendment "seizure," noting that the defendants never were arrested, never posted bail, were free to travel, never had to report to authorities pre-trial. *DiBella v. Borough of Beachwood*, 407 F.3d 599, 602-03 (3d Cir. 2005).

[4] *See also Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013); *Rohman v. New York City Transit Auth.*, 215 F.3d 208, 216 (2d Cir. 2000).

While the Court of Appeals here has enthusiastically endorsed Justice Ginsburg's "continuing seizure" theory as "compelling and supported by Supreme Court case law," Pet. App. 13a-14a (quoting *Gallo*, 161 F.3d at 223), the full Court has not weighed Justice Ginsburg's analysis. Further, many Courts of Appeals have declined to adopt the "continuing seizure" approach to Fourth Amendment analysis. The First Circuit expressly rejected the theory in *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001), concluding that, "[n]otwithstanding the eminence of its sponsor, the view that an obligation to appear in court to face criminal charges constitutes a Fourth Amendment seizure is not the law." *Id*. at 55-57.[5] Similarly, the Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have not adhered to the "continuing seizure" theory. *See, e.g., Riley v. Dorton*, 115 F.3d 1159, 1162-1164 (4th Cir. 1997) (*en banc*); *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004); *Karam v. City of Burbank*, 352 F.3d 1188, 1193-1194 (9th Cir. 2003); *Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir. 2007); *Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004). Rejecting the notion that one is effectively "seized" for Fourth Amendment purposes merely by having to appear in court and answer criminal charges, these decisions echo the observation of this Court in *Gerstein v. Pugh,* 420 U.S. 103 (1975), that a probable cause determination "is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Id*. at 125 n. 26.

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[5] *See also Harrington v. City of Nashua*, 610 F.3d 24, 32-33 (1st Cir. 2010); *Britton v. Maloney*, 196 F.3d 24, 29-30 (1st Cir. 1999).

This Court should settle the sharp disagreement that exists among the circuits concerning the viability of the "continuing seizure" theory that the Court of Appeals has applied in this case to find an actionable violation of the Fourth Amendment. The Third Circuit erred by adopting and applying a theory which presumes a "seizure" whenever a defendant "facing serious criminal charges" is "required to appear in court at the state's command." *Albright*, 510 U.S. at 278 (Ginsburg, J., concurring). Fertilized by this overly broad view of the concept of "seizure," most state-law malicious prosecution suits would blossom into constitutional claims – leading to an undesirable federalizing of garden-variety state tort actions.

In the present case, Ms. Black was never arrested,[6] she was never imprisoned, she was not required to post money or any other form of security for bail, she was permitted to return to her California home after arraignment, and she did not face a formal limitation on travel while awaiting trial. Pet. App. 6a-7a, 16a. It was the requirement that Ms. Black repeatedly travel from California to Pennsylvania for court appearances that caused the Court of Appeals to find a "seizure" of Ms. Black's person. *Id.* at 16a-17a. But compliance with the state's standard pre-trial command that a person must appear in court to answer criminal charges should not amount to a seizure. As the First Circuit found in *Nieves*, "the very idea of defining commonplace conditions of pretrial release as a 'seizure' for Fourth Amendment purposes seems to

[6] Ms. Black flew from her home in California to Pennsylvania for arraignment after learning that Pennsylvania authorities had issued an arrest warrant for her. *See* Pet. App. 6a.

stretch the accepted meaning of the term" because a "seizure" under the Fourth Amendment "is generally a discrete event, quintessentially an arrest, … , or at least a physical detention" and "not a continuous fact," such as "run-of-the-mill conditions of pretrial release." *Id.*, 241 F.3d at 55 (citing *California v. Hodari D.*, 499 U.S. 621, 624-25 (1991) and *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968)).

This Court should grant the petition for a writ of certiorari, resolve the gulf represented by the conflicting views of the circuits on the question of what constitutes a "seizure" under the Fourth Amendment, and correct the Third Circuit's erroneous conclusion that Ms. Black experienced a "seizure" of her person sufficient to maintain a Fourth Amendment malicious prosecution action merely because she had to travel repeatedly to appear and defend herself in court.

B. The circuits also are divided regarding the extent to which one may pursue a Fourth Amendment malicious prosecution claim against an investigating officer in general.

In *Albright v. Oliver,* a plurality of this Court found that, following the dismissal of criminal charges, an arrestee cannot mount a substantive due process challenge to the aborted prosecution but must proceed instead pursuant to the Fourth Amendment. *Id.*, 510 U.S. at 271. But *Albright* "express[ed] no view" on what an exonerated suspect's possible Fourth Amendment claim might entail because the suspect had failed to raise the issue. *Id.* at 275.

Since *Albright*, the Court has "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983[.]" *Wallace v. Kato,* 549 U.S. 384, 390 n.2 (2007). Indeed, the decision of the Court of Appeals at issue here acknowledges that "the lack of a decision on the merits of a Fourth Amendment claim in *Albright,* 'as well as the splintered views on the constitutional implications of malicious prosecution claims expressed in the various concurrences, has created great uncertainty in the law.'" Pet. App. 12a n. 5 (quoting *Gallo*, 161 F.3d at 222); *see also Taylor v. Meacham*, 82 F.3d 1556, 1561 n. 5 (10th Cir. 1996) (noting that "*Albright* muddied the waters rather than clarified them"); *Reed v. City of Chi*, 77 F.3d 1049, 1053 (7th Cir. 1996) (alluding to the "*Albright* minefield"). The analytical challenges to defining the boundaries of a Fourth Amendment malicious prosecution suit are well-summarized in the petition for a writ of certiorari. *See* Pet. 13-14.

In *Manuel v. City of Joliet*, 136 S. Ct. 890 (U.S. Jan. 15, 2016), which was argued on October 5, 2016, this Court is considering "whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment." The Seventh Circuit, from which *Manuel* arose, does not permit Fourth Amendment malicious prosecution claims arising following a person's initial appearance in court, choosing instead to focus upon Fourteenth Amendment due process. *Llovet v City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014). In numerous other circuits, *see* Pet. 15 n. 13, including the Third Circuit in the present case, the view is that "Fourth Amendment protection against seizure but upon

probable cause does not end when an arrestee becomes held pursuant to legal process." *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99-100 (1st Cir. 2013).

If the existence and contours of a cause of action under § 1983 for Fourth Amendment malicious prosecution are not first resolved in *Manuel*, this case presents an opportunity for the Court to clarify these thorny issues of Fourth Amendment jurisprudence.

II. The Circuits Are Split On Whether A Person Who Is Criminally Charged But Never Confined, And Is Later Acquitted, Nevertheless Can Pursue A Fourteenth Amendment Due Process Claim Alleging Fabrication Of Evidence.

In addition to asserting a Fourth Amendment malicious prosecution claim, Ms. Black also raised what she described as a procedural due process claim concerning the alleged suppression and destruction of evidence and the use of allegedly fabricated evidence against her. She no doubt couched this claim as one for procedural due process because of the plurality's conclusion in *Albright* that a criminal defendant who claims that a law enforcement officer maliciously prosecuted him cannot rely upon a substantive due process theory. *Id.*, 510 U.S. at 271. The Court of Appeals described Ms. Black's claim instead as a "stand-alone" due process claim for fabrication of evidence. Pet. App. 18a, 20a, 23a.

In *Halsey v. Pfeiffer*, 750 F.3d 273 (3d Cir. 2014), the Court of Appeals held that a Fourteenth Amendment fabricated evidence claim could proceed when the criminal defendant had been convicted at

trial but left open whether such a claim would be viable if the criminal defendant was acquitted. Reversing the District Court, the Court of Appeals used the present case to extend *Halsey* to instances in which a criminal defendant was acquitted despite the use of allegedly fabricated evidence. Pet. App. 17a-24a.

Importantly here, the Court of Appeals acknowledged a split among the circuits concerning the viability of a due process claim for fabrication of evidence in the absence of a conviction. *Id.* at 22a-23a. The Court of Appeals noted three other circuits – the Second[7], Fifth[8] and Eleventh[9] Circuits – in which a criminal defendant could pursue a due process claim for the fabrication of evidence notwithstanding the fact, as was true of Ms. Black, that the criminal defendant was not convicted of the charges.[10] *Id.* at

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[7] *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000); *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123 (2d Cir. 1997).

[8] *Cole v. Carson*, 802 F.3d 752 (5th Cir. 2015); *cert. granted, vacated & remanded*, *Hunter v. Cole*, 85 U.S.L.W. 3259 (U.S. Nov. 28, 2016).

[9] *Weiland v. Palm Beach Ct. Sheriff's Office*, 792 F.3d 1313 (11th Cir. 2015).

[10] In each of these cases relied upon by the Court of Appeals, however, the criminal defendant, unlike Ms. Black, was confined for a significant period of time pre-trial. In *Zahrey*, the criminal defendant was "held without bail for eight months" before acquittal. *Id.*, 221 F.3d at 346. The accused individuals in *Ricciuti* were "forced to remain in jail for more than 30 hours" before being released on their own recognizance. *Id.*, 124 F.3d at 126. The criminal defendant in *Weiland* was "incarcerated for nearly two years awaiting trial" before being exonerated. *Id.*, 792 F.3d at 1317. The accused in *Cole* was subjected to house arrest for about a year and a half before most charges against him were dismissed. *Id.*, 802 F.3d at 764.

22a. On the other side of the issue, the Seventh and Fourth Circuits require a conviction as a prerequisite to a due process claim for fabrication of evidence. *Saunders-El v. Rohde*, 778 F.3d 556, 562 (7th Cir. 2015) ("[A] police officer does not violate an acquitted defendant's due process rights when he fabricates evidence."); *Massey v. Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014) ("Fabrication of evidence alone is insufficient to state a claim for a due process violation; a plaintiff must plead adequate facts to establish that the loss of liberty – i.e., his conviction and subsequent incarceration – resulted from the fabrication.").

On its face, the Fourteenth Amendment forbids the deprivation of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Thus, as the Seventh Circuit recognized in *Saunders-El*, fabrication of evidence violates due process if illegitimate evidence is used to deprive the accused of liberty. *Id.*, 778 F.3d at 560. "Not every act of evidence fabrication offends one's due process rights[.]" *Id.* While using fabricated evidence to obtain a conviction and confinement does violate a criminal defendant's constitutional rights by depriving the defendant of liberty, one who is acquitted does not necessarily have such a claim. If someone were confined after arrest on the basis of fabricated evidence, and later acquitted, that person would have suffered a deprivation of liberty between arrest and acquittal, and a due process claim for that deprivation would lie. *Id.* at 560-561. If, however, someone were released on bond pending trial, and later acquitted (as was Ms. Black), that person could not claim to have been deprived of liberty in the interim, because the burden of appearing in court and attending trial, in and of itself,

is not a deprivation of liberty. *Id.* at 561. Without some deprivation of liberty, there cannot be a due process violation.

Disagreeing with *Saunders-El*, the Court of Appeals here took "a broader view of the liberty deprivations occasioned by criminal process." Pet. App. 23a n. 12. This expansive view was expressly driven by the Third Circuit's understandable "concern … with the corruption of the truth-seeking process of trial" that is wrought by the use of fabricated evidence. *Id.* While the goal of the Court of Appeals to root out the knowing use of false evidence is laudable and even essential, it cannot be accomplished by untethering a due process claim from its fundamental mooring of a deprivation of life, liberty or property – as the Court of Appeals has done here. A civil action under § 1983 is not the only means to redress and discourage the knowing use of fabricated evidence in criminal prosecutions. Persons who knowingly fabricate evidence are not beyond the reach of the criminal law, attorneys who knowingly present false evidence are subject to professional discipline, government employees may be subject to discipline by employers for such conduct, and, as is the case here, civil liability remains a possibility under state law.[11]

This Court should grant certiorari to correct the Third Circuit's erroneous expansion of the Fourteenth Amendment's due process guarantee beyond the context of a deprivation of liberty. As the Amendment

[11] Ms. Black is pursuing a parallel state court malicious prosecution action against most of the investigating officers in the Court of Common Pleas of Montgomery County, Pennsylvania. *Black v. Fallon, et al.*, No. 2015-26592.

requires, and as other circuits have held, this Court should confirm that a criminal defendant who is not confined pretrial or otherwise deprived of liberty, and who eventually acquitted, cannot maintain a procedural or "stand alone" due process claim against law enforcement officers and their local government employers for allegedly fabricating evidence.

CONCLUSION

For these reasons and those explained in Robert Pomponio's petition for a writ of certiorari, the Court should grant the petition.

Respectfully submitted,

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