No. 16-846

In the Supreme Court of the United States

ROBERT POMPONIO,

Petitioner,

v.

MICHELE OWEN BLACK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

A small fire broke out at a home; it resulted in a "V" pattern of fire damage extending from an electrical outlet. Petitioner Robert Pomponio was among those officials who investigated whether the fire was accidental or intentionally set.

State officials ultimately charged respondent Michele Black with arson. Petitioner and other officials alleged, and later testified, that the fire was not accidental because the wire supplying power to the outlet had been cut prior to the fire.

Officials fabricated this evidence. In fact, photos taken the day of the fire show that the wire to the outlet was intact. It was sometime later that the wire was cut; the officials' testimony to the contrary was not true. A jury thus acquitted respondent.

As a consequence of the criminal proceeding, Black's liberty was substantially limited: she was seized at least twice, she was forced to travel across the country for her arraignment, she was fingerprinted, photographed, and required to post a bond, she was compelled to travel to Pennsylvania a dozen more times for pre-trial proceedings, and she ultimately had to endure a trial.

Black subsequently brought this Section 1983 lawsuit against the officers who fabricated the evidence against her, including petitioner. The court of appeals unanimously concluded that Black has stated claims for relief. Further review should be denied.

Petitioner's first question presented concerns the Fourth Amendment—whether an individual may be

seized within the meaning of the Fourth Amendment without ever having been "confined." Pet. i. But this case does not implicate that question: the record demonstrates that Black *was* detained in the traditional sense. Even as framed in the petition, the question does not warrant review—there is no split among the circuits, the issue is a factbound request for error correction, and the decision below is correct.

Petitioner next raises a question concerning the due process clause. But, because Black's claim may proceed on the basis of her Fourth Amendment claim, there is no practical reason for the court to address the due process claim now. There is, moreover, no circuit split, and the decision below is correct.

Finally, petitioner's request for summary reversal on the basis of qualified immunity lacks all merit. No court has yet addressed qualified immunity; this Court should not be the first. And petitioner misunderstands the governing principles: petitioner has always had a duty to refrain from fabricating evidence, and he does not contend otherwise.

A. Factual background

On November 21, 2012, Black's mother had recently sold her house, and she was in the process of moving out. Pet. App. 3a-4a. Black was helping her mother move. *Ibid.*

During the sale of the house, the home inspection uncovered "old wiring" that posed a "fire hazard." Pet. App. 4a. As a result, the "buyers could not obtain homeowner's insurance." *Ibid.* Black's mother agreed to accelerate the closing date so the buyers could upgrade "the wiring before they moved in." *Ibid.* As a result, the parties further agreed that

Black's mother could "remove her possessions from the home" while the electricians were at work. *Ibid.*

A fire broke out in the third floor of the house. Pet. App. 4a. The "electricians extinguished the fire before they called the fire department." *Ibid.* The "fire resulted in a 'V' pattern of fire damage extending from a 220-volt electrical outlet." *Ibid.* The first official to respond, the Gladwyne Fire Chief, called the dispatcher "to report an electrical fire." *Ibid.*

A deputy fire marshal, Frank Hand, arrived next. Although he was not an electrical expert, he "disassembled the electrical outlet where the fire had started." Pet. App. 4a. Photographs taken that day showed that the wire connecting the outlet to the power supply was intact. *Id.* at 7a. Hand, however, had a different idea in mind: he "intentionally misrepresented his findings that the wire to the outlet had been cut 18 inches from the outlet to support the proposition that there was no power source for the outlet." *Id.* at 4a. Hand also failed to preserve the outlet, the supporting brackets, electrical box, or the outlet cover. *Ibid.*

Petitioner Pomponio, a state trooper and alternate deputy fire marshal, arrived later. Pet. App. 5a. He "did not inspect the electrical panel in the basement," which was standard practice in these circumstances. *Ibid.* If he had, "he would have discovered that the fire was an electrical one." *Ibid.* Pomponio thus "concluded the fire was caused by an open flame, ruling out that the outlet caused the fire." *Ibid.* Other officials, including John Fallon, a fire inspector, were also at the scene and participated in the investigation. *Ibid.*

During this time, Black "was advised that she was not free to leave the premises until she was questioned by police, and was escorted by police to and from the bathroom." Pet. App. 5a. When the officers interrogated Black, they accused her of starting the fire. *Ibid.* She was also informed that if she did not surrender to them at a later date, a warrant would be issued for her arrest, and she would be extradited from her home in California. *Id.* at 5a-6a.

The officers drew up an affidavit of probable cause to arrest Black, which contained a number of falsehoods and omissions. Pet. App. 6a. It failed to mention that the fire started at an electrical outlet; that the fire chief reported an electrical fire; that electricians were there to fix the old and dangerous electrical wiring; that the electrical panel was never checked; and that the electrical outlet and live wires were never tested. *Ibid.* And it relied on Hand's lie regarding the wire to the outlet. *Ibid.*

Black returned home to California. A month later, a warrant was issued for her arrest on felony charges of arson, risking catastrophe, and criminal mischief, and a misdemeanor charge of reckless endangerment. Pet. App. 6a. She returned to Pennsylvania, where she was arraigned, fingerprinted, photographed, and ultimately released on $50,000 unsecured bond—on the condition she appear at all subsequent hearings. *Ibid.* While being fingerprinted and photographed at the police station, "she was clearly not free to leave." *Id.* at 16a.

In all, Black was required to fly from California to Pennsylvania to attend twelve pretrial conferences. Pet. App. 6a-7a. Notices for each informed her that if she did not attend, a warrant would be issued for her arrest. *Id.* at 7a.

Black retained a fire expert, "who concluded that the fire was unequivocally an electrical one, not an arson." Pet. App. 7a. The expert and Black's counsel repeatedly contacted law enforcement to discuss the expert's conclusions, but they received no response. *Ibid.*

Black went to trial on April 23, 2014. Pet. App. 7a. Fallon and Hand asserted that the wire to the outlet where the fire started had been cut and showed photographs purporting to reveal as much. *Ibid.* But Black introduced photos, taken prior to Fallon's fabrication of evidence, that "show[ed] the wire was intact." *Ibid.* Black presented further evidence that the officers had fabricated evidence and suppressed exculpatory evidence. *Ibid.*

The jury deliberated for less than forty minutes before returning a verdict of not guilty. Pet. App. 7a.

B. Procedural background

Black subsequently filed this lawsuit. Pet. App. 7a. She asserts two constitutional claims against certain defendants (including Hand and Fallon), based on the defendants' fabrication, suppression, and destruction of evidence: a Fourth Amendment claim and a Fourteenth Amendment due process claim. *Ibid.* See also *id.* at 33a, 36a. See also Second Am. Compl. ¶¶ 148-150, D. Ct. Dkt. No. 30. As for petitioner Pomponio, Black asserted that he participated in a conspiracy with Hand and Fallon, the consequence of which was a violation of Black's constitutional rights. See Pet. 37a. See also Second Am. Compl. ¶¶ 154-159.

1. The trial court granted defendants' motions to dismiss. As for Black's Fourth Amendment claim, the court concluded that she "did not suffer the types of

onerous non-custodial restrictions that constitute a Fourth Amendment seizure." Pet. App. 35a. As for her due process claim, the court concluded that "a procedural due process claim exists if there is a reasonable likelihood that fabricated evidence led to an individual's conviction." *Id.* at 37a. Black, however, had been acquitted. *Ibid.*

The district court dismissed the conspiracy claim against Pomponio, finding it derivative of Black's ability to assert a constitutional claim. Pet. App. 38a.

2. The Third Circuit vacated and remanded, in an opinion authored by Judge Chagares and joined by former Chief Judge Scirica and Judge Krause.

With respect to Black's Fourth Amendment claim, the court agreed that she was required to show a "deprivation of liberty consistent with the concept of seizure." Pet. App. 9a (emphasis omitted) (quoting *Johnson* v. *Knorr*, 477 F.3d 75, 82 (3d Cir. 2007)). And, the court explained, "[p]retrial custody and some onerous types of pretrial, non-custodial restrictions constitute a Fourth Amendment seizure." *Id.* at 15a (quoting *DiBella* v. *Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005)).

The allegations of this case, the court concluded, satisfy that standard. The court found that Black was subjected to "serious criminal charges," and it identified a number of "constitutionally significant restraints" on her liberty. Pet. App. 15a. Black was compelled to fly from California to Pennsylvania for her arraignment (*ibid.*); she "spent more than an hour being fingerprinted and photographed" (*id.* at 16a); she "was required to post unsecured bail of $50,000," which would be forfeited if she failed to appear at hearings (*ibid.*); and she was "required to fly

from California to Pennsylvania for twelve pre-trial conferences in just a year" (*ibid.*). Thus, the Court concluded that "Black has sufficiently alleged that her liberty was intentionally restrained by the defendants." *Id.* at 17a.

As to Black's Fourteenth Amendment claim, the court concluded that a conviction is not necessary for Black to pursue a "fabrication of evidence claim." Pet. App. 18a. "[F]abrication of evidence * * * den[ies] a defendant due process of law" (*ibid.*)—and this "corruption of the trial process[] occurs whether or not one is convicted" (*id.* at 20a). It would be "anomalous," the court explained, "if an attentive jury correctly saw through fabricated evidence, and its acquittal categorically barred later relief to the criminal defendant." *Ibid.* "Such a result would insulate the ineffective fabricator of evidence while holding accountable only the skillful fabricator." *Ibid.*

Although Black was acquitted, she was subjected to "a criminal charge that would not have been filed without" the use of falsified evidence (Pet. App. 21a (quoting *Halsey* v. *Pfeiffer*, 750 F.3d 273, 294 n.19 (3d Cir. 2014))), and forced to submit to a "corrupt[ed] * * * trial process" (*id.* at 20a). Additionally, the court concluded that Black had been subject to a "deprivation[]" of her "liberty" as a result of the fabricated evidence. *Id.* at 23a n.12.

The court noted that its holding has limited practical effects: because a defendant must demonstrate that, "absent [the] fabricated evidence, the defendant would not have been criminally charged" (Pet. App. 23a), *and* because "there is a notable bar for evidence to be considered 'fabricated'" (*id.* at 23a-24a), "it will be an unusual case in which a police officer cannot

obtain summary judgment" (*id.* at 24a (quoting *Halsey*, 750 F.3d at 295)).

The court of appeals additionally vacated the district court's dismissal of the conspiracy claims against petitioner Pomponio. Pet. App. 24a n.14. The court did not address the additional arguments he raised with respect to the conspiracy claims. *Ibid.*

REASONS FOR DENYING THE PETITION

Neither of the two questions presented merits review. Both questions assume, as a premise, that Black was never subject to a restriction on her liberty. The first question is premised on the assertion that she was "never confined," and the second on the assertion that she "remained at liberty pending trial." Pet. i. But petitioner disregards that Black *was* seized. Pet. App. 16a. As a result, the facts of this case do not implicate either question.

Setting aside that obvious flaw, the petition still lacks merit. There is no relevant circuit split. Neither factbound question has any institutional or recurring importance. And the decision below is correct. Review should be denied.[1]

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[1] This petition is a poor vehicle for an additional reason. Black sued some officers (Fallon and Hand) for Fourth and Fourteenth Amendment violations; she sued others, including petitioner, for conspiring with Fallon and Hand. See Pet. 37a; Second Am. Compl. ¶¶ 154-159. Only petitioner sought certiorari.

Below, petitioner advanced several unique arguments regarding the conspiracy claims; for example, he asserted that Black failed to adequately allege an agreement among the co-conspirators. See, *e.g.*, D. Ct. Dkt. No. 33-1, at 7-9. These issues have not yet been addressed, rendering any further review of the conspiracy claims premature. See Pet. App. 38a.

I. The Fourth Amendment Question Does Not Warrant Review.

In *Manuel* v. *City of Joliet*, No. 14-9496, the Court recently concluded that claims regarding unreasonable pre-trial seizures are governed by the Fourth Amendment. See slip op. 6. That holding squarely confirms the result reached below.

The petition presents a narrow question regarding the "continuing seizure" doctrine. Pet. i. But this case does not implicate that issue. And even if it did, review would nonetheless be unwarranted.

A. Resolution of the question presented has no bearing on the outcome of this case.

The petition presents the question whether an individual who was "never confined or subjected to any non-standard pretrial restrictions[] [may] rely on the 'continuing seizure' doctrine" in pursuing a Fourth Amendment claim. Pet. i. Certiorari should be denied because that question neither describes nor controls Black's claim.

After the officers arrived and first fabricated evidence, Black was interrogated by petitioner and other officers. Pet. App. 5a. She "was advised that she was not free to leave the premises." *Ibid*. Some time later, after returning to Pennsylvania and being arraigned, Black "spent more than an hour being fingerprinted and photographed at a police station." *Id.* at 16a. Once again, Black "was clearly not free to leave." *Ibid*.

This Court has recognized that "a person has been 'seized' within the meaning of the Fourth Amendment" when "in view of all of the circumstances surrounding the incident, a reasonable person

would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (plurality). This has long been the "touchstone" for "telling when a seizure occurs." *Brendlin* v. *California*, 551 U.S. 249, 255 (2007). See also *Manuel*, slip op. 6.

The central premise of petitioner's argument—that Black "was not physically detained for a single moment" (Pet. 17)—is therefore false. As the court of appeals understood this case, Black was physically seized "pre-legal-process" (*Manuel*, slip op. 10)—during her interrogation at her mother's house. And she was seized "post-legal-process" (*ibid.*) during fingerprinting and photographing at the stationhouse. Pet. App. 5a, 16a. Try as he might, petitioner cannot remake the record to fit the question presented.

Although these seizures were relatively brief in duration, that has no bearing on the constitutional analysis. Individuals detained for even a few minutes in connection with a traffic stop are "seized" within the meaning of the Fourth Amendment. *Brendlin*, 551 U.S. at 263. And, if these seizures were based "solely on false evidence," as Black claims, then they are "unreasonable." *Manuel*, slip op. 6.

Although the court of appeals considered the "continuing seizure" doctrine (Pet. App. 12a-14a), this case does not depend on that doctrine. Indeed, the "continuing seizure" doctrine addresses circumstances where the unreasonable conduct in violation of the Fourth Amendment occurs *after* the physical seizure has concluded. See, *e.g.*, *Nieves* v. *McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001). Here, by contrast, the wrongful conduct in violation of the Fourth Amendment occurred *before*, and thus caused, the subsequent seizures.

B. This case implicates no division among the circuits.

Even if this case did rest on the "continuing seizure" doctrine, petitioner fails to substantiate his assertion of a relevant circuit split.

Manuel resolves the first issue petitioner addresses—asserted "ongoing concern" regarding the "temporal reach of the Fourth Amendment." Pet. 14-15. *Manuel* holds that the Fourth Amendment governs official conduct both before *and* after the initiation of legal process. Slip op. 6-10.[2]

Petitioner next addresses a bevy of cases purportedly concerning whether one is "automatically and indefinitely 'seized' for Fourth Amendment purposes merely because one has to respond to criminal charges." Pet. 16-17. As we have shown, however, Black was undeniably seized, both during the interrogation and at the stationhouse. This alone satisfies the Fourth Amendment's "seizure" requirement.

While that obviates the balance of petitioner's argument, it nonetheless fails on its own terms. Here, the Third Circuit "[c]onsider[ed] the totality of the circumstances alleged" to determine whether Black was "seized" for purposes of the Fourth

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[2] Petitioner also cites cases describing a circuit split regarding an entirely separate issue—whether a plaintiff in these circumstances must allege and prove the elements of "only a Fourth Amendment violation," or whether she must prove those elements *and* "all the elements of a common law malicious prosecution claim." *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 100 (1st Cir. 2013). Below, the court of appeals applied the latter, more-stringent and thus more defendant-friendly approach, yet nonetheless found that Black stated a claim. Pet. App. 9a-10a.

Amendment. Pet. App. 17a. The matrix of factors the court considered included:

- Black was interrogated, at which point she "was advised that she was not free to leave the premises." *Id.* at 5a.
- Less than a month "after being interrogated by police and accused of committing arson," Black was compelled to fly "from her home in California to Pennsylvania for her arraignment because an arrest warrant had been issued and she had been directed to return." *Id.* at 15a.
- Black "spent more than an hour being fingerprinted and photographed at a police station—and she was clearly not free to leave." *Id.* at 16a.
- She "was required to post unsecured bail of $50,000." *Ibid.*
- She "was forced to travel" across the country, "presumably at great expense," "a dozen times to defend herself." *Id.* at 16a-17a.
- She faced "the cloud of very serious charges." *Id.* at 16a.

Based on these factors, the court concluded that Black's "liberty was intentionally restrained by the defendants." Pet. App. 17a. Her "life was presumably disrupted by the compulsion that she travel out of state a dozen times." *Ibid.* And her "circumstances demonstrate that she experienced 'constitutionally significant restrictions on her freedom of movement for the purpose of obtaining her presence at a judicial proceeding.'" *Ibid.* (alterations omitted).

Petitioner fails to demonstrate that any circuit has held otherwise in analogous circumstances. He merely asserts—with virtually no analysis—that six

circuits have "declined to adopt the continuing seizure doctrine." Pet. 17. But each of those courts took pains to distinguish the circumstances they addressed from the sort of claim at issue here.

In *Nieves* v. *McSweeney*, the First Circuit considered whether any "seizure" occurred *after* "the first time the [plaintiffs] were subject to legal process." 241 F.3d at 54-55. The court found no seizure because, after the initiation of legal process, there was no evidence that the plaintiffs "were held after the initiation of criminal proceedings, required to post a monetary bond upon arraignment, subjected to restrictions on their travel, or otherwise exposed to any significant deprivation of liberty." *Id.* at 56. *Nieves* found cases from other circuits, including the Third Circuit's decision in *Gallo* v. *City of Philadelphia,* 161 F.3d 217 (3d Cir. 1998) (relied upon extensively below, see Pet. App. 13a-17a), "materially distinguishable" because the "aggregate deprivations [of liberty] involved * * * substantially exceeded the overall deprivation imposed here." 241 F.3d at 57.

Petitioner then rattles off a string cite of five cases, without explaining how they allegedly conflict with the decision below. Pet. 17-18. They do not.

In *Riley* v. *Dorton*, 115 F.3d 1159, 1163 (4th Cir. 1997), the Fourth Circuit considered the governing standard to apply "to excessive force claims of pretrial detainees." That does not bear on the claim at issue here.[3]

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[3] *Wiley* v. *City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004), turned on the Seventh Circuit's peculiar rule regarding the Fourth Amendment, which *Manuel* rejected.

The Ninth Circuit held that "[n]o Fourth Amendment seizure occur[s]" where "release restrictions [are] de minimus," and thus "do[] not involve circumstances comparable to those" addressed by the Third Circuit in *Gallo*. *Karam* v. *City of Burbank*, 352 F.3d 1188, 1194 (9th Cir. 2003).

In *Becker* v. *Kroll*, 494 F.3d 904, 916 (10th Cir. 2007), the Tenth Circuit also distinguished *Gallo*, explaining that the plaintiff there did "not argue that she was subject to any of these indicia of non-physical control."

The Eleventh Circuit *also* distinguished *Gallo*, holding that, in the case before it, there was no "significant deprivation of liberty." *Kingsland* v. *City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004). See also *Hoelper* v. *Coats*, 2010 WL 4292310, at *5 (M.D. Fla. 2010) (holding under *Kingsland* that "large bond and travel restrictions, and about eighteen (18) months of criminal proceeding" amounted to a significant "post-arraignment deprivation of liberty").

There is, accordingly, no meaningful division among the circuits. The courts have consistently held that pretrial restrictions that significantly impinge on an individual's liberty can amount to a seizure under the Fourth Amendment. Pet. App. 14a-15a.

C. The question presented has limited prospective significance.

Review is also unwarranted because this fact-bound question has limited practical importance.

First, petitioner makes no serious showing that the issue addressed here—whether the particular circumstances confronted by Black qualify as a Fourth Amendment seizure—is likely to recur with

any frequency. One of the factors at issue here, for example, was the onerous and unlikely-to-recur fact that Black had to make twelve cross-country trips to attend court hearings. Pet. App. 16a-17a.

Rather than analysis, petitioner offers hyperbole: under the decision below, he asserts, "virtually any suspect who is not detained may experience a continuing seizure and, with that, may have a potential Fourth Amendment malicious prosecution claim." Pet. 20. But this assertion is demonstrably false.

In the months since the decision issued, courts within the Third Circuit have had little trouble distinguishing the unusual and onerous circumstances here from far more pedestrian cases. The courts held that there was no seizure:

- Where a plaintiff "alleges only that she 'received a police summons by mail' and that the trial court held a two-day suppression hearing." *Brantley* v. *Wysocki*, 662 F. App'x 138, 141 (3d Cir. 2016).
- Where a plaintiff had four pre-trial restrictions: "(1) release on unsecured bail bond; (2) appear at all subsequent court hearings; (3) obey all further orders of the bail authority; and (4) provide written notice of any change of address within forty-eight (48) hours of the day of the change." *Heilimann* v. *O'Brien*, 2017 WL 898160, at *6 (M.D. Pa. 2017) (footnote omitted).
- Where "the Complaint is completely devoid of any facts from which it can be inferred that Plaintiffs were subject to *any* pretrial restrictions." *Wilson* v. *Borough*, 2017 WL 467974, at *6 (W.D. Pa. 2017).

This all highlights that petitioner seeks nothing more than error correction. There is no broad disagreement about the governing rules—he just disputes how they were applied to the facts of his case. That factbound question does not merit review.

And there are additional reasons why the holding below will not have any significant downstream effects. Alleging a Fourth Amendment claim requires the plaintiff to state a number of other elements that serve to winnow out frivolous claims. See Pet. App. 9a-10a. See also *Boseman* v. *Upper Providence Twp.*, 2017 WL 758480, at *4 (3d Cir. 2017) (finding no fabrication of evidence).

Second, the question has no implications for the day-to-day operations of law enforcement. Rather, all law enforcement officers labor under a clearly established, inviolable duty—the prohibition on the fabrication of evidence. Pet. App. 20a-22a. Whether that duty is later enforced and litigated in the context of a Fourth Amendment action, a Fourteenth Amendment due process claim, a state-law malicious prosecution action, a defense in a criminal prosecution, or anywhere else has no bearing on how officers are to conduct their business.

D. The decision below is correct.

This case is also unfit for review because the decision below is correct. Even apart from the clear seizure during the interrogation and, subsequently, at the stationhouse, the court of appeals correctly determined that Black was "seized" within the meaning of the Fourth Amendment.

Black was subjected to a wide array of pretrial restrictions. She was brought up on "serious criminal charges" (*Albright* v. *Oliver*, 510 U.S. 266, 278 (1994)

(Ginsburg, J., concurring))—*i.e.*, *three* separate felony charges of arson, risking catastrophe, and criminal mischief, and a misdemeanor charge of reckless endangerment. Pet. App. 6a. She was then arraigned, fingerprinted and photographed, forced to post $50,000 unsecured bail, and required to fly from California to Pennsylvania *twelve* times to attend pretrial hearings on penalty of arrest. *Id.* at 6a-7a.

Each of these restrictions constituted a significant deprivation of her liberty as protected by the Fourth Amendment. Taken together, they offer an overwhelming demonstration of a "seizure." *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975) ("Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty.").

There is broad agreement, for example, that the sort of trips that Black was compelled to undertake, under threat of arrest, are the kind of restrictions that constitute seizure. See, *e.g.*, *Rohman* v. *N.Y.C. Transit Auth.*, 215 F.3d 208, 216 (2d Cir. 2000) (five trips); *Evans* v. *Ball*, 168 F.3d 856, 861 (5th Cir. 1999) (regular reporting to pretrial services); *Hoelper*, 2010 WL 4292310, at *5 (large bond and eighteen months of proceedings). The $50,000 bond likewise supports the finding that Black was seized. *Nieves*, 241 F.3d at 57 (noting the significance of a $10,000 bond).

Petitioner presents only a single criticism of the decision below: that the Third Circuit's focus on whether the cumulative restrictions are sufficiently serious is "largely a subjective determination." Pet. 19. But that ignores wholly the framework the court of appeals applied, which carefully compared the facts of this case with the relevant precedents in order to determine the circumstances that do in fact

constitute a significant deprivation of liberty. See Pet. 15a-17a.[4]

II. The Fourteenth Amendment Question Does Not Warrant Review.

The due process issue similarly does not warrant review. Black's Fourth Amendment claim is an independent and sufficient basis for her case to proceed. As a result, the due process claim is academic—and thus does not warrant this Court's review. Aside from that, there is no circuit split, and the result below is correct.

A. This case is not an appropriate vehicle to review any due process question.

First, Black presented parallel Fourth and Fourteenth Amendment claims given confusion as to the governing law in the lower courts. Both claims addressed the same fabrication of evidence resulting in the same wrongful seizure and initiation of legal process against Black, with all the attendant harms.

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[4] *Manuel*, which confirmed that a Fourth Amendment claim is cognizable following initiation of legal process, supports the result reached below. In passing, petitioner asserts *Manuel* could be relevant were it to hold that a malicious-prosecution theory is not cognizable pursuant to the Fourth Amendment, or if *Manuel* were to address the contours of such claims. See Pet. 11-12. But *Manuel* expressly did not do so. Slip op. 11-15.

Nor does this case pose an opportunity to address these issues. Petitioner does not identify this issue in the questions he presents. See Pet. i. In the court of appeals, petitioner recognized—and did not challenge—existing circuit precedent permitting a malicious prosecution claim. See Brief for Appellee Pomponio at 14, *Black* v. *Montgomery Cty.*, No. 15-3399 (3d Cir. 2016). And, as the Court noted, there is no disagreement among the circuits on this issue. See *Manuel*, slip op. 13 & n.9.

In light of *Manuel*, Black has undoubtedly stated a claim pursuant to the Fourth Amendment. Her complaint therefore alleges a legally-cognizable cause of action addressing the officers' fabrication of evidence. Because further consideration of the due process claim will have no practical bearing on this case—it will proceed to discovery in any event—further review of the due process claim is unwarranted at this juncture.

Second, this case does not in fact implicate the question petitioner asks this Court to resolve—whether an innocent citizen, who was subjected to the use of fabricated evidence at trial, may bring a due process claim when she "remained at liberty pending trial." Pet. i. As we have shown (see pp. 9-10, *supra*), Black was seized at least twice. She was seized during her interrogation, and she was seized at the stationhouse. Pet. App. 5a, 16a. Both seizures occurred after the fabrication of evidence occurred. And during these incidents, "she was clearly not free to leave." Pet. App. 16a. See also *id.* at 5a. Thus, the question that petitioner asks this Court to resolve is not one addressed by these facts.

Third, *Manuel* recognizes that, "once a trial has occurred, the Fourth Amendment drops out." Slip op. 11 n.8. At that point, the Due Process Clause governs. *Ibid.*

Here, a trial *did* occur, during which fabricated evidence was used against Black. *Manuel* suggests that, because the trial "occurred," the Fourth Amendment does not apply to trial-related conduct. Slip op. 11 n.8. That is consistent with the result reached below. See Pet. App. 20a.

Manuel, of course, did not address a due process claim at all, much less one where officers presented fabricated evidence at trial, yet the defendant was nonetheless acquitted. See slip op. 6. Whether *Manuel* sheds light on those circumstances is an issue that no court has yet to consider—and thus percolation is necessary before this Court should do so. Whatever the answer to that question, though, it will have no practical bearing on this case.[5]

B. There is no circuit split.

Review is also unwarranted because there is no disagreement among the circuits. Although petitioner begins with the broad claim that "there is a circuit split with regard to the viability of Ms. Black's due process claim" (Pet. 22), he quickly retreats, acknowledging that, "[o]n closer scrutiny, the decisions of other courts * * * are not inconsistent" (*id.* at 23).

Petitioner's later concession is correct: all courts agree that deprivation of some form of a constitutionally protected interest, such as a liberty interest, is part of a due process claim. And no court, contrary to petitioner's broad suggestion, has adopted a rigid requirement requiring a conviction in all circumstances.

Here, the district court recognized that Black's due process claim turned, in part, on the "liberty deprivations" Black had suffered (Pet. App. 23a

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[5] Because this case will proceed irrespective of the due process claim, the Court should not grant, vacate, and remand in light of *Manuel*. Should any distinction later emerge between a Fourth Amendment and due process claim as it relates to this case, the lower courts may address *Manuel*'s effect at that time.

n.12), which included the interrogation and the jail-house seizure (*id*. at 15a-16a).

The Second, Fifth, and Eleventh Circuits have all reached the same conclusion. "[A] constitutional right is violated" whenever law enforcement "fabricates evidence that results in a deprivation of liberty." *Zahrey* v. *Coffey*, 221 F.3d 342, 356 (2d Cir. 2000). That deprivation can be "unjust incarceration" pending an acquittal. *Weiland* v. *Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1327 (11th Cir. 2015). But it need not be: "[b]eing framed and falsely charged brings inevitable damage to the person's reputation," "it requires the person framed to mount a defense," and it "places him in the power of a court of law, where he may be required to appear." *Cole* v. *Carson*, 802 F.3d 752, 772 (5th Cir. 2015).[6]

No circuit has adopted a categorical rule to the contrary. In *Alexander* v. *McKinney*, 692 F.3d 553, 557 (7th Cir. 2012), the Seventh Circuit distinguished—rather than rejected—the Second Circuit's *Zahrey* holding on the grounds that it involved a "liberty deprivation" other than a conviction. Subsequently, in *Saunders-El* v. *Rohde*, 778 F.3d 556, 561 (7th Cir. 2015), the Seventh Circuit stated that the plaintiff, "released on bond following his arrest and acquitted at trial, * * * cannot make out an evidence fabrication-based due process violation." Again, the court did not hold that a conviction is the *only* form

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[6] Petitioner criticizes the Third Circuit's reliance on *Cole* because it was subsequently granted, vacated, and remanded by this Court. Pet. 23 n. 22. But the proposition that fabricated evidence violates the Due Process Clause even where it does not result in conviction was established well before *Cole*. See, *e.g.*, *Boyd* v. *Driver*, 579 F.3d 513, 515 (5th Cir. 2009).

of liberty deprivation that can establish this form of a claim—it simply concluded that the plaintiff had identified no deprivation of liberty in that case. *Ibid.* These holdings do not, therefore, conflict with the holding below. See Pet. App. 20a.

In fact, a recent decision from a district court within the Seventh Circuit confirms that there is no categorical conviction requirement. In *Myvett* v. *Chicago Police Detective Edward Heerdt*, 2017 WL 75738, at *10 (N.D. Ill. 2017), the court "conclude[d] that the Seventh Circuit has affirmed, repeatedly, that a due process claim will lie when fabricated evidence is used to deprive a criminal defendant of liberty, even when the prosecution of that defendant is ultimately unsuccessful."[7]

Petitioner cites a decision by the Fourth Circuit in a footnote (Pet. 21 n.21), but he does not explain how it establishes a conflict. It does not. There, the Court stated that "a plaintiff must plead adequate facts to establish that the loss of liberty—*i.e.*, his conviction and subsequent incarceration—resulted from the fabrication." *Massey* v. *Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014). Showing that fabricated evidence caused a "conviction" was just one way that a claimant could demonstrate a loss of liberty; nothing in *Massey* suggests it was the only way. To the contrary, *Massey* rested expressly—and uncritically—on the Second Circuit's earlier decision in *Zahrey*, confirming that all circuits are aligned. And the district courts have not understood *Massey* to require a conviction in all circumstances. See, *e.g.*, *Ellis* v.

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[7] The Fifth Circuit also observed that the Seventh Circuit "has suggested a willingness to consider deprivations short of conviction and imprisonment if properly raised." *Cole*, 802 F.3d at 770.

Thornsbury, 2016 WL 3039961, at *14, *15 (S.D.W. Va. 2016) (requiring an "actual loss of liberty" "through incarceration *or otherwise*" (emphasis added)).

There is, accordingly, no circuit split implicated by this case. Petitioner has certainly not shown that another circuit has considered materially similar factual circumstances and reached a contrary result. Review in these circumstances is unwarranted.

C. The decision below is correct.

Review is also unnecessary because the decision below is correct. A conviction is not a categorical prerequisite to a due process claim challenging the use of fabricated evidence at trial. Holding otherwise would be to "insulate the ineffective fabricator of evidence while holding accountable only the skillful fabricator." Pet. App. 20a.

Petitioner agrees that the Constitution has long forbidden the use of fabricated evidence. Pet. 24. "[T]hat a State may not knowingly use false evidence" is "implicit in any concept of ordered liberty." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). See also *United States* v. *Agurs*, 427 U.S. 97, 104 (1976) (explaining that perjured testimony "involve[s] a corruption of the truth-seeking function of the trial process"). Thus, "every court of appeals that has considered the question of whether * * * fabricating evidence to charge or convict the defendant has answered the question in the affirmative." *Halsey*, 750 F.3d at 292.

As the decision below recognized, use of fabricated evidence at trial is no less offensive when it fails to achieve a conviction. Whether or not the defendant is ultimately convicted, he or she is forced to submit

to a "corrupt[ed] * * * trial process." Pet. App. 20a. Thus, "[w]hen falsified evidence is used as a basis to initiate the prosecution of a defendant"—and all that goes with it—"the defendant has been injured." *Id.* at 19a (alteration omitted) (quoting *Halsey*, 750 F.3d at 289).

Petitioner's ultimate claim—that the Third Circuit "decoupl[ed] * * * the fundamental right to due process of law" from the need to show a "deprivation of life, liberty, or property"—is simply incorrect. Pet. 24. As we have shown, the court of appeals linked its due process decision to its prior discussion of "the liberty deprivations occasioned by the criminal process." Pet. App. 23a n.12.[8]

Petitioner is equally wrong to suggest that the decision below "will enable anyone who is obliged to respond to any official accusation" to pursue a due process claim. Pet. 25. In addition to demonstrating a deprivation of liberty, a plaintiff must also prove "a

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[8] Additionally, as petitioner recognizes (Pet. 24), due process also protects deprivations of property. Courts have thus recognized that, if fabricated evidence yields a deprivation of property, there is a due process claim. See, *e.g.*, *Costanich* v. *Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1108 (9th Cir. 2010) ("We conclude that deliberately fabricating evidence in civil child abuse proceedings violates the Due Process clause of the Fourteenth Amendment when a liberty or property interest is at stake."); *White* v. *Wright*, 150 F. App'x 193, 198 (4th Cir. 2005) (recognizing "the right not to be deprived of liberty or property based on the *deliberate* use of evidence *fabricated by* or *known to be false* to a law enforcement official"). Here, the prosecution of Black caused a deprivation of her property. She "was forced to travel" cross-country "a dozen times to defend herself," "presumably at great expense," and she was released on $50,000 unsecured bail. Pet. App. 16a-17a. It also impacted her reputation. *Ibid.*

reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged." Pet. App. 23a. He or she must further meet the "notable bar for evidence to be considered 'fabricated'" (*id.* at 23a-24a)—and "demonstrate that the fabricated evidence 'was so significant that it could have affected the outcome of the criminal case'" (*id.* at 23a (quoting *Halsey*, 750 F.3d at 295)). And, finally, the plaintiff must show that the proponents were aware that the evidence was fabricated. *Id.* at 24a.

As the court of appeals concluded, "it will be an unusual case in which a police officer cannot obtain a summary judgment in a civil action charging him with having fabricated evidence." *Ibid.* (quoting *Halsey*, 750 F.3d at 295). But in those egregious cases, the existence of a constitutional remedy is essential.

III. Summary Reversal Is Unwarranted.

Petitioner closes with a naked plea for summary reversal on the basis of qualified immunity. Pet. 25-27. The petition itself, however, presents no question regarding qualified immunity. See *id.* at i. Petitioner's argument lacks all merit.

First, as petitioner acknowledges (Pet. 26), no court has yet addressed the issue. The district court never reached the issue (see Pet. App. 28a-41a), and thus it was not before—and not decided by—the court of appeals (*id.* at 1a-25a). This Court should not be the first to resolve the question.

Second, petitioner is not entitled to qualified immunity because the scope of his duty was clearly established.

Because qualified immunity "gives government officials breathing room to make reasonable but mis-

taken judgments," it turns on whether "a reasonable official would understand that *what he is doing* violates that right." *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014) (emphasis added) (quoting *Anderson* v. *Creighton,* 483 U.S. 635, 640 (1987)). "Where an official could be expected to know that certain *conduct* would violate statutory or constitutional rights," the law is clearly established. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added). That is, the "salient question" for the "clearly established" prong of the qualified immunity test "is whether the state of the law at the time of an incident provided fair warning to the defendants that *their alleged conduct* was unconstitutional." *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014) (emphasis added) (internal quotation marks and alterations omitted).[9]

Here, Black alleges that petitioner participated in a conspiracy to fabricate evidence. See Pet. App. 4a-6a. At the time of his conduct, the prohibition on the fabrication of evidence was clearly established—indeed, that much is elementary. See, *e.g.*, *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 261 (1993). See also Pet. App. 20a-21a. Petitioner advances no argument to the contrary; if anything, he appears to agree. See Pet. 24.

Instead, petitioner asserts that there is uncertainty regarding *other* elements of Black's claims—

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[9] See also *Armstrong* v. *Daily*, 786 F.3d 529, 556 (7th Cir. 2015) ("The issue is not whether issues concerning the availability of a *remedy* are settled. The qualified immunity defense focuses instead on whether the official defendant's *conduct* violated a clearly established constitutional right."); *Stoot* v. *City of Everett*, 582 F.3d 910, 927 (9th Cir. 2009) ("The qualified immunity evaluation must therefore focus on an officer's duties, not on other aspects of the constitutional violation.").

such as whether she must have been incarcerated or convicted of an offense. But that has no bearing on whether, at the time petitioner acted, *his* legal obligations were clearly established.

Petitioner's argument is especially hollow because the additional elements at issue—whether there is an incarceration or conviction requirement—relate to subsequent events wholly unknowable to petitioner when he committed the acts at issue. He nonetheless asserts that a "comparable" case for purposes of qualified immunity would be one in which the individual was "completely exonerated at trial." Pet. 27. But whether a suspect is later convicted or acquitted is *never* a fact known to an officer at the time he investigates; those kinds of after-the-fact developments cannot have any possible bearing on the qualified immunity analysis.

Petitioner's cases highlight this distinction. In *Carroll*, for example, it was unclear whether a police officer "may conduct a 'knock and talk' at any entrance that is open to visitors rather than only the front door." 135 S. Ct. at 352. In *Mullenix* v. *Luna*, 136 S. Ct. 305, 309 (2015), it was unclear whether an officer's use of force, in the particular factual circumstances the officer faced, was unreasonable. Here, by contrast, there was nothing at all unclear about petitioner's legal obligation—he had a clearly established duty not to fabricate evidence, and he offers no colorable contention otherwise.

Third, even if he had advanced a legitimate qualified immunity argument, petitioner errs by disregarding governing Third Circuit precedent. See *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999) (a right can be clearly established by "cases of controlling authority" in the relevant jurisdiction).

The relevant law was clear at the time: "When the state places constitutionally significant restrictions on a person's freedom of movement * * *, that person has been seized within the meaning of the Fourth Amendment." *Schneyder* v. *Smith*, 653 F.3d 313, 321-322 (3d Cir. 2011) (footnote omitted).[10] Likewise, it had long been established that fabrication of evidence violates due process. See *Halsey*, 750 F.3d at 296 (denying qualified immunity because "[r]easonable officers should have known that if they could not withhold exculpatory evidence from a defendant, they certainly could not fabricate inculpatory evidence against a suspect or defendant").

[10] *DiBella* is not to the contrary. There, unlike here, the plaintiffs "were only issued a summons; they were never arrested; they never posted bail; they were free to travel; and they did not have to report to Pretrial Services." *DiBella* v. *Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir. 2005).

CONCLUSION

The petition should be denied.

Respectfully submitted.

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