No. 16-846

# In the Supreme Court of the United States

ROBERT POMPONIO,
*Petitioner*

*v.*

MICHELE OWEN BLACK,
*Respondent*

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

## REPLY BRIEF

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## REASONS FOR GRANTING THE WRIT

"The Constitution does not guarantee that only the guilty will be arrested." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). By the same token, the Constitution does not guarantee that every accused individual who is eventually cleared of criminal charges inevitably suffers constitutional violations in the process of securing such a result.

Contrary to these principles, Respondent Black – who was acquitted on criminal charges – sued a number of law enforcement officers and entities pursuant to 42 U.S.C. § 1983, claiming that she was both subject to malicious prosecution (in violation of the Fourth Amendment) and deprived of procedural due process (in violation of the Fourteenth Amendment).[1] Even while acknowledging the uncertain state of the law on both counts, Pet. App. 12a n.5, 22a n.12, the Court of Appeals vacated the dismissal of Ms. Black's two constitutional claims. Pet. App. 25a.

Crucially, Ms. Black was never jailed or otherwise confined. She was not detained once "legal process" against her commenced (that is, when investigating officers secured a warrant against her); rather, upon notice, she surrendered voluntarily when a preliminary arraignment was scheduled pursuant to Pa.R.Crim.P. 540. Nor was she detained while the

[1] As noted at every opportunity in Ms. Black's latest filing, she contends that the case against her was based on "fabricated" evidence. In the district court, she had actually alleged "a variety of wrongful acts," which the Court of Appeals referred to collectively as "fabrication," for simplicity. *See* Pet. App. 18a n.9.

charges against her remained pending; rather, to remain at liberty, she had only to comply with modest and wholly routine terms, set by a judicial officer. *See* Pa.R.Crim.P. 524(C)(3), 526(A)(1).[2] Just as she was not detained before trial, she also was not detained during her trial. And she certainly was not detained once the jury rendered its verdict, because she prevailed.

The indisputable fact that Ms. Black was never jailed or otherwise confined undermines both of her constitutional claims. With that in mind, Petitioner Pomponio, a Pennsylvania State Police Trooper, asks the Court to grant review and to confirm that the Fourth and Fourteenth Amendments are not implicated when – as in this case – the only restraint on suspects' freedom is "the condition that they appear for trial." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975).[3] Under such circumstances, there is neither an actionable "seizure" for Fourth Amendment malicious prosecution purposes nor an actionable deprivation of "liberty" for Fourteenth Amendment due process purposes.

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[2] These included "appear[ing] at all times required until full and final disposition of the case." Pa.R.Crim.P. 526(A)(1). For Ms. Black to attend scheduled court hearings in Montgomery County, Pennsylvania, may well have been time-consuming and expensive, *see* Pet. App. 16a-17a, but in no way was her right to travel during the pendency of the criminal case *restricted*, by the criminal court judge or anyone else. Whatever logistical or financial burdens Ms. Black had to shoulder in order to appear when required stemmed entirely from her status as a California resident.

[3] Although considered Respondents at this stage, Trooper Pomponio's district court co-defendants have filed briefs that support the granting of his petition. *See* S.Ct. Rule 12.6.

## I. The Court Of Appeals' Reliance On The "Continuing Seizure" Rationale To Validate Ms. Black's Fourth Amendment Malicious Prosecution Claim Warrants Review.

In her multi-prong response to Trooper Pomponio's first Question Presented, Ms. Black maintains, as a threshold matter, that the Court's March 21, 2017 decision in *Manuel v. City of Joliet*, No. 14-9496, "confirms" the decision below. Opp. 9, 10, 11. It did not. She also contends that there is no need to ponder the applicability, or not, of the continuing seizure doctrine (and the circuit split on that issue) because she suffered two discrete, dispositive "traditional" seizures in any event. Opp. 9-14. She did not.

### A.

While Trooper Pomponio's petition was being prepared, *Manuel* was under consideration. By its terms, the Question Presented in that case concerned malicious prosecution, but the recent *Manuel* decision does not address whether, and on what terms, a person – like Ms. Black – is entitled to pursue a constitutional malicious prosecution claim pursuant to § 1983. It holds only "that the Fourth Amendment governs a claim for *unlawful pretrial detention* even beyond the start of legal process[.]" *Id.*, slip op. 11 (emphasis added). Although the dissent would have done so, the Court did not decide whether such a claim incorporates a "favorable termination" element, akin to what is required in a common-law malicious prosecution action, *id.*, slip op. 14, or indeed, whether a malicious prosecution claim may be brought under the Fourth Amendment at all, *id.*, Alito op. 3.

Contrary to Ms. Black's suggestion, *Manuel* does not "confirm" the Court of Appeals' analysis of *her* Fourth Amendment claim. Its holding only applies to individuals who have been detained pending trial (pre- or post-legal-process) – as Manuel was, for 48 days, but Ms. Black was not. At the same time, *Manuel* has not altered existing circuit-level caselaw generally permitting individuals to pursue Fourth Amendment malicious prosecution claims.

The central issue in this case is whether a person, like Ms. Black, who is charged but *not* detained nevertheless remains "seized" for Fourth Amendment purposes and may therefore press a Fourth Amendment malicious prosecution claim if acquitted. Only if what Ms. Black experienced before and during the time she was on unsecured bond amounted to a Fourth Amendment seizure could her § 1983 malicious prosecution claim could go forward. That issue – which hinges on whether the "continuing seizure" theory is viable – survives *Manuel*.

B.

In the Court of Appeals, Ms. Black argued vigorously that she was subjected to a continuing seizure,[4] and the Court of Appeals explicitly agreed, relying on its earlier decision in *Gallo v. City of Philadelphia*, 161 F.3d 217 (3d Cir. 1998), to rule in Ms. Black's favor. Pet. App. 12a-17a. *Gallo* had affirmatively adopted the continuing seizure doctrine as the law in the Third Circuit. *Id.*, 161 F.3d at 223-

[4] *See* 3d Cir. Brief of Appellant, at 13-25.

225. Other circuits, however, have declined to do the same. *See* Pet. 16-20.[5]

In an effort to neutralize this split, Ms. Black points out that, on occasion, other courts have distinguished *Gallo*. Opp. 13-14. If anything, that accentuates the contrast between the view of the Third Circuit (along with the Second and Fifth Circuits) and the views of the First, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits, both on the continuing seizure concept generally and on the analytical framework to be used if and when litigants invoke it.[6] As this contested and divisive issue was "passed upon below," it is appropriately addressed by this Court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

In a further effort to deflect attention from the continuing-seizure split, Ms. Black now argues that the Court need not concern itself with the Fourth Amendment question Trooper Pomponio has raised,

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[5] *See, e.g., Bielanski v. County of Kane,* 550 F.3d 632, 638 (7th Cir. 2008) ("we have repeatedly rejected the concept of a continuing seizure in the Fourth Amendment context"); *Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004) (expressing "doubts about the viability of this theory"); *Nieves v. McSweeney*, 241 F.3d 46, 55-57 (1st Cir. 2001) ("This court, too, has declined to embrace the whole of Justice Ginsburg's view" regarding continuing seizures); *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997) (noting court's "refusal to adopt the 'continuing seizure' theory of the Fourth Amendment"), *abrogated on other grounds, Wilkins v. Gaddy*, 559 U.S. 34, 39 (2010).

[6] No two cases are ever identical, so factual distinctions between one case and another are largely beside the point. Whether the courts have conscientiously and consistently applied the governing legal principles is what matters. In that respect, the courts' approaches diverge.

which focuses on the continuing seizure theory, because she "*was* detained in the traditional sense." Opp. 2 (emphasis in original). Throughout her Brief in Opposition, she submits that she was "seized" twice and, on that basis alone, satisfied the "seizure" element of her Fourth Amendment malicious prosecution claim. *See* Opp. 1, 8, 9-10, 11, 17, 19. But the first seizure Ms. Black claims to have experienced (being interrogated shortly after the fire) is legally irrelevant in the present context, and the second alleged seizure (being photographed and fingerprinted after her preliminary arraignment, before going home) did not run afoul of the Fourth Amendment for malicious prosecution purposes or otherwise.

Ms. Black relies on the familiar proposition that one may be "seized" within the meaning of the Fourth Amendment when "in view of all the circumstances … a reasonable person would have believed that he was not free to leave." Opp. 9-10 (citing*, e.g., United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality)). However, for this proposition to be useful to Ms. Black in this litigation, it has to be read in conjunction with the "seizure" element of a Fourth Amendment malicious prosecution claim in particular. As the Court of Appeals recognized, Pet. App. 9a, a Fourth Amendment malicious prosecution plaintiff must show that he or she "suffered deprivation of liberty consistent with the concept of seizure *as a consequence of a legal proceeding*." *E.g., Johnson v. Knorr*, 477 F.3d 75, 82 (3d Cir. 2007) (emphasis added). *See also, e.g., Kingsland*, 382 F.3d at 1235 (malicious prosecution plaintiff must have been "seized *in relation to the prosecution*") (emphasis added).

Accepting Ms. Black's factual averments at face value as required, Trooper Pomponio and the other investigating officers compelled her to remain at the house where the fire occurred and submit to an interrogation. If indeed she was "not free to leave," that may have amounted to a brief seizure, but it was not "as a consequence of a legal proceeding." To the contrary, at least until the warrant naming Ms. Black was issued about a month later, there was no "legal proceeding."

Nor did Ms. Black undergo a seizure when, following her initial court appearance, she was sidelined for an hour to be photographed and fingerprinted. These were "routine administrative steps," incidental to Ms. Black's formal entry into the criminal justice system. *See Maryland v. King*, 133 S.Ct. 1958, 1976-1977 (2013); *County of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991). As such, they were wholly permissible under the Fourth Amendment and did not amount to seizures in and of themselves. To the contrary, fulfillment of these technical requirements *enabled* Ms. Black to get on her way, consistent with the terms of her judicially-authorized release on unsecured bond.

## II. As To Ms. Black's Fourteenth Amendment Due Process Claim, The Court Should (At A Minimum) Grant, Vacate, And Remand For Reconsideration In Light Of *Manuel*.

Once again, aside from her Fourth Amendment malicious prosecution claim, Ms. Black also pleaded a separate Fourteenth Amendment procedural due process claim. This has been puzzling from the outset.

Beyond her broad contention that she never should have been prosecuted at all, Ms. Black has never pinpointed any *procedural* protection she was constitutionally entitled to but not afforded.[7]

At this point, though, it appears that procedure *vel non* was never Ms. Black's concern. Rather, she now indicates, she only raised a separate Fourteenth Amendment claim to cover herself because, as even she recognizes, there is "confusion as to the governing law in the lower courts." Opp. 18. Her two constitutional claims concern the very same events and, in her eyes, are virtually one and the same ("parallel") – so much so that she characterizes the due process claim as "academic" at this juncture. *Id.*

Ms. Black implies that, in the wake of *Manuel*, she would be satisfied to proceed pursuant to the Fourth Amendment alone. *See* Opp. 19. However, while voluntary dismissal of the Fourteenth Amendment claim may technically be an option, Ms. Black has not utilized it. That claim is still part of this case. Concomitantly, whether the claim *should* be part of the case remains an issue.

Trooper Pomponio does question whether the Court of Appeals was justified in allowing Ms. Black to pursue not just one but two (overlapping) constitutional claims, based on all the same facts and

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[7] For instance, Ms. Black was not compelled to be a witness against herself; she had a "speedy and public trial, by an impartial jury;" she was "informed of the nature and cause of the accusation" against her; she was able to confront the witnesses against her at trial, and to summon witnesses in her favor; she had "assistance of counsel;" and at no point was ""excessive bail" required of her. *See* U.S. CONST. amend. V, VI, VIII.

circumstances. Pet. 2.[8] Given *Manuel*, that concern is heightened. As Ms. Black would surely acknowledge, *see* Opp. 19, it is now clear beyond peradventure that a person who claims to have been wrongly charged, prosecuted, and subjected to pretrial detention can seek redress under the Fourth Amendment. *Manuel*, Slip op. 6-11. On the other hand, *Manuel* firmly rejected the Seventh Circuit's "outlier" approach to such scenarios, under which an accused detainee "could at most … challenge his pretrial confinement via the Due Process Clause." Slip. op. 5. Although Ms. Black's circumstances differ from those of Mr. Manuel (particularly in that she was not detained, while he was), the *Manuel* decision strongly suggests that if Ms. Black has a viable constitutional claim at all, it is one based on the Fourth Amendment, not one based

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[8] Nevertheless, insofar as the Court of Appeals green-lighted two separate claims, one would expect them to be analyzed consistently. Pet. 23. As expressed in the petition, "the reason why one who is not confined pending trial and is eventually acquitted cannot state a cognizable Fourteenth Amendment due process claim (*i.e.*, no deprivation of liberty) neatly parallels the reason why such a person cannot state a cognizable Fourth Amendment malicious prosecution claim (*i.e.*, no continuing seizure)." Pet. 23.

As to Fourteenth Amendment due process, Ms. Black has now gone beyond the deprivation-of-liberty requirement, arguing for the first time, by way of a footnote, that being prosecuted "caused a deprivation of her property" (because it was expensive for her to defend herself in the criminal court). Opp. 24 n.8. Neither of the cases cited in that footnote is remotely comparable to this one. In contrast, a case cited by Ms. Black one page earlier, *Ellis v. Thornsbury*, 2016 WL 3039961 (S.D. W.Va. May 27, 2016), appears to undercut her newly-minted deprivation-of-property contention. *See id.* at *15.

on the Fourteenth Amendment (and definitely not a "double" cause of action, based on both).[9]

Plenary review of the due process issue articulated in Trooper Pomponio's second Question Presented is warranted. *See* Pet. 20-25. Alternatively, the Court should grant, vacate, and remand for reconsideration of the Court of Appeals' Fourteenth Amendment ruling in light of *Manuel.*[10]

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[9] According to *Manuel*, the Fourteenth Amendment only comes into play after trial. Slip op. 11 n.8. At that stage, "[a] person challenging the sufficiency of the evidence to support both a *conviction* and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment." *Id.* (emphasis added). The Court's statement is not inconsistent with the due process conclusion of the district court in this case. *See* Pet. App. 37a (finding that Ms. Black did not have a viable Fourteenth Amendment fabricated evidence claim because she was not convicted).

[10] Anticipating the possibility of a GVR, Ms. Black disagrees, arguing that "this case will proceed irrespective of the due process claim." Opp. 20 n.5. Not necessarily. If the Court takes up Trooper Pomponio's first Question Presented and reverses, little of this case will remain.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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