No. 10-788

In the Supreme Court of the United States

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III, AND KELLY R. BURKE,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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STATUTE

42 U.S.C. § 1983 ....*passim*

REPLY BRIEF FOR PETITIONER

Respondent Paulk recognizes that the courts of appeals are divided regarding whether, in an action under 42 U.S.C. § 1983, a complaining witness is absolutely immune from damages liability when the claim is based on false grand jury testimony. And he does not dispute that the issue of complaining witness immunity arises with great frequency in the lower courts. See Pet. 16-17. Moreover, respondent does nothing to challenge or even address the arguments advanced by amicus Government Accountability Project confirming the importance of the question presented.

Respondent argues only that certiorari should be denied because he did not know that his statements were false when he testified before the grand jury. That, according to respondent, means that petitioner cannot prevail on his Section 1983 claim and makes this case a poor vehicle for resolving the conflict among the lower courts. But the complaint amply alleges respondent's knowing and culpable participation in a malicious prosecution in violation of petitioner's constitutional rights, and that is all that is relevant at the motion to dismiss stage.

Respondent's related attempt to gerrymander the lower court decisions to fit his "innocent false testimony" theory is similarly unavailing—the facts here squarely present the conflict among the courts of appeals. Because this case is an ideal vehicle for this Court to resolve the clear conflict among the lower courts regarding application of the complaining witness rule to false testimony, review by this Court is plainly warranted.

A. The Complaint Properly Alleges A Section 1983 Claim Based On Malicious Prosecution.

1. Respondent asserts that in testifying before the grand jury he was no more than an innocent "surrogate" or "conduit" for false information given to him by the prosecutors. Opp. 5-7. Because the case was decided below on a motion to dismiss, however, it is the allegations of the complaint—not the assertions in respondent's brief in opposition—that are controlling. See, *e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

The court of appeals stated that the complaint "alleges that * * * Hodges and Paulk *knew there was no probable cause* to indict him, and therefore they got together *with malice*, fabricated evidence (i.e., Paulk's false testimony), and decided to present that fabricated evidence to the grand jury." Pet. App. 11a (emphasis added). That is dispositive of respondent's argument.

Certainly there is no basis for challenging the court of appeals' interpretation of the complaint. The complaint alleges that "[a]cting as investigators, Mr. Paulk and Mr. Hodges instituted an investigation of Mr. Rehberg and then instigated criminal indictments of Mr. Rehberg *with malice and without probable cause*." Compl. ¶ 99 (emphasis added). It further states that "[p]robable cause never existed for any of the charges alleged against Mr. Rehberg. Yet he was the subject of an extensive illegal investigation conducted as a political favor." Compl. ¶ 29. Indeed, respondent admitted that his investigation was a "favor" to the hospital, and "[o]ther witnesses have confirmed Mr. Paulk's admission that he was doing [the hospital] a favor by investigating Mr. Rehberg."

Compl. ¶ 35. And respondent himself "admitted that he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary." Compl. ¶ 17. These specific factual allegations easily support a plausible inference that respondent's testimony was knowingly and maliciously false. *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Respondent's contrary construction of the complaint rests on allegations that are not part of the Section 1983 malicious prosecution claim that is the subject of this petition. For example, respondent relies on a paragraph of the complaint that is part of a separately pleaded state law negligence claim against Paulk. Opp. 4 (quoting Compl. ¶ 63 in Count One).[1] But it is axiomatic that a civil plaintiff may plead alternative and even inconsistent theories of relief. See, *e.g.*, *United Techs. Corp.* v. *Mazer*, 556 F.3d 1260, 1273-1274 (11th Cir. 2009) (citing Fed. R. Civ. P. 8(d) and noting that a "complaint is not subject to dismissal simply because it alleges that both [defendant and another person] committed the tortious conduct, even if it would be impossible for both to be simultaneously liable"). Allegations relating to other counts of the complaint are therefore wholly ir-

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[1] Respondent similarly quotes other provisions of the complaint that neither are a part of the malicious prosecution claim (Count Six) nor even assert any claims at all against respondent. See Opp. 3-4 (quoting Compl. ¶¶ 134-135, which asserts a claim solely against respondent Kelly Burke under Count Eight); Opp. 6-7 (quoting Compl. ¶ 148 and ¶ 152, which pertain to Count Nine that was asserted against respondent Ken Hodges and Dougherty County, but that was *not* asserted against Paulk). Count Six of the complaint includes only ¶¶ 1-60 by incorporation and ¶¶ 96-120 by direct allegation.

relevant in interpreting the Section 1983 claim at issue here.

2. Moreover, even if the complaint did not allege that respondent knew his testimony was false—and therefore failed to allege criminal perjury, as respondent claims (Opp. 6)—that would not render petitioner's Section 1983 claim defective.

The appropriate inquiry for a federal malicious prosecution claim is whether the defendant acted with malice and without probable cause. See *Kjellsen* v. *Mills*, 517 F.3d 1232, 1237 (11th Cir. 2008) ("To prove a § 1983 malicious prosecution claim, under federal law and Georgia law, a plaintiff must show the following: '(1) a criminal prosecution instituted or continued by the present defendant; (2) *with malice and without probable cause*; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused.'" (emphasis added) (quoting *Wood* v. *Kesler*, 323 F.3d 872, 881-882 (11th Cir. 2003))). The allegations detailed above plainly satisfy these requirements.

In sum, respondent does not dispute that his testimony was false and respondent is wrong in asserting that the complaint does not sufficiently allege his awareness of its falsity. This case therefore presents an ideal vehicle for this Court to resolve the disputed question whether the complaining witness exception applies to judicial testimony, such as testimony before a grand jury.

B. Respondent Wrongly Characterizes The Circuit Court Split And Its Application To This Case.

Respondent recognizes that the federal courts are divided about the applicability of the complaining

witness exception to judicial testimony in general and to grand jury testimony in particular.

He contends that these cases are inapposite because they do not involve a witness who "[t]estifies [f]rom the [f]acts [s]upplied by the District Attorney." Opp. 8. But, as set forth above, this case does not involve an innocent complaining witness; the complaint properly and plausibly alleges respondent caused petitioner to be indicted maliciously and without probable cause. Moreover, none of the cases relies on respondent's distinction between knowingly false testimony and "innocent" false testimony in determining the availability of absolute immunity, further demonstrating the irrelevance of respondent's argument to whether this Court should grant review.

In addition, respondent attempts to disguise the extent of the division among the lower courts by asserting that "only the Second Circuit and Ninth Circuits [*sic*] have carved out a complaining witness exception to absolute immunity for false grand jury testimony." Opp. 9. In fact, four more circuits have recognized that the complaining witness exception to absolute immunity applies in the grand jury context. See *Cervantes* v. *Jones*, 188 F.3d 805, 809-810 (7th Cir. 1999), overruled on other grounds by *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001); *Enlow* v. *Tishomingo Cnty., Miss.*, 962 F.2d 501, 511 (5th Cir. 1992); *Anthony* v. *Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992); *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 419, 423 (D.C. Cir. 1991).

This is to say nothing of the additional circuit court decisions that divide over whether the complaining witness exception should extend to judicial proceedings outside the grand jury context. Compare, *e.g.*, *Moldowan* v. *City of Warren*, 578 F.3d 351, 390

(6th Cir. 2009) (declining to apply the complaining witness exception to immunity for trial testimony), with *Harris* v. *Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997) (applying the complaining witness exception to immunity for trial testimony). See also Pet. 11-13 (discussing this divergence among cases).

As noted in the petition, this division among the courts of appeals stems from the tension between this Court's decisions in *Malley* and *Briscoe* and will persist until this Court clarifies the relationship between those two precedents. Until then, these Section 1983 claims will be resolved differently depending on where the lawsuit is filed. This Court should grant review to eliminate this disparate treatment of similarly situated litigants.

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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