No. 12-1363

In the Supreme Court of the United States

DAVID F. EVANS; COLLIN FINNERTY;
READE SELIGMANN, PETITIONERS

v.

CITY OF DURHAM, NORTH CAROLINA, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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In a brief in opposition that is long on invective—and, for that matter, just plain long—respondents seek to hold petitioners to an impossible burden. Respondents effectively ask the Court to deny certiorari because no other circuit has upheld liability against police officers on precisely the facts presented here. The relevant inquiry, however, is whether other circuits have announced conflicting legal standards in similar cases—and whether "it can be said with confidence that [they] would decide the case differently" if presented with the same facts. Eugene Gressman et al., *Supreme Court Practice* § 6.31(a), at 478 (9th ed. 2007). Respondents cannot seriously dispute either that the circuits have announced conflicting legal standards for determining whether a prosecutor's intervening action serves as a superseding cause, or that

resolution of that conflict would be outcome-dispositive in this case.

Respondents do not even try to dispute, moreover, that the question presented here is closely related to the one the Court took up, but did not decide, in *Pottawattamie County* v. *McGhee*, 129 S. Ct. 2002 (2009). To be sure, this case, like *Pottawattamie County*, involves egregious facts. But that is hardly a reason for denying review—particularly in the realm of official immunity, where the Court routinely grants certiorari despite the inherently fact-specific nature of the analysis. This case, like *Pottawattamie County*, is a compelling candidate for further review. The petition for certiorari should be granted.

1. The decision below deepens a widely recognized circuit conflict regarding the circumstances under which police officers may be liable despite a prosecutor's intervening action. As one court has noted, the relevant decisions are "legion and difficult to reconcile." *Hector* v. *Watt*, 235 F.3d 154, 161 (3d Cir. 2001). In arguing that no conflict exists, respondents systematically mischaracterize the legal standards that those decisions have adopted—under which petitioners would unquestionably prevail.

a. Unlike the decision below, the Second and Sixth Circuits have adopted expansive standards for causation where police officers engage in investigative misconduct. Respondents do not dispute that, "[i]n constitutional-tort cases," the Sixth Circuit applies a standard under which "a man [is] responsible for the natural consequences of his actions." *Gregory* v. *City of Louisville*, 444 F.3d 725, 747 (2006) (second alteration in original; citation omitted), cert. denied, 549 U.S. 1114 (2007). Instead, respondents contend that the Sixth Circuit's standard does not conflict with the Fourth Circuit's standard, under

which an officer must have misled or pressured the prosecutor, because the officer in *Gregory* arguably did mislead the prosecutor by failing to turn over all of the exculpatory evidence. See Br. in Opp. 10. But the Sixth Circuit did not rely on that fact in framing its standard; tellingly, respondents cite the unpublished opinion of the *district court* for that fact. See *ibid.* And the Sixth Circuit has never suggested that the "natural consequences" for which an officer may be held liable are limited to those flowing from the officer's deceptive or coercive conduct. Indeed, the Sixth Circuit has applied its "natural consequences" standard in at least one other constitutional-tort case where such conduct was not alleged. See *McKinley* v. *City of Mansfield*, 404 F.3d 418, 438-439 (2005), cert. denied, 546 U.S. 1090 (2006).

Respondents' efforts to explain away the Second Circuit fare no better. Respondents do not dispute that the Second Circuit applies a standard that focuses on "reasonable foreseeability." See *Zahrey* v. *Coffey*, 221 F.3d 342, 353-354 (2000). Respondents instead contend that, in *Wray* v. *City of New York*, 490 F.3d 189 (2007), the Second Circuit limited liability to instances in which the officer misled or pressured the prosecutor. But *Wray* merely recognized that cases upholding officer liability "typically" involve deceptive or coercive conduct, *id.* at 195; it did not limit liability to those situations. To the contrary, *Wray* quoted *Zahrey* for the proposition that "[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerates the wrongdoer who enlists himself in a scheme to deprive a person of liberty." *Id.* at 194 (brackets and citation omitted). That "perverse doctrine" is precisely what the Fourth Circuit adopted in its supposedly consistent opinion.

b. Also unlike the decision below, the Ninth Circuit has applied a presumption that an intervening prosecutorial action serves as a superseding cause, but has held that the presumption may be rebutted by showing that the officers "act[ed] maliciously or with reckless disregard for the rights of an arrested person." *Beck* v. *City of Upland*, 527 F.3d 853, 862 (2008) (alteration in original; citation omitted). Again, respondents do not dispute that the Ninth Circuit adopted that standard, but instead contend that the only type of malicious or reckless conduct that can rebut the presumption is "officers' lying to or withholding evidence from the prosecutor." Br. in Opp. 14. In *Beck*, however, the Ninth Circuit identified "giv[ing] false information [to the prosecutor]" as merely one in a non-exclusive list of examples of malicious or reckless conduct—a list that also included "engag[ing] in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings." 527 F.3d at 862-863 (internal quotation marks and citations omitted). Because petitioners have alleged here that their indictments and ensuing arrests were the direct result of the conspiracy, they would also have prevailed under the Ninth Circuit's standard.

c. Respondents cannot reconcile the decision below even with the decisions of the Fifth, Seventh, and Eleventh Circuits. Although those courts have all held that a prosecutor's intervening action breaks the causal chain absent evidence that the officers misled or pressured the prosecutor, they have recognized exceptions to that rule that would apply in the circumstances presented here.

To begin with, respondents acknowledge that the Eleventh Circuit has stated that its rule that a prosecutor's intervening action breaks the causal chain applies only where the prosecutor "acted without malice that caused [him] to abuse [his] powers." *Barts* v. *Joyner*,

865 F.2d 1187, 1195, cert. denied, 493 U.S. 831 (1989). Respondents note only that the Eleventh Circuit has had no occasion to apply its exception for cases where the prosecutor acted *with* malice. See Br. in Opp. 16. Yet there can be no dispute that the Eleventh Circuit recognized that exception in *Barts*—or that petitioners have alleged here that the prosecutor acted with malice by participating in a conspiracy to fabricate evidence.

The story is much the same when it comes to the Fifth Circuit. Respondents seemingly concede that, under that circuit's approach, a prosecutor's intervening action does not break the causal chain where "it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the [officers]." *Hand* v. *Gary*, 838 F.2d 1420, 1428 (1988). Respondents assert only that, under that rule, "the only 'taint' that matters is police deception." Br. in Opp. 16. *Hand*, however, plainly refutes that contention: the court explained that a prosecutor's intervening action "remain[s] tainted by the malicious actions of the government officials" either if the officials "join in malicious prosecution by prosecutors" or if the officials' malice "results in an improperly motivated prosecution without probable cause." 838 F.2d at 1426. That is exactly what petitioners have alleged here.

Respondents do not contest that the Seventh Circuit requires "some action of a third party that makes the plaintiff's injury an unforeseeable consequence of the defendant's [misconduct]" for the causal chain to be broken. *Whitlock* v. *Brueggemann*, 682 F.3d 567, 584 (2012), cert. denied, 133 S. Ct. 981 (2013) (emphasis and citation omitted). Respondents point to *Whitlock*'s statement that, where an *independent* prosecutor knows of fabricated evidence and proceeds nonetheless, the prosecutor's action severs the causal chain. See Br. in Opp. 17.

But that is entirely consistent with a legal standard that turns on foreseeability. It would be unforeseeable that an independent prosecutor would proceed with a prosecution based on fabricated evidence, but it is eminently foreseeable that a prosecutor who conspires to fabricate the evidence would do so. 682 F.3d at 584. Consistent with that distinction, the Seventh Circuit was careful to state only that the presentation of fabricated evidence "may" constitute a superseding cause "in some circumstances." *Ibid.*

In sum, because the circuits are plainly divided on the appropriate standard for causation where police officers engage in investigative misconduct, and because this case would come out differently in all of the other circuits discussed above, this case warrants the Court's review.[1]

2. The Fourth Circuit's decision also conflicts with the decisions of other circuits on the question whether the fabrication of evidence at the investigation stage, standing alone, gives rise to a constitutional violation. As a preliminary matter, respondents contend that the Fourth Circuit did not explicitly address that question. See Br. in Opp. 18. That is true, and we have never con-

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[1] Respondents' passing suggestion that petitioners have forfeited the argument that officers may be held liable even where they did not mislead or pressure the prosecutor, see Br. in Opp. 9, verges on the frivolous. In the opinion below, the court of appeals noted that petitioners had not alleged that the officers had misled or pressured the prosecutor, then proceeded to reject a rule that would "extend personal liability to police officers who have assertedly conspired with, but neither misled nor unduly pressured, an independent prosecutor." Pet. App. 20a, 21a. That is the rule that petitioners advocated below, see, *e.g.*, Pet. C.A. Br. 2 (first question presented), and are now advocating here.

tended otherwise. But respondents do not, because they cannot, dispute that the Fourth Circuit must necessarily have resolved that question in their favor. If it had not done so, its holding that the prosecutor's decision to seek the indictments broke the causal chain as to the officers' misconduct would have been nonsensical, because the constitutional violation would already have been completed before the prosecutor's intervening act.

Perhaps recognizing that fact, respondents labor to distinguish the cases that have held that the fabrication of evidence before trial gives rise to a constitutional violation. Again, however, respondents' arguments do not pass the smell test. To begin with, respondents err when they contend that the Eighth Circuit's decision in *McGhee* v. *Pottawattamie County*, 547 F.3d 922 (2008), did not speak to the issue. See Br. in Opp. 21. In that case, the district court had "held the procurement or fabrication of the evidence constituted a due process violation." 547 F.3d at 932. The Eighth Circuit adopted the same view, holding that a prosecutor who "violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges" may be held liable in a Section 1983 action. *Id.* at 933. Tellingly, the parties before this Court (including the government) viewed the Eighth Circuit as having addressed that question—and, after this Court granted certiorari, addressed it themselves in their merits briefing. See Pet. 22-23.

Respondents' efforts to distinguish the First Circuit's decision in *Limone* v. *Condon*, 372 F.3d 39 (2004), are equally ineffectual. Respondents acknowledge that the First Circuit characterized the proposition that there is a constitutional right "not to be framed by the government" as "easy pickings." *Id.* at 44. Respondents note only that the plaintiff in *Limone* had been wrongfully

convicted based on fabricated evidence, see Br. in Opp. 20—whereas petitioners here were merely wrongfully indicted, arrested, and detained. If there is a principled basis for that distinction, it is lost on us. But in any event, the First Circuit did not rest its conclusion on the fact that a conviction had resulted. To the contrary, it explained that, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from *deliberately fabricating evidence and framing individuals for crimes they did not commit*." 372 F.3d at 44-45 (emphasis added).[2]

3. Perhaps the best evidence that this case warrants further review is that respondents felt compelled to devote *fifteen pages* of their cert-stage brief to the merits. See Br. in Opp. 22-36. We address just a few of respondents' voluminous points here and leave the remainder to subsequent merits briefing if certiorari is granted.

a. Assuming, *arguendo*, that use of the evidence is a prerequisite for a constitutional claim based on the fabrication of evidence, this Court's decisions on causation in the context of constitutional torts strongly support peti-

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[2] Consistent with their scorched-earth approach, respondents contend that petitioners have waived this argument too. See Br. in Opp. 18. Again, not so. The district court permitted petitioners' claims to proceed not only under the Due Process Clause, but also under the Fourth Amendment. See Pet. App. 93a. In the footnote from petitioners' brief below on which respondents rely, petitioners simply noted that, insofar as the Fourth Amendment provided a sufficient basis for the officers' liability, there was no need to engage in a separate due process analysis. See Pet. C.A. Br. 31 n.6. Petitioners proceeded to contend that, while the law was "unsettled" on the question "whether the pre-trial use of fabricated evidence supports a claim under the Fourteenth Amendment," the district court "correctly" permitted their claim to proceed under the Due Process Clause. *Ibid.*

tioners' position. Respondents dismiss *Malley* v. *Briggs*, 475 U.S. 335 (1986), as standing for the proposition that an officer could be held liable for submitting deficient warrant applications only where the officer had misled or pressured the judicial officer who issued the warrants. See Br. in Opp. 27-28. That is incorrect. In *Malley*, the Court explained that "[t]he officer * * * cannot excuse his own default by pointing to the greater incompetence of the magistrate." 475 U.S. at 346 n.9. There would of course be no magisterial incompetence to account for if the magistrate had been misled or pressured into reaching the decision. Unsurprisingly, numerous circuits have rejected the cramped reading of *Malley* that respondents advance here. See *Beck*, 527 F.3d at 864 n.13; *Warner* v. *Orange County Dep't of Probation*, 115 F.3d 1068, 1072-1073 (2d Cir. 1996); *Wagenmann* v. *Adams*, 829 F.2d 196, 213 (1st Cir. 1987).

As for *Dennis* v. *Sparks*, 449 U.S. 24 (1980), respondents note that this Court did not explicitly discuss causation. That is true, as we have recognized. But respondents offer no answer to the fact that the Court's discussion of *immunity* would have been entirely beside the point if the conspiring judge's action had served as a superseding cause (and therefore immunized the private co-conspirators from suit). See Pet. 26.

In addition, even if respondents could distinguish *Malley* and *Dennis*, they cannot refute that well-established principles of tort and conspiracy law more generally support petitioners' petition. Respondents offer no support for their contention that tort principles of causation are applicable only to claims of negligence and not claims of intentional tort. See Br. in Opp. 28-29. And this Court has squarely rejected respondents' suggestion that conspiracy principles are inapplicable to Section

1983 actions. See *Sparks*, 449 U.S. at 28; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

b. Respondents argue at length that the United States' position in *Pottawattamie County* supports their position in this case and not petitioners'. See Br. in Opp. 22-26. Respondents' extended discussion of *Pottawattamie County* only underscores the close similarities between that case and this one. But in any event, respondents' characterization of the government's position is mistaken. As is their habit, respondents seek to read into the government's position an implicit limitation to cases in which the officer has misled or pressured the prosecutor. See *id.* at 24. But the critical statement in the government's brief—that "[a] conspiracy between the officer and prosecutor may *also* support a procurement theory of officer liability"—immediately follows a statement that the officer may discretely be held liable for "dup[ing]" or "coerc[ing]" the prosecutor. U.S. Br. at 25 n.6, *Pottawattamie County*, *supra* (No. 08-1065) (emphasis added). And respondents completely ignore the statements made by a majority of this Court suggesting that the government's view on the scope of officer liability was correct, see Pet. 2; instead, they focus on statements made by the government that did not even involve the question of liability for conspiracy, see Br. in Opp. 23-25.

c. Respondents' affirmative argument as to why police officers who conspire with a prosecutor to fabricate evidence should be immune from liability, like the court of appeals' decision, rests heavily on concerns about opening the floodgates to similar claims. See Br. in Opp. 30-32. Those concerns are unfounded. Respondents summarily dismiss the role that the Court's strict pleading standards play in weeding out implausible claims—including implausible conspiracy claims. See *Bell Atlan-*

tic Corp. v. *Twombly*, 550 U.S. 544, 556-557 (2007). And they disregard the Court's repeated admonition that qualified immunity provides sufficient protection against meritless claims. See, *e.g.*, *Malley*, 475 U.S. at 341.

4. Finally, respondents suggest that this case is an unsuitable vehicle for the Court's review because it is in an interlocutory posture. That argument can readily be swept aside. The Court often reviews cases presenting questions relating to official immunity in an interlocutory posture. See, *e.g.*, *Wilkie* v. *Robbins*, 551 U.S. 537, 549 (2007); *Hartman* v. *Moore*, 547 U.S. 250, 257 (2006). In any event, this case is "interlocutory" only in the sense that petitioners still have other claims in the same lawsuit; as to the claims at issue here, the court of appeals' decision is final. And while it is theoretically possible that, if the Court were to reverse, respondents could renew their defense that they are entitled to qualified immunity, but see Pet. App. 116a (rejecting that defense), the issues raised by that defense are discrete from the question presented here. Notably, *Pottawattamie County* was in a materially identical posture, yet the Court granted certiorari. This case presents a closely similar question to *Pottawattamie County*, and it is similarly well situated for the Court's review.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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