No. 13-1143

In the Supreme Court of the United States

BRIAN KOOPMAN, PETITIONER

v.

JEREMY C. MYERS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a Fourth Amendment claim for malicious prosecution is actionable under 42 U.S.C. § 1983.

2. Whether a cause of action for malicious prosecution accrues at the time a person is detained, as petitioner claims, or at the time of the "termination of the [resulting] criminal proceeding in favor of the accused," as this Court held in *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-17a) is reported at 738 F.3d 1190. The order of the district court granting defendant's motion for judgment on the pleadings (Pet. App. 18a-39a) is unreported, but available at 2012 WL 5456410. An earlier opinion of the court of appeals denying petitioner absolute prosecutorial immunity is unreported, but available at 462 F. App'x 823. An earlier opinion of the district court, dismissing certain claims against petitioner and all claims against the City of Loveland, but denying petitioner absolute prosecutorial immunity, is unreported, but available at 2011 WL 2445863.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2013, and a petition for rehearing was denied on January 8, 2014 (Pet. App. 1a-3a). The petition for a writ of certiorari was filed on March 19, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

After months of rummaging through the trash and conducting round-the-clock video surveillance at respondent's former residence, petitioner, a detective in the Loveland, Colorado Police Department, obtained a no-knock search warrant by alleging that respondent ran a methamphetamine laboratory in the attic, guarded by attack dogs and a sniper, and was disposing of waste chemicals and storing finished

drugs on the grounds. Resp. C.A. App. 60-62, 64, 68-69. The next day, SWAT teams using tear gas and an armored vehicle forcibly entered and searched the premises and a former sugar-beet factory lab nearby, seizing numerous items, including a jar containing a white substance that petitioner said field-tested for methamphetamine. Pet. App. 23a-24a. Petitioner then obtained an arrest warrant for respondent. Police boasted to the local paper that the search yielded "a lot of dope," and the media portrayed respondent as a methamphetamine manufacturer. *Id.* at 7a. Petitioner was taken into custody and held for several days before being released on bond.

There was only one problem: All of it was false. The "dope" found in the sugar-beet lab turned out to be—*sugar*. Resp. C.A. App. 466-467. The surveillance tapes showed no attack dogs, no sniper, no dumping of waste, no stashing of drugs. In a remarkable coincidence, *all* of the "field tests" turned out to be false positives. *Id.* at 61, 68-69. After the Colorado Bureau of Investigation concluded that the search had turned up no controlled substances, the district attorney dismissed all charges against respondent, more than two months after his arrest. Pet. App. 8a. Respondent sued petitioner under 42 U.S.C. § 1983 for malicious prosecution in violation of the Fourth Amendment. He alleged that petitioner had fabricated numerous statements in his search- and arrest-warrant affidavits and rigged the field tests, resulting in his wrongful arrest and prosecution. The district court dismissed respondent's claim as time barred, but the Tenth Circuit reversed and remanded for further proceedings.

Petitioner asks this Court to grant review to resolve a purported circuit split about whether a person wrongfully arrested may bring a Fourth Amendment malicious prosecution action against a police officer under Section 1983 and, if so, when such a claim accrues. Review is not warranted. Contrary to petitioner's claim of a split, "each of the eight Courts of Appeals to directly address in the years since *Albright* [v. *Oliver*, 510 U.S. 266 (1994)] whether the Fourth Amendment provides protection against pretrial detention without probable cause has concluded that it does." *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 99 (1st Cir. 2013). The consensus view among the courts of appeals represents a straightforward application of the governing legal principles. Moreover, the Tenth Circuit remanded the case for the district court to address in the first instance the absolute and qualified immunity arguments petitioner asserted below, Pet. App. 17a, which may afford petitioner all the relief he seeks. This case's interlocutory posture makes it a poor vehicle to review the question presented. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). The petition should be denied.

A. Factual Background

Because the District Court granted judgment on the pleadings, see Fed. R. Civ. P. 12(c), the facts alleged in respondent's amended complaint "must [be] accept[ed] as true," *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164 (1993). "Treated as true, [petitioner's]

allegations paint a compelling picture of overzealous police work." Pet. App. 7a. For several months, petitioner conducted extensive surveillance of a building in Loveland, Colorado, where respondent had lived and operated an excavating business, including rummaging through the trash and conducting round-the-clock video surveillance. Pet. App. 23a; Resp. C.A. App. 59, 64. Petitioner then allegedly falsified an affidavit in order to obtain a no-knock search warrant of the premises. In the affidavit, petitioner asserted that, according to an unnamed confidential informant, respondent was running a methamphetamine laboratory out of the attic, dumping chemical waste on the property, and storing finished drugs on the grounds. Resp. C.A. App. 274. Petitioner also alleged that the premises were guarded by attack dogs and a sniper, and contained drug paraphernalia and laboratory equipment used to produce methamphetamine. *Id.* at 273-275.

Petitioner then led city and county SWAT teams to the property to execute the search. Resp. C.A. App. 63. Petitioner spurned an offer from respondent's father to let him in with a key, and the SWAT teams entered the premises forcibly using tear gas and an armored vehicle, causing extensive property damage. *Ibid*; *id.* at 522-524. Petitioner and members of the county's drug task force searched the building, and even searched a neighboring property neither owned nor controlled by respondent, which had been used as a sugar beet factory's laboratory. *Id.* at 63-64. They seized several items, including a mason jar found in the sugar beet laboratory containing white powder. *Id.* at 67-68. Police conducted

seven field tests on the items, which they claimed tested positive for illegal drugs. *Id.* at 64, 69, 375; Pet. App. 23a.

Petitioner then sought an arrest warrant for respondent, who was not present during the search. Petitioner's arrest warrant affidavit substantially incorporated the allegations of his search warrant affidavit, but also included the (false) assertion that the seized materials were part of the methamphetamine manufacturing process. Resp. C.A. App. 64-65. Respondent surrendered to the Loveland Police on September 7, 2007, and was released on bond on September 10. *Id.* at 65. While criminal proceedings were pending, the Colorado Bureau of Investigation tested the items seized from respondent and the sugar beet laboratory, and concluded that they contained no controlled substances. *Ibid.* The mason jar seized from the sugar beet laboratory contained not methamphetamine, but sugar. *Id.* at 466-467. The district attorney dismissed all charges against respondent on November 15, 2007. Pet. App. 8a.

B. Procedural History

1. Respondent filed suit against petitioner in Colorado state court on November 5, 2009; petitioner then removed the case to federal district court. The operative amended complaint alleges a single Section 1983 claim for malicious prosecution under the Fourth Amendment.[1] Respondent alleges that peti-

[1] Respondent also alleged a malicious prosecution claim under the Fourteenth Amendment. The district court dismissed that claim (Pet. App. 31a-35a), and the Tenth Circuit affirmed (*id.* at 9a-11a). That allegation is not at issue here.

tioner lacked probable cause to search the premises and "maliciously, intentionally and/or recklessly made false and misleading statements" in his search- and arrest-warrant affidavits. Resp. C.A. App. 59-60. Respondent also alleges that petitioner fabricated the results of the field tests conducted during the search. *Id.* at 69. Finally, respondent alleges that petitioner made several factual representations in his search-warrant affidavit that were inconsistent with the video-surveillance evidence. *Ibid.*

2. The district court granted petitioner judgment on the pleadings, dismissing respondent's claim under Fed. R. Civ. P. 12(c), as barred by Colorado's two-year statute of limitations.[2] Pet. App. 18a-39a. Concluding that respondent's claim was "in the nature of false imprisonment," *id.* at 31a, the court determined that his cause of action accrued upon his release from custody on September 10, 2007, and that the two-year statute of limitations had run by the time he filed his initial complaint on November 5, 2009, *ibid.*

3. The court of appeals reversed in relevant part and remanded. Pet. App. 4a-17a. The court concluded that the district court had "improperly dismissed [respondent's] Fourth Amendment malicious

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[2] The district court previously dismissed all claims against the City of Loveland, and dismissed respondent's Fourteenth Amendment substantive due process claim against petitioner, but denied petitioner's motion for absolute prosecutorial immunity, and the Tenth Circuit affirmed the denial of prosecutorial immunity on interlocutory appeal. See *Myers* v. *Koopman*, No. 09-CV-02802-REB-MEH, 2011 WL 2445863 (D. Colo. June 17, 2011), aff'd, 426 F. App'x 823 (10th Cir. 2012). Those issues are not before the Court in the current petition.

prosecution claim as untimely after recasting it as a claim for false imprisonment." *Id.* at 6a. Because "[u]nreasonable seizures imposed with legal process precipitate Fourth Amendment malicious-prosecution claims," *id.* at 13a, the court concluded that respondent had "correctly styled his Fourth Amendment claim as one for malicious prosecution," *id.* at 6a. Because "all the elements" of a malicious-prosecution cause of action are not satisfied until "the original action terminate[s] in favor of the plaintiff," *id.* at 16a, respondent's claim did not accrue until the criminal action terminated in respondent's favor on November 15, 2007, when the charges against him were dismissed. Since respondent filed his initial complaint less than two years later, his action could proceed. *Ibid.* The court remanded for consideration of the "arguments regarding absolute and qualified immunity" that petitioner had raised in his cross-appeal, directing that those "should be addressed in the first instance by the district court." *Id.* at 17a; see also *id.* n.6.[3]

REASONS FOR DENYING THE PETITION

I. THE COURTS OF APPEALS' UNIFORM HOLDINGS ON THE AVAILABILITY OF A FOURTH AMENDMENT MALICIOUS PROSECUTION ACTION ARE CORRECT

A. Petitioner strains to argue that the Fifth, Eighth, Ninth, and Seventh Circuits have held that a

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[3] The court of appeals affirmed dismissal of respondent's Fourteenth Amendment due process claim, concluding that Colorado law provides an adequate post-deprivation remedy. That holding is not at issue here.

Fourth Amendment malicious prosecution action cannot be brought under Section 1983, mischaracterizing or ignoring the holdings of many federal courts of appeals in an effort to paint the Tenth Circuit as the lone holdout against a solid wall of circuit authority. Pet. 20, 21. That view, however, runs directly counter to that of the circuit courts themselves. As the First Circuit noted only last year:

> [R]ecogniz[ing] a Fourth Amendment malicious prosecution claim [under § 1983] is now the majority rule. Indeed, each of the eight Courts of Appeals to directly address in the years since *Albright* [v. *Oliver*, 510 U.S. 266 (1994)] whether the Fourth Amendment provides protection against pretrial detention without probable cause has concluded that it does.

Hernandez-Cuevas v. *Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) (collecting cases). And in adopting this majority rule on behalf of the D.C. Circuit, Judge Sentelle, joined by Judges Henderson and Tatel, noted that "nearly every other Circuit has held that malicious prosecution is actionable under the Fourth Amendment to the extent that the defendant's actions cause the plaintiff to be 'seized' without probable cause." *Pitt* v. *District of Columbia*, 491 F.3d 494, 510 (2007) (collecting cases).[4] On a fair reading, the Tenth Circuit's holding accords with the views of *all* the

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[4] The D.C. Circuit concluded that "only one circuit has held that malicious prosecution claims do not implicate any constitutional rights," 491 F.3d at 511 (citing *Kurtz* v. *City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001)). As explained below, see pp. 14-15, *infra*, the Eighth Circuit actually has not decided the issue.

other courts of appeals that have considered the issue. There simply is no circuit conflict on the issue, let alone conflict sufficiently deep and troubling to warrant this Court's review.[5]

1. Petitioner neglects to mention the holdings of *seven* courts of appeals that have, like the Tenth Circuit, concluded that a malicious prosecution claim based on a Fourth Amendment seizure is cognizable under Section 1983 or *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971): The First, Second, Third, Fourth, Sixth, Eleventh, and D.C. Circuits *all* have aligned with the Tenth Circuit's position. See *Hernandez-Cuevas*, 723 F.3d at 99-100; *Swartz* v. *Insogna*, 704 F.3d 105, 112 (2d Cir. 2013); *Evans* v. *Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012);

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[5] Petitioner also claims that review is needed because "the current state of Fourth Amendment-based § 1983 prosecution theory is an embarrassment to the federal judiciary and imperils confidence in the law." Pet. 30 (initial capital letters deleted). The statements of confusion he collects, however, have little specific bearing on the questions presented. Indeed, petitioner concedes as much when he couches the courts' complaints as concerning "[s]ection 1983-based malicious prosecution *jurisprudence*" generally, *ibid.* (emphasis added), and "this area of the law" in the abstract, *ibid.* Although he correctly quotes the *Albright* plurality as stating that there is an "embarrassing diversity of judicial opinion," *id.* at 31 (quoting 510 U.S. at 271 n.4), the plurality was there referencing an entirely different issue: the standards that should govern § 1983 malicious prosecution claims, not whether they exist, see *Albright*, 510 U.S. at 271 n.4 (noting that at the time "[m]ost of the lower courts recognize some form of malicious prosecution under § 1983. The disagreement among the courts concerns whether malicious prosecutions, standing alone, can violate the Constitution.").

Pitt, 491 F.3d at 494, 511 (D.C. Cir.); *Fox* v. *DeSoto*, 489 F.3d 227, 237 (6th Cir. 2007); *Kingsland* v. *City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004); *Gallo* v. *City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998). Even if petitioner's characterization of the circuits he places on the other side of the issue were correct (which, as discussed below, it plainly is not), the Tenth Circuit would stand firmly on the majority side of any split.

2. Although petitioner contends that four circuits have held that Fourth Amendment malicious prosecution actions are not cognizable under Section 1983, Pet. 21-23, *none* of those courts actually takes that position. Three of them, in fact, specifically reject that position and the other has left the question open.

Petitioner argues, for example, that in *Castellano* v. *Fragozo*, 352 F.3d 939 (2003) (en banc), the Fifth Circuit held that no Fourth Amendment malicious prosecution exists under Section 1983. As the two sentences he quotes from that opinion suggest, however, the Fifth Circuit has actually held the opposite. As petitioner notes, *Castellano* held that "no * * * *freestanding* constitutional right to be free from malicious prosecution exists." Pet. 22 (quoting 352 F.3d at 942) (emphasis added). But the quotation makes clear that the Fifth Circuit was ruling out only "freestanding" malicious prosecution claims, that is, ones involving no constitutional violation. See *ibid.* (addressing claims for "'malicious prosecution' *standing alone*") (quoting 352 F.3d at 942 (emphasis added)). The Fifth Circuit *specifically approved* claims founded on violations of federal law, such as the Fourth Amendment. In order "to proceed under

42 U.S.C. § 1983," the court held, "such a claim must rest upon a denial of rights secured under federal * * * law." See *ibid.* (quoting 352 F.3d at 942). In other words, the Fifth Circuit holds that Section 1983 does not federalize the common law tort of malicious prosecution, but does allow recovery for claims of malicious prosecution resting on constitutional violations. Indeed, *Castellano* recognized that

> [t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example. * * * Such claims of lost constitutional rights are for violation of rights locatable in constitutional text, and some such claims may be made under 42 U.S.C. § 1983.

352 F.3d at 953-954.

The Fifth Circuit and other courts have consistently recognized that *Castellano* adopts the Tenth Circuit's position. The Fifth Circuit itself has described *Castellano* as holding that "a freestanding 42 U.S.C. § 1983 claim based solely on malicious prosecution [i]s not viable. Rather, the claimant must allege 'that officials violated specific constitutional rights in connection with a 'malicious prosecution.'" *Cuadra* v. *Houston Indep. Sch. Dist.*, 626 F.3d 808, 812 (2010). And both the First and the D.C. Circuits have concluded that *Castellano* recognizes a Fourth Amendment-based claim for malicious prosecution under Section 1983. *Hernandez-Cuevas*, 723 F.3d at 99; *Pitt*, 491 F.3d at 511. The Fifth Circuit, in short, has *firmly rejected* the position petitioner attributes to it.

The Seventh Circuit likewise has held that Section 1983 recognizes a claim of malicious prosecution grounded in a violation of the Fourth Amendment. Although petitioner selectively plucks statements from three Seventh Circuit decisions to support his view, those statements actually support the opposite conclusion. Two of those statements lay out the Seventh Circuit's position that the availability of "state-law remedies for wrongful-prosecution claims precludes any constitutional theory of the tort." Pet. 21-22 (quoting *Smith* v. *Lamz*, 321 F.3d 680, 684 (2003)); *id.* at 21 (quoting *Newsome* v. *McCabe*, 256 F.3d 747, 750-751 (2001) ("*Albright* 'scotches any constitutional tort of malicious prosecution when state courts are open.'")). To say such claims are "precluded," however, confirms that they would otherwise be available but for the preclusion, and, indeed, the Seventh Circuit has consistently held that they are available. See, *e.g.*, *Julian* v. *Hanna*, 732 F.3d 842, 848 (2013) ("holding that Indiana's failure to provide an adequate remedy for malicious prosecution by public officers opens the door to federal malicious prosecution suits against such officers"); *Reed* v. *City of Chicago*, 77 F.3d 1049, 1051 (1996) (laying out elements of § 1983 claim for malicious prosecution).

Petitioner's selective quotation of *Serino* v. *Hensley* for the proposition that the constitution does not create a "right not to be prosecuted without probable cause," Pet. 22 (quoting 735 F.3d 588, 593 (7th Cir. 2013)), disregards statements from later in the *same paragraph* demonstrating that the views of the Seventh Circuit fully accord with those of the

decision below. The very next sentence puts the quoted statement into context: "Thus, [plaintiff] must allege something else that does amount to a constitutional violation (even if he calls it malicious prosecution)." 735 F.3d at 593. While a warrantless arrest without probable cause will not support a claim for malicious prosecution (because the defendant is not subject to legal process), *Serino* is quite clear that "[m]alicious prosecution provides a remedy for a deprivation of liberty pursuant to legal process" under the Fourth Amendment. *Ibid.* (emphasis deleted). The Seventh Circuit, in other words, rejects freestanding malicious prosecution claims under Section 1983 but recognizes those grounded in the Fourth Amendment. See also *Pitt*, 491 F.3d at 511 (concluding that Seventh Circuit has "held that malicious prosecution is actionable under the Fourth Amendment to the extent that the defendant's actions cause the plaintiff to be 'seized' without probable cause") (citing *Smart* v. *Bd. of Trustees of Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir. 1994)).

The Ninth Circuit also has expressly adopted the majority rule—indeed, it did so in the very case petitioner claims rejected it. In *Usher* v. *City of Los Angeles*, 828 F.2d 556 (1987), decided before *Albright*, the Ninth Circuit held that Section 1983 does not recognize malicious prosecution claims unless they are founded on a constitutional violation. *Id.* at 562. The language that petitioner quotes from the opinion makes this clear. The opinion states that a Section 1983 malicious prosecution claim exists "when a malicious prosecution is conducted with the intent to

* * * subject a person to a denial of constitutional rights." Pet. 23 (quoting *Usher*, 828 F.2d at 562). The Ninth Circuit has made clear since *Albright* that a violation of the Fourth Amendment is the type of "constitutional violation" that can support a malicious prosecution claim. In *Galbraith* v. *County of Santa Clara*, for example, the Ninth Circuit held that "a coroner's reckless or intentional falsification of an autopsy report that plays a material role in the false arrest and prosecution of an individual can support a claim under 42 U.S.C. § 1983 and the Fourth Amendment." 307 F.3d 1119, 1126 (2002), abrogated on other grounds by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

Contrary to petitioner's claim, the Eighth Circuit has not taken a position on this issue. In *Kurtz* v. *City of Shrewsbury*, 245 F.3d 753 (2001), petitioner's only cited authority from the Eighth Circuit, that court rejected only *freestanding* malicious prosecution claims, not those grounded in constitutional violations. In fact, the language from the opinion that petitioner quotes makes exactly this point: "malicious prosecution *by itself* is not punishable under § 1983 because it does not allege a constitutional injury." Pet. 22 (quoting *Kurtz*, 245 F.3d at 758) (emphasis added). The case *Kurtz* cites for this proposition makes the point even more clearly. In *Gunderson* v. *Schlueter*, 904 F.2d 407, 409 (1990), the Eighth Circuit wrote:

> [T]his and other circuits are uniform in holding that malicious prosecution by itself is not punishable under section 1983 because it does not allege a constitutional injury. Therefore, malicious pros-

> ecution can form the basis for a section 1983 action only if the defendants' conduct also infringes some provision of the Constitution or federal law.

Just last year, the Eighth Circuit reaffirmed this holding. See *Joseph* v. *Allen*, 712 F.3d 1222, 1228 (2013) ("[W]e held in *Kurtz v. City of Shrewsbury,* 245 F.3d 753 (8th Cir. 2001), that an allegation of malicious prosecution *without more* cannot sustain a civil rights claim under § 1983.") (emphasis added).

Although the Eighth Circuit has firmly rejected malicious prosecution claims not founded on constitutional violations, it has never actually decided whether claims founded on Fourth Amendment violations are cognizable under Section 1983. Just two years ago, it noted the issue remains open and avoided deciding the issue by resolving the case on qualified immunity grounds. See *Harrington* v. *City of Council Bluffs*, 678 F.3d 676, 680 (2012) ("We need not enter this debate now. * * * Assuming a Fourth Amendment right against malicious prosecution exists, such a right was not clearly established when the appellees were prosecuted in 1977 and 1978.").

B. Petitioner argues that the uniform position of the courts of appeals is wrong on the merits because it treats police officers and prosecutors differently, see Pet. 14-16, and "open[s] the door to § 1983 malicious prosecution claims against investigating police officers for every dismissed state criminal prosecution without regard to the constitutional concept of 'seizure,'" *id.* at 16-20. Both arguments fail for the same reason. Ordinarily, police officers, just like prosecutors, enjoy immunity from malicious prosecution

suits. *Evans*, 703 F.3d at 647. The Fourth Circuit has summarized the law as follows:

> Of course, constitutional torts, like their common law brethren, require a demonstration of both but-for and proximate causation. Accordingly, subsequent acts of independent decision-makers (*e.g.,* prosecutors, grand juries, and judges) may constitute intervening superseding causes that break the causal chain between a defendant-officer's misconduct and a plaintiff's unlawful seizure. Such intervening acts of other participants in the criminal justice system insulate a police officer from liability.

Ibid. (citations omitted). And, as courts have recognized, this causation doctrine provides police officers absolute protection in most cases: "Certainly, in most cases, the neutral magistrate's determination that probable cause exists for the individual's arrest is an intervening act that could disrupt any argument that the defendant officer had caused the continued unlawful seizure." *Hernandez-Cuevas*, 723 F.3d at 100. In such cases, there is no difference in treatment: Police officers and prosecutors both effectively receive absolute immunity.

In cases, like this one, where police officers *intentionally mislead* the prosecutor, there is a very good reason for any difference in treatment. When the prosecutor bases a decision to prosecute, for which he is absolutely immune, see *Burns* v. *Reed*, 500 U.S. 478, 487-492 (1991), on a police officer's knowingly false information, both the criminal defendant and the prosecutor are victims. In such circumstances, courts have routinely held it appropriate to treat the

police officer differently and deny him the immunity he would otherwise enjoy. See, *e.g.*, *Hernandez-Cuevas*, 723 F.3d at 100 ("officers may be liable for unlawful pretrial detention when they have (1) lied to or misled the prosecutors; (2) failed to disclose exculpatory evidence; or (3) unduly pressured the prosecutor to seek the indictment."); *Evans*, 703 F.3d at 647-648 (same); *Taylor* v. *Meacham*, 82 F.3d 1556, 1564 (10th Cir. 1996) (denying police officer immunity when there is "pressure or influence [over the prosecutor] exerted by the police officer[], or knowing misstatements made by the officer[] to the prosecutor"); *Reed*, 77 F.3d at 1053 (same); *Senra* v. *Cunningham*, 9 F.3d 168, 174 (1st Cir. 1993) (same); *Dellums* v. *Powell*, 566 F.2d 167, 192-193 (D.C. Cir. 1977); see also *Restatement (Second) of Torts* § 653 cmt. g (1977) ("If * * * information is known by the giver to be false, an intelligent exercise of the [prosecutor's] discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information."); W. Page Keeton et al., *Prosser & Keeton on The Law of Torts* § 199, at 873 & nn. 33-36 (5th ed. 1984). Because the police officer's deliberate misbehavior has undermined the prosecutor's independent judgment, it is appropriate to treat the two differently. There is thus no "anomaly." Pet. 14 (emphasis deleted).

This immunity also undermines petitioner's breathless assertion that allowing respondent's Section 1983 claim will open up police officers to malicious prosecution claims "for every dismissed state criminal prosecution." Pet. 16 (emphasis deleted). As the First Circuit recognized, "in most cases" a court

will dismiss such claims at the outset. See *Hernandez-Cuevas*, 723 F.3d at 100. Only when the police officer has intentionally misled the prosecutor or otherwise improperly influenced his decision to prosecute can the claim proceed. And, of course, traditional official immunity doctrines are available to protect police officers who have acted in good faith. See *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967) (granting qualified immunity to police officers sued under § 1983 for false arrest). As this Court has recognized, such immunity doctrines "provide[] ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Given those two independent and broad protections, there is no basis for petitioner's scaremongering that dismissal of criminal charges will result in routine civil liability for police.

II. CONSISTENT WITH THIS COURT'S HOLDINGS, THE COURTS OF APPEALS HAVE UNIFORMLY CONCLUDED THAT MALICIOUS PROSECUTION CLAIMS RUN FROM THE FAVORABLE TERMINATION OF CHARGES

Petitioner argues that a Section 1983 action for malicious prosecution accrues on the date legal process against a criminal defendant begins, not when it terminates favorably to him. See Pet. 23-27. He contends that decisions of "[t]he First, Seventh and Tenth Circuits are * * * in direct conflict" on when such claims accrue. But as the courts of appeals have uniformly concluded, this Court's holdings in *Wallace* v. *Kato*, 549 U.S. 384 (2007), and *Heck* v. *Humphrey*, 512 U.S. 477 (1994), firmly foreclose this argument.

Indeed, those holdings are so clear, there simply is no conflict on the issue.

In *Wallace*, this Court held that Section 1983 claims accrue when "the plaintiff has a complete and present cause of action." 549 U.S. at 388 (internal quotations omitted). In *Heck*, it held that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." 512 U.S. at 484. Together, those two holdings make petitioner's position untenable. If favorable termination is a necessary element of a Section 1983 malicious prosecution claim, and a Section 1983 claim does not accrue until it is "complete" (that is, every necessary element is present), then the claim cannot accrue before favorable termination occurs.

This conclusion is so straightforward and compelling that all ten courts of appeals that have decided the issue have held that a Section 1983 malicious prosecution claim accrues only upon favorable termination of criminal proceedings against the accused. See *Calero-Colon* v. *Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995); *Murphy* v. *Lynn*, 53 F.3d 547 (2d Cir. 1995); *Rose* v. *Bartle*, 871 F.2d 331 (3d Cir. 1989); *Snider* v. *Seung Lee*, 584 F.3d 193, 199 (4th Cir. 2009); *Eugene* v. *Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1306 (5th Cir. 1995); *McCune* v. *City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *Julian*, 732 F.3d at 844-845; *Venegas* v. *Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); Pet. App. 12a; *Kelly* v. *Serna*, 87 F.3d 1235, 1238-1239 (11th Cir. 1996).

The First and Seventh Circuit cases that petitioner relies on, see Pet. 24-25 (discussing *Reed* v.

City of Chicago, *supra*, and *Walden, III, Inc.* v. *Rhode Island*, 576 F.2d 945 (1st Cir. 1978)), are not to the contrary. Neither of them actually concerns a Section 1983 malicious prosecution claim. Since the relevant events in both of those cases occurred *before* the commencement of legal process, *Reed*, 77 F.3d at 1050 (noting detectives acted "without an arrest or search warrant"); *Walden, III*, 576 F.2d at 945 (noting actions concerned "a warrantless search and seizure"), both cases concern not malicious prosecution, but wrongful arrest or imprisonment. As this Court noted in *Wallace*, it is the commencement of legal process that distinguishes malicious prosecution from those other torts:

> Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held pursuant to such process—when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the "entirely distinct" tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by wrongful institution of legal process. If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself.

549 U.S. at 389-390 (citations and emphasis omitted).

As this Court held in *Wallace*, Section 1983 actions *not* involving legal process accrue when arrest or imprisonment occurs, rather than at the time proceedings terminate favorably to the defendant. See 549 U.S. at 388 ("There can be no dispute that petitioner could have filed suit as soon as the allegedly wrongful arrest occurred * * * so the statute of limitations would normally commence to run from that date."). Petitioner realizes that that difference explains away the authorities he cites: Hidden among the petition's footnotes is the concession that the First and Seventh Circuits have recognized that "under federal law a *malicious prosecution* claim does not accrue until the criminal proceeding that gave rise to it ends in the claimant's favor." Pet. 25 n.17 (discussing *Julian*, 732 F.3d at 845 (emphasis added); accord *id.* at 25 n.16 (discussing *Calero-Colon*, 68 F.3d at 4). There is no split.

III. DENIAL IS ALSO WARRANTED BECAUSE OF THIS CASE'S INTERLOCUTORY POSTURE

Finally, this Court should deny review because the Tenth Circuit remanded the case, writing that the "absolute and qualified immunity" issues that petitioner raised "should be addressed in the first instance by the district court." Pet. App. 17a. The interlocutory posture of this case "of itself alone furnishe[s] sufficient ground for the denial" of the petition, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for re-

view by this Court"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). If the district court grants petitioner immunity, he will have obtained all the relief he seeks, and obviate any need for this Court's review.[6] If the court denies immunity, petitioner will be able to seek review of that decision, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985) (permitting interlocutory appeals from the denial of qualified immunity), and the Court will have the benefit of any further factual development that may occur on remand. Moreover, petitioner will be able to raise both his current claims and his immunity claims in a single petition, see *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001), promoting

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[6] Earlier this year, the district court denied petitioner leave to file a renewed motion for summary judgment addressing immunity because it "was filed long after the expiration of the dispositive motions deadline" and petitioner had not "demonstrate[d] a need for further briefing on the dispositive motions filed previously in this case." But the district court made clear it would consider the absolute and qualified immunity arguments petitioner *already* has made in dispositive motions currently pending before the court (which the district court previously denied as moot after granting petitioner's since-reversed motion to dismiss). Order Denying Mot. for Status Conf. & Striking Mot. for Summ. J. 1-2, Dkt. #274, No. 09-CV-02802-REB-MEH (D. Colo. Feb. 13, 2014). While the district court denied (and the court of appeals affirmed) petitioner's broader claim to absolute prosecutorial immunity, see n.2, *supra*, it has not yet ruled on petitioner's current, narrower claim to absolute immunity or on qualified immunity.

important interests in judicial efficiency. At this juncture, review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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