No. 13-1143

IN THE

Supreme Court of the United States

BRIAN KOOPMAN,

Petitioner,

v.

JEREMY C. MYERS,

Respondent.

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

REPLY BRIEF

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Respondent, Jeremy C. Myers' ("Myers") contention that certiorari is not warranted in this case misconstrues the holdings of the several circuit court decisions in conflict with the panel decision of the Tenth Circuit below, ignores the explicit recognition of that conflict contained in several of the opinions below as well as in the writings of numerous legal commentators, and severely understates the scope of the uncertainty and confusion in the law pertaining to §1983 malicious prosecution and the incompatibility of the Tenth Circuit's holding with sound Fourth Amendment jurisprudence. Properly considered, the extent of the circuit splits and the scope of uncertainty and confusion in the law of Fourth Amendment-based §1983 malicious prosecution strongly support review by this Court without awaiting further litigation in the lower courts.

I. THE CIRCUIT SPLITS AT ISSUE HERE ARE REAL, EXTENSIVE, AND EXPRESSLY ACKNOWLEDGED BY NUMEROUS COURTS AND LEGAL COMMENTATORS.

A. Circuit Split Regarding Existence of Fourth Amendment-Based §1983 Malicious Prosecution Claim

In contending no circuit conflict exists regarding the existence of a Fourth Amendment-

based §1983 malicious prosecution claim, Myers not only misconstrues the holdings of the conflicting circuits but also overlooks the express acknowledgement of those conflicting decisions in several of the circuit courts' decisions and by numerous legal commentators.

Myers contends that Petitioner Brian Koopman ("Koopman") "strains to argue that the Fifth, Eighth, Ninth, and Seventh Circuits have held that a Fourth Amendment malicious prosecution action cannot be brought under Section 1983," Br. in Opp. at 7-8, and mischaracterizes or ignores the holdings of many federal courts of appeal. *Id.* Nothing could be further from the truth. Koopman never argued the Tenth Circuit is "the lone holdout against a solid wall of circuit authority." Nevertheless, a profound circuit split exists concerning the very existence of a Fourth Amendment malicious prosecution claim under §1983 despite Myers' heavy reliance upon the First Circuit's decision in *Hernandez-Cuevas v. Taylor,* 723 F.3d 91 (1st Cir. 2013) (collecting cases) (asserting that recognition of a Fourth Amendment malicious prosecution claim under §1983 is now the majority rule).

The D.C. Circuit's statement in *Pitt v. District of Columbia,* 491 F.3d 494, 510 (D.C. Cir. 2007) (collecting cases) that "*nearly* every other Circuit has held that malicious prosecution is

actionable under the Fourth Amendment to the extent that the defendant's actions caused the plaintiff to be 'seized' without probable cause" impliedly recognizes that not *every* other circuit has so held. Even if a "large majority" of circuits, according to the D.C. Circuit in *Pitt,* has held that Fourth Amendment malicious prosecution is actionable under §1983, a split still exists in the circuits that justifies this Court's certiorari review. *See, e.g., Lambert v. Williams,* 223 F.3d 257, 261 (4th Cir. 2000), *cert. denied,* 531 U.S. 1130, 121 S.Ct. 889 (2001) ("In the wake of *Albright*, the courts of appeals have diverged, some finding that §1983 does not provide a malicious prosecution cause of action, some that it does, some that it might.").

For instance, the Fifth Circuit in *Castellano v. Fragozo,* 352 F.3d 939 (5th Cir. 2003) (en banc), *cert. denied,* 543 U.S. 808, 125 S.Ct. 31, 160 L.Ed.2d 10 (2004), disclaimed and "jettison[ed] its mischievous and unfounded theory constitutionalizing the tort of malicious prosecution." 352 F.3d at 961 (Jolly, J. concurring and dissenting). The Fifth Circuit there "finally proscrib[ed] a claim under 42 U.S.C. §1983 for malicious prosecution." *Id.* at 962 (Barksdale and Garza, JJ., concurring in part and dissenting in part). The Fifth Circuit unmistakably held that "malicious prosecution may not be pursued through §1983." *Id.* at 963.

Myers cites *Cuadra v. Houston Indep. Sch. Dist.,* 626 F.3d 808, 812 (5th Cir. 2010), *cert. denied*, ___ U.S. ____, 131 S.Ct. 2972 (2011), in support of his argument that *Castellano* is actually consistent with the Tenth Circuit's position recognizing a Fourth Amendment-based §1983 cause of action. This more recent Fifth Circuit panel decision purports to quote from page 945 of the *en banc Castellano* decision for the proposition that "the claimant must allege 'that officials violated specific constitutional rights in connection with a "malicious prosecution,"' yet the quoted language does not appear in the text of the *Castellano* decision. Moreover, the panel in *Cuadra* recognized that the argument that defendants violated plaintiff's constitutional rights by engaging in malicious prosecution was an argument foreclosed by the *Castellano* decision. *Cuadra,* 626 F.3d at 812.

The Seventh Circuit also remains in conflict with the Tenth Circuit. According to *Newsome v. McCabe,* 256 F.3d 747, 750-51 (7th Cir. 2001), "*Albright* 'scotches *any* constitutional tort of malicious prosecution when state courts are open.'" (emphasis added); *accord, Smith v. Lamz,* 321 F.3d 680, 684 (7th Cir. 2003) (the availability of "state-law remedies for wrongful-prosecution claims precludes *any* constitutional theory of the tort.") (emphasis added); *Washington v. Summerville*, 127 F.3d 552, 559 (7th Cir.1997), *cert. denied*, 523 U.S.

1073, 118 S.Ct. 1515 (1998)(no malicious prosecution claim exists under the Fourth Amendment).

Julian v. Hanna, 732 F.3d 842, 848 (7th Cir. 2013) is a Fourteenth, and not a Fourth, Amendment case, which explains its 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 . . . ." *Id.* at 848. *Julian* does not remove the Seventh Circuit from the Fourth Amendment circuit split.

Neither does *Reed v. City of Chicago,* 77 F.3d 1049 (7th Cir.1996) align the Seventh Circuit with the Tenth Circuit. The panel in *Reed declined* to recognize a §1983 claim for malicious prosecution was stated because what plaintiff had "label[ed] malicious prosecution [was] nothing more than his time-barred wrongful arrest claim." *Id.* at 1053.

Myers insists that *Serino v. Hemsley,* 735 F.3d 588 (7th Cir. 2013) brought the views of the Seventh Circuit into full accord with those of the Tenth Circuit's decision below. Myers argues that "*Serino* is quite clear that '[m]alicious prosecution provides a remedy for a deprivation of liberty pursuant to legal process' under the Fourth Amendment." Br. in Opp. at 13. However, the quoted language from *Serino* was mere *dicta,*

inasmuch as Serino had not stated a constitutional violation independent of his alleged wrongful arrest, 735 F.3d at 593, and according to the Seventh Circuit in *Serino,* "there is no such thing as a constitutional right not to be prosecuted without probable cause." *Id.*

Close analysis of *Serino* confirms that the Seventh Circuit remains firmly in the group of circuits that have rejected a Fourth Amendment-based §1983 malicious prosecution cause of action. Regardless, conflicting language in *Serino* concerning the Fourth Amendment and malicious prosecution theory is additional evidence of the extensive confusion concerning this topic, and is further justification for this Court's intervention.

Myers mistakenly argues that the Eighth Circuit "has never actually decided whether claims founded on Fourth Amendment violations are cognizable under Section 1983," Br. in Opp. at 15, citing *Harrington v. City of Council Bluffs,* 678 F.3d 676, 680 (8th Cir. 2012). The *Harrington* panel addressed malicious prosecution as a Fourth Amendment-based "constitutional violation" only in a hypothetical sense in order to perform its constitutionally-mandated qualified immunity analysis of the state of the law in 1977 or 1978 when the alleged unconstitutional police actions were taken. *See* 678 F.3d at 679-81. *Harrington* is not in any sense a departure from the Eighth

Circuit's precedent rejecting §1983 malicious prosecution claims. *See, e.g., Kurtz v. City of Shrewsbury,* 245 F.3d 753, 758 (8th Cir. 2001) ("malicious prosecution by itself is not punishable under §1983 because it does not allege a constitutional injury"); *Joseph v. Allen*, 712 F.3d 1222, 1228 (8th Cir. 2013) ("[A]llegations of malicious prosecution cannot sustain a valid claim under §1983.").

Even if *Harrington* and other Eighth Circuit decisions can somehow be reconciled with the Tenth Circuit's decision below concerning the existence of a §1983 malicious prosecution claim based in the Fourth Amendment, *Harrington* recognizes that its "sister circuits have taken a variety of approaches on the issue of *whether* or *when* malicious prosecution violates the Fourth Amendment," 678 F.3d at 680 (emphasis added), thereby confirming the existence of the circuit split.

Finally, numerous legal commentators recognize the split among the circuits. *See, e.g.,* Michael Avery *et al.,* Police *Misconduct: Law and Litigation* §2:14 (2013 Westlaw, POLICEMISC database); Sheldon Nahmod, *Civil Rights & Civil Liberties Litigation: The Law Of Section* 1983, §3:67 (2013 Westlaw database); Note, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 VA. L. REV. 1635 (2013); Note, *Who's On First, What's On Second, And I Don't Know About the*

Sixth Circuit: A §1983 Malicious Prosecution Circuit Split That Would Confuse Even Abbott and Costello, 36 SUFFOLK U.L.REV. 513 (2003); 1 M. Schwartz, Section 1983 Litigation §3.18[C], pp. 3-605 to 3-629 (4th ed. 2004) (noting a range of approaches in the lower courts); Note & Comment, *Unexamined Premises: Toward Doctrinal Purity in §1983 Malicious Prosecution Doctrine,* 97 NW U.L.REV. 439 (2002); Schonfeld, *Malicious Prosecution As A Constitutional Tort: Continued Confusion And Uncertainty,* 15 TOURO L.REV. 1681 (1999); Note, *From The Exclusionary Rule To A Constitutional Tort For Malicious Prosecutions,* 106 COLUM. L.REV. 643 (2006); Note, *Section 1983 And The Tort Of Malicious Prosecution: A Tenth Circuit Historical Analysis,* 82 DENV. U.L.REV. 499 (2005).

B. Circuit Split Regarding Elements of Fourth Amendment-Based §1983 Malicious Prosecution Claim

Even among those circuits that recognize the existence of a Fourth Amendment malicious prosecution claim there exists a troublesome split as to the contours and elements of such a claim. Br. of *Amicus* at 10-14. This split is perhaps best described in *Hernandez-Cuevas, supra,* as a difference between those circuits that have adopted a "purely constitutional approach" and those that have adopted a "blended constitutional/common

law approach." According to *Hernandez-Cuevas,* the First, Fourth, Sixth and Tenth Circuits have adopted a "purely constitutional approach" whereas the Second, Third, Ninth and Eleventh Circuits have adopted a "blended constitutional/common law approach." 723 F.3d at 99. The "blended approach" requires the plaintiff to "demonstrate a Fourth Amendment violation *and* all the elements of a common law malicious prosecution claim." *Id.* (emphasis in original). As pointed out by *Amicus,* some of the circuits require proof of "malice" (despite that the Fourth Amendment contains no mention of malice and instead focuses on the objective reasonableness of the seizure), whereas other circuits do not require proof of malice. *See, e.g., Lambert, supra,* at 262 n.2. Furthermore, the Ninth Circuit requires an additional subjective element, namely, whether the police officer had the intent to deprive the plaintiff of his constitutional rights. *See, e.g., Lassiter v. City of Bremerton,* 556 F.3d 1049, 1054 (9th Cir. 2009).

This subsidiary circuit split – which issue is fairly included within the first question presented for review in Koopman's petition – by which some, but not all circuits, focus on subjective intent, including malice, as part of the *prima facia* case of a Fourth Amendment-based §1983 malicious prosecution claim runs counter to the predominantly objective inquiry used to determine Fourth Amendment reasonableness. *See Ashcroft*

v. al-Kidd, 131 S.Ct. 2074, 2080 (2011) ("We ask whether 'the circumstances, viewed objectively, justify [the challenged] action.' If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials.") (emphasis in original) (internal citations omitted). This presents a compelling alternative justification for this Court's review.

C. Circuit Split Regarding Date of Accrual for Statute of Limitations Purposes of Fourth Amendment-Based §1983 Malicious Prosecution Claim.

Myers misconstrues the holdings of this Court in *Wallace v. Kato,* 549 U.S. 384 (2007) and *Heck v. Humphrey,* 512 U.S. 477 (1994) to support his argument that this Court has already settled the law that a §1983 action for malicious prosecution accrues on the date legal process against a criminal defendant terminates favorable to him instead of the date the underlying constitutional violation occurs.

Wallace was not a malicious prosecution case but involved a false arrest claim. *See* 549 U.S. at 387 n.1 (grant of certiorari expressly limited to Fourth Amendment false-arrest claim). Similarly, *Heck* was not a malicious prosecution case *per se*. *See* 512 U.S. at 478-79.

The actual holdings in *Wallace* consisted of: (1) the tort of false imprisonment provided the proper analogy for determining the accrual date for limitations purposes; (2) the limitations period began to run when the arrestee appeared before an examining magistrate and was bound over for trial, not later upon his release from custody after the state dropped charges against him; (3) the lack of a conviction did not preclude commencement of the limitations period; and (4) the limitations period was not tolled by the arrestee's conviction. Contrary to Myers' argument, the *Wallace* Court did *not* hold that §1983 claims accrue when the plaintiff has a complete and present cause of action, although that is the so-called "standard rule." *See* 549 U.S. at 388. Nevertheless, Myers could have filed suit as soon as the allegedly wrongful "seizure" underlying his malicious prosecution claim occurred, which subjected him to the harm of prosecution without probable cause, so the statute of limitations would naturally and logically commence to run from that date.

Myers is further incorrect in arguing that this Court held in *Heck* 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." *See* 512 U.S. at 484. This was mere *dicta* describing the common law elements of the state law tort of malicious prosecution. *See id.* The *actual* holding

in *Heck* was that in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. *Heck* further held that a claim for damages so related to a conviction or sentence that has *not* been so invalidated is not cognizable under §1983.

Reed v. City of Chicago, see 77 F.3d at 1051, and *Walden, III, Inc. v. Rhode Island,* 576 F.2d 945 (1st Cir. 1978), were both §1983 malicious prosecution cases. *See id.* In *Reed,* the alleged "malicious prosecution" occurred *after* legal process, namely, return of a grand jury indictment, was initiated. *Reed* therefore, like the Tenth Circuit decision below, dealt with a claim of malicious prosecution occurring *after* commencement of legal process, yet the Seventh Circuit held the claim was time-barred. Thus, a true circuit split exists.[1]

[1] To the extent *Julian*, *supra* – a Fourteenth Amendment case – is, *arguendo,* in conflict with *Reed, supra,* and *Newsome, supra,* (both of which are Fourth Amendment malicious prosecution cases) concerning the statute of limitations accrual date, such constitutes an intra-circuit split on this

In *Walden, III, Inc.,* the plaintiffs argued that because their claims were analogous to the state law of "malicious use of process" they were entitled to claim the benefits of the rule of law that a cause of action for such a claim does not accrue until the allegedly abusive proceedings have come to an end. *See* 576 F.2d at 947 n.5. This is precisely what Myers argued and the Tenth Circuit adopted. The Tenth Circuit's decision below overlooks (and conflicts with) the truism advocated by the First Circuit in *Walden, III, Inc.* that because §1983 applies to the violation of federal rights, a claim under that statute accrues when the federal right has been violated, 576 F.2d at 947 n. 5. In this case, the claim accrued under *Walden, III, Inc.* when Myers was "seized" and not when he was later absolved of criminal liability. A genuine split exists between the First and Tenth Circuits on this §1983 accrual principle.

II. IN THIS EXTRAORDINARY CASE, THE COURT NEED NOT AWAIT FINAL DECREE OF THE TENTH CIRCUIT TO GRANT CERTIORARI.

Because this is an "extraordinary case[]," the Court need not await final decree of the Tenth

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issue, thereby providing additional justification warranting this Court's certiorari review.

Circuit to issue its writ of certiorari. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258, 36 S.Ct. 269, 271 (1916). Review at this stage "is necessary to prevent extraordinary inconvenience . . . in the conduct of the cause." *American Const. Co. v. Jacksonville, T. & K.W.Ry. Co.,* 148 U.S. 372, 384, 13 S.Ct. 758, 763, 37 L.Ed. 486 (1893). While this Court "generally" awaits final judgment in the lower courts before exercising its certiorari jurisdiction, *see Virginia Military Inst. v. United States,* 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari), this Court has discretion to grant the writ anyway, *see id.* (describing the decision in that case to await final judgment in the lower courts before exercising certiorari jurisdiction as "prudent" under the circumstances there).

The Tenth Circuit directed the district court on remand to consider Koopman's absolute and qualified immunity arguments. While a court may analyze the two prongs of the *Scaucier v. Katz*, 533 U.S. 194, 201-02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), test – (1) a constitutional right (2) that is clearly established – in any sequence, *see Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento*

v. Lewis, 523 U.S. 833, 841 n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

It makes little sense and is judicially non-economical for the lower courts to decide whether Myers' Fourth Amendment §1983 malicious prosecution claim was "clearly established" at the time of Koopman's actions if such cause of action does not even exist.

CONCLUSION

The numerous splits among and overwhelming confusion within the various circuits concerning §1983 malicious prosecution as it relates to the Fourth Amendment cry out for Supreme Court review. For the reasons stated above and previously, this Court should grant the petition for a writ of certiorari.

Respectfully submitted this 2nd day of June, 2014.

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