No. 12-1363

IN THE
Supreme Court of the United States

DAVID F. EVANS, ET AL.,
Petitioners,
V.
CITY OF DURHAM, NORTH CAROLINA, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prosecutor's decision to seek an indictment breaks the chain of causation between police officers' investigative actions and a person's post-indictment arrest, where the police officers provided the prosecutor with all the evidence and did not mislead or pressure him into seeking the indictment.

2. Whether the alleged fabrication of evidence alone would violate substantive due process, even if the evidence was never used at a trial or other judicial proceeding.

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Respondents the City of Durham, North Carolina; David Addison; Patrick Baker; Steven W. Chalmers; Beverly Council; Mark Gottlieb; Benjamin Himan; Ronald Hodge; Jeff Lamb; Michael Ripberger; and Lee Russ respectfully submit this brief in opposition to the petition of David F. Evans, Collin Finnerty, and Reade Seligmann for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

Petitioners seek review of an interlocutory decision of the Fourth Circuit that does not conflict with the decision of any other circuit and that is entirely consistent with the prior decisions of this

Court. Moreover, Petitioners themselves say that there are few cases "remotely similar" to this one. Pet. 30. There is thus no reason this Court should review this case.

Petitioners rely on arguments in support of certiorari that were never raised below, let alone addressed by the court of appeals. They also attempt to bolster their position by suggesting that this case raises a question discussed hypothetically at oral argument in a previous case. But that case presented an entirely different issue, with entirely different facts. The fact that Petitioners are compelled to resort to such strained creativity underscores that this case does not meet the criteria for certiorari. The Court should deny the petition.

A. Background

In March 2006, Durham police investigated the allegations of a young woman who claimed to have been raped. Crystal Mangum had been hired as a stripper by Duke lacrosse players to perform at a party in their home. C.A. App. 408. Durham police investigated her rape allegations—meeting with witnesses and working through the State Prosecutor's office to obtain DNA evidence. C.A. App. 408-29.

After ten days of investigation, State Prosecutor Michael Nifong took charge of the case. C.A. App. 431. City investigators fully briefed Nifong about the available evidence, including its weaknesses and exculpatory evidence. C.A. App. 432-33. Nifong nevertheless decided to seek, and obtained, indictments against Petitioners. C.A. App. 463, 472.

Petitioners were then briefly arrested and immediately released.

The indictments were later dismissed, C.A. App. 494, and Petitioners were publicly exonerated by the North Carolina Attorney General, Pet. 10. Petitioners subsequently asserted myriad federal and state claims against sixteen defendants based on the investigation. C.A. App. 496-550.

Petitioners describe the allegations in their complaint as "amply corroborated" and "undisputed." Pet. 3, 4. Because this case is still at the pleadings stage, however, there has been no discovery. There are only allegations. While the allegations must be accepted as true at this stage, they are by no means corroborated or undisputed.

There are numerous misstatements and omissions in Petitioners' statement of the case. For the sake of brevity, only two will be mentioned here. Petitioners assert that "[t]he rape examination produced no evidence to corroborate Mangum's allegations." Pet. 5. But in their complaint, Petitioners acknowledge that "Mangum reported being upset and in excruciating pain," and that medical personnel who examined her identified "diffuse edema of the vaginal walls." C.A. App. 417.

Petitioners also omit the discussion of a briefing of Nifong by Officers Benjamin Himan and Mark Gottlieb that they devote so much attention to in their complaint. Specifically, the complaint alleges that:

> Gottlieb and Himan proceeded to detail [for Nifong] the extraordinary evidence

> of innocence and the fatal defects in Mangum's claims, including, for example, the numerous contradictions and inconsistencies in Mangum's accounts of events, the fact that Pittman had called Mangum's rape claim a "crock," that Mangum had already viewed several photo arrays and failed to identify any of her purported attackers, and that the three lacrosse team captains had voluntarily cooperated with police and denied that the alleged attack occurred.

C.A. App. 432-33. Petitioners also leave out their allegations that "Himan conveyed to Nifong that Mangum was not credible," *id.*, and that Himan's initial reaction to Nifong's decision to seek indictments was to inquire, "With what?" C.A. App. 465.

Petitioners' own allegations thus show that the officers fully disclosed all the evidence to Nifong and did not mislead or pressure him into seeking an indictment. These allegations are critical to the main question presented here.

Petitioners have sought throughout this case to attribute Nifong's conduct to the City police and, by extension, the City of Durham. They sought to direct liability to the City and its employees by alleging that the City somehow delegated municipal authority to Nifong, a state official—a theory soundly

rejected by the district court.[1] They also try to do this by alleging a broad conspiracy between City investigators, other City officials, and Nifong. The Fourth Circuit properly rejected this attempt on the ground that the police could not be held liable for Nifong's decision to seek indictments.[2]

The central question presented here is whether police officers can be held liable for arrests resulting from indictments, when: 1) they turned over all the evidence, including exculpatory evidence, to the prosecutor; 2) they did not mislead, pressure, or otherwise unduly influence the prosecutor; and 3) the prosecutor was solely responsible—legally and factually—for the decision to seek indictments. Respondents respectfully submit that the answer is no.

B. Disposition Below

On March 31, 2011, the district court granted in part and denied in part Respondents' motions to dismiss, and denied the City's motion for partial summary judgment on governmental immunity grounds. Pet. App. 159a.

On Respondents' interlocutory appeal, the Fourth Circuit, in an opinion authored by Judge Motz,

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[1] Petitioners have not sued Nifong's own employer, the state of North Carolina, presumably because it enjoys sovereign immunity.

[2] Nifong remains a party to this case. He also was ultimately convicted of criminal contempt for his actions, jailed, and disbarred. C.A. App. 495-96.

dismissed the remaining federal and state common law claims against all Respondents, with the exception of the state common law malicious prosecution claim alleged against Officers Gottlieb and Himan. Pet. App. 41a. It also dismissed for lack of appellate jurisdiction the City's appeal of the district court's decision to permit state constitutional claims to proceed. Those state claims therefore remain pending against Respondents.

Judge Wilkinson wrote a concurring opinion to "underscore the overblown nature of this case," which he described as "on the far limbs of law and one destined, were it to succeed in whole, to spread damage in all directions." Pet. App. 42a. Judge Gregory joined the majority opinion but dissented on one issue; he would have dismissed the state malicious prosecution claim, too, on the ground that the complaint did not plausibly allege that the officers had acted maliciously. Pet. App. 54a.

ARGUMENT

Petitioners assert that there is a division in the circuits as to when police may be held liable for a decision by a prosecutor to seek an indictment. They also claim that the Fourth Circuit "implicitly" took sides in another split regarding whether the fabrication of evidence that is never used at trial (or for any other purpose) violates the Constitution. Pet. 21. Neither argument was raised below. Neither argument was addressed by the Fourth Circuit. And, in any event, there is no circuit split on either issue. The court of appeals' ruling is fully consistent with this Court's decisions and the decisions of the other circuits.

A. There Is No Circuit Split on the Standard for Determining When a Prosecutor Breaks the Causal Chain Between a Police Investigator's Actions and an Arrest

Petitioners claim that three circuits—in contrast to the Fourth, Fifth, Seventh, and Eleventh—allow for police liability even if the police did not mislead or pressure the prosecutor. There are two problems with this argument. First, Petitioners did not raise it below. Indeed, Petitioners did not even mention most of the cases that they now say create the split.

Second, there is no circuit split. Petitioners simply misstate the actual holdings of the cases they cite.

1. In the Fourth Circuit, Petitioners argued that Officers Gottlieb and Himan could be held liable because they misled or pressured Nifong. *See*, *e.g.,* Brief of Appellees at *Evans v. Baker, et al.*, 703 F.3d 636 (4th Cir. 2012) ("Pet. 4th Cir. Brief") at 21 ("What the case law establishes, however, is that the chain of causation is ***not*** broken, and a police officer is ***not*** relieved of liability, where—as here—the officer is alleged to have 'misrepresented, withheld, or falsified evidence' that influenced the grand jury's, or another independent decision-maker's, decision to indict or bring charges. In such a case, a 'prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—***none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision***.") (citations omitted)

(emphasis in original). Accordingly, Petitioners cited numerous cases in which police officers allegedly misled the prosecutor or other intermediary, and then asserted that "[t]his is precisely the type of misconduct alleged against the City Defendants." *Id.* at 21-23.

Not surprisingly, the Fourth Circuit rejected Petitioners' argument because it was completely inconsistent with the factual allegations in their complaint:

> [T]he Evans plaintiffs maintain that Officers Gottlieb and Himan conspired with Nifong to fabricate and conceal evidence from the grand jury and thus somehow unduly pressured Nifong to seek the indictment. The allegations in their complaint significantly undercut this argument. For the Evans plaintiffs ground their entire case on allegations that Nifong desired to exploit the 'high-profile, racially-charged rape allegation for *his personal* political gain. . . . No matter how generously read, these allegations do not allege that Officers Gottlieb and Himan pressured Nifong to seek an indictment.

Pet. App. 20a-21a. *See also id.* at 20a ("The Evans Plaintiffs do not allege that Officers Gottlieb and Himan misled or misinformed Nifong. Indeed, [they] expressly allege that, from the outset, the officers candidly briefed Nifong as to the startling weaknesses in the case 'by detail[ing] the extraordinary evidence of innocence and the fatal

defects in Mangum's claims' and 'convey[ing] to Nifong that Mangum was not credible.'") (alterations in original).

Petitioners now argue that police may be liable for a prosecutor's action even if they did not mislead or pressure him. But since this new argument was not raised below, this would not be an appropriate vehicle to resolve any circuit split (if there were one). Indeed, Petitioners did not even cite to the Fourth Circuit two of the three cases that they now say create the split, thus depriving the court of appeals of the opportunity to consider the supposedly different views of other circuits. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

2. In any event, there is no circuit split.[3] The first case relied on by Petitioners, *Gregory v. City of Louisville*, 444. F.3d 725 (6th Cir. 2006), does not even discuss the question decided by the Fourth Circuit—whether police must mislead or pressure the prosecutor in order for the chain of causation to be preserved. *See id.* at 747.

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[3] Petitioners cite *Hector v. Watts*, 235 F.3d 154 (3d Cir. 2001), and two student law review notes to support their claim of a circuit split. *See* Pet. 14, 15 n.3. But none of these sources discusses the issue in this case at all. In any case, the Third Circuit made clear in a subsequent decision that its approach is the same as the Fourth Circuit's. *See Egervary v. Young*, 366 F.3d 238, 250-51 (3d Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005).

Moreover, unlike this case, the police officer in *Gregory* did *not* turn all of the exculpatory evidence over to the prosecutor. Crucially, the officer failed to inform the prosecutor that the crime victim "had failed to pick Plaintiff's picture out of a photopak, or that [her] description of her assailant was inconsistent with Plaintiff's physical appearance." *Id.* at 733.

By not informing the prosecutor of the exculpatory evidence, the officer in *Gregory* misled him as to the strength of the case against the plaintiff, and this surely influenced the prosecutor's decision to pursue the case and to submit the victim's subsequent identification of the plaintiff, based on a suggestive procedure, into evidence at trial. Indeed, the district court in *Gregory* specifically held that a jury could find that the officer had "deceived . . . the prosecutor." *Gregory v. City of Louisville*, No. 3:01-00535-TDR, slip op. at 14 (W.D. Ky., Mar. 29, 2004). *See also id.* at 19 (jury could find that officer failed to disclose other exculpatory evidence to prosecutor). Only in this way was the prosecutor's decision the "natural consequence[]" of the officer's action. *Gregory* thus presents no conflict with the Fourth Circuit's decision.[4]

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[4] Petitioners also cite in a footnote *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005), as using "similar reasoning" to *Gregory*. Pet. 16 n.4. But *McKinley* did not address the question at issue here. It also involved the privilege against self-incrimination, not an allegedly unconstitutional seizure.

Petitioners next cite the Second Circuit's decision in *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000). But that case involved only a prosecutor, not police, so there was no allegation of a conspiracy between investigating officers and the prosecutor.[5] The court decided that the prosecutor could be held liable for fabricating evidence during the investigation since that same prosecutor later decided to use the evidence at trial. *Zahrey* is therefore inapposite.[6]

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[5] Contrary to Petitioners' assertion, Pet. App. 21a n.5, *Zahrey*'s discussion of when a prosecutor's action breaks the chain between a police officer and an indictment was plainly dictum, since the case did not involve police at all. The Second Circuit itself has made this clear. *See Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007) ("the *Zahrey* opinion wondered aloud why such misconduct [an officer's misleading or coercing the intervening decision-maker] would be necessary under the doctrine of reasonable foreseeability . . . [but] [t]he court declined to decide that issue. . . .").

[6] Justice Thomas' statement that *Zahrey* was correctly decided (*see* Pet. 17-18) is thus irrelevant here, since *Zahrey*, and Justice Thomas' comment, concerned the liability of a prosecutor who both investigated and prosecuted the case. *See Michaels v. McGrath*, 531 U.S. 1118, 1119 (2001) (Thomas, J., dissenting from denial of certiorari) ("The intervention of a subsequent immunized act *by the same officer* does not break the chain of causation necessary for liability.") (emphasis added).

Petitioners' citation (Pet. 18 n.7) of *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), is also totally off target. The issue there was whether two officers who shot at the plaintiff's vehicle could be held liable for violating the plaintiff's due process rights even if it was a third officer's bullet that hit the plaintiff's body. That case was thus not remotely similar to this one. Moreover, this Court has soundly

(Continued . . .)

Moreover, in a subsequent case that did involve a police officer, the Second Circuit expressly held that even if the police officer's conduct "amounted to a wrong under state common law or statutory law," that conduct could not be considered the cause of the plaintiff's injury unless the officer "misled or pressured the prosecution." *Wray*, 490 F.3d at 193, 195. Indeed, the court characterized the notion that the officer could be held liable without evidence that he misled or pressured the prosecutor as "unprecedented." *Id.* at 193. *See also Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir. 1999) (trial judge broke chain of causation between police officers' illegal search and plaintiffs' conviction because there was no evidence police misled or pressured judge).

The court in *Wray* also noted that *Zahrey* "involved the unusual circumstance that the same person took both the initial act of alleged misconduct and the subsequent intervening act," 490 F.3d at 195 (internal quotation marks and citation omitted), and concluded that its reasoning could not be applied beyond its unusual facts. It therefore found that *Zahrey* had no application to a case like this one.[7]

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rejected Petitioners' premise that negligence can give rise to a Section 1983 due process claim. *See Daniels v. Williams*, 474 U.S. 327, 328 (1986).

[7] Petitioners contend that *Wray* is consistent with *Zahrey* because it recited the words "reasonably foreseeable." Pet. 18 n.7. But *Wray* was explicit in stating that "reasonable foreseeability" is not the touchstone. The court said that the prosecutor's decision to enter a suggestive identification at trial

(Continued . . .)

The third case Petitioners cite is the Ninth Circuit's decision in *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008). They claim that *Beck* conflicts with the Fourth Circuit's decision because, in their view, it allows the presumption that a prosecutorial action serves as a superseding cause to be rebutted based on a showing that officers acted maliciously or with reckless disregard for the rights of the plaintiff. *See* Pet. 18-19. But, again, Petitioners ignore the actual holding of *Beck*.

In that case, the plaintiff alleged that police violated his Fourth Amendment rights by "engineer[ing] his arrest." 527 F.3d at 857. The police had filed a police report with the prosecutor that did not contain key exculpatory evidence, and the prosecutor then generated a complaint which, along with an affidavit from an officer, caused a judge to issue an arrest warrant.[8] The court allowed

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was not the "reasonably foreseeable consequence[]" of the officer's actions because the police officers did not mislead or pressure the prosecutor into that decision. 490 F.3d at 195 ("It is always possible that a judge who is not misled or deceived will err; but such error is not reasonably foreseeable, or (to use the phrase employed in *Zahrey*) it is not the 'legally cognizable result' of an investigative abuse.") (citation omitted).

[8] The form submitted by the police to the prosecutor listed the crime as "Threatening an Officer," *Beck*, 527 F.3d at 859, based on the plaintiff's statement to the officer that "[y]ou don't know who you're dealing with." *Id.* at 858. However, the police report accompanying the form did not contain the statement by an officer that prompted the plaintiff's remark, *id.* at 859, which was, "Ken, we should have taken care of you a long time ago." *Id.* at 858.

the plaintiff to defeat summary judgment without firm proof that police had pressured the prosecutor only because of a unique circumstance: the prosecutor asserted privilege rather than answering questions about whether the police pressured him. *See id.* at 865. Since "[c]ritical evidence" was "therefore unavailable," the court allowed the issue to go to a jury. *Id. See also id.* at 869-70. *Beck* is therefore completely consistent with the Fourth Circuit's decision.

Moreover, *Beck*'s discussion of the causation standard is based entirely on a prior Ninth Circuit decision, *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981). That case makes clear that when the court spoke of police officers' acting "maliciously or with reckless disregard for rights of the arrested person," it was referring to officers' lying to or withholding evidence from the prosecutor. *Id.* at 267.

> [A] showing that the district attorney was pressured or caused by the investigating officers to act contrary to his independent judgment will rebut the presumption and remove the immunity. Also the presentation by the officers to the district attorney of information known by them to be false will rebut the presumption . . . . Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the

> presumption of independent judgment by the district attorney is rebutted.

Id. at 266-67.[9]

In a second appeal involving the same case, the Ninth Circuit reiterated that the chain of causation is broken by the prosecutor's action unless the prosecutor "was subjected to unreasonable pressure by the police officers, or . . . the officers knowingly withheld relevant information with the intent to harm [the plaintiff], or . . . the officers knowingly supplied false information" to the prosecutor. *Smiddy v. Varney*, 803 F. 2d 1469, 1471 (9th Cir. 1986).

3. Petitioners acknowledge that the Fifth, Seventh, and Eleventh Circuits (among others) take the same approach as the Fourth. Pet. 20-21. Nevertheless, they attempt to find small differences in these courts' application of this standard. This hardly justifies certiorari. In any case, those differences disappear upon examination.

Petitioners suggest that *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989), indicated that the acts of an

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[9] The cases that *Smiddy* relied on also specifically said that the chain of causation is broken unless the plaintiff shows that the officer pressured or unduly influenced the prosecutor, presented false evidence to him, or withheld evidence. *See Smiddy*, 665 F.2d at 267 & n.2 (citing *Ames v. United States*, 600 F.2d 183, 185 (8th Cir. 1979); *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977); *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc)). Another Ninth Circuit case relied on by *Beck* held the same thing. *See Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004).

intervening actor might not break the chain if that person acted with malice. *See* Pet. 20. But this statement is dictum, as there was no evidence, or even contention, that an intervening actor acted with malice, or that an intervening actor was deceived or pressured by the officers. The Eleventh Circuit itself has specifically said this discussion in *Barts* is "dicta" for this reason. *Jones v. Cannon*, 174 F.3d 1271, 1288 n.11 (11th Cir. 1999).

Moreover, the rest of the discussion in *Barts* makes clear that the Eleventh Circuit's focus is on whether the intervening actor has been deceived or pressured. *See* 865 F.2d at 1195-96. And most of the cases that the court cites take the same approach. *See id.* at 1196. Tellingly, no Eleventh Circuit decision subsequent to *Barts* has ever ruled that police can be held liable merely because the intervening actor acted maliciously.

Petitioners also misread the Fifth Circuit's decision in *Hand v. Gary*, arguing that the case held that the chain is not broken if the intermediary's actions are "tainted" by the police investigator. In fact, *Hand* makes clear that the only "taint" that matters is police deception. *See* 838 F.2d 1420, 1428 (5th Cir. 1988) ("Any misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior"); *id.* ("An independent intermediary breaks the chain of causation unless it can be shown that the deliberations of that intermediary were tainted by the actions of the defendant. Here there is no such evidence. As we stated above, Gary withheld no

information from the federal agents, from the federal prosecutors, or from the federal grand jury.").

Similarly, Petitioners misconstrue the holding of the Seventh Circuit in *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 981 (2013). They claim that the court found that the action of an intermediary breaks the chain only if it is unforeseeable. Pet. 20-21. But Petitioners once again ignore the actual analysis of the court, as well as the reasoning of numerous other Seventh Circuit decisions. These make clear that the intermediary breaks the chain if he knows that evidence is fabricated, whether or not his actions were foreseeable by the officer.

> We noted in *Buckley* [*v. Fitzsimmons*], that the officers in *Jones* [*v. City of Chicago*] would not have been liable "if the prosecutors had known the truth and proceeded anyway" because "then the immunized prosecutorial decisions would be the cause of the injury." . . . [C]ausal responsibility for the violation lies with the prosecutor who chooses to put on the fabricated evidence, not with the fabrication itself, because "[i]f the prosecutors had known" of the fabrication they could (and should) "have dropped the charges."

Whitlock, 682 F.3d at 583-84 (citations omitted). *See also Buckley v. Fitzsimmons*, 20 F.3d 789, 796-97 (7th Cir. 1994); *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988); *Newsome v. McCabe,* 256 F.3d 747, 752 (7th Cir. 2001).

In sum, then, there is no division in the Circuits at all on the question presented in the petition. Petitioners have not cited, and cannot cite, a single case in which a court has ruled that police can be held liable for a prosecutor's decision to seek an indictment without evidence that the police misled or pressured the prosecutor into making that decision.

B. There Is No Circuit Split on Whether Fabrication of Evidence Alone Violates Substantive Due Process

Having failed to show a circuit split on the standard for determining when a prosecutor's action serves as a superseding cause, Petitioners next argue that the Fourth Circuit "implicitly took sides" in a different purported circuit conflict—whether the fabrication of evidence during an investigation violates substantive due process even if the evidence is never used to arrest, indict, or convict a person. Pet. 21. Saying the Fourth Circuit "implicitly took sides" is another way of saying that the Fourth Circuit did not address the question. *Id.* And, indeed, it did not. Nor did Petitioners raise the issue below. In fact they expressly acknowledged this in their brief in the Fourth Circuit. *See* Pet. 4th Cir. Brief 31 n.6. These reasons alone warrant rejection of the petition.

Beyond this, there are numerous other defects in Petitioners' argument. First, this Court held in *Albright v. Oliver*, 510 U.S. 266 (1994) that any "malicious prosecution" claim brought under Section 1983 must be assessed under the Fourth Amendment, not substantive due process. *Id.* at 274-75 (plurality opinion); *id.* at 275-76 (Scalia, J.,

concurring); *id.* at 276 (Ginsburg, J., concurring); *id.* at 286-91 (Souter, J., concurring in judgment). If, as Petitioners posit on this issue, false evidence is not used to justify a search or seizure, there can be no Fourth Amendment violation. *See California v. Hodari D.*, 499 U.S. 621 (1991).

Even if it were appropriate to examine this issue under the rubric of substantive due process, there are no cases holding that there is a due process right against the fabrication of evidence that is never used. As Justice Scalia has said, there is simply "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring).[10] Moreover, this Court has previously said that "a suggestive preindictment identification procedure does not[,] in itself[,] intrude upon a constitutionally protected interest." *Manson v. Brathwaite*, 432 U.S. 98, 113 n.13 (1977). *Cf. Chavez v. Martinez*, 538 U.S. 760, 776 (2003) (plurality opinion) (no substantive due process right against coercive interrogation where that interrogation is not used at trial).

Petitioners assert that two circuits have "squarely held" that fabrication of evidence violates the

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[10] Petitioners' assertion (*see* Pet. 25) that *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam) held that fabrication of evidence alone is a constitutional violation is false. The plaintiff in *Mooney* was *convicted* and *imprisoned* on the basis of allegedly perjured testimony.

Constitution even if it is never used at trial, in contrast to the plethora of cases holding to the contrary. Pet. 22.[11] This is not correct.

Limone v. Condon, 372 F.3d 39 (1st Cir. 2004) involved a plaintiff who was *convicted* based on the defendants' alleged subornation of perjury and suppression of exculpatory evidence. When the court spoke of the right "not to be framed by the government," it was clearly not speaking of some free-standing right against the preparation of false evidence, but the right not to be *convicted* with such evidence. *See id.* at 44 ("[T]he plaintiffs asseverate that *an individual's right not to be convicted* by these tawdry means—his right not to be framed by the government—is beyond doubt. This is easy pickings.") (emphasis added). *See also id.* at 45 ("the Due Process Clause forbids *convictions* predicated on deliberate deceptions") (emphasis added) (citations omitted).

Moreover, the First Circuit has squarely rejected Petitioners' argument in another case. *See Landrigan v. City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980) ("we do not see how the existence of a false police report, sitting in a drawer in a police station,

[11] In addition to the three Circuits cited in Petitioner's brief, Pet. 24 & 24 n.9, the Sixth Circuit has also held that there is no right against the fabrication of evidence that is never used. *See Gregory*, 444 F.3d at 747.

by itself deprives a person of a right secured by the Constitution and laws").[12]

McGhee v. Pottawattamie County, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009), *cert. dismissed*, 558 U.S. 1103 (2010), also does not "squarely hold" what Petitioners say it does. That case concerned the scope of absolute immunity for prosecutors, and whether it extended to pre-trial fabrication of evidence *that was later used at trial*. The court emphasized that the prosecutor had no immunity for the pre-trial fabrication because he "was accused of both fabricating evidence *and then* using the fabricated evidence at trial," resulting in a post-trial "deprivation of liberty." *Id.* at 932 (emphasis added) (citation omitted). In no way, then, did the Eighth Circuit "squarely hold" that fabrication of evidence alone violates due process even if it is never used.

Moreover, in at least one other case, the Eighth Circuit squarely held the converse—that the intentional preparation by police of a false report does *not* violate due process absent some deprivation of life, liberty, or property. *See Shock v. Tester*, 405 F.2d 852, 855 (8th Cir. 1969); *see also Landrigan*, 628 F.2d at 744 (discussing *Shock*'s due process holding).

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[12] Petitioners' suggestion that *Landrigan* was solely about damages is wrong. *See* 628 F.2d at 745 ("the mere filing of the false police reports, by themselves and without more, did not create a right of action in damages under 42 U.S.C. § 1983").

C. The Government's Position in *Pottawattamie County* Supports the Fourth Circuit's Decision

As shown above, there is no circuit split on the issues that Petitioners have raised, for the first time, in their petition. Petitioners therefore place great weight on two unlikely sources: the government's *amicus* brief and snippets of oral argument in *Pottawattamie County v. McGhee*. These are no substitute for actual authority. And Petitioners' citation of them in this case is particularly strained, since, as discussed above, *Pottawattamie County* involved the very different issue of the scope of a prosecutor's absolute immunity concerning fabricated evidence that he introduced at trial. It did not involve the liability of police officers *at all*. And here, there was never a trial.[13]

Still, Petitioners suggest that a footnote in the *amicus* brief and bits of the argument transcript indicate that the United States took the position that police officers can be held liable for a prosecutor's actions if they conspired with him. In fact, the government argued that officers cannot be held liable for a prosecutor's decision to seek an indictment unless they misled, coerced, or unduly induced him

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[13] *Pottawattamie County* also did not involve the Fourth Amendment. Because the evidence in that case was used at trial (unlike here), the plaintiffs' claim was based on substantive due process. *See McGhee v. Pottawattamie Cnty.*, 475 F. Supp. 2d 862 (S.D. Iowa 2007), *aff'd in part and rev'd in part,* 514 F.3d 739, *amended*, 547 F.3d 922 (8th Cir. 2008).

into taking an action that he otherwise would not have taken.

Petitioners stake their argument on footnote 6 of the government's brief, which contains this sentence: "A conspiracy between officer and prosecutor *may* also support a procurement theory of officer liability, as may anything that makes 'an intelligent exercise of the [prosecutor's] discretion . . . impossible." Brief of the United States at *Pottawattamie Cnty.,* 129 S. Ct. 2002 (2009), at 25 n.6 (quoting Restatement (Second) of Torts, § 653 cmt. g (1977)) (emphasis added). But the government's brief makes clear that a mere conspiracy alone does *not* suffice to create officer liability for a prosecutor's action, unless the officer does something to compel the prosecutor to take that action.

The government addressed the issue of officer liability as a means of explaining why a *prosecutor* cannot be held liable based on a theory that he "procured" his own use of fabricated evidence at trial.

> The standard requirements for procurement . . . are *stricter than simple foreseeability*:
>
> > It is . . . not enough that some act of his should have caused the third person to initiate the proceedings. *** The giving of the information or the making of the accusation *** does not constitute procurement of the proceedings that the third person initiates *if it is left to the uncontrolled choice of the third person to bring the*

> *proceedings or not as he may see fit.*
>
> Thus, lower courts have held that a police officer who, *without the prosecutor's knowledge*, fabricates evidence may be held liable under Section 1983 because, by analogy to malicious prosecution law, the officer has procured the liberty deprivation.

Id. at 25 (quoting Restatement § 653, cmt. d) (emphases added).

The government continued in this vein in the rest of footnote 6:

> [T]he courts of appeals have most often invoked a procurement theory of liability when a police officer *dupes* the prosecutor by supplying fabricated evidence, *while concealing the fabrication.* Likewise, the Restatement suggests *coercion of the prosecutor* would support a procurement theory of liability.

Id. at 25 n.6 (emphases added).

While *some* conspiracies may support a procurement theory of liability, the government's brief makes clear that a conspiracy alone is not sufficient. Rather, the officer has to do something to induce the prosecutor to take an action that he otherwise would not have taken, through deception, coercion, or some other form of pressure.

The government reiterated this same point at oral argument, as in this colloquy with Justice Kennedy:

> JUSTICE KENNEDY: What if a prosecutor knows that it's fabricated evidence? The police officer fabricates the evidence and says: Mr. Prosecutor, it's a very bad man; I fabricated the evidence. The prosecutor introduces it. What result there?
>
> See, your footnote 6 presumes that the prosecutor doesn't know.
>
> . . . .
>
> MR. KATYAL: And if the prosecutor does know, we don't think that there is a Fifth Amendment due process violation.
>
> JUSTICE KENNEDY: Against the policeman?
>
> MR. KATYAL: Against -- against the policeman in that circumstance.

Oral Arg. Tr. 20-21, *Pottawattamie Cnty.*, 129 S. Ct. 2002 (2009).

Similarly, when Justice Scalia asked "how do you get the policeman who has fabricated the evidence?" the Deputy Solicitor General responded, "Because the policeman essentially induces the prosecution at an earlier point of time and acts through the *innocent agent*, the prosecutor." *Id.* at 20.

The government's theory in *Pottawattamie County* is consistent with this Court's precedents.

See Hartman v. Moore, 547 U.S. 250, 262 (2006) (plaintiff seeking to hold investigators responsible for a retaliatory prosecution "must show that the nonprosecuting official . . . *induced* the prosecutor to bring charges *that would not have been initiated without his urging*") (emphases added). And it is consistent with the plain meaning of "induce" and "procure." See Oxford English Dictionary (2013 online version), www.oed.com, (defining "induce" as "to lead (a person), by persuasion or some influence or motive that acts upon the will, *to* . . . some action . . .; to lead on, move, influence, prevail upon (any one) *to do* something"); *id.* (defining "procure" as "to obtain; to bring about").

As the Fourth Circuit unanimously held, Petitioners do not remotely allege that Officers Gottlieb and Himan induced the state prosecutor to seek an indictment through deception, coercion, or any form of pressure. To the contrary, their complaint alleges again and again that the *prosecutor* was calling the shots, that he pursued the case to bolster his campaign for office, and that the investigators were following *his* direction. *See, e.g.*, C.A. App. 431-35, 441-42, 458, 463, 471, 474-75, 478.

D. The Fourth Circuit's Decision Was Correct

Petitioners assert that the Fourth Circuit's decision is inconsistent with general principles of causation and is based on flawed policy concerns. But these arguments, too, are unavailing.

1. Petitioners rely on two cases that did not even present a causation issue. *Dennis v. Sparks*, 449 U.S. 24 (1980), involved the questions whether a

private actor who conspired with a judge could be considered to have acted "under color of law" for purposes of Section 1983 and, if so, whether he was entitled to an immunity derived from that of the judge. There was no discussion of causation whatsoever.[14]

Malley v. Briggs, 475 U.S. 335 (1986), did discuss causation in a footnote, opining that the issuance of an arrest warrant by a magistrate did not break the causal link between an officer's submission of a complaint and the plaintiff's "improvident arrest." *See id.* at 344 n.7. But this statement is dictum, as the Court acknowledged that the officer had not raised the causation argument, *see id.*, and the Court's decision was based on an entirely different ground (*i.e.*, that an officer who applies for an arrest warrant is not entitled to absolute immunity). *See also Egervary v. Young*, 366 F.3d 238, 248 (3d Cir. 2004) *cert. denied*, 543 U.S. 1049 (2005) ("The causation issue was not included in the grant of certiorari" in *Malley*, the officer "had not pressed the . . . argument," and the Supreme Court's comment about causation is "dictum").

In any case, *Malley*'s dictum is consistent with the Fourth Circuit's decision here. In *Malley*, the officer himself made the decision to submit a complaint and supporting evidence to a judicial

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[14] Moreover, although the private party was not alleged to have "pressured" the judge, he did bribe him, *Dennis*, 449 U.S. at 28, and thereby "persuade" him "to exercise his jurisdiction corruptly." *Id.* at 27.

officer and to advocate for the warrant, and that advocacy induced the magistrate to issue the warrant. Moreover, the officer in *Malley* provided only a summary and interpretation of the relevant evidence, not the entirety of it. *See Malley,* 475 U.S. at 338. *See also Egervary*, 366 F.3d at 248 ("[T]he cryptic reference to the common law in *Malley*'s footnote 7 would appear to preclude judicial action as a superseding cause only in the situation in which the information, submitted to the judge, was deceptive."); *Hector*, 235 F.3d at 164 (Nygaard, J., concurring) ("The warrant in *Malley* . . . was contaminated and compromised by the officer's misinformation.").

It is no surprise, then, that in the twenty-seven years since *Malley,* courts have consistently held that the intermediary breaks the chain unless the investigator misled, pressured, or otherwise unduly influenced him. *See, e.g., Smiddy*, 803 F.2d at 1472 (finding "no inconsistency" between *Malley* and prior Ninth Circuit decision holding that chain is broken unless police misled or pressured prosecutor).

2. Petitioners also cite general principles of *negligence* law. But the claim here is not that the investigators acted negligently, but that they acted intentionally. The common law tort most analogous to their claim is malicious prosecution, not negligence. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994) ("The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because . . . it permits damages for confinement imposed pursuant to legal process."). And, as discussed above, the case

law regarding malicious prosecution has long recognized that an intermediary's action breaks the chain of causation unless that intermediary is misled or pressured, even if the intermediary's action is "foreseeable" in the sense meant by negligence jurisprudence. In addition, plaintiffs bringing a Section 1983 claim based on an illegal seizure must allege that the defendant acted intentionally, not negligently. *See County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

Moreover, this Court has expressly rejected Petitioner's common law "foreseeability" test in Section 1983 cases. *See Martinez v. California*, 444 U.S. 277, 285 (1980) ("Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused her death, we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment.") (citations omitted).[15] Petitioner's rule of mere foreseeability would turn the Constitution and Section 1983 into the "font of tort law" that this Court has refused to make it since at least *Paul v. Davis*, 424 U.S. 693, 701 (1976). Courts should be especially reluctant to create what is effectively new tort law where it would be superimposed upon state common law torts that already address the same conduct—in this case, the common law tort of

[15] Indeed, *Martinez* cited the hornbook negligence case, *Palsgraf v. Long Island R.R. Co.,* 162 N.E. 99 (N.Y. 1928), as an example of the foreseeability analysis it declined to apply.

malicious prosecution. *See, e.g., Albright*, 510 U.S. at 284 (Kennedy, J., concurring in judgment).

3. Criminal conspiracy jurisprudence is equally off the mark. *See* Pet. 28-29. Petitioners cite no case suggesting that a Section 1983 case based on a malicious prosecution theory (or any other theory) should follow the principals of criminal conspiracy law.

4. Petitioners also criticize (Pet. 29-32) the Fourth Circuit's concern that allowing suits against police to proceed based solely on allegations of a conspiracy with prosecutors would undermine the purpose of qualified immunity by "mak[ing] discovery the rule, rather than the exception." Pet. App. 21a. The purpose of qualified immunity, of course, is not just to minimize the burden of *trial* on officers who did not violate clearly established law, but to avoid the cost and burden of discovery as well. *See Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Since prosecutors are often involved in investigations—meeting with police to review evidence, determine additional areas for investigation, and discuss trial preparation—it would not be difficult for plaintiffs to characterize such collaboration as a "conspiracy." And lower courts might consider allegations of communications between police and prosecutors sufficient to pass the pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Petitioners attempt to minimize this problem by pointing to the extraordinary detail in their massive complaint. Pet. 30. But as the district court said,

the complaint is full of "a mass of legally unsupportable claims and extraneous factual allegations." Pet. App. 157a. When those are stripped away, Petitioners' allegations of conspiracy boil down to references to meetings between the officers and the prosecutor and conclusory allegations of improper motive.

This would not be difficult for future plaintiffs to replicate. Every judge below, regardless of their different judicial philosophies, recognized this and warned of the consequences. *See* Pet. App. 21a (Motz, J.) ("Allowing § 1983 claims against police officers to proceed on allegations of such a 'conspiracy' would in virtually every case render the officers' qualified immunity from suit 'effectively lost.'") (citation omitted); *id.* at 53a (Wilkinson, J., concurring) ("The plaintiffs seek to thrust the prospect of monetary liability and burdensome discovery into every meeting between supervisor and subordinate within a police department, every internal communication between police officer and prosecutor, every statement by a police spokesperson, and every effort to invoke judicial process in furtherance of a police investigation. Allowing these claims to proceed would let litigation loose in such a fashion as to impair the ability of the criminal justice system to do its job."); *id.* at 55a-58a (Gregory, J., concurring in part and dissenting in part) ("Stripping the complaint of its conclusory allegations, it does not plausibly suggest the officers acted 'wantonly,' in a way that reasonable officers 'would know to be contrary to [their] duty,' for the purpose of framing the plaintiffs. . . . If a complaint of this kind can proceed, I fear that every rape case

where a victim has given inconsistent accounts and a witness has changed her statement could subject investigating police officers to personal liability.") (alteration in original) (citation omitted).[16]

5. As Judge Wilkinson recognized below, *see* Pet. App. 48a, if claims against police were allowed to proceed based on allegations of conspiracy alone, it would necessarily cause police to be reluctant to communicate fully with prosecutors, especially regarding weaknesses in the case or exculpatory evidence. The fact of that communication alone would be cited by plaintiffs as proof that the police conspired to frame a person despite evidence of his innocence. This Court acknowledged this same concern in *Rehberg v. Paulk* when it warned that

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[16] To hold police liable for a prosecutor's decision would also undermine the state's assignment of roles and responsibilities among its officials. *See Rehberg v. Paulk*, 132 S. Ct. 1497, 1508 (2012) ("[I]t is almost always a prosecutor who is responsible for the decision to present a case to a grand jury . . . . It would . . . be anomalous to permit a police officer who testifies before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor . . . who is actually responsible for the decision to prosecute." (citation omitted)); *Barts*, 865 F.2d at 1196-97 ("Criminal procedure . . . involves a division of power and duties among several entities, each of which has the responsibility for his own decisions. To hold that the decisions of the prosecutor . . . do not break the chain of proximate causation trivializes the importance of [his] decisions. . . ."). *See also Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion").

grand jury witnesses' absolute immunity for their testimony

> may not be circumvented by claiming that [the] . . . witness conspired to present false testimony . . . . Were it otherwise, "a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves." In the vast majority of cases . . ., the witness and the prosecutor conducting the investigation engage in preparatory activity, such as a preliminary discussion . . . of [the] intended testimony.

Rehberg, 132 S. Ct. at 1506-07 (citation omitted).

Stifling communication between police and prosecutors would be enormously detrimental to criminal defendants, and to the criminal justice system as a whole. Everyone is better off—prosecutors, police, defendants, judges, and the public—when there is full communication between investigators and prosecutors and all the evidence is brought to light. *Cf. Rehberg*, 132 S. Ct. at 1505 ("a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence").

6. Finally, it should be kept in mind that other criminal, civil, and administrative penalties exist to deter police from fabricating evidence to frame innocent persons. *See id.* ("the possibility of civil liability [i]s not needed to deter false testimony . . . because other sanctions—chiefly prosecution for perjury—provide a sufficient deterrent" (citation

omitted)). Thus, for example, federal law makes it a crime for any person acting under color of state law to "conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of" his constitutional or statutory rights, 18 U.S.C. § 241 (2006), or to "willfully . . . depriv[e]" him of those rights, *id*. § 242. In addition, states provide a number of criminal penalties for the creation or presentation of false evidence, perjury, or obstruction of justice. *See, e.g.,* N.C. Gen. Stat. Ann. § 14-221.1 (altering evidence); N.C. Gen. Stat. Ann. § 14-209 (perjury); N.C. Gen. Stat. Ann. § 14-226 (intimidating or interfering with witnesses); *North Carolina v. Taylor*, 713 S.E.2d 82, 88 (N.C. Ct. App. 2011) (North Carolina recognizes common law *criminal* obstruction of justice).

Officers are also subject to disciplinary action, including termination and revocation of a certification to work as a law enforcement officer. *See, e.g.*, N.C. Gen. Stat. Ann. § 17C-11; 12 N.C. Admin. Code 9A.0203, 9A.0204. *See also Rehberg*, 132 S. Ct. at 1506 (deterrent of civil liability for law enforcement witnesses not necessary because they "face the possibility of sanctions . . . namely, loss of their jobs and other employment-related sanctions"). In addition, victims of police misconduct can seek compensation under state law.

E. This Case Is a Poor Vehicle For Resolving the Questions Presented

Even if there were an issue worthy of this Court's review, this case is not a good one in which to address it. First, this case is on interlocutory appeal. No final judgment has been entered. The absence of

a final judgment alone is a "sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Brotherhood of Locomotive Firemen& Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258; *see also* Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-81 (9th ed. 2007). There are no such extraordinary circumstances here.

Second, Petitioners assert "that there are few, if any, cases in the pipeline even remotely similar to this one." Pet. 30. That the Court's resolution is unlikely to affect many other cases weighs heavily against certiorari. *See* Gressman, *supra* § 6.37(i)(3), at 506 n.160 (a concession that a case is unusual or unique is the "kiss of death" for a petition for certiorari). *See also Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393, (1923) (certiorari should be denied "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties").

Third, even if this Court were to grant certiorari and reverse, the officers would still be entitled to at least qualified immunity. As Petitioners themselves would have it, the case law does not clearly establish that officers could be liable for an arrest resulting from an indictment even though they turned over all relevant evidence to a prosecutor. For a right to be clearly established, "existing precedent must have placed the statutory or constitutional question

beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).[17]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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[17] Indeed, under this Court's decision in *Rehberg,* Officers Gottlieb and Himan would be entitled to *absolute* immunity as grand jury witnesses. Petitioners' complaint is premised on the theory that the officers presented fabricated evidence to the grand jury, causing it to indict them. But the Court in *Rehberg* made it clear that grand jury witnesses' absolute immunity "may not be circumvented by . . . simply reframe[ing] a claim to attack the preparation instead of the absolutely immune actions themselves." (citation omitted) *Rehberg*, 132 S. Ct. at 1506-07. Petitioners are attempting to do exactly what *Rehberg* proscribed.