NO. _____

In The
Supreme Court Of The United States

BRIAN KOOPMAN,
Detective in the Loveland, Colorado Police Department, in his individual capacity,
Petitioner,

v.

JEREMY C. MYERS,
Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a §1983 malicious prosecution claim exist under the Fourth Amendment against an investigating police detective?

2. Should the Court's holding in *Wallace v. Kato*, 549 U.S. 384 (2007) apply to a Fourth Amendment §1983 malicious prosecution claim not involving a conviction so that the applicable statute of limitations begins running when the claimant was detained pursuant to the arrest warrant?

PARTIES TO THE PROCEEDING

Petitioner:	Brian Koopman, detective in the Loveland, Colorado Police Department, in his individual capacity
Respondent:	Jeremy C. Myers

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Petitioner Brian Koopman ("Koopman") respectfully requests that a writ of certiorari issue to review the judgment and opinion, as amended, of the United States Court of Appeals for the Tenth Circuit entered in this case. The Tenth Circuit is in conflict with at least three, and perhaps four, other circuits by permitting a cause of action under 42 U.S.C. §1983 for a violation of the Fourth Amendment on the basis of a claim analogous to malicious prosecution to be pursued against Koopman, an investigating police detective, where the Respondent Jeremy C. Myers ("Myers) was arrested and detained over a weekend pursuant to an arrest warrant issued on the basis of Koopman's allegedly false affidavit. This Court has never explicitly decided that a Fourth Amendment malicious prosecution suit is cognizable under §1983, *see Wallace v. Kato,* 549 U.S. 384, 389 n.2 (2007), and in *Rehberg v. Paulk,* ___ U.S. ____, 132 S.Ct. 1497 (2012) expressed doubt that a police officer can be sued for malicious prosecution when the prosecutor, who is actually responsible for the decision to prosecute, is shielded by absolute immunity.

The Tenth Circuit has further decided, in conflict with at least two other circuits, that the §1983 malicious prosecution claim accrued, for statute of limitations purposes, when the criminal case was terminated in Myers' favor and not at the time of arrest, and that such claim was not barred

by the statute of limitations despite this Court's distinction drawn in *Wallace* between the date of accrual of a malicious prosecution tort cause of action, on the one hand, and the date the statute of limitations begins to run, on the other, where the §1983 claim is putatively grounded in the Fourth Amendment.

This case squarely presents the facts on which the lower courts are split. A decision by this Court either that the constitutional cause of action does not exist or, if it does exist, that the statute of limitations begins running when the constitutional deprivation that undergirds the cause of action occurs, will render final judgment in this case.

Regardless of the Court's decision on the merits, it will provide sorely needed guidance to all the circuits.

OPINIONS BELOW

The opinion of the court of appeals, as amended, is reported at *Myers v. Koopman*, ___ F.3d ___ (10th Cir. 2013) (Petitioner's Appendix "Pet.App." B at 4a-17a). The order of the district court dismissing the amended complaint with prejudice is unreported, but is reproduced at Pet.App. C at 18a-39a.

STATEMENT OF JURISDICTION

The amended decision of the United States Court of Appeals for the Tenth Circuit was entered on January 8, 2014, *nunc pro tunc* to December 20, 2013. The appeals court denied a petition for panel rehearing on January 8, 2014. This petition for writ of certiorari is filed within ninety (90) days after the denial of rehearing pursuant to Supreme Court Rule 13.3. The jurisdiction of this Court is proper under 28 U.S.C. §1254(1). Jurisdiction in the court of appeals was proper under 28 U.S.C. §1291, and jurisdiction in the district court was proper under 42 U.S.C. §1983 and 28 U.S.C. §§1331 and 1343.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendments to the Constitution of the United States, Article IV provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a civil rights suit asserting a single §1983 malicious prosecution claim grounded in the Fourth Amendment against a Loveland, Colorado police detective relating to the execution of a warrant to search a premises belonging to Myers and Myers' subsequent arrest under a warrant and his prosecution by information in state court on drug-related charges. The prosecution was

terminated prior to trial upon dismissal by the prosecutor.

This Court has "never explored the contours of a Fourth Amendment malicious-prosecution suit under §1983, or even decided that such a claim is cognizable under §1983." *Wallace,* 549 U.S. at 390 n.2; *see Albright v. Oliver,* 510 U.S. 266, 270-271, 275, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (plurality opinion). This Court has, however, hinted that such cause of action against a police officer does not exist. *See Rehberg,* ___ U.S. at ___, 132 S.Ct. at 1508 ("[A] detective . . . , unlike a complaining witness at common law, does not make the decision to press criminal charges. . . . It would thus 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 shielded by absolute immunity, who is actually responsible for the decision to prosecute."). Nevertheless, on November 5, 2009, Myers brought suit in a Colorado state court against Koopman and others, thereafter removed to the United States District Court for the District of Colorado where an amended complaint asserted a single claim against Koopman[1] pursuant to 42 U.S.C. §1983 alleging

[1]The amended complaint also included the City of Loveland, Colorado, a municipality, as a defendant, but that entity was dismissed by the district court and that order has not been appealed.

malicious prosecution in violation of the Fourth Amendment[2] by which Myers explicitly asserted that he had "a constitutionally protected right to be secure in his person against malicious prosecution." Amended Complaint ¶32 (See Record below, p. 66). Myers therein sought unspecified compensatory and consequential damages, punitive damages and attorneys fees from Koopman.

Myers asserted that Koopman falsified an affidavit to obtain a warrant to search Myers' property and then, following that search which found a substance incorrectly identified by field tests as methamphetamine or its precursors, fabricated facts in an affidavit to obtain a warrant for Myers' arrest. Myers surrendered on September 7, 2007, where he remained in custody until he posted bond on September 10, 2007. The district attorney then filed criminal charges by information in state court. Laboratory testing of the samples recovered from the raid later revealed that they were not controlled substances. On November 15, 2007, the district attorney dismissed all charges.

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[2]The claim also asserted a §1983 malicious prosecution cause of action grounded in the Fourteenth Amendment, but the district court dismissed the Fourteenth Amendment substantive and procedural due process grounds for the §1983 malicious prosecution claim and only the order dismissing the procedural due process claim was appealed. That claim is not addressed in this petition, however.

Koopman, in his answer to the amended complaint, denied that Myers had a constitutionally protected right to be secure in his person against malicious prosecution under the Fourth Amendment and asserted that Myers had failed to state a claim upon which relief could be granted. Defendant's Answer to Amended Complaint and Jury Demand ¶¶20, 22 (See Record below, p. 213).

Koopman moved for judgment on the pleadings, contending that neither the Fourth nor the Fourteenth Amendments provide an adequate constitutional basis for Myers' §1983 malicious prosecution claim and, alternatively, that such claims were time-barred. Defendant's Motion for Judgment on the Pleadings at 2-4, 7-15 (See Record below, AppleeSuppApp, pp. 44-46, 49-57). After briefing, the district court (Blackburn, J.) dismissed the case with prejudice, concluding that the existence of a post-deprivation state tort remedy consisting of an available common law malicious prosecution cause of action precluded Myers from asserting a malicious prosecution claim against Koopman under the Fourteenth Amendment,[3] and

[3]That order dismissed the Fourteenth Amendment-based §1983 claim asserted under a *procedural* due process theory. The district court had previously dismissed Myers' Fourteenth Amendment-based §1983 claim asserted under a *substantive* due process theory.

that Myers' Fourth Amendment claim was time-barred with the case having been filed more than two years after Myers' Fourth Amendment claim accrued on the date of his release from custody, September 10, 2007. Order Granting Defendant's Motion for Judgment on the Pleadings, Pet.App. 18a-39a (See also Record below, pp. 25-37).

On timely appeal after final judgment was entered, and following briefing and oral argument,[4] a panel of the United States Court of Appeals for the Tenth Circuit (Briscoe, C.J., joined by O'Brien and Phillips, JJ.) agreed with the district court that

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[4]Koopman preserved in the Tenth Circuit his argument challenging the very existence of a Fourth Amendment-based §1983 malicious prosecution cause of action. See Appellee's Principal and Response Brief at 1-2, 4, 7, 15 and 23 (See Record below, Doc. No. 01019036686, filed 04/16/2013). Koopman also preserved in the Tenth Circuit his argument—adopted by the district court—that the facts alleged in the amended complaint do not support a Fourth Amendment claim based on events occurring after September 10, 2007, the date of Myers' release from custody, *id.* at 10-11, thereby triggering the statute of limitations to begin running once the allegedly unconstitutional deprivation of liberty undergirding the malicious prosecution claim ended. At oral argument, Koopman reiterated this argument and the related argument that language in *Wallace* can be understood to mean that the statute of limitations began running as early as the date the allegedly unconstitutional deprivation of liberty began, namely September 7, 2007, the date Myers became held pursuant to legal process—consisting of his arrest pursuant to an arrest warrant.

the existence of an adequate post-deprivation remedy – the state common law malicious prosecution tort claim under Colorado law – satisfied procedural due process requirements, thereby barring Myers' Fourteenth Amendment claim, but reversed the district court's holding that the Fourth Amendment §1983 malicious prosecution claim was time-barred. Pet.App.9a-17a. Relying on an earlier decision of the Tenth Circuit in *Wilkins v. DeReyes,* 528 F.3d 790, 799 (10th Cir. 2008), *cert. denied,* 555 U.S. 1212, 129 S.Ct. 1526, 173 L.Ed.2d 657 (2009), in which the appeals court had said that where detention occurs after the institution of legal process, a plaintiff can claim that the legal process itself was wrongful and thereby state a "Fourth Amendment violation sufficient to support a §1983 malicious prosecution cause of action," the panel held that Myers properly stated a Fourth Amendment claim for malicious prosecution, which accrued on November 15, 2007, when the criminal proceedings were resolved in his favor. Pet.App.11a-16a. Judge Phillips, writing for the panel, rejected Koopman's contention that the statute of limitations must have began to run – for Fourth Amendment purposes – when Myers was "seized" pursuant to the arrest warrant or, at the very latest, when he was released from custody, holding instead that a Fourth Amendment-based malicious prosecution claim is not cognizable until all the elements are satisfied, and one of the elements is that the original action terminated in favor of the plaintiff. Pet.App. 12a-16a. The panel

therefore concluded that Myers' malicious prosecution claim did not accrue until proceedings terminated in his favor on November 15, 2007, less than two years before Myers filed his complaint on November 5, 2009. Pet.App. 16a.[5]

REASONS FOR GRANTING THE WRIT

The lower federal courts have struggled with understanding and applying Fourth Amendment jurisprudence as it relates to §1983 in the context of a malicious prosecution theory ever since this Court's decision in *Albright.* In *Albright,* a plurality of the Court held, in effect, that it is the Fourth Amendment, and not Fourteenth Amendment substantive due process, under which a claim to a right to be free from criminal prosecution except upon probable cause must be judged.[6] Indeed, 20 years after *Albright* was

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[5]The parties agreed, and the Tenth Circuit approved, that Colo.Rev.Stat. §13-80-102(1)(a) provided the applicable two-year statute of limitations and that issue has not been appealed. Only the date the statute of limitations began running was and is in dispute as asserted in the second of the Questions Presented for Review above.

[6]*See, e.g.,* Michael Avery *et al., Police Misconduct: Law and Litigation* §2:14 (2013 Westlaw, POLICEMISC 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

decided, it remains "an open question whether the Constitution permits the assertion of a §1983 claim for malicious prosecution on the basis of an alleged Fourth Amendment violation."[7] Some circuit courts have rejected such claims outright.[8] Others

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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) (cited in *Wallace,* 549 U.S. at 389 n.2).

[7] *Nieves v. McSweeney,* 241 F.3d 46, 54 (1st Cir. 2001); *See Wallace,* 549 U.S. at 390 n.2 ("We have never explored the contours of a Fourth Amendment malicious-prosecution suit under §1983 . . . , and we do not do so here. . . . Assuming without deciding that such a claim is cognizable under §1983, petitioner has not made one.").

[8] *See Newsome v. McCabe,* 256 F.3d 747, 750-51 (7th Cir. 2001) (reading *Albright* as having answered in the negative the question whether there is a constitutional right not to be prosecuted without probable cause, which "scotches any constitutional tort of malicious prosecution when state courts are open"); *Smith v. Lamz,* 321 F.3d 680, 684 (7th Cir. 2003) (disallowing an action under §1983 for malicious prosecution in accordance with the "narrowest ground" of the *Albright* decision "to be that the opportunity for state-law remedies for wrongful-prosecution claims precludes any constitutional theory of the tort"); *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"); *cf. Castellano v. Fragozo,* 352 F.3d 939, 942 (5th Cir. 2003) (en banc), *cert. denied,* 543 U.S. 808, 125 S.Ct. 31, 160 L.Ed.2d 10 (2004) ("We decide that 'malicious prosecution' standing alone is no violation of the United States Constitution, and that to proceed under 42 U.S.C. §1983 such a claim must rest upon a denial of rights

have recognized a Fourth Amendment malicious prosecution action subsequent to *Albright*, although there is wide discrepancy in the analyses employed.[9]

The splintered views and applications at the circuit level involving this aspect of Fourth Amendment jurisprudence continue to vex and confound bench and bar alike, feeding a growing frustration with and mistrust of Fourth Amendment constitutional analysis, not to mention the resulting "great uncertainty in the law" itself. *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3rd Cir. 1998). Whether a police officer's actions that lead to an eventual criminal prosecution violate the

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secured under federal and not state law.") (collecting cases and analyzing split among the circuits).

[9]*See* Michael Avery *et al., Police Misconduct: Law and Litigation* §2:14 & n.4 for a survey of the dizzying array of directions the circuits have gone in grappling with the Fourth Amendment and §1983 malicious prosecution since *Albright*; *Hernandez-Cuevas v. Taylor,* 723 F.3d 91, 99-101 (1st Cir. 2013) (*Bivens* action) (discussing additional split among the circuits concerning the elements of such a claim, with the First, Fourth, Fifth, Sixth and Tenth Circuits requiring the plaintiff to demonstrate only a Fourth Amendment violation ("purely constitutional approach") and the Second, Third, Ninth and Eleventh Circuits requiring the plaintiff to demonstrate a Fourth Amendment violation *and* all the elements of a common law malicious prosecution claim ("blended constitutional/common law approach")).

Constitution is determined not by the Constitution, but instead by geography.

Certiorari is warranted here for several significant reasons. First, as described in Part I below, the Tenth Circuit has decided (and perpetuated) an important issue of federal constitutional law that was expressly left open by this Court's decision in *Wallace,* and did so in a way that undermines the guiding principles of *Albright, Wallace* and *Rehberg,* with undesirable consequences for federal courts and law enforcement officials throughout the Tenth Circuit. S.Ct. Rule 10(c). Second, as described in Part II below, the Tenth Circuit's decision is in conflict with the decisions of several other circuit courts in various respects. S.Ct. Rule 10(a). Third, as discussed in Part III below, the Tenth Circuit's decision imperils confidence in the law by contributing to an "embarrassing diversity of judicial opinion," *Albright,* 510 U.S. at 271 n.4, as to whether malicious prosecution is an actionable claim under §1983. S.Ct. Rule 10(c).

Any of these grounds is sufficient to warrant this Court's review; collectively, they provide a compelling case for certiorari. The time is ripe for this Court to tackle head-on the Fourth

Amendment basis of §1983 malicious prosecution jurisprudence.[10]

I. In Holding that the Fourth Amendment gives rise to a §1983 Malicious Prosecution Claim by Focusing on the Police Officer's Role in the Criminal Prosecution Rather than his Role in the Seizure, the Tenth Circuit has Decided an Important Federal Question Undecided in *Wallace*, and at Odds with Principles in *Albright* and *Rehberg*.

A. *Albright* and *Rehberg* recognized the anomaly of permitting federal malicious prosecution suits against police officers.

As noted above, this Court in *Wallace* acknowledged that it had "never explored the contours of a Fourth Amendment malicious-prosecution suit under §1983," 549 U.S. at 390 n.2, and declined to do so there because the petitioner had not made such a claim, *id.*. The petitioner in *Wallace,* instead, alleged unlawful arrest in violation of the Fourth Amendment. However,

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[10] *See* Justice White's dissent in *Campbell v. Brummett,* 504 U.S. 965, 112 S.Ct. 2323 (1992) (denying cert.) lamenting the Court's refusal to settle the question concerning if a cause of action for malicious prosecution is available under §1983 and, if it is, when the cause of action accrues. The Court's intervention is no less needed today than it was 22 years ago.

Justice Ginsburg, in her concurring opinion in *Albright,* pointed out that "reliance on a 'malicious prosecution' theory rather than a Fourth Amendment theory, is anomalous," 510 U.S. at 278 n.5, 114 S.Ct. at 816, further explaining that, "[t]he principal player in carrying out a prosecution – in the 'formal commencement of a criminal proceeding,' . . . – is not police officer but prosecutor." *Id.* Justice Ginsburg went on to explain that, "[b]y focusing on the police officer's role in initiating and pursuing a criminal prosecution rather than his role in effectuating and maintaining a seizure, Albright's theory raises serious questions about whether the police officer would be entitled to share the prosecutor's absolute immunity." *Id.*

This Court recently commented on Justice Ginsburg's "anomaly" argument in *Albright,* pointing out that, "[i]t would thus 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 shielded by absolute immunity, who is actually responsible for the decision to prosecute." *Rehberg,* ____ U.S. at _____, 132 S.Ct. at 1508. This Court there reiterated that "a detective . . . , unlike a complaining witness at common law, does not make the decision to press criminal charges." *Id.*

The repeated recognition by members of this Court of the "anomalous" nature of §1983 malicious

prosecution claims against police officers, especially where, as here, the claimant focuses on the police officer's "role in initiating and pursuing a criminal prosecution, rather than his role in effectuating and maintaining a seizure," *see Albright,* 510 U.S. at 279, n.5, 114 S.Ct. 807, strongly suggests that Myers' theory undergirding his sole §1983 malicious prosecution claim – accepted by the Tenth Circuit – is flawed. Although Koopman believes (and will contend in his merits brief) that this Court in *Rehberg* properly suggested a reluctance to allow a §1983 malicious prosecution claim in a circumstance such as this, the panel's decision perpetuating a contrary understanding by the Tenth Circuit of a Fourth Amendment theory of malicious prosecution undermines the principles articulated in *Albright* and *Rehberg.* The Tenth Circuit surely has decided an important question of federal constitutional law that warrants this Court's attention.

B. The Tenth Circuit's decision would open 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."

This Court has repeatedly noted that §1983 permits recovery only for rights guaranteed by the constitution, not the common law. *See Memphis*

Community School Dist. v. Stachura, 477 U.S. 299, 305-06, 106 S.Ct. 2537, 2542, 91 L.Ed.2d 249 (1986); *accord, Britton v. Maloney,* 196 F.3d 24, 29 (1st Cir. 1999), *cert. denied,* 530 U.S. 1204, 120 S.Ct. 2198, 147 L.Ed.2d 234 (2000) ("the essential elements of actionable section 1983 claims derive first and foremost from the Constitution itself, not necessarily from the analogous common law tort") ("the constitutional violation lies in the 'deprivation of liberty accompanying the prosecution' rather than in the prosecution itself"). According to *Becker v. Kroll,* 494 F.3d 904, 915 (10th Cir. 2007), "[t]he Court has been careful to tie all actions under §1983 to specifically protected constitutional rights in order to avoid creating a free-standing constitutional tort regime under §1983." *See, e.g., Collins v. City of Harker Heights,* 503 U.S. 115, 119, 112, S.Ct. 1061, 1065 (1992) ("Although the [§1983] statute provides the citizen with an effective remedy against those abuses of power that violate federal law, it does not provide a remedy for abuses that do not violate federal law . . . ."); *see also County of Sacramento v. Lewis,* 523 U.S. 833, 847, 118 S.Ct. 1708 (1998) (reminding of the "need to preserve the constitutional proportions of the constitutional claims, lest the Constitution be demoted to what we have called a font of tort law.") (quoting *Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)).

The facts of this case are typical of how malicious prosecution claims commonly arise. A

police officer conducts a preliminary investigation. Based on that investigation, the officer secures a search warrant to gather more evidence. Based on the evidence then gathered, the officer secures an arrest warrant. The subject of the investigation is arrested. Thereafter, the police officer submits the case to the prosecutor. Following the prosecutor's review of the case and investigation of the facts, the prosecutor exercises his independent authority in deciding whether to prosecute.[11] If, after filing a criminal action, the prosecutor decides the case lacks merit, the prosecutor seeks dismissal. The person charged then sues the investigating officer under § 1983, but not the prosecutor because of the prosecutor's absolute immunity.

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[11]Colo.Rev.Stat. §16-5-101 requires all felony criminal prosecutions in Colorado be brought by the return of a grand jury indictment, or filing by the district attorney of an information in district court, or filing by the district attorney of a felony complaint in county court. The district attorney has wide discretion in determining whether and whom to prosecute for criminal activity and what charge to file. *People v. MacFarland,* 189 Colo. 363, 366, 540 P.2d 1073, 1075 (1975); *People v. District Court,* 632 P.2d 1022, 1024 (Colo. 1981); *see People v. Lucero,* 623 P.2d 424, 427 (Colo.App. 1980) (complaining witness and victim have no control over the prosecution of the case because they are not parties to the litigation and cannot require prosecution or dismissal). However, Colo. Rev. Stat. §16-5-209 authorizes state courts in certain, limited circumstances to order the sitting prosecutor or an appointed special prosecutor to pursue a particular criminal prosecution. *Kailey v. Chambers,* 261 P.3d 792, 794-95 (Colo. App. 2011).

In this case, Myers' failure to timely pursue claims under the Fourth Amendment that *are* mentioned in the constitutional text, such as unreasonable seizure constituting false arrest, false imprisonment or excessive force, or an unreasonable search, leaves him with just a malicious prosecution claim that only survives because the Tenth Circuit has decided that its common law tort accrual characteristics permit a later running of the statute of limitations.[12] In colloquial terms, Myers pounds the square peg of "malicious prosecution" into the round hole of the Fourth Amendment to achieve a statute of limitations advantage that would not otherwise be available to him if his causes of action are limited to those actually mentioned in the Fourth Amendment.

By recognizing an expansive interpretation of the Fourth Amendment to include malicious prosecutions, in addition to unreasonable searches and seizures, the Tenth Circuit has constitutionalized the tort of malicious prosecution despite the fact that freedom from malicious prosecution is nowhere mentioned in the Fourth Amendment.

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[12]Myers' original complaint included claims for unreasonable search and seizure and for excessive force during the search. Both claims were dismissed by the district court as time-barred. That order of dismissal was not appealed.

The Tenth Circuit's decision – if allowed to stand – leaves open the door throughout the Tenth Circuit to §1983 malicious prosecution claims in federal court against investigating police officers for every dismissed state criminal prosecution without regard to the Fourth Amendment constitutional concept of "seizure." The consequences of constitutionalizing the common law tort of malicious prosecution, coupled with the magnitude of the fallout from the Tenth Circuit's decision, warrants this Court's review. *See* S.Ct. Rule 10(c).

II. The Tenth Circuit's Decision is in Direct Conflict with Fifth, Seventh, Eighth and Ninth Circuit Decisions Addressing the Existence of a §1983 Malicious Prosecution Claim Under the Fourth Amendment and with First and Seventh Circuit Decisions Concerning when the Statute of Limitations Begins to Run for this Claim, if it Exists.

A. The Tenth Circuit's decision that there exists a Fourth Amendment-based §1983 malicious prosecution claim as a constitutional tort is in conflict with the decisions of the Fifth, Seventh, Eighth and Ninth Circuits.

The Tenth Circuit relied on its earlier decision in *Wilkins,* 528 F.3d at 799, in reaching its holding that Myers had adequately pled a Fourth

Amendment violation sufficient to support a §1983 malicious prosecution cause of action. The Tenth Circuit's decision stands in stark contrast with decisions from the Fifth, Seventh, Eighth and Ninth Circuits.

The Seventh Circuit, in *Newsome v. McCabe,* 256 F.3d 747, 750-51 (7th Cir. 2001), read *Albright* as having answered in the negative the question whether there is a constitutional right not to be prosecuted without probable cause and concluded that *Albright* "scotches any constitutional tort of malicious prosecution when state courts are open."[13] *Accord, Smith v. Lamz,* 321 F.3d. 680, 684 (7th Cir. 2003) (disallowing an action under §1983 for malicious prosecution in accordance with the "narrowest ground" of the *Albright* decision "to be that the opportunity for state-law remedies for wrongful-prosecution claims precludes any constitutional theory of the tort"); *Serino v. Hensley,* 735 F.3d 588, 593 (7th Cir. 2013) ("there is no such thing as a constitutional right not to be prosecuted without probable cause").

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[13] *See Walden III, Inc., infra,* 576 F.2d at 947 ("§1983 has been construed as not embracing every violation of a duty for which state tort law provides a remedy") (citing *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)); *Screws v. United States,* 325 U.S. 91, 108, 65 S.Ct. 1031, 1039 (1945) ("Violation of local law does not necessarily mean that federal rights have been invaded.")

The Fifth Circuit, *en banc,* reached a similar conclusion in *Castellano v. Fragozo,* 352 F.3d 939, 942 (5th Cir. 2003), *cert. denied,* 543 U.S. 808, 125 S.Ct. 31, 160 L.Ed.2d 10 (2004) ("We decide that 'malicious prosecution' standing alone is no violation of the United States Constitution, and that to proceed under 42 U.S.C. §1983, such a claim must rest upon a denial of rights secured under federal and not state law.") ("[W]e conclude that no such freestanding constitutional right to be free from malicious prosecution exists.") (collecting cases and analyzing split among the circuits).

The Eighth Circuit, in *Kurtz v. City of Shrewsbury,* 245 F.3d 753, 758 (8th Cir. 2001), stated that it "has uniformly held that malicious prosecution by itself is not punishable under §1983 because it does not allege a constitutional injury," and also observed that "[t]he Constitution does not mention malicious prosecution . . . ."

The Ninth Circuit has taken a somewhat different approach that still conflicts with the Tenth Circuit. In *User v. City of Los Angeles,* 828 F.2d 556, 561-62 (9th Cir. 1987), the Ninth Circuit, while adhering to the general rule that a "claim of malicious prosecution is not cognizable under 42 U.S.C. §1983 if process is available within the state judicial system to provide a remedy," recognizes an exception "when a malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise

intended to subject a person to a denial of constitutional rights." *Id.*

These direct conflicts among the circuits support this Court's review of the circuit split. *See* S.Ct. Rule 10(a).

B. The Tenth Circuit's decision that the statute of limitations applicable to a Fourth Amendment-based §1983 malicious prosecution claim does not begin to run until the criminal prosecution terminates in the claimant's favor is in conflict with decisions of the First and Seventh Circuits.

The Tenth Circuit's decision that Myers' Fourth Amendment-based §1983 malicious prosecution claim was not barred by the statute of limitations because it had not accrued until the criminal case was dismissed was based on *dicta*[14] in *Wallace,* 548 U.S. at 388, and *Heck v. Humphrey,*

[14] *Wallace* was not a malicious prosecution case but involved a false arrest claim. *See* 549 U.S. at 387 n.1, 127 S.Ct. 1091 (noting grant of certiorari was expressly limited to Fourth Amendment false-arrest claim). *Heck, infra,* was not a malicious prosecution case per se but involved a pro se §1983 claimant making allegations of various unlawful actions in connection with his criminal investigation, arrest and trial. *See* 512 U.S. at 478-79, 114 S.Ct. at 2368.

512 U.S. 477, 489, 114 S.Ct. 2364, 2374, 129 L.Ed.2d 383 (1994).[15] The Tenth Circuit's decision in this respect is in direct conflict with decisions from the First and Seventh Circuits.

In *Walden III, Inc. v. Rhode Island,* 576 F.2d 945, 947 n.5 (1st Cir. 1978), the First Circuit rejected the argument relied on by the Tenth Circuit that a §1983 malicious prosecution claim does not accrue until the allegedly abusive proceedings have come to an end, explaining that such a position "overlooks the fact that §1983 applies to the violation of federal rights, and that a

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[15] *See* language in *Wallace* that "it is 'the standard rule that [accrual occurs] when the plaintiff has "a complete and present cause of action . . . ,"'" 549 U.S. at 388, 127 S.Ct. at 1095, and in *Heck* (describing state common law) that "a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor." 512 U.S. at 489, 114 S.Ct. at 2374. The Tenth Circuit reasoned that because a malicious prosecution claim is not cognizable until all the elements are satisfied, and since one of the elements is that the original action be terminated in favor of the plaintiff, a §1983 malicious prosecution claim does not accrue until proceedings terminate in the plaintiff's favor. Pet.App. B at 12a, 16a. While claims under §1983 are governed by the forum state's statute of limitations, *Wallace,* 549 U.S. at 387, federal law determines the date on which the claim accrues and, therefore, when the limitations period starts to run. *Id.* at 388.

claim under that statute accrues when the federal right has been violated."[16]

The Seventh Circuit, likewise, in *Reed v. City of Chicago*, 77 F.3d 1049, 1053-54 (7th Cir. 1996) held that relabeling a time-barred Fourth Amendment wrongful arrest or detention claim as "malicious prosecution," thereby attempting to "shoehorn a wrongful arrest claim into a malicious prosecution claim in order to avoid a successful statute of limitations defense," would not avoid the bar of the limitations period. *Accord, Newsome*, 256 F.3d at 751 (7th Cir.) ("Relabeling a fourth amendment claim as 'malicious prosecution' would not extend the statute of limitations . . . .").[17]

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[16] *But see Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995) (holding that §1983 Fourth Amendment claim resembling common law tort of malicious prosecution claim did not accrue, for statute of limitations purposes, until criminal prosecution ended in acquittal). It appears that an intra-circuit split exists in the First Circuit.

[17] *But see Julian vs. Hanna*, 732 F.3d 842, 845 (7th Cir. 2013) (holding in a Fourteenth Amendment-based §1983 malicious prosecution case 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). The *Julian* panel, however, declined to overrule *Newsome's* refusal to ground a §1983 malicious prosecution claim in the Fourth Amendment. *Id.* at 846.

Koopman contends – as he did in the circuit court below (and will argue in his merits brief) – that the deprivation of Myers' liberty, that is to say, his arrest pursuant to a warrant and weekend detention, constituted the federal right alleged to have been violated, initiated by an unlawful seizure,[18] thereafter followed by a prosecution said

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[18]"A seizure is a single act, and not a continuous fact," *California v. Hodari D.*, 499 U.S. 621, 625, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) (quoting *Thompson v. Whitman,* 85 U.S. 457, 471, 18 Wall. 457, 471, 21 L.Ed. 879 (1874)), and under Fourth Amendment jurisprudence is generally a discrete event, quintessentially an arrest, *see Hodari D.*, 499 U.S. at 624, or at least a physical detention, *see Terry v. Ohio,* 392 U.S. 1, 16-19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *cf. Becker,* 494 F.3d at 914 (10th Cir.) ("We have repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under §1983 must be 'the Fourth Amendment's right to be free from unreasonable seizures.'") ("a seizure is necessary to support a §1983 malicious prosecution claim based on the initiation of criminal proceedings that are dismissed before trial") ("[I]n our cases analyzing malicious prosecution under §1983, we have always proceeded based on a seizure by the state—arrest or imprisonment.") (explaining that, generally, conditions of bond do not constitute a seizure of a person sufficient to support a Fourth Amendment claim) (declining to adopt a non-custodial "continuing seizure" theory); *accord, Nieves,* 241 F.3d at 55 (1st Cir.) ("[I]f the concept of a seizure is regarded as elastic enough to encompass standard conditions of pretrial release, virtually every criminal defendant will be deemed to be seized pending the resolution of the charges against him. That would mean, in turn, that nearly every malicious prosecution claim could

to have been without probable cause.[19] The First, Seventh and Tenth Circuits are therefore in direct conflict on this limitations period accrual issue.

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be brought before a federal court under the aegis of section 1983.").

[19]At its very core, a §1983 malicious prosecution claim (assuming one exists) is but a Fourth Amendment claim of groundless prosecution without probable cause. More specifically it is a claim of unreasonable search or seizure leading to a perverse and faulty prosecution by way of "*wrongful institution* of legal process . . . ." *Wallace*, 459 U.S. at 390, 127 S.Ct. at 1096 (emphasis in original). As such, the crucial factor central to ascertaining the accrual date of the applicable statute of limitations is not found in the common law analog of malicious prosecution, but instead in the constitutional violation itself, namely the date of onset of the deprivation of liberty protected by the Fourth Amendment guarantee against unreasonable searches and seizures – in this case, the arrest and jailing pursuant to warrant. The claimant who suffers an ill-advised prosecution which results in dismissal in his or her favor before trial, and hence, no conviction, knows of the unreasonableness of the search or seizure, and the lack of probable cause, resulting in damages the instant the constitutional violation occurs. That insight should trigger the statute of limitations to commence running as surely as it triggers running of the statute of limitations on an unlawful or false imprisonment claim. See *Wallace,* 459 U.S. at 391, 127 S.Ct. at 1097 ("Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable."); *cf. Hunt v. Bennett,* 17 F.3d 1263, 1266 (10th Cir), *cert. denied.,* 513 U.S. 832, 115 S.Ct. 107, 130 L.Ed.2d 55 (1994) ("Section 1983 claims accrue, for the purpose of the

This split among the circuits necessitates this Court's review. *See* S.Ct. Rule 10(a).

This Court in *Wallace* seems to have recognized the constitutional distinction between the date of accrual of the tort and the date the statute of limitations begins to run on the alleged constitutional deprivation. The Court stated: "We assume that, for purposes of the present tort action, the *Heck* principle would be applied not to the date of accrual but to the date on which the statute of limitations began to run, that is the date petitioner became held pursuant to legal process." 549 U.S. at 393, 127 S.Ct. at 1098. The *Wallace* Court proceeded to require all §1983 claims (including potentially *Heck*-barred claims) be filed at once and §1983 claimants seek stays in the civil action until the criminal case or the likelihood of a criminal case is ended. 549 U.S. at 393-94, 127 S.Ct. at 1098; *see* 549 U.S. at 401, 127 S.Ct. at 1103 (Breyer, J., joined by Ginsburg, J., dissenting).

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statute of limitations, when the plaintiff knows or has reason to know of the injury which is the basis of his action.'") (quoting *Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) ("Claims arising out of police actions toward a criminal suspect, such as arrest . . . or search and seizure, are presumed to have accrued when the actions actually occur.")); *accord, Price v. Philpot,* 420 F.3d 1158, 1162 (10th Cir. 2005) (same).

The Court would do well by explicitly making this rule of law applicable to §1983 malicious prosecution claims, especially given the additional split among the circuits concerning the reach of the *Wallace* Court's refusal in that case to extend the *Heck* bar. *Compare Beck v. City of Muskogee Police Department,* 195 F.3d 553, 561 (10th Cir. 1999) (holding that malicious prosecution claim was premature under *Heck* and therefore not barred by the applicable statute of limitations) *with Fox v. DeSoto,* 489 F.3d 227, 234 (6th Cir. 2007) ("in no uncertain terms . . . the Court in *Wallace* clarified that the *Heck* bar has no application in the pre-conviction context."); *see also Kucharski v. Leveille,* 526 F.Supp.2d 768, 774 (E.D. Mich. 2007) (in *Wallace* . . . , the Supreme Court overruled all the precedents in the circuits applying *Heck* to bar section 1983 claims filed by persons with criminal charges pending in state court *or deferring the accrual date of such claims. Heck* only applies if the plaintiff has actually been convicted.") (emphasis added).

Of course, if the Court decides that there exists no Fourth Amendment-based §1983 malicious prosecution cause of action, the Court would never need to decide the statute of limitations issue.

III. The Current State of Fourth Amendment-Based §1983 Malicious Prosecution Theory is an Embarrassment to the Federal Judiciary and Imperils Confidence in the Law.

Section 1983-based malicious prosecution jurisprudence has been characterized by the circuit courts as "murky waters,"[20] a "minefield,"[21] and an object of "general confusion."[22] The circuit courts have been described as having "flipped-flopped"[23] on the constitutional tort status of malicious prosecution. The struggles of the many circuits in this area of the law have been said to result from "laxness,"[24] "weak discipline,"[25] and

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[20] *Becker,* 494 F.3d at 913.

[21] *Reed,* 77 F.3d at 1053.

[22] *Taylor v. Meacham,* 82 F.3d 1556, 1561 n.2 (10th Cir.), *cert. denied,* 519 U.S. 871, 117 S.Ct. 186 (1996).

[23] *Brummett v. Cambel,* 946 F.2d 1178, 1181 n.2 (5th Cir. 1991), *cert. denied sub nom,* 504 U.S. 965, 112 S.Ct. 2323 (1992), 513 U.S. 1112, 115 S.Ct. 905 (1995).

[24] *Castellano,* 352 F.3d at 945. The Fifth Circuit insightfully recognized that claims of lost constitutional rights for violation of rights locatable in constitutional text—some of which may be made under 42 U.S.C. §1983—"are not claims for malicious prosecution and labeling them as such only invites confusion." *Id.* at 953-54.

"inattentive[ness]."[26] This state of the law, described by this Court as an "embarrassing diversity of judicial opinion," *Albright,* 510 U.S. at 271 n.4, 114 S.Ct. at 811, is indeed an embarrassment to the federal judiciary and imperils confidence in the law. Certiorari is warranted to end the disarray that currently exists among the many circuit courts, including the Tenth Circuit, that have grappled with §1983 malicious prosecution as it relates to the Fourth Amendment.

This Court should use its "broad" supervisory powers over the lower federal courts to replace confusion in this area of the law with clarity. *See United States v. Munsingware, Inc.,* 340 U.S. 36, 40 (1950) (citing 28 U.S.C. §2106); *see also Carnegie-Mellon University v. Cohillo,* 484 U.S. 343, 349 (1988) (noting that this Court created the modern doctrine of pendent jurisdiction in order to put an end to "confusion" in the lower courts as they tried to apply a "murky" test). The time is right to do this and the facts and posture of this case are ideal for the Court to finally settle this important constitutional question.

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[25] *Id.*

[26] *Id.*

CONCLUSION

For the forgoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted this _____ day of February, 2014.

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