No. 13-1143

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

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INC. IN SUPPORT OF PETITIONER BRIAN KOOPMAN

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 2,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the federal and state courts.

Amicus curiae represent local governments, and their attorneys, from across the nation. Because local governments are regularly engaged in the administration of police activities, Amicus has a substantial interest in resolving the unanswered question left by *Albright v. Oliver,* 510 U.S. 266 (1994), and the ensuing inconsistency among the lower courts occurring in Fourth Amendment jurisprudence concerning the existence and contours of a malicious prosecution claim. The Tenth Circuit's decision, which held that the Respondent had a Fourth Amendment malicious prosecution claim available to him, is a

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Pursuant to Rule 37.2, counsel for both petitioner and respondent were notified more than 10 days before the due date of the brief of our intent to file this brief; their written consent is submitted with this brief.

byproduct of that unanswered question and the resulting circuit split needs to be addressed.

SUMMARY OF THE ARGUMENT

In the twenty years since this Court's decision in *Albright*, the lower courts have failed to remedy the "embarrassing diversity of legal opinion" concerning the extent to which a malicious prosecution claim is actionable under 42 U.S.C. § 1983. *Albright,* 510 U.S. at 270 n. 4. While this Court held in *Albright* that "substantive due process may not furnish the constitutional peg on which to hang such a 'tort,'" this Court expressed no view as to whether the Fourth Amendment may serve as that peg. *Id.* This Court expressed no view because that particular question was not before the Court at that time - Albright made no Fourth Amendment claim. Myers, however, has made that claim and because he has, this Court has the opportunity to address the "embarrassing diversity of legal opinion" on this issue, which has only worsened since *Albright.*

As a result of the unanswered question in *Albright,* today, circuits are split as to whether a malicious prosecution claim exists under the Fourth Amendment. At the heart of that split is the circuits' uneven application of *Albright*; it has been used both as support for and opposition to a Fourth Amendment malicious prosecution claim. In addition, within the split as to whether such a claim exists another split has developed; circuits holding that a malicious prosecution claim exists disagree on the contours and elements of such a claim. Considering the question left unresolved by *Albright* and the ensuing circuit split regarding whether a malicious prosecution claim exists under the

Fourth Amendment as well as the split within the circuits that do recognize such a claim regarding what the elements of the claim are, this Court should grant the Petition and provide much needed guidance on whether a Fourth Amendment malicious prosecution claim exists.

ARGUMENT

I. The Unresolved Constitutional Question from *Albright* Has Led to a Deep Circuit Split.

Since *Albright*, lower courts have grappled with whether that holding established a Fourth Amendment malicious prosecution claim. The Seventh and Eighth Circuits have held no such cause of action exists. *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013) (No malicious prosecution claim exists as "there is no such thing as a constitutional right not to be prosecuted without probable cause"); *Joseph v. Allen*, 712 F.3d 1222, 1228 (8th Cir. 2013) ("[A]llegation of malicious prosecution cannot sustain a valid claim under § 1983.") Similarly, the Fifth Circuit has held that "the assertion of malicious prosecution states no constitutional claim."[2] *Castellano v. Fragozo*, 352 F.3d

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[2] The court in *Castellano* further noted the confusion courts invite by labeling § 1983 claims as malicious prosecution claims:

> We have been inexact in explaining the elements of a claim for malicious prosecution brought under the congressional grant of the right of suit under 42 U.S.C. § 1983. We are not alone. Other circuits have been facing similar difficulties and share with us a common shortcoming -- either not demanding that this genre of claims identify specific constitutional deprivations or struggling in their efforts to do so. This laxness has tolerated claims in which

939, 953 (5th Cir. 2003) (en banc).

On the other hand, the First, Second, Third, Fourth, Sixth, Ninth, Tenth and Eleventh Circuits have held that a Fourth Amendment malicious prosecution claim in some form does exist. *See Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013); *Evans v. Chalmers,* 703 F.3d 636, 647 (4th Cir.2012); *Manganiello v. City of New York,* 612 F.3d 149, 160–61 (2d Cir. 2010); *Sykes v. Anderson,* 625 F.3d 294, 310 (6th Cir. 2010); *Grider v. City of Auburn,* 618 F.3d 1240, 1256 (11th Cir. 2010); *McKenna v. City of Philadelphia,* 582 F.3d 447, 461 (3d Cir. 2009); *Lassiter v. City of Bremerton,* 556 F.3d 1049 (9th Cir. 2009); *Pierce v. Gilchrist,* 359 F.3d 1279 (10th Cir. 2004).

The split amongst the circuits is not a result of what this Court decided in *Albright*, but rather what it could not decide. This Court could not answer the burning question at issue in this Petition because Albright never made a Fourth Amendment claim; rather, Albright made a malicious prosecution claim grounded in the Fourteenth Amendment. *Albright,* 510 U.S. at 268. Thus, this Court's holding was that "substantive

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> specific constitutional violations are often embedded, but float unspecified, undefined, and hence unconfined inside a general claim of malicious prosecution. Its characteristic weak discipline has permitted the blending of state tort and constitutional principles, inattentive to whether the court is adopting state law as federal law in a process of federal common law decision-making, such as detailing remedial responses to a constitutional deprivation, or whether the court is creating a freestanding constitutional right to be free of malicious prosecution.

Castellano, 352 F.3d at 945.

due process, with its scarce and open-ended guideposts, can afford [Albright] no relief." *Id.* at 275 (internal quotations omitted). The Court expressed "no view as to whether [Albright's] claim would succeed under the Fourth Amendment." *Id.*

Despite this Court explicitly expressing it had no view as to any Fourth Amendment claim, circuit courts have found support for establishing a malicious prosecution claim from the text of *Albright*. *Jordan v. Mosley*, 298 F. App'x 803, 805 (11th Cir. 2008) (citing *Albright* for the proposition that a malicious prosecution claim "must be analyzed under the Fourth Amendment"); *Lewis v. Rock*, 48 F. App'x 291, 294 (10th Cir. 2002) ("In accordance with the Supreme Court's plurality decision in [*Albright*], Lewis and Woodman must establish a violation of their rights under the Fourth Amendment to prevail on their malicious prosecution claims under § 1983"); *Spurlock v. Satterfield,* 167 F.3d 995, 1006 (6th Cir. 1999) (interpreting *Albright* as holding that a "malicious prosecution of an individual and continued detention of an individual without probable cause clearly violate rights afforded by the Fourth Amendment"); *Gallo v. City of Philadelphia,* 161 F.3d 217, 222-23 (3d Cir. 1998) (relying on Justice Ginsburg's concurrence in *Albright* for support of a malicious prosecution claim grounded in the Fourth Amendment); *Murphy v. Lynn,* 118 F.3d 938, 944 (2d Cir. 1997) ("[T]he Supreme Court ruled [in *Albright*] that a plaintiff who has alleged that a criminal prosecution was initiated against him without probable cause . . . must show a violation of his rights under the Fourth Amendment.")

The Fifth Circuit and Seventh Circuit, however, disagree with the foregoing interpretation of *Albright*. The Fifth Circuit has held that as important as *Albright* is, it "held far less than is now being claimed." *Castellano,* 352 F.3d at 953 ("causing charges to be filed without probable cause will not without more violate the Constitution"); *see also Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001) (relying on Justices Kennedy and Thomas's concurrence for opposition to a malicious prosecution claim); *Washington v. Summerville,* 127 F.3d 552, 559 (7th Cir. 1997) (relying on Justice Ginsburg's concurrence in concluding that no malicious prosecution claim exists under the Fourth Amendment).

The remaining circuits addressing *Albright* merely note that this Court had left the question unanswered and that uncertainty abounds amongst the lower courts. *Snider v. Seung Lee,* 584 F.3d 193, 199 (4th Cir. 2009) ("[I]t is not entirely clear whether the Constitution recognizes a separate constitutional right to be free from malicious prosecution"); *Moran v. Clarke,* 296 F.3d 638, 646 (8th Cir. 2002) (noting the Court "did not rule out the possibility of bringing such claims under the auspices of the Fourth Amendment"); *Roche v. John Hancock Mut. Life Ins. Co.,* 81 F.3d 249, 256 (1st Cir. 1996) ("[T]he Supreme Court left open the possibility that a malicious prosecution claim might lie under § 1983 on the basis of the Fourth Amendment); *Haupt v. Dillard,* 17 F.3d 285, 290 (9th Cir. 1994) ("The constitutional foundation for a claim of malicious prosecution under § 1983 is a matter of dispute.")

This split concerning what is, what is not, and what should be a malicious prosecution claim does not exist

in a vacuum; instead, it is inherent in the nature of the myriad of opinions accompanying this Court's decision in *Albright*. With its plurality opinion, four concurrences, and one dissent, *Albright* has been used both as a sword, as well as a shield, by lower courts in determining the existence of a malicious prosecution claim under the Fourth Amendment. In fact, within one particular concurring opinion – Justice Ginsburg's – circuits have found support for and opposition to a Fourth Amendment malicious prosecution claim.

For instance, the Seventh Circuit has used Justice Ginsburg's quote concerning the anomaly of a Fourth Amendment malicious prosecution claim to hold no such claim exists. *See Washington,* 127 F.3d at 559-60. In her concurrence, Justice Ginsburg stated that "Albright's reliance on a 'malicious prosecution' theory, rather than a Fourth Amendment theory, is anomalous. The principal player in carrying out a prosecution—in the formal commencement of a criminal proceeding—is not police officer but prosecutor." *Albright*, 510 U.S. at 279 n. 4 (internal citations omitted). The Seventh Circuit, used this portion of Justice Ginsburg's concurrence to conclude that no such claim exists under the Fourth Amendment against a police detective accused of a malicious prosecution claim. *See Washington,* 127 F.3d at 559-60; *see also Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996).

On the other hand, the Second and Third Circuits used another portion of Justice Ginsburg's concurrence to support their reasoning that a Fourth Amendment claim for malicious prosecution does exist. In that portion, Justice Ginsburg concluded that a seizure

exists beyond the initial detention and "so long as the prosecution against him remained pending." *Albright,* 510 U.S. at 280 (Ginsburg, J., concurrence). A face-value reading of this indicates Justice Ginsburg would have this Court adopt an extended definition of seizure—a "continuing seizure" definition." *Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir. 2007).

The Second and Third Circuit, however, took Justice Ginsburg's "continuing seizure" definition and used it to support a Fourth Amendment malicious prosecution claim. *See Gallo v. City of Philadelphia,* 161 F.3d 217, 222-23 (3d Cir. 1998); *Murphy v. Lynn*, 118 F.3d 938, 944 (2d Cir. 1997). In *Murphy*, the court held that in order to prevail on a malicious prosecution claim under § 1983, "the plaintiff must show a violation of his rights under the Fourth Amendment." *Murphy*, 118 F.3d at 944, *citing Albright,* 510 U.S. at 274-75. The court then relied on Justice Ginsburg's "continuing seizure" definition and held that "the imposition of restrictive conditions of release constitutes a seizure within the meaning of the Fourth Amendment." The Third Circuit in *Gallo* chose the same path a year later and "adopted Justice Ginsburg's 'continuing seizure' interpretation of the Fourth Amendment" as support for a malicious prosecution claim. *Schneyder v. Smith*, 653 F.3d 313, 319 (3d Cir. 2011), *citing Gallo,* 161 F.3d at 222-24; *see also Torres v. McLaughlin*, 163 F.3d 169, 179 (3d Cir. 1998) ("The bond, of course, required his presence in court when ordered and imposed other conditions upon him . . . [and] can constitute the seizure element of such a claim.") Thus, rather than a mere extension of the seizure definition the Second and Third Circuits have held that Justice Ginsburg's concurrence

established a 'malicious prosecution' Fourth Amendment claim.[3]

While Justice Ginsburg's concurrence is perhaps the best example of lower courts' divergent use of *Albright,* Justices Kennedy and Thomas' concurrence is also worth noting. In their concurrence, Justices Kennedy and Thomas opined that because a State malicious prosecution tort existed there was "neither need nor legitimacy to invoke § 1983 in [Albright's] case." *Albright, at* 285-86 (Kennedy, and Thomas, JJ., concurring). That concurrence spawned a separate basis for opposition to the creation of a Fourth Amendment malicious prosecution claim.

The Seventh Circuit relied on Justices Kennedy and Thomas' concurrence "as the narrowest ground of decision" and, thus, held that it constituted "the effective holding of the Court." *Newsome*, 256 F.3d at 751. In doing so, the Seventh Circuit held that the fact that a State malicious prosecution tort is available "knocks out any constitutional tort of malicious prosecution." *Id.* at 751. The Ninth Circuit, too, has agreed with this same theory, although not necessarily quoting Justices Kennedy and Thomas' concurrence.

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[3] The Second and Third Circuits have misread Justice Ginsburg's concurrence. Rather than create a malicious prosecution claim Justice Ginsburg's concurrence merely articulated a "continuing seizure analysis." While that analysis would create, if adopted by this Court, an expanded claim under the Fourth Amendment, that analysis does not create a second cause of action for plaintiffs. Further, the fact that Justice Ginsburg carved out such an analysis to offer support for Albright's otherwise delinquent Fourth Amendment claim indicates that no such Fourth Amendment malicious prosecution tort was envisioned.

According to the Ninth Circuit, a claim of malicious prosecution is not cognizable under § 1983 "if process is available within the state judicial systems" to provide a remedy. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 919 (9th Cir. 2012), *citing Bretz v. Kelman,* 773 F.2d 1026, 1031 (9th Cir. 1985) (*en banc*). Although, to add to the diversity of opinions, that court found that an exception exists "when a malicious prosecution is conducted with the intent to ... subject a person to a denial of constitutional rights." *Id.*

All told, the question left unresolved by *Albright* is a source of conflicting Fourth Amendment malicious prosecution jurisprudence. Different circuits have found in the plurality and the four concurrences support for divergent positions on the issue of whether a Fourth Amendment malicious prosecution claim exists. By granting the petition and clarifying what was left undecided in *Albright,* this Court will have the opportunity to answer the question that has perplexed lower courts for twenty years – does a Fourth Amendment malicious prosecution claim exist? An answer to that question would provide much needed guidance for police and plaintiffs alike.

II. An Additional Circuit Split Exists as to the Contours and Elements of a Malicious Prosecution Claim under the Fourth Amendment within those Circuits that Recognize Such a Claim.

Not only is there a split between circuits as to whether a malicious prosecution claim exists under the Fourth Amendment, but within those circuits that have established such a claim there are further splits and open questions. This, too, illustrates the muddy waters

of the law and the need for this Court to provide guidance.

"The varying approaches adopted by the different Courts of Appeals can be roughly placed in one of two groups:" those that have adopted a *"purely constitutional approach"* and those that have adopted a *"blended constitutional/common law approach."* *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) (emphasis added). The "constitutional approach" requires the plaintiff to establish that the officer "(1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." *Id.* at 100-01. The First, Fourth, and Sixth Circuits have adopted this approach to malicious prosecution claims under the Fourth Amendment. *Id.; Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012); *Sykes v. Anderson,* 625 F.3d 294, 310 (6th Cir. 2010).

On the other hand, the "blended approach" requires the plaintiff to "demonstrate a Fourth Amendment violation *and* all the elements of a common law malicious prosecution claim." *Hernandez-Cuevas,* 723 F.3d at 99 (emphasis in the original). The common law elements of malicious prosecution include "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused." *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1256 (11th Cir.2010). The Second, Third, Tenth and Eleventh Circuits have adopted this approach; although, the merging of the Fourth Amendment violation and common law elements are stated

differently within those circuits. *See e.g., Manganiello*, 612 F.3d 149 160–61 (2d Cir. 2010); *McKenna*, 582 F.3d 447, 461 (3d Cir. 2009); *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008); *Grider*, 618 F.3d at 1256. For instance, the Third and Tenth Circuits have merged the elements together as follows: "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages." *Wilkins*, 528 F.3d at 799; *see also McKenna*, 582 F.3d at 461. The Second and Eleventh Circuits, on the other hand, hold that "the plaintiff must prove two things: (1) the elements of the common law tort of malicious prosecution listed above and (2) a violation of the Fourth Amendment right to be free from unreasonable seizures. *Grider*, 618 F.3d at 1256; *see also Manganiello*, 612 F.3d at 160–61.

The Ninth Circuit, which has also found a malicious prosecution claim exists, is an outlier and has created a different scheme than those mentioned above. In order to prevail on a § 1983 claim of malicious prosecution in the Ninth Circuit, a plaintiff "must show that the defendants prosecuted [him] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right." *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 (9th Cir. 2009).

One significant difference exists when comparing the *blended constitutional / common law approach* and the Ninth Circuit's approach to the *purely*

constitutional approach, and that is the malice element. The former two approaches adopt malice as an element of the claim, while the latter does not. Of course, the Fourth Amendment contains no mention of malice; rather, it focuses on the objective reasonableness of the seizure and the subjective intent. "[I]f the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice." *Sykes,* 625 F.3d at 309, *citing Gallo,* 161 F.3d at 222 n. 6. In fact, the focus on the subjective intent runs counter to Fourth Amendment law:

> Fourth Amendment reasonableness is predominantly an objective inquiry. We ask whether the circumstances, viewed objectively, justify [the challenged] action. If so, that action was reasonable *whatever* the subjective intent motivating the relevant officials. This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts, and it promotes evenhanded, uniform enforcement of the law.

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (internal citations omitted, emphasis in the original).

To add to this contrary view of the Fourth Amendment law and to add to the circuit split, the Ninth Circuit requires an additional subjective element. In addition to the objective test of whether probable cause existed and in addition to the subjective test of whether malice existed, the Ninth Circuit has created a second subjective test: whether the police officer had the intent to deprive the plaintiff of his constitutional rights.

Setting aside that *any* subjective element conflicts with established Fourth Amendment law, the divide amongst the circuits on whether a subjective intent element exists is troubling. This Court's approach to reasonableness, which "promotes evenhanded, uniform enforcement of the law," has become muddied amongst the circuits. *Id.* Without clarity, police around the country are left without a uniform standard of conduct.

CONCLUSION

For the foregoing reasons and the reasons contained in the Petitioner's brief, this Court should grant the petition for writ of certiorari and provide much needed guidance by resolving the divisions between the circuits on this important unanswered constitutional question.

Respectfully submitted,

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