No. 17-294

IN THE

Supreme Court of the United States

KAREN THOMPSON

Petitioner,

v.

KELLY SOO PARK,

Respondent.

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

BRIEF IN OPPOSITION

Becky S. James
Counsel of Record
GREENBERG GROSS LLP
601 South Figueroa Street,
30th Floor
Los Angeles, CA 90017
(213) 334-7000
BJames@GGTrialLaw.com

QUESTION PRESENTED

Whether the court of appeals erred in declining to hold that the Constitution permits a government officer to deliberately subvert a criminal defendant's right to call favorable witnesses, so long as the trial does not terminate in a conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Other Materials

INTRODUCTION

The allegations of respondent's Section 1983 complaint describe a deliberate, sustained—and successful—effort by petitioner, a police detective, to use the powers of her office to prevent the jury at respondent's criminal trial from hearing favorable witness testimony and indeed from hearing any defense at all.

In the decision below, the court of appeals permitted plaintiff's suit alleging a violation of her rights under the Compulsory Process Clause to proceed. That case-specific, interlocutory decision does not warrant further review. It does not raise any genuine conflict as to any practically significant question of federal law and—notwithstanding petitioner's attention-grabbing suggestions to the contrary—follows directly from this Court's controlling precedents.

STATEMENT OF THE CASE

A. *Thompson Violates Park's Sixth Amendment Rights.*

1. In 2008, petitioner Karen Thompson, a detective in the Santa Monica Police Department, was assigned to investigate a homicide case in which the victim, Julianna Redding, was found strangled in her apartment. Pet. App. 6a. Petitioner's investigation yielded little progress. *Id.* But in 2010, when DNA in the apartment was matched to respondent's, Thompson, who at that point was working on the investigation only during off-duty time, concluded that the culprit had been found. *See id.* Respondent was then arrested and charged. *Id.* Soon thereafter—but

more than a year before a jury would hear the evidence—Thompson's department presented her with a medal of merit for "solving" the Redding murder. E.R.658. (Her theory was that Ms. Park had gone to the apartment to talk to Redding about a business deal involving Redding's father and Park had "lost her temper" and attacked her. *See* E.R.661.)

2. As respondent's 2013 trial approached, the prosecution's case began to take on water. Defense investigators had uncovered evidence pointing to John Gilmore, a man Redding had been dating prior to the time she was killed, as the perpetrator. Pet. App. 6a-7a. Melissa Ayala, whom Gilmore dated after the murder, told the investigators that she had been choked by Gilmore on multiple occasions and he had said he was "show[ing her]" how Redding—who had been strangled to death—had "felt." *Id.* 7a. Gilmore, whom Detective Thompson had been quick to relieve of suspicion—because his alibi was supported in part by security video (even though other aspects of his account had proven false, *see* E.R.659)—had physically abused Redding. Pet. App. 6a. He also had a history of appearing uninvited at her apartment and forcing his way in. Twelve days before the killing, Gilmore, enraged that Redding had not responded to his text messages, had shown up, broken her gate, pounded on her window, and thrown furniture within the apartment. And he had sent Redding multiple messages the night of the killing expressing anger at being ignored and blaming Redding for "ruin[ing] it all." E.R.635-36.

3. Though Ayala was afraid of Gilmore—he had been convicted of domestic violence against her and had forced her from a moving car for having purchased

the "wrong brand of beer," E.R.637—she agreed to cooperate with and testify for the defense. Pet. App. 7a. The defense notified the District Attorney of its intent to call Ayala and to place the issue of third-party culpability before the jury. *Id.*

4. When Thompson learned this, she moved aggressively to ensure that Ayala's testimony—and the other evidence of Gilmore's abusive relationship with the murder victim—would not be heard by the jury. She telephoned Ayala and proceeded to tell her that Gilmore, a man with a history of physically abusing her, would be "really upset" were Ayala to testify as intended at Ms. Park's trial. Pet. App. 7a. Thompson left little doubt in her conversation with the domestic violence survivor that law enforcement was committed to protecting *Gilmore's* interests. Gilmore—whom the detective called "John"—was "not a bad guy," she told Ayala, just someone who "has a temper." E.R.422. Thompson later admitted, in a sworn declaration in the criminal court, that she had no "investigatory purpose[]" in phoning Ayala, but rather had done so, she explained, to "repair" the relationship between the convicted abuser and his victim. Pet. App. 8a, 16a-17a n.9.

After Ayala had been primed to reflect on what "really upset[ting]" Gilmore might entail, petitioner told her deliberate falsehoods, all meant to inculpate respondent. Thompson told Ayala that Ms. Park's blood had been found on the door of Redding's apartment. That was untrue. Pet. App. 8a n.4. Thompson told Ayala that Redding and Gilmore had been talking about watching Seinfeld together the night Redding was killed. E.R.429. (In fact, Gilmore had been sending angry, unanswered text messages to

Redding). And over and over, Thomson said that the defense was lying to Ayala; that police knew Gilmore was innocent; and that Ayala's truthful testimony would help "the killer" evade justice. E.R.637-39.

Thompson, aware that the call was recorded, made sure to say that Ayala should "tell the truth" if subpoenaed, E.R.428, but she further instructed Ayala "to call [her]" if she received a subpoena, whereupon Thompson would "tell [her] what to do." E.R.640. (There is no evidence whether such a call took place and if so, what was said.)

5. Petitioner's exertions did not stop there. In case the telephone call proved not enough to prevent Ayala's testifying for the defense, Thompson contrived to have felony charges brought against *Ayala* in El Segundo, a neighboring jurisdiction, accusing her of assaulting *Gilmore*—so that her taking the stand at Park's trial would risk adversely affecting her own defense. Pet. App. 8a-9a. And Ayala was not the only potential defense witness whom petitioner pressured this way. When she learned that the defense intended to call a man named Ronnie Case as an alibi witness, Thompson had *him* arrested. E.R.643-44. In the course of her interrogation of Case, Thompson expressed satisfaction at having turned a defense "witness [in]to a defendant." *See* E.R.643.

6. When the prosecution moved to preclude respondent from raising the subject of Gilmore's culpability with the jury, Ayala—who by then had ceased communication with the defense and had to be subpoenaed—refused to testify about Gilmore's actions and statements, on the ground that doing so could incriminate her on the charges Thompson had

helped bring about. Pet. App. 8a-9a. Without Ayala's testimony, the criminal court ruled, Park was not permitted to pursue the third-party culpability case that she had intended to make the centerpiece of her defense at trial. *Id.*

7. When the criminal trial began, there was nothing left of the defense Ms. Park had intended to put on. Prohibited from asking the jury to consider that someone other than she had committed the crime, respondent was left to stake her fate on the jury's holding the prosecution to its burden of proof. Pet. App. 9a-10a. Because the prosecution's case remained underwhelming—they had accused and tried the wrong person—the jury was able to see the deficiencies in the DNA evidence and, after lengthy deliberation, it acquitted Ms. Park. *Id.*

B. *Respondent's Section 1983 Suit.*

1. After Ms. Park was found not guilty, she filed this civil rights suit, alleging that Thompson's willful interference with her right to "offer the testimony of witnesses . . . to present a defense, . . . [and] present [her] version of the facts . . . to the jury," *Washington v. Texas*, 388 U.S. 14, 19 (1967), violated the Sixth Amendment's Compulsory Process Clause and denied her a fair, public trial at which to clear her name, *see* Pet. App. 10a.

2. Petitioner filed an unusual motion to dismiss, supported by a "Request for Judicial Notice" consisting of 19 exhibits, ranging from documents and transcripts from the criminal case to a full transcript of a television program that had been mentioned in the complaint. E.R.691-94. Among the grounds petitioner advanced were that the complaint insufficiently

alleged that Thompson had caused Ayala's decision not to testify; that the complaint's allegations about the charges against Ayala were insufficient; and that petitioner was entitled to qualified immunity. *Id.* 680. Petitioner's motion made liberal use of the proposed "judicial notice" materials, arguing, for example, that testimony by El Segundo officers denying they had spoken with Thompson rendered the complaint's allegation implausible. *Id.* 689.

Petitioner also advanced an "acquittal bar" theory, but acknowledged that research had uncovered "no case law" involving the compulsory process right. E.R.56. Instead, petitioner identified "persuasive" authority not "directly on point"—a concurring opinion that had argued that the absence of a conviction precludes a Section 1983 suit alleging a *Brady* violation. *See id.* (citing *Smith v. Almada*, 640 F.3d 931, 944-45 (9th Cir. 2011) (Gwin, D.J., specially concurring)). (*Smith* had not decided that question, because two judges concluded that the withheld evidence was not "material" in any event. *See* 640 F.3d at 940.)

3. The district court granted petitioner's motion. In a decision that blended petitioner's arguments and the "judicial notice" materials with the allegations of the complaint, the court held the complaint's causation allegations inadequate and expressed doubt that Ayala's testimony would have qualified as "exculpatory." *See* Pet. App. 11a. The court assumed, without deciding, that Ms. Park's acquittal was not an independent bar to relief, *id.* 53a & n.11, and having concluded that the complaint failed on the merits, declined to rule on qualified immunity, *id.* 56a n.15.

4. Respondent appealed. As at the district court level, the parties' briefing focused chiefly on sufficiency of the allegations of causation and the proper application of the Rule 12(b) standard. Petitioner's discussion of the proposed acquittal bar began on page 46 of her brief and offered scant argument specific to the Compulsory Process Clause. Her principal submission was that the court's prior decision in *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994), which had permitted a man acquitted at trial to bring a Section 1983 suit against a police officer who had intimidated the presiding judge, *id.* at 277-78, was no longer good law or should be limited to suits involving particularly "egregious" constitutional violations, C.A. Br. 54.

5. The court of appeals reversed. The court was divided on the question whether the complaint's allegations regarding the detective's behavior adequately pleaded that her actions had prevented the jury from hearing favorable testimony from Ayala. *See* Pet. App. 22a; *id.* 40a (Fernandez, J., concurring in part and dissenting in part). But the court was unanimous in rejecting the argument for a per se acquittal bar. The court held that *Haupt* remained good law and echoed *Haupt*'s observation that the presence or absence of a conviction bears on the damages a plaintiff can recover under Section 1983 rather than the right to bring suit. *Id.* 23a-24a. The court took exception to language in the Eleventh Circuit's opinion in *Kjellsen v. Mills*, 517 F.3d 1232 (11th Cir. 2008), but explained that that decision's reasoning would not support dismissal on the facts of this case. Pet. App. 29a, 27a. n.17. Although he would have affirmed dismissal on the other grounds, Judge

Fernandez expressed general agreement on this point, emphasizing that whether the absence of a conviction "ultimately preclude[s] a constitutional claim . . . depend[s] on the facts and circumstances of the particular case." *Id.* 41a (Fernandez, J., concurring in part and dissenting in part).

Thompson sought rehearing en banc, which was denied with no judge calling for a vote. Pet. App. 57a.

REASONS FOR DENYING THE WRIT

The appeals court's decision does not warrant this Court's review. The question actually resolved here, concerning the right of persons acquitted to pursue Section 1983 claims against officers for willfully interfering with their Sixth Amendment right to call favorable witnesses is fortunately rare. Nor has petitioner shown any pressing need to announce a rule about when persons acquitted may recover for violations of their Fifth Amendment rights under *Brady v. Maryland*, 373 U.S. 83 (1963). But if that issue were to warrant review, it should come in a case where, unlike here, there is a *Brady* claim.

This case's interlocutory posture is itself ground for denying certiorari. The district court has not addressed petitioner's qualified immunity motion. And police officers elsewhere do not need this Court's immediate guidance to know how to conduct themselves: They should refrain from subverting the accused's rights to call "witnesses in his favor" "in all criminal prosecutions," without regard to whether the jury might vote to acquit. U.S. Const. amend. VI.

Nor did the court here err by refusing a per se rule that persons who are acquitted may never sue officers

for violating their Sixth Amendment and fair trial rights. The court's reluctance to announce *any* categorical rule at this early stage was entirely prudent, given the vast diversity of factual circumstances and constitutional guarantees that such a rule is claimed to govern. And the court was plainly right to reject the per se rule that petitioner proposes. The notion that *only* convicted defendants may seek redress under Section 1983—or that only convicted defendants' compulsory process clause rights may be violated—are foreclosed by "well-settled" precedent, Pet. 29. And not just any precedent: by the two decisions of this Court most cited in petitioner and amici's briefs—*Heck v. Humphrey*, 512 U.S. 477 (1994), and *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). Even if precedent were less emphatic, constitutional text—and common sense—would suffice. The Sixth Amendment does not secure a right to call witnesses in "all criminal prosecutions [that result in conviction]," and Section 1983 does not impose a "[first unfavorable then] favorable termination" requirement. Indeed, the few courts that have gone beyond slogans to seriously consider the implications of petitioner's proposed rule for actual cases have found it plainly untenable.

I. The Compulsory Process question the court of appeals decided does not warrant this Court's review.

Notwithstanding perfunctory assertions of "exceptional[] importan[ce]," Pet. 27, the question resolved below, whether an acquittal is a per se bar to a Section 1983 compulsory process claim, is the antithesis of the frequently recurring, practically

significant legal questions that warrant exercise of this Court's jurisdiction.

1. There is, to begin, no genuine conflict as to the significance of an acquittal for a Section 1983 suit alleging a compulsory process deprivation. Petitioner is not wrong that the Eleventh Circuit's *Kjellsen* opinion appeared to *say*—and the decision here read it to say—that the absence of a conviction precludes a Section 1983 claim. But if that court had actually *applied* an acquittal bar, it would have had no reason to examine the effect of the allegedly suppressed evidence on the criminal proceedings against Kjellsen. In fact, the Eleventh Circuit carefully examined the underlying proceeding to determine both (1) whether the crime lab's producing earlier the allegedly exculpatory blood test results would have yielded a different "outcome"—a directed acquittal verdict, rather than submission of guilt or innocence to the jury and (2) whether earlier production of that evidence would have cast the "whole" impaired driving case against Kjellsen in "a different light." *Kjellsen v. Mills*, 517 F.3d 1232, 1239 (11th Cir. 2008) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). It was only *after* answering these questions in the negative that *Kjellsen* held that the materiality requirement could not be satisfied and plaintiff's Section 1983 suit should be dismissed. *Id.* at 1239-40.

Thus, on its own terms, *Kjellsen* is fairly described as applying, rather than rejecting, a fact-sensitive approach. And, for all the petition's talk of conflict, the opinion here left no doubt that a case with *Kjellsen's* facts would come out the same in the Ninth Circuit as it did in the Eleventh. *See* Pet. App. 27a n.17.

Even this discussion—and the petition's allegation of a 1-1 circuit split—likely inflate by 100% the number of appellate decisions involving an acquitted defendant's Section 1983 compulsory process rights. The plaintiff in *Kjellsen* did not allege that the defendant lab technicians had done anything to prevent him from calling any defense witness; rather, the entirety of the misconduct alleged involved the technicians' neglect to make prosecutors aware of the favorable test results revealed in their trial testimony. 517 F.3d at 1235-36. That is not a compulsory process claim at all. It is a *Brady* claim (and one that could not succeed under Section 1983, for reasons unrelated to an acquittal bar, *see infra* p. 18). At the very least, petitioner shows impressive flexibility to insist that *Kjellsen* was a compulsory process case while maintaining that this one, which involves intentional interference with witnesses who were prepared to provide critical, favorable testimony for the defense, is an "ill fit" with the Compulsory Process Clause, Pet. 4.

2. But even if petitioner's claim of "division" between the Ninth and Eleventh Circuits were substantial, those courts stand together in an important respect: They appear to be the only courts of appeals to have ever confronted a Section 1983 compulsory process claim by an acquitted defendant. The dearth of litigation activity in any of the twelve circuits that have not closed the door to such suits is readily explained. For the question even to potentially arise, there must have been both an acquittal and a compulsory process claim. The former is notably infrequent, *see, e.g.*, U.S. Dep't of Justice, *United States Attorneys' Annual Statistical Report: Fiscal Year 2016*, at 7 tbl.2A, 10 tbl.2B (2016) (reporting that

258 of 127,081 federal criminal adjudications in 2016 were acquittals); and the latter is vanishingly rare. No decision of this Court found a Compulsory Process Clause violation in the 175 years between the ratification of the Bill of Rights and *Washington v. Texas*, 388 U.S. 14 (1967). And the pace of litigation has barely picked up since then. *See* Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 Wis. L. Rev. 1275, 1288-89 (2002). Petitioner told the district court that counsel had been able to find "no case law directly on point," E.R.56. It is thus unlikely that (m)any district courts would feel "deprive[d]" of "needed guidance," Pet. 22, were review denied here.

But looking at the entire (modest) universe of cases that meet those two preconditions would still overstate the question's practical significance. For the question to arise, there must also be a Section 1983 suit by an acquitted defendant. Such suits impose distinct requirements that do not apply when criminal defendants seek to overturn a conviction, *see infra* p. 18, and must overcome qualified immunity defenses even to proceed to discovery. Civil litigants, moreover, are not provided counsel, "imaginat[ive]" or otherwise, Pet. 22 (quoting *Valenzuela-Bernal*, 458 U.S. at 867), at government expense. And, as the decision here noted, acquitted defendants will generally have less substantial and certain damages claims than those who suffered lengthy incarceration as a result of the same constitutional misbehavior.

Nor is there genuine importance on the government side. As just noted, the immunity petitioner seeks would be *in addition to* the protections that Section 1983 qualified immunity doctrine already

provides. And this issue is not one for which it may plausibly be claimed that the Court's guidance would affect law enforcement behavior, let alone "the broader public," Pet. 27. Whatever the rule in the Eleventh Circuit, no officer there believes it is constitutionally permissible to do what the complaint alleges Detective Thompson did here: intimidate and oppress witnesses with the specific intent to prevent a jury from hearing truthful, relevant testimony favorable to the defense. Nor could any officer key such misconduct to the fortuity that the prosecution's case might fail before (rather than after) a guilty verdict. If that were a realistic prospect, it would be the strongest ground for *rejecting* petitioner's proposed rule.

II. It is neither appropriate nor necessary to announce a rule for *Brady* claims here.

The alleged "conflict" with the Eleventh Circuit over compulsory process claims is mere throat-clearing for petitioner's proposal that the Court review this case to announce a rule that an acquittal makes a *Brady* violation "[im]material" and therefore beyond redress under Section 1983. That question, petitioner insists, is the subject of an "entrenched" conflict, Pet. 19, and her amici warn the Court that such claims are so readily alleged that, in the wake of the decision here, every acquittal will spawn a Section 1983 lawsuit, *see* Amici Br. 8-9.

1. These assertions, whatever their merit, have no bearing on this case. Respondent's claim is not a *Brady* claim. It would be extraordinary for the Court to decide the rules governing a constitutional provision the petition acknowledges this case does not "involve[]," see Pet. 1; c*f.* S. Ct. R. 14.1(f)—and one in

which the respondent has no actual personal interest. The Court has stressed in this same setting the importance of "identify[ing] the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *accord Chavez v. Martinez*, 538 U.S. 760, 775-76 (2003); *cf.* Pet. 25 (faulting decision for going beyond "the law governing the constitutional provision at issue"). If there were the least merit to the suggestion that the federal courts will be awash with *Brady* claims by acquitted defendants, Amici Br. 4, that would be reason by itself to deny certiorari here and wait for a case actually involving that issue.

Petitioner tries to avoid this problem by arguing that the Sixth Amendment Compulsory Process right is so nearly identical to the Fifth Amendment *Brady* right that respondent's case may be a proxy to decide the *Brady* rights of persons who were tried but not convicted. Citing and quoting liberally, but selectively, from this Court's decision in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), petitioner asserts these two claims are not merely "analogous," as the decision here said, but "the same," Pet. 17.

That assertion is immediately suspect. Petitioner earlier acknowledged that *Brady* cases are not "directly on point," E.R.56, and her en banc petition said the panel opinion was "correct" to describe the issues as "analogous." Pet. for Rehearing 13. The Eleventh Circuit, which had already endorsed petitioner's preferred rule for *Brady* claims in *Flores v. Satz,* 137 F.3d 1275, 1278 (11th Cir. 1998) (per curiam), did not mention that decision when it addressed the compulsory process issue in *Kjellsen.*

But petitioner's suggestion that *Valenzuela-Bernal* merged *Brady* and Sixth Amendment rights into a single mega-doctrine—one governed by a unitary "reasonable probability" materiality standard—could hardly be more wrong. To begin, the language from *Valenzuela-Bernal* that petitioner repeatedly truncates observed that the two rights—and others—could be grouped in what "might *loosely be called* the area of constitutionally guaranteed access to evidence," 458 U.S. at 867 (emphasis added). And despite *Valenzuela-Bernal*'s use of *Brady* cases, the decision also highlighted important differences between *Brady* and compulsory process claims. The Court recognized that, unlike a defendant seeking a new trial based on *Brady* material, one denied the opportunity to call a witness the government deported "simply ha[s] no access" to the missing testimony and "cannot be expected to render a detailed description of [it]." *Id.* at 870, 873. And *Valenzuela-Bernal* announced a standard for *dismissal* in such cases that has no *Brady* analogue: The defendant must offer "*some explanation*" or "some *plausible showing of how* [the] testimony would have been both material and favorable." *Id.* at 872, 867 (emphasis added).

More important, *Valenzuela-Bernal* cannot be read to have held that every "access to evidence" claim is subject to the standards applicable to a garden-variety, no-fault *Brady* claim. The *Brady* decision *Valenzuela-Bernal* "borrowed" from, *United States v. Agurs*, 427 U.S. 97 (1976), itself identified "three quite different situations," that *Brady* covered, and emphasized that "the test of materiality" should not "necessarily [be] the same" for each. *Id.* at 103, 106. And when the Court revisited the issue in *United*

States v. Bagley, 473 U.S. 667 (1985), its lead opinion reaffirmed that distinct rules govern when the *Brady* violation consists of deliberately placing false testimony before a jury. In those cases, Justice Blackmun explained, it is "clear" the materiality rule is "equivalent to" the presumption of prejudice that governs constitutional errors outside the evidence-access area. *Id.* at 678, 679 n.9.

And *Valenzuela-Bernal* surely did not hold that the "same" materiality requirement even governs every compulsory process claim. Pet. 21. The claim rejected in *Valenzuela-Bernal* was an especially unconvincing one—the potential witnesses were removed pursuant to congressional directive, after a good-faith determination that their testimony was not relevant; and the defendant had argued that his conviction could not stand if the testimony might "conceivabl[y]" be beneficial. *See Bagley*, 473 U.S. at 681 (opinion of Blackmun, J.) (noting that "the Court's discussion [in *Valenzuela-Bernal* did not] . . . distinguish among the three situations described in *Agurs*"). The Court in fact took care to emphasize that cases involving prosecutors' deliberately "hiding out" or "concealing" witnesses should *not* "be judged by [the] standards" it was applying to the lawful deportation claim before it. *Valenzuela-Bernal*, 458 U.S. at 866. True to that admonition, courts hold that if a "defendant is able to prove [intentional] misconduct amounting to substantial interference with a witness," reversal is warranted, absent proof by the government the error was "harmless beyond a reasonable doubt." *United States v. Foster*, 128 F.3d 949, 953 (6th Cir. 1997).

3. Even if all this could be overlooked, the "conflict" petitioner asks the Court to resolve is neither as developed nor as practically important as she suggests.

a. To be sure, the *Brady* issue is not as obscure as the compulsory process one—but even on petitioner's account, the question whether a never-convicted person can bring a Section 1983 claim seeking damages for a *Brady* violation has never arisen in the majority of circuits. And in the two circuits that have refused the rule petitioner propounds, it arises infrequently. Acquittals are rare, and civil litigation for acquittal damages is seldom an attractive proposition for litigants or the lawyers who might represent them. Indeed, even Section 1983 *Brady* claims by persons who were exonerated after long periods of incarceration are not sure things. *See Connick v. Thompson*, 563 U.S. 51, 54 (2011) (overturning *Brady* claim by wrongly convicted, death-sentenced plaintiff); *Fappiano v. City of New York*, 640 F. App'x 115, 119 (2d Cir. 2016) (affirming summary judgment on *Brady* claim of DNA exoneree who served 21 years in prison); *Drumgold v. Callahan*, 707 F.3d 28, 32-33 (1st Cir. 2013) (vacating damage award on exoneree's *Brady* claim and remanding for new trial).

b. The overheated predictions of petitioner's amici that, absent an absolute bar, every garden-variety *Brady* claim would be actionable by an acquitted defendant ignore how the Section 1983 remedy works. *Brady* violations are much more litigated *in criminal cases* than are compulsory process claims. But prosecutors, who *do* bear the full no-fault duty to disclose material exculpatory information, enjoy absolute immunity from Section 1983 suits. *See*

Imbler v. Pachtman, 424 U.S. 409, 429 (1976). And when a Section 1983 suit is brought against a police officer for failing to notify prosecutors about exculpatory evidence, courts require proof that the officer withheld evidence with at least "deliberate indifference to or reckless disregard for an accused's rights or for the truth," *Tennison v. City & Cty. of San Francisco*, 570 F.3d 1078, 1088 (9th Cir. 2009). As the Eighth Circuit explained:

> *Brady* ensures that the defendant will obtain relief from a conviction tainted by the State's nondisclosure of materially favorable evidence, regardless of fault, but the recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial.

Villasana v. Wilhoit, 368 F.3d 976, 980 (8th Cir. 2004).

c. Nor has the *Brady* question received the close consideration petitioner's claims of "entrenched conflict" imply. Three of the four *Brady* decisions petitioner cites in support of an "acquittal bar" involved plaintiffs who were never *tried*, and thus who necessarily were never acquitted. The criminal charges in *McCune v. City of Grand Rapids*, 842 F.2d 903, 904 (6th Cir. 1988), *Flores v. Satz*, 137 F.3d 1275, 1277 (11th Cir. 1998), and *Livers v. Schenck*, 700 F.3d 340, 343 (8th Cir. 2012), were dropped by the prosecution before there was a trial. As for the fourth case, the Tenth Circuit's decision in *Morgan v. Gertz*, 166 F.3d 1307 (10th Cir. 1999), is only a partial exception: The Section 1983 plaintiff there *had* been acquitted, but in rejecting his claim, the court relied on the "universal" rule that if "all criminal charges

[are] dismissed prior to trial [then]. . . the right to a fair trial is not implicated, and, therefore, no [*Brady*] cause of action exists under § 1983." *Id.* at 1310.

This distinction matters, because the "universal rule" the Tenth Circuit invoked—that there must be a trial for there to have been a violation of a trial right—poses no conflict (even by analogy) with the decision in this case. *See Chavez v. Martinez*, 538 U.S. 760, 772-73 (2003) (plurality opinion) (rejecting a Section 1983 *Miranda* claim—because of the "absence of a 'criminal case' in which [the plaintiff] was compelled to be a 'witness' against himself" (quoting U.S. Const. amend. V)). Here, a "criminal case" did proceed against respondent, and she was denied the right to call "witnesses in [her] favor" at trial. U.S. Const. amend. VI. (The plaintiff in *Haupt* likewise was subjected to trial.)[1]

---

[1] Petitioner's description of the "conflict" over *Brady* suffers from two further problems. First, it depends on placing the Ninth Circuit on the other "side," which rests exclusively on petitioner's aggressive parsing of the opinion in this case and mostly of a footnote stating that the right here and *Brady* are "analogous."

Petitioner's effort to whisk the Seventh Circuit off the stage—by implying that that court has all but extinguished claims by those who have not been convicted—is also telling. *See* Pet. 19 n.3. That court, in a series of carefully reasoned decisions, has refused to close the door to Section 1983 claims by such persons. In a case decided seven years after the one petitioner cites, that court held a plaintiff's case should proceed—expressly rejecting the result the "broad language in *Morgan v. Gertz*" compelled. *Armstrong v. Daily*, 786 F.3d 529, 554 (7th Cir. 2015). "Under the[] circumstances" presented in *Armstrong*, the court explained, "requiring a plaintiff to undergo a second trial and conviction [in order] to pursue a civil claim under § 1983" was insupportable. *Id.*

This distinction is also practically important, because, as the petition acknowledges, the same courts it applauds for announcing an acquittal bar to *Brady* claims have held that never-convicted defendants *may* recover Section 1983 damages for pretrial detention resulting from officers' withholding exculpatory evidence, on a malicious prosecution and/or a Fourth Amendment theory. *See* Pet. 26; *Livers*, 700 F.3d at 359-60; *cf. Manuel v. City of Joliet*, 137 S. Ct. 911, 918 (2017). That reality both undermines the suggestion that a "*Brady* acquittal" immunity is of critical value to officers—who concededly face liability for suppressing exculpatory evidence—and it also mitigates the erroneous rule's actual harm to (the few) tried-and-acquitted plaintiffs with *Brady* claims.

When the dust has settled, what the petition presents as a decisional juggernaut arrayed against the compulsory process decision here turns out to be one barely reasoned decision, *Morgan*, that wrongly barred a Fifth Amendment claim by an acquitted defendant and a second, *Kjellsen*, that *correctly* rejected a *Brady* claim, albeit one which that court mistakenly labeled "compulsory process" (and that the opinion here mistakenly treated as resting on a per se rule).

III. This case's present posture makes it an inappropriate candidate for review.

Its other deficiencies aside, the petition demonstrates no basis for departing from the Court's "general[]" practice of "await[ing] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari). *See generally Hamilton-Brown Shoe Co. v.*

Wolf Bros. & Co., 240 U.S. 251, 258 (1916) (recognizing that a case's interlocutory posture "of itself alone" is "sufficient ground for the denial of [review]").

This case is not merely interlocutory; it is at the very earliest stage. Far from allowing respondent to "collect Section 1983 damages," Pet. 3, the court of appeals did not even hold that petitioner must answer the complaint. It merely declined to grant dismissal based on a sweeping, ill-defined rule—one the district court eschewed. It remains respondent's burden to persuade the district court of both a violation and her entitlement to relief, each of which was hotly disputed at the complaint stage (including within the panel), and will continue to be as the case proceeds to summary judgment. It is thus entirely possible—and surely is petitioner's position—that she could prevail without the benefit of the sweeping constitutional rule she asks the Court to announce. *See, e.g.*, *Smith v. Almada*, 640 F.3d 931, 940 (9th Cir. 2011).

Indeed, the courts below have not yet decided petitioner's qualified immunity defense. Petitioner cannot show that her or others' need for additional protection—an absolute immunity, for officers whose misconduct targets trial rights, where the defendant is still acquitted—is so urgent that it must be decided right away. Both the general policy against piecemeal appeals as well as basic fairness argue strongly against forcing this long-pending civil rights suit on an additional detour, requiring respondent to defend others' rights to raise claims she has not. And as already explained, no one else needs this Court's immediate guidance in order to make decisions about their primary conduct. (It is *petitioner*'s contention

that officers will behave no differently were the Court to embrace a categorical bar. *See* Pet. 26.)

Finally, this case lacks the compensating feature that decisions in this posture can sometimes offer. Although petitioner alludes to "undisputed facts" and pays lip service to the rules requiring that complaint allegations control, a central thrust of her litigation efforts below was to persuade the courts to disregard nearly all the complaint's allegations, on the ground that "facts" in the voluminous judicial notice submission undermined the allegations' plausibility. The court of appeals rebuffed those efforts, and the petition avers that it accepts that decision. But the statement of the case, which makes free use of the materials the court of appeals properly disregarded, raises concern whether petitioner is prepared to litigate the question on the terms her concession would require—or whether, were certiorari granted, she might "smuggle" fact-bound Rule 12(b)(6) contentions into the case and thereby impede the Court's resolution of the question presented.[2]

IV. There is no acquittal bar to respondent's Section 1983 suit.

The decision below was correct. This Court's "well-settled" precedent, Pet. 29, along with constitutional text and common sense, all foreclose the rule

---

[2] The bare facts, for example, that the trial court in the criminal case was unpersuaded that petitioner's conduct was "outrageous" or that El Segundo officers denied conniving with petitioner, *see* Pet 8, were part of petitioner's judicial notice submission. But even if these are properly subject to notice, they have no legal relevance whatsoever if the complaint's allegations are genuinely accepted.

petitioner seeks: that any action a government official takes, no matter how harmful or egregious, that deprives a defendant of her right to call favorable witnesses at trial is constitutionally permissible, unless the plaintiff is convicted (and then secures an appellate reversal). Neither Section 1983 nor the Sixth Amendment can be understood to impose a "[first unfavorable and then] favorable termination" requirement. Petitioner's efforts to derive such a requirement from language in opinions addressing which errors warrant setting aside *convictions* lack plausibility.

1. *Section 1983.* The petition submits that a Section 1983 *Brady* action *may not* be maintained "when a defendant is acquitted at trial (or otherwise secures a favorable termination of the criminal proceeding)." Pet. 21. But this Court's foundational decision on the relationship between criminal and civil remedies, *Heck* v. *Humphrey*, 512 U.S. 477 (1994)—the only case to rate a "*passim*" in the brief supporting petitioner—says the exact opposite. Far from posing a *bar* to such suits, the Court held, "favorable termination" is a prerequisite. *Only* persons who have regained their liberty through "a favorable termination," Pet. 21, may bring Section 1983 claims seeking redress for unconstitutional behavior at trial. *See Skinner v. Switzer*, 562 U.S. 521, 536 (2011) (identifying *Brady* claims as prototypical of ones to which *Heck* applies); *Muhammad v. Close*, 540 U.S. 749, 751 (2004).

Petitioner therefore must mean to say that "favorable termination" by acquittals and by appellate reversals warrant fundamentally different treatment. *Cf.* Pet. 26 (acknowledging that witness intimidation

of the sort alleged here "can result in . . . civil liability to [initially] convicted defendants"). But under *Heck*, that qualification does even worse. This Court not only rejected any supposition that some "favorable determinations" are superior to others, it highlighted that common law courts had long given "acquit[als] at trial," Pet. 21 uniquely *better* treatment. Indeed, the law long *denied* the right to sue to those "convicted in the first instance and [then] . . . acquitted in the appellate court." 512 U.S. at 496 (Souter, J., concurring) (quoting T. Cooley, *Law of Torts* 185 (1879)). What petitioner's amici call "bizarre," Amici Br. 5, is in fact the holding of the case they cite more than any other, which in turn rested on centuries of common law practice.

But petitioner's error reflects a deeper misunderstanding of the Section 1983 remedy and its relationship to the criminal process. *Heck*'s starting point is a legal tradition that recognizes the inherent limits on criminal courts' powers to address abuses of official authority. When a criminal proceeding is favorably terminated based on constitutional error, the person whose rights were violated has received "all the remedy to which he was entitled," from the criminal courts, Pet. 18 (quoting *Morgan v. Gertz*, 166 F.3d 1307, 1309 (10th Cir. 1999))—that is, all that those courts are able to provide. But full redress then may and should be obtained through suit against the officers who deprived her of her rights (subject to ordinary burdens of proof and immunity defenses). *Cf. Hudson v. Michigan*, 547 U.S. 586, 597 (2006) (discussing civil remedies against officers).

To be sure, as the decision here recognized, convictions can have practical relevance in Section

1983 suits. But Section 1983 is not a post-conviction relief or wrongful conviction compensation statute. Compare 28 U.S.C. §§ 1495, 2513(e) (providing remedy for those "unjustly convicted . . . and imprisoned" and keying damages limits to years incarcerated). Section 1983 provides a general damages cause of action for all persons deprived of constitutional rights—with an exception for certain claims when brought by the still-convicted (and therefore channeled to the habeas corpus statute, *see Heck*, 512 U.S. at 489-90).

And nothing in the text or background of Section 1983 limits recovery to damages resulting from convictions. The Sixth Amendment recognizes that a criminal *accusation* causes harm—it "may seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). That is why it guarantees a speedy, public trial and right to call favorable witnesses. And when an official violates these personal rights, Section 1983 authorizes compensation for "such injuries as 'impairment of reputation . . . , personal humiliation, and mental anguish and suffering.'" *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). Indeed, the Court has held that a public-school student denied a fair suspension hearing may recover damages for emotional harm from the unfair process even if the outcome was not affected—so long as he "convince[s] the trier of fact that he actually suffered distress because of the denial of procedural due process itself."

Carey v. Piphus, 435 U.S. 247, 263 (1978). There is no basis for denying a cause of action to a person who suffered distress caused by an officer's deliberate subversion of her criminal trial on murder charges.

2. *The Compulsory Process Clause.* With Section 1983 law unalterably opposed to her rule, petitioner seeks to locate her conviction requirement in "the Constitution" itself. Pet. 24-25. That contention fares no better. The text of the Sixth Amendment's Compulsory Process Clause says nothing about convictions. It applies to "all criminal prosecutions"—and secures to the defendant a right to compel the presence of witnesses *at trial.* U.S. Const. amend. VI; *cf. id.* art. III, § 3 (limiting the means by which a "Person shall be *convicted* of Treason") (emphasis added).

Petitioner nonetheless seeks to establish, based on negative implications from language in decisions reviewing convictions, that because *Brady* materiality (and, by extension, Compulsory Process materiality) considers prejudice, as well as seriousness, no constitutional violation can occur until the accused has been convicted. That edifice does not survive a reading of the decision *petitioner* cites more than any other—*United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). If a conviction truly were an element of a compulsory process violation, the constitutionally mandatory course in every case where government suppression of witness testimony is raised would be to let the trial proceed and wait for the verdict. If the jury returns a guilty verdict, the appellate court can assess the harm; in the event of a not-guilty verdict, petitioner would say, no "constitutionally cognizable harm" has been inflicted, Pet. 27.

But *Valenzuela-Bernal* did not treat "materiality" remotely that way. One issue before the Court in that case was whether the trial court had erred by not *dismissing* the indictment. The Court did not reverse based on the imperative to await the "outcome." Rather, it presupposed the power to dismiss, while observing that "determinations of materiality are *often* best made in light of all of the evidence adduced at trial, [so] judges *may wish* to defer ruling on motions until after the presentation of evidence." 458 U.S. at 874 & n.10 (emphasis added).

Nor could petitioner's rule be salvaged by saying that there would be no acquittal to "ignore" in a dismissal case, as there is here. The premises of the dismissal power are precisely what petitioner denies: (1) that some wrongs are so egregious and clearly prejudicial that a court may determine that a trial could not be fair, whatever its outcome; and (2) that subjecting a defendant to a trial (with an appellate reversal, if convicted) is not harmless, but rather constitutionally impermissible.

In fact, cases where courts' dismissal power is properly exercised highlight a particularly perverse feature of the regime petitioner would impose. If a jury is unable to reach a verdict in a murder case and the court, after learning that officers had deliberately destroyed DNA evidence definitively exonerating the defendant, dismisses the charges, petitioner's rule would deny him damages for harms he could claim had there been a retrial and then a conviction and reversal. (This is not a contrived hypothetical; it tracks the allegations in *Armstrong v. Daily*, 786 F.3d 529, 554 (7th Cir. 2015), which led that court to doubt the soundness of the rule). Indeed, petitioner is adamant

that this is a *constitutional* bar: Because such a case did not proceed to a conviction, on her account, no violation occurred.[3]

3. Brady *Materiality Cases.* Nor do this Court's decisions addressing the standards for deciding the new trial rights of *convicted* defendants provide minimally plausible support, let alone authority, for an acquittal bar. Petitioner posits that cases like *Strickler v. Greene*, 527 U.S. 263 (1999), and *Kyles v. Whitley*, 514 U.S. 419 (1995), announce an effect-on-outcome test for *Brady* (and other) violations, which, by definition, no acquitted person can satisfy. *See* Pet. 25, 28. Because excising the officer's wrongdoing would not improve on an acquittal, the most egregious misconduct is "[im]material" and therefore constitutional per se.

It strains credulity that when this Court has considered whether immaterial violations should be grounds for setting aside *convictions*, it meant to announce a rule limiting the constitutional rights of persons who are *acquitted.* And it is unimaginable that those decisions, by directing courts to look to

---

[3] A similar irrationality is revealed by the facts of *Morgan v. Gertz*, the only one of petitioner's "acquittal bar" decisions to involve an acquittal. *See supra* p. 18. The jury there had actually found the Section 1983 plaintiff *guilty*, but the trial judge entered a post-verdict judgment of acquittal, based on the government's destruction of an exculpatory tape-recording, 166 F.3d at 1308-09—and the Tenth Circuit held the acquittal precluded his civil suit, *id.* at 1310. Although a conviction might have inflicted additional, compensable harm, neither the Tenth Circuit's decision nor the petition here explains why it is *constitutionally* significant that the misconduct was remedied by a trial court's post-verdict action, rather than an appellate court's.

effects on "outcomes" (i.e., convictions), meant to establish the no-rights-for-the-acquitted regime petitioner urges. Indeed, petitioner's rule fails even as a matter of literal meaning. There *are* "outcomes" more favorable to defendants than not-guilty verdicts. Though a court of criminal appeals likely would not entertain an acquitted defendant's claim that his prosecution should have been dismissed at the threshold, that "outcome" is plainly preferable to enduring a trial; and an acquittal rendered at a first trial is preferable to one on retrial; so too with one rendered immediately, rather than after lengthy deliberations; and one that vindicates an innocence defense, rather than a failure of proof.

The slogan-like rationales of the decisions petitioner cites are simply wrong. The court in *Flores v. Satz*, 137 F.3d 1275 (11th Cir. 1998), for example, suggested that the core concern of fair trial rights—preventing "erroneous conviction[s]" of the innocent—is not "implicated" by abuses that purposefully subvert the accused's rights in order to bring about wrongful convictions unless they succeed in doing so. *Id.* at 1278 (citation omitted). And it then posited that persons "never convicted" have not "suffer[ed] the effects of an unfair trial." *Id.* To be sure, most defendants, given the choice between a fair trial and an acquittal, will choose the latter. But that doesn't establish they are the same thing or that the Constitution puts defendants to that choice. On the contrary, as *Heck* makes clear, those whose rights are violated are entitled to both—a favorable determination *and* compensation for harm that the deprivation caused them.

4. Petitioner's final, softer-edged arguments also fail. Even if discerning materiality is not strictly impossible in acquittal cases, she argues, that inquiry is so "unworkable," Pet. 2, 4, 27—or at least so "starkly different," Pet. 22, "fundamentally different," Pet. 28, and "completely different," *id.*—from what occurs in conviction cases that it is better simply to give up. Exhibit A against this puzzling argument is the Eleventh Circuit's decision in *Kjellsen*, which after making noises supportive of an acquittal bar, examined materiality using standards adapted from this Court's conviction cases. *See supra* p. 10. Indeed, the two undertakings are not "wholly different," Pet. 24, or even meaningfully different. The materiality inquiry in conviction cases is itself, necessarily, "counter-factual," Pet. 23 as is the harmless error regime applicable to deliberate misconduct cases. And the question—whether the challenged official misbehavior "might have affected the outcome," Pet. 28 (quoting *Valenzuela-Bernal*, 458 U.S. at 868)—often can be answered the same way in both situations: by comparing "two criminal cases," *Turner v. United States*, 137 S. Ct. 1885, 1896-97 (2017) (Kagan, J., dissenting)—the actual one and another, where (counterfactually) the officer discharged her constitutional responsibilities—and then determining whether the difference raised the risk of erroneous conviction intolerably.[4]

---

[4] Petitioner repeatedly faults the court here for acknowledging—correctly—that the inquiries will not always be exactly the same in civil and criminal cases. But that is not because the Sixth Amendment means something different in

Finally, to the extent petitioner criticizes the court of appeals for not announcing a more limited rule applicable to cases, like *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994), involving "particularly egregious" government conduct, Pet. 19-20, that is unwarranted. The decision here did not announce a sweeping rule; it rejected one, essentially holding that "the facts and circumstances of the particular case" should control when acquitted persons may bring Section 1983 suits.

In any event, the allegations here—including petitioner's using her powers of office to promote the arrest and prosecution of defense witnesses and to dissuade a domestic violence victim from "upset[ting]" her abuser with truthful testimony—surely clear any "egregiousness" bar that *Haupt* established. Indeed, the jury in *Haupt* knew that the judge had been intimidated—he said so on the record and then said he would have given an advisory acquittal instruction had he not been threatened; and the jury, which heard all the evidence that would have supported that instruction, acquitted promptly. Here, the interference was equally deliberate and brazen, and neither the full evidence nor the fact of intimidation was known to the jury. The deliberations lasted a week and a half, and

---

Section 1983 cases, but rather because civil courts can consider and remedy outcomes—a prosecution that should have been terminated or one that caused reputational harm—that criminal courts do not. To the extent that the court expressed that insight imprecisely, by pressing into service the already overburdened term "materiality," that is not ground for granting review. *See Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., respecting denial of certiorari) (emphasizing that the Court "reviews judgments, not opinions") (citation omitted)).

acquittal hinged on the beyond-a-reasonable-doubt standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Becky S. James
Counsel of Record
GREENBERG GROSS LLP
601 South Figueroa Street,
30th Floor
Los Angeles, CA 90017
(213) 334-7000
BJames@GGTrialLaw.com

December 4, 2017