No. 17-294

In The
Supreme Court of the United States

KAREN THOMPSON, PETITIONER

v.

KELLY SOO PARK.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent Kelly Soo Park attempts to deny what the Ninth Circuit readily acknowledged: its decision conflicts with those of multiple courts of appeals. The Ninth Circuit held that acquitted defendants may pursue Section 1983 claims for alleged violations of the Compulsory Process Clause. As the Ninth Circuit itself recognized, the Eleventh Circuit has held they cannot. The Ninth Circuit also effectively acknowledged that its approach would allow a never-convicted defendant to pursue a Section 1983 suit for an alleged *Brady* violation. As the court also recognized, multiple other circuits have held the opposite.

Park's revisionism extends to the merits. The Ninth Circuit departed from this Court's longstanding standard for assessing the materiality of unavailable evidence—whether there was a reasonable probability that its introduction would have produced a different outcome. Instead, the Ninth Circuit held that evidence is material if its introduction would have altered the "trajectory" of a criminal trial, even if not its destination. The court reasoned that "materiality must have a different meaning" depending on whether it arises in a criminal prosecution or a Section 1983 suit. Park does not mention, much less defend, the court's "trajectory" test. And she attempts to explain away the Ninth Circuit's "different meaning" holding as merely "imprecise[]" wording. Opp. 31 n.4. But that was the fulcrum on which the court's entire decision turned.

Park cannot evade review through imaginative rewritings of the Ninth Circuit's decision and those of the courts disagreeing with it. And the delay in review she advocates would subject thousands of officers and hundreds of governments within the Ninth Circuit to years of that court's erroneous and amorphous materiality standard. All of these things are true *now*: There is a circuit conflict; the Ninth Circuit is on the wrong side; and the issue is important. This Court should grant the petition and correct the court of appeals' error—either summarily or after plenary review.

ARGUMENT

A. The Acknowledged Circuit Conflict Is Entrenched And Applies Equally To Compulsory Process And *Brady* Claims

As the petition showed (at 20-21), this Court has consistently assessed the materiality of unavailable evidence by asking whether there is a reasonable probability that its introduction would have produced a different result. True to that standard, multiple courts of appeals have held that a never-convicted defendant cannot show that unavailable evidence was material in a subsequent civil action for damages. That is so because she already received a favorable result even without the evidence. Pet. 13-20. The Ninth Circuit came to the opposite conclusion, holding that such a defendant can pursue damages if introduction of the evidence would have altered the "trajectory" of the trial. Even though the court candidly acknowledged that its rule conflicts with that of multiple other

circuits, Pet. App. 27a & n.16, Park contends there actually is no conflict. She is mistaken.

1. **Kjellsen *meant what it said***

As the Ninth Circuit here explained, the Eleventh Circuit in *Kjellsen v. Mills*, 517 F.3d 1232 (2008), "held that an acquitted defendant can never state a claim for a violation of his compulsory process right or his due process right to a fair trial because the violation will never be 'material.'" Pet. App. 29a. The district court there had allowed the acquitted defendant's Section 1983 claim to proceed, reasoning that materiality could be assessed "'at the time the alleged violation occurred rather than post-trial.'" *Kjellsen*, 517 F.3d at 1239. From that vantage point, the court had concluded, the evidence "'could have affected the judgment of the jury.'" *Id.*

The Eleventh Circuit held that the district court's approach was "inconsistent with the Supreme Court's formulation of the materiality standard, which requires the criminal defendant to show a 'reasonable probability of a *different result*.'" *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (emphasis added). Because Kjellsen was not convicted, "[a]ny additional testimony presented in Kjellsen's favor would not have achieved a better result." *Id.* The Ninth Circuit here acknowledged that its materiality standard was in "conflict" with that of the Eleventh Circuit. Pet. App. 27a.

Park nonetheless contends (at 11) that the claim in *Kjellsen* was "not a compulsory process claim at all"

but rather "a *Brady* claim." The Eleventh Circuit disagrees: "Kjellsen * * * asserts a claim that Defendants-Appellants violated his Sixth Amendment right to compulsory process (*i.e.*, Defendants-Appellants' failure to turn over the retest results allegedly deprived Kjellsen of the right to call witnesses and present evidence at trial concerning the retest results)." *Kjellsen*, 517 F.3d at 1238-1239. And: "Kjellsen does not claim a *Brady* due process violation for failure to turn over exculpatory evidence." *Id.* at 1239 n.2.

Park further contends (at 10) that the Eleventh Circuit did not actually find Kjellsen's claim barred by his acquittal because it also made observations about what might have happened had the absent evidence been introduced. That is incorrect. The court squarely held that non-introduced evidence is material only when it "'could reasonably be taken to put the whole case in such a different light *as to undermine confidence in the verdict*'"; that this inquiry must be conducted "post-trial" because only then "can there be a 'result' to be differed from or an 'outcome' to be doubted"; and that "any additional testimony presented in Kjellsen's favor would not have achieved a better result." *Kjellsen*, 517 F.3d at 1239 (citation omitted; emphasis added).

The Ninth Circuit was thus correct that its decision "conflict[s]" with *Kjellsen*. Pet. App. 26a-27a.

2. The materiality test for compulsory process and Brady *claims is the same*

As the petition showed (at 17-19), the Ninth Circuit's decision also conflicts with those of other circuits addressing Section 1983 *Brady* claims. Those courts have uniformly held that a defendant whose prosecution ended favorably cannot recover on a civil *Brady* claim because the withheld evidence could not have been material.

Park attempts to downplay the significance of these cases by contending that Detective Thompson failed to demonstrate that *Brady* claims and compulsory process claims are "identical." Opp. 14. But Detective Thompson never contended that the *claims* are identical—rather, precedent shows that their materiality standards are. This Court expressly "borrowed" *Brady*'s materiality standard for use in compulsory process claims. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). Indeed, the Court described a broader category of cases that "might loosely be called the area of constitutionally guaranteed access to evidence," and it viewed the requirement that unavailable evidence be material as a common denominator across all of them. *See id.* at 867-868; *contra* Opp. 15.

If the materiality standard were not the same, the Ninth Circuit here would not have noted the conflict between its decision that "an acquittal does not preclude a Section 1983 claim arising out of a fundamental constitutional violation" and those of other courts that have barred Section 1983 *Brady* claims by

never-convicted plaintiffs. Pet. App. 31a-32a n.19; *see id.* 27a n.16; *Mosley v. City of Chicago*, 614 F.3d 391, 397 (7th Cir. 2010) (recognizing conflict between *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994)—followed by the Ninth Circuit here—and other circuits' decisions holding that "a trial that results in an acquittal can never lead to a valid claim for a *Brady* violation because the trial produced a fair result, even without the exculpatory evidence"); *Ambrose v. City of New York*, 623 F. Supp. 2d 454, 467-473 (S.D.N.Y. 2009) (noting same conflict).

Park suggests (at 14) that the Eleventh Circuit must view the *Brady* materiality standard as different from the compulsory process one because that court in *Kjellsen* did not cite its earlier decision holding that a defendant whose prosecution ended favorably cannot pursue a *Brady* claim. But the court in *Kjellsen* expressly applied the materiality standard "[f]ollowing the *Brady* line of cases" and noted that "[i]n *Valenzuela-Bernal*, the [Supreme] Court imported the materiality requirement from the line of cases beginning with *Brady* into compulsory process clause analysis." 517 F.3d at 1239 (citation omitted).

Other courts of appeals have also observed that the materiality standard for compulsory process and *Brady* claims is the same. *See, e.g.*, *Makiel v. Butler*, 782 F.3d 882, 908 (7th Cir. 2015) ("The materiality standard of the Compulsory Process Clause is identical to the materiality requirement of *Brady*.") (citation omitted); *Gov't of the Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir. 1992) ("In *Valenzuela-Bernal*, the

Court imported the materiality requirement from the line of cases beginning with [*Brady*] into compulsory process clause analysis.").

Despite all that, Park persists in her efforts to distinguish the materiality standard for the two claims. For example, she seizes on *Valenzuela-Bernal*'s acknowledgment that a defendant denied the opportunity to call witnesses often will not fairly "be expected to render a detailed description of their lost testimony." 458 U.S. at 873; *see* Opp. 15. But the Court emphasized that this difficulty did not "relieve the defendant of the duty to make some showing of materiality." 458 U.S. at 873. Instead, courts are to be flexible in *how* they permit defendants to satisfy that standard—they "should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself." *Id.* at 874.

The fact that some of the *Brady* cases identified by the Ninth Circuit and the petition as conflicting with the decision here involved dismissals rather than acquittals is a distinction without a difference. *Contra* Opp. 18-19. The courts in those cases categorically held that never-convicted plaintiffs cannot show that the alleged withholding of evidence prejudiced them because its disclosure could not have led to a different outcome. *See* Pet. 18-19. That rule conflicts with the Ninth Circuit's holding here.

In sum, the Ninth Circuit's novel materiality standard is fundamentally incompatible with the

standard applied in other courts of appeals. This Court should resolve this conflict.

B. The Ninth Circuit's Decision Is Wrong

As the petition showed (at 20-26), the Ninth Circuit's materiality test conflicts with this Court's precedent—and does so to such a degree that the Court may wish to consider summary reversal. This Court has uniformly assessed the materiality of unavailable evidence by asking whether there is a reasonable probability that its introduction would have produced a different result. The Ninth Circuit instead adopted a "trajectory" test that is incompatible with this Court's outcome-based standard. To justify that novel approach, the Ninth Circuit erroneously cabined this Court's outcome-based test to criminal cases on the theory that "materiality must have a different meaning" for purposes of a Section 1983 claim. Pet. App. 30a. But Section 1983 is exclusively remedial; it confers no substantive rights. And the meaning of a constitutional provision does not change depending on whether it is asserted in a criminal or civil proceeding. Pet. 24-25.

Park contends (at 23-24) that it would be inconsistent with *Heck v. Humphrey*, 512 U.S. 477 (1994), to allow a defendant whose conviction is overturned on appeal or through habeas to pursue a compulsory process claim through Section 1983 while denying that remedy to one acquitted. But in claiming that *Heck* "highlighted that common law courts had long given 'acquitt[als] at trial' uniquely *better* treatment" than

appellate reversals, Park relies on Justice Souter's concurrence in the judgment, not the *Heck* majority. Opp. 24 (quoting Pet. 21; brackets and emphasis added by Park). It was Justice Souter's separate opinion that stated that "the law long *denied* the right to sue to those 'convicted in the first instance and [then] . . . acquitted in the appellate court.' " Opp. 24 (quoting 512 U.S. at 496) (emphasis, brackets, and ellipses added by Park). The *Heck* majority *rejected* that view, concluding that precedent "well establishes that the absolute rule Justice Souter contends for did not exist." 512 U.S. at 486 n.4.

In any event, there is nothing anomalous in requiring a Section 1983 plaintiff to satisfy both *Heck*'s favorable termination requirement and the substantive elements of her constitutional claim—including, as here, showing that wrongfully excluded testimony was material. Even if enforcing those requirements might mean that fewer plaintiffs will be able to state valid Section 1983 claims, it does not follow that the requirements should be relaxed. *Cf. Heck*, 512 U.S. at 490 n.10 (rejecting Justice Souter's argument to that effect).

It is beside the point that "nothing in the text or background of Section 1983 limits recovery to damages resulting from convictions." Opp. 25. Section 1983 is not a "font of tort law"; rather, a constitutional violation must be proved. *Paul v. Davis*, 424 U.S. 693, 701 (1976). As the petition showed (at 20-21, 24-25), the materiality requirement comes not from Section 1983 but from the substantive constitutional right Park

seeks to enforce through Section 1983. Outcome-based materiality is an element of that substantive claim.

Park suggests otherwise by pointing to *Valenzuela-Bernal*'s statement that "[b]ecause determinations of materiality are often best made in light of all of the evidence adduced at trial, judges may wish to defer ruling on motions until after the presentation of evidence." 458 U.S. at 874; *see* Opp. 27. Park observes that the "may wish" formulation implies that criminal courts may instead dismiss an indictment pretrial based on the wrongful withholding of evidence. But a court doing so would not be dispensing with materiality; instead, it would be making a forward-looking assessment of it. Courts' ability to forecast whether the unavailability of evidence is reasonably likely to change the outcome at an upcoming trial does not mean that a court can also find a violation when it already knows with certainty that unavailable testimony did *not* alter the outcome because the defendant was acquitted.

Finally—and tellingly—Park offers no meaningful standard of her own to replace the outcome-based materiality test, nor does she defend the Ninth Circuit's "trajectory" standard. She alludes to (but does not elaborate upon) yet a third test: whether the officer's failure to "discharge[] her constitutional responsibilities * * * raised the risk of erroneous conviction intolerably." Opp. 30. Park cites nothing for that novel standard, and it thus stands in stark contrast to the longstanding outcome-based test for materiality. Pet. 24. She offers no suggestion for how a court might

divine the point at which the risk of an "erroneous conviction" became "intolerabl[e]." And she offers no response to amici's showing that a relaxed materiality standard would seemingly require a retrial of the criminal case during the Section 1983 action, complete with testimony from defense counsel on how she would have deployed the missing evidence. IMLA Amicus Br. 13-14. Most fundamentally, Park does not explain why a Section 1983 plaintiff should recover for a mere "risk" of a harm that never materialized.

C. The Question Presented Is Significant

The question presented raises an important issue of constitutional law on which the courts of appeals are divided. It implicates the ability of plaintiffs to sue law enforcement officials under Section 1983 as well as the basic meaning of materiality in the context of due process claims involving access to evidence. Pet. 27.

Park argues that compulsory process claims pursued by acquitted defendants are rare, citing the relatively low number of acquittals in *federal* cases. Opp. 11-12. But this is a Section 1983 case involving an alleged constitutional violation in a *state* criminal proceeding. And because the materiality standard for compulsory process and *Brady* claims is identical (Pet. 17-18), a decision in this case would have significance for those often-litigated claims—both within the Ninth Circuit and in jurisdictions that continue to address this issue. *See, e.g.*, *Ambrose*, 623 F. Supp. 2d

at 467-473 (canvassing recent and numerous lower court decisions).

D. The Court Should Decide The Issue Now

That this case arises on a motion to dismiss poses no barrier to review. *Contra* Opp. 20-21. Where a petition presents an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." S. Shapiro et al., Supreme Court Practice 283 (10th ed. 2013) (citing cases); *see also*, *e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (granting certiorari in interlocutory posture to determine availability of a *Bivens* remedy).

The petition presents a pure question of law. No factual development is needed to determine whether an acquittal bars a Section 1983 plaintiff from pursuing a compulsory process claim. The only relevant fact—Park's acquittal—is uncontested.[1] Nor does the possibility of a future ruling for Detective Thompson on qualified immunity justify delay. *Contra* Opp. 21. Indeed, this Court granted a petition from Section 1983 defendants who had *already* prevailed on qualified immunity but who challenged a separate holding

[1] Detective Thompson disputes Park's characterization of her conduct (Opp. 1-5) and would vigorously contest those allegations in summary judgment proceedings or at trial. But as Detective Thompson has made clear (Pet. 6 n.1), she seeks no review here of the adequacy of Park's allegations and instead asks the Court to decide a purely legal question that takes Park's allegations as given.

that their conduct violated the Constitution. *Camreta v. Greene*, 563 U.S. 692, 704 (2011) ("The constitutional determinations that prevailing parties ask us to consider in these cases are not mere dicta or 'statements in opinions.' They are rulings that have significant future effect on the conduct of public officials." (citation omitted)). The hypothetical possibility of a *future* win on qualified immunity thus poses no barrier to immediate review of the important constitutional question squarely presented by this petition.

Delaying review—whether for further proceedings in this case or for the circuit conflict to become even more entrenched—would only extend the period during which the Ninth Circuit's erroneous materiality standard would govern Section 1983 cases. That would mean subjecting officers and municipalities within that Circuit to years of litigation under a vague standard and to the ongoing threat of unjustified liability. Review is warranted now.

CONCLUSION

The petition should be granted, and the Court may wish to consider summarily reversing.

Respectfully submitted,

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