

No. 17-1123

In the Supreme Court of the United States

WOODSTON MADDOX,

Petitioner,

v.

ANDREA MILLER,

Respondent.

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

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

Petitioner takes a shotgun approach to his request for further review. First, he asserts that the Court should address whether respondent's arrest and subsequent custodial detention qualifies as a seizure within the meaning of the Fourth Amendment. Then, he asks the Court to review whether a grand jury indictment somehow categorically insulates the arresting officer who fabricated the underlying charges from a Fourth Amendment claim. And, third, he requests review of the qualified immunity holding below. In making this third request, he embeds yet three more sub-questions. The first asks whether this Court has previously considered malicious-prosecution-style Fourth Amendment claims, the second asserts confusion about what constitutes a "seizure," and the third quibbles with the Sixth Circuit's conclusion that the evidence, taken in the light most favorable to respondent, establishes a violation of her clearly established rights.

At bottom, the dizzying petition reduces to little more than a multifaceted request for error correction. Although such a scattershot, fact-bound petition would not warrant this Court's attention in any circumstance, it is especially unworthy of review given that there is, in fact, no error to correct.

As the court of appeals explained, the evidence—taken in respondent's favor—indicates that she "was arrested, charged, and indicted on charges of reckless driving and resisting arrest, based on false statements made by [petitioner]." Pet. App. 2. Thus, the unanimous court reached the unexceptional con-

clusion that respondent properly stated a Fourth Amendment claim. *Ibid.*

A contrary holding would be extraordinary. In petitioner’s telling, a police officer can fabricate a charge against a citizen, arrest her, detain her, and lie to ensure that prosecution against her will continue—yet the citizen will have no Fourth Amendment recourse. That is not—and certainly should not become—the law. The petition should be denied.

A. Factual background.

On August 31, 2011, respondent Andrea Miller was driving home to her residence after working a night shift. Compl. 2 (D. Ct. Dkt. No. 1).¹ Petitioner Woodston Maddox, a police officer with the Metropolitan Nashville Police Department, pulled over and handcuffed respondent on her own street, a cul-de-sac. *Id.* at 1-2. He charged respondent with reckless driving and resisting arrest. Pet. App. 2.

Respondent contends that petitioner’s allegations of misconduct were false. For his part, petitioner “accepts as true for the purpose of this appeal that his statements that [respondent] was speeding and subsequently resisted arrest were false.” Pet. App. 10.

Petitioner nonetheless arrested respondent, and she was incarcerated that evening, including for more than 45 minutes after she appeared on video conference with the night court commissioner. Pet. App. 12. To secure her release, respondent was required to pay a fee and to participate in a pretrial release program. *Id.* at 12-13. That program provided

¹ Because this case arises at the summary judgment stage, all factual disputes must be resolved in respondent’s favor. Pet. App. 3.

that she would timely appear to all court proceedings and call a pretrial case manager every week until her case was resolved. *Id.* at 13. Respondent also had to notify the case manager if she changed her address, phone number, or place of employment. See Pretrial Services Agreement (D. Ct. Dkt. No. 67-6).

Respondent's arrest stemmed directly from petitioner's conduct. Petitioner swore in an affidavit for an arrest warrant that respondent ran a stop sign, sped down the street, was verbally confrontational, and physically resisted arrest. Pet. App. 7. As a result of that affidavit, the night commissioner on duty issued an arrest warrant. *Ibid.* Petitioner then testified to the same effect at a preliminary hearing—at which he was the only witness to testify (see Prelim. Hr'g Tr. 1-9 (D. Ct. Dkt. No. 67, Ex. F.))—and the judge consequently bound the case to a grand jury. Pet. App. 7.

The grand jury returned an indictment against respondent. Pet. App. 23. While petitioner did not testify before the grand jury, another officer did—and that officer “does not remember what he said.” *Ibid.*²

No trial was held, and the criminal charges against respondent were all dismissed with prejudice. See Pet. 5-6.

² That officer's recollection of the proceedings is quite limited indeed. He “does not know whether he reviewed the arrest reports, or arrest affidavits, or any other documents, in preparing to give his testimony or in giving his testimony”—nor does he remember even “whether the grand jury asked him any questions.” Pet'r C.A. Br. 6 (Dkt. No. 25).

B. Proceedings below.

1. Respondent brought a Fourth Amendment claim against petitioner pursuant to 42 U.S.C. § 1983. Pet. App. 2. Petitioner subsequently moved for summary judgment. *Ibid.*

In a report and recommendation, the magistrate judge concluded that petitioner’s “submission of affidavits” for the purpose of arresting and charging respondent “constituted more than passive or neutral participation in the decision to prosecute.” Pet. App. 24-25. Accordingly, the magistrate judge recommended that petitioner’s summary judgment motion be denied. *Id.* at 22.

The district court, however, rejected that report and recommendation, granted petitioner’s summary judgment motion, and dismissed the case. Pet. App. 22.

The district court was of the view that a “finding of an indictment” in itself “conclusively determines the existence of probable cause.” Pet. App. 26. While the court made note of an exception to that rule when “a defendant deliberately or recklessly presents false testimony to a grand jury in order to obtain an indictment,” the court found that there was “no record from which an inference could be drawn that [petitioner’s] indictment was secured through false testimony.” *Id.* at 26-27. Accordingly, the district court found that respondent did not sufficiently “show[] a lack of probable cause.” *Id.* at 27.

2. On appeal, a panel of the Sixth Circuit unanimously reversed and remanded. Pet. App. 1-20. In that court’s view, disputed questions of fact precluded a grant of summary judgment.

The court examined each element necessary to satisfy a Fourth Amendment malicious prosecution claim: whether (1) a criminal prosecution was initiated against respondent in which petitioner “made, influenced, or participated in the prosecution decision”; (2) there was no probable cause to support the charges against respondent; (3) respondent suffered a deprivation of liberty “apart from the initial seizure”; and (4) the criminal proceedings ended in respondent’s favor. Pet. App. 4 (citing and quoting *Sykes v. Anderson*, 625 F.3d 294, 308-309 (6th Cir. 2010)). Because the fourth prong was “not in dispute” (*ibid.*), the court addressed the first three.

With respect to the first, the court concluded that petitioner “at least influenced or participated in the prosecution decision.” Pet. App. 7. Indeed, petitioner “swore out the warrant affidavit that was submitted to the night commissioner and was the only witness to testify in the preliminary hearing.” *Ibid.*

Respecting the second prong, the court concluded that “the district court erred in granting summary judgment” on the ground of probable cause. Pet. App. 8. The court observed (*ibid.*) that, under *King v. Harwood*, 852 F.3d 568 (6th Cir. 2017), a Fourth Amendment claim may proceed against an arresting officer, notwithstanding a grand jury indictment, when three conditions are satisfied—where (1) a law enforcement officer “falsifies or fabricates evidence” that sets a prosecution in motion, (2) that evidence is “material to the ultimate prosecution,” and (3) the false statements and evidence “do not consist solely of grand-jury testimony or preparation for that testimony.” *Id.* at 587-588.

Petitioner accepted as true that his statements were false, and the court found that those false

statements “set the prosecution in motion.” Pet. App. 10. The evidence, the court found, was material, as there was “no indication of [other] evidence in the record that would allow the charges” to proceed to a grand jury. *Ibid.* And, as petitioner himself emphasized, “he did not testify during the grand jury proceedings,” nor was there any evidence that the false statements were used during the proceedings. *Ibid.* Accordingly, the court found that *King* applied and that respondent was “entitled to rebut the presumption of probable cause” created by the grand jury indictment. *Id.* at 11.

In considering the third prong of a Fourth Amendment malicious prosecution claim, the court determined that the case involved “precisely the factors” that constituted a deprivation of liberty: respondent was detained for 45 minutes, paid a fee to be released, and was obligated to participate in a time-intensive pretrial release program. Pet. App. 13-14. In the court’s view, there were “genuine issues of material fact” that foreclosed summary judgment on behalf of petitioner. *Id.* at 15.

Furthermore, the court determined that petitioner was entitled to neither absolute nor qualified immunity. Pet. App. 15-19. “[A]n officer is not absolutely immune when he makes false statements in a warrant affidavit,” and respondent had a “clearly established Fourth Amendment right to be free from seizure and prosecution based on fabricated evidence.” *Id.* at 16, 19.

3. A petition for rehearing en banc was denied. Pet. App. 30. No judge requested a vote. *Ibid.*

REASONS FOR DENYING THE PETITION

The quantity of arguments raised by the petition does not compensate for their lack of quality. Petitioner has not identified any question that warrants further, interlocutory review. Moreover, the issues presented in this case are tethered closely to the Court’s very recent decision in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), and the lower courts have had scant opportunity to consider the effects of that decision—much less reach any conflicting results warranting review.

A. Petitioner physically seized respondent.

Petitioner’s first contention is that the decision below implicitly endorsed a “continuing seizure” Fourth Amendment theory—and that this implicit holding conflicts with that of other circuits. See Pet. 11-16. That argument is flawed on multiple levels.

1. To begin with, petitioner’s Fourth Amendment claim does not depend on a continuing seizure theory. That is likely why the court of appeals did not even mention the term “continuing seizure,” let alone address *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975), or *Albright v. Oliver*, 510 U.S. 266 (1994). In fact, petitioner acknowledges that the court of appeals “did not expressly invoke the ‘continuing seizure’ doctrine by name in its decision.” Pet. 12. For that reason alone, this case is not a suitable vehicle to review the first question presented. The court of appeals did not directly address the “continuing seizure” theory, and it would be inappropriate for this Court to do so in the first instance.

Petitioner instead says that “it is from this doctrine” that the decision below implicitly “must flow.” Pet. 12. But that is incorrect. The facts taken in the

view most favorable to respondent demonstrate that she was seized in the physical sense, eliminating any need to rely tacitly on the continuing seizure concept.

This Court has recognized that “a person has been ‘seized’ within the meaning of the Fourth Amendment” when “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality). This has long been the “touchstone” for “telling when a seizure occurs.” *Brendlin v. California*, 551 U.S. 249, 255 (2007).

Here, “[t]he record reflects that after [respondent] participated in the video conference with the night court commissioner who found probable cause, she remained detained for approximately forty-five minutes.” Pet. App. 12. During this time, she was confined in a jail. See R. & R. 7 (D. Ct. Dkt. No. 76). Respondent’s 45 minutes of incarceration occurred after the initiation of legal process, and it was therefore distinct from the initial seizure. Pet. App. 12.

The best-case scenario for petitioner is a dispute of fact as to whether respondent “was detained” “beyond the point necessary to carry out” the original seizure. Pet. App. 14. The facts taken most favorably to respondent, therefore, establish that she was seized—after the initiation of legal process—in the physical sense of the word.

In short, the claims in this case do not depend on the “continuing seizure” theory. This interlocutory appeal is therefore not an appropriate vehicle to consider the “continuing seizure” doctrine given that the lower court did not directly address it, and because the holding below does not depend upon it.

2. Nor does the decision below conflict with the holding of any other circuit.

In asserting otherwise, the petition focuses principally (Pet. 13-14) on *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001). There, the First Circuit considered whether any “seizure” occurred *after* “the first time the [plaintiffs] were subject to legal process.” 241 F.3d at 54-55. The court found that there was no relevant seizure because, after the initiation of legal process, there was no evidence that the plaintiffs “were held after the initiation of criminal proceedings, required to post a monetary bond upon arraignment, subjected to restrictions on their travel, or otherwise exposed to any significant deprivation of liberty.” *Id.* at 56. Petitioner’s assertion of a split is misguided for several reasons.

First, unlike in *Nieves*, petitioner *was* physically seized following the initiation of legal process. See Pet. App. 12. *Nieves* accordingly says nothing about this case.

Second, in *Nieves*, the plaintiff was not “exposed to any significant deprivation of liberty.” *Nieves*, 241 F.3d at 56. Here, by contrast, respondent was “required to check in with a case manager once per week.” Pet. App. 13. She was also required to pay a fee to be released from jail. *Ibid.* This case thus does involve the sort of facts that *Nieves* viewed as significant to the question of seizure.

Third, *Nieves* itself undermines the notion of a circuit conflict. Petitioner asserts (Pet. 14) that *Nieves* conflicts with *Gallo v. City of Philadelphia*, 161 F.3d 217 (3d Cir. 1998), but *Nieves* itself saw it differently. *Gallo* was “materially distinguishable,” the First Circuit held, because the “aggregate depri-

vations [of liberty] involved * * * substantially exceeded the overall deprivation imposed here.” *Nieves*, 241 F.3d at 57.

Petitioner next offers a string cite of cases (Pet. 14) without attempting to explain how they conflict with the decision below. They do not.

In *Riley v. Dorton*, 115 F.3d 1159, 1163 (4th Cir. 1997), the Fourth Circuit considered the governing standard to apply “to excessive force claims of pretrial detainees.” That does not bear on the claim at issue here. *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004), turned on the Seventh Circuit’s peculiar rule regarding the Fourth Amendment, which the Court rejected in *Manuel*, 137 S. Ct. at 917, 922 (describing the Seventh Circuit’s position as “an outlier among the Courts of Appeals, with ten others taking the opposite view”).

The Ninth Circuit held that “[n]o Fourth Amendment seizure occur[s]” where “release restrictions [are] de minim[is],” and thus “do[] not involve circumstances comparable to those” addressed by the Third Circuit in *Gallo*. See *Karam v. City of Burbank*, 352 F.3d 1188, 1194 (9th Cir. 2003). In *Becker v. Kroll*, 494 F.3d 904, 916 (10th Cir. 2007), the Tenth Circuit also distinguished *Gallo*, explaining that the plaintiff there did “not argue that she was subject to any of these indicia of non-physical control.” The Eleventh Circuit *also* distinguished *Gallo*, holding that, in the case before it, there was no “significant deprivation of liberty.” *Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004).

In fact, subsequent decisions by lower courts bound by the holding below confirm that it effects no change in the law at odds with other circuits. When

less meaningful restrictions are imposed, lower courts continue to find that there is no seizure. See, e.g., *Howell v. Cox*, 2017 WL 5900115, at *3 n.3 (M.D. Tenn. 2017); *Cummin v. North*, 2017 WL 4386809, at *6 (S.D. Ohio 2017).

There is, accordingly, no material division among the circuits. The courts have consistently held that pretrial restrictions that significantly limit an individual’s liberty—including imposition of a mandatory fee, reporting and check-in requirements—can amount to a seizure under the Fourth Amendment. The holding below accords with all of this other precedent. And, in any event, the issue is academic in this case, because respondent was also seized in the custodial sense.

3. Petitioner also fails to demonstrate that the first question presented has any practical importance. In petitioner’s telling, the question of whether there is a “continuing seizure” matters in this case only because he contends that this lawsuit was filed outside the statute of limitations for a Fourth Amendment false arrest claim. See Pet. 9.³ Petitioner appears to admit—as he must—that his arrest and subsequent detention of respondent is a prototypical “seizure” to which the Fourth Amendment attaches. Petitioner instead asserts that the “continuing seizure” theory is relevant only to whether respondent can *also* assert a malicious-prosecution-style Fourth Amendment claim, which he maintains requires a

³ Petitioner did not plead a statute of limitations defense; any such argument is now waived. See Answer to First Am. Compl. (D. Ct. Dkt. No. 51). Therefore, petitioner’s arguments about a statute of limitations are hypothetical, and they have no possible bearing on this case.

seizure after the initiation of legal process. (As we have shown, the physical seizure *after* the initiation of legal process obviates that question in this case.)

Understood on these terms, the question petitioner asks the Court to resolve is unimportant and—if anything—would entrench what is likely mistaken law.

Under petitioner’s view (Pet. 9), this issue will be irrelevant in the mine run of cases, as a plaintiff can bring a Fourth Amendment false arrest claim, which will eliminate any arguable need to prove some seizure separate and apart from the initial arrest. It makes little sense for the Court to grant review of an issue that matters only because of a factual quirk allegedly implicated here. To the extent this question may have relevance for other reasons, the Court should address the issue in the context of such a case.

Beyond that, resolving this question as it is presented in this case would run the risk of entrenching a legal error. At the very least, it would require the Court to entertain assumptions about thorny legal questions that it has yet to resolve.

The petition is written on the premise that common-law malicious prosecution standards inescapably guide the contours of the Fourth Amendment claim pressed here—and that it is a claim distinct from a Fourth Amendment unlawful arrest claim. That is why petitioner asserts that a seizure *after* the initiation of legal process is required. But that assumption is likely wrong. Rather, respondent’s claim is simply a violation of the Fourth Amendment: if petitioner unreasonably seized respondent in violation of the Fourth Amendment, then respondent states a

claim under Section 1983. That is how the Court understood it in *Manuel*. See 137 S. Ct. at 917-921 (“Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving ‘more as a source of inspired examples than of prefabricated components.’”).

This case, however, was litigated against the Sixth Circuit’s background view that respondent had to rigidly prove each of the common-law malicious prosecution elements. Respondent has done so—and petitioner’s doctrinally specific challenges to that claim therefore underlie the petition. But given that this approach is likely wrong after *Manuel*, this Court’s review is presently uncalled for.

Following *Manuel*, the lower courts are likely to reconsider their approaches to these kinds of Fourth Amendment claims—especially their approach to the governing statute of limitations. And that will obviate the sort of hyper-technical question that petitioner poses here. Yet this line of argument was not developed below, so this case presents no opportunity to consider it. Even were it otherwise, review would be premature: the Court’s consideration of these issues should await more thoughtful consideration and clear determination by the lower courts of whether common-law malicious prosecution elements remain rigid requirements of a Fourth Amendment claim after *Manuel*.

B. The *Rehberg* issue does not warrant review.

Petitioner next asserts (Pet. 16-22) that the decision below conflicts with a “conclusive presumption of probable cause created by an indictment” and “the absolute immunity afforded to testimonial conduct as

discussed by this Court in *Rehberg v. Paulk*, 566 U.S. 356 (2012).” Pet. 16. Review is not warranted of this question, either.

1. For starters, this case would be a poor vehicle to resolve any such issue because petitioner waived a substantial aspect of his argument below. In the court of appeals, while petitioner “insist[ed] that the determination of probable cause at the preliminary hearing definitively establishes probable cause for purposes of [respondent’s] malicious prosecution claim,” the court of appeals noted that, “before the district court, [petitioner] argued only that he was absolutely immune from testimony given at the preliminary hearing and that the indictment conclusively establishes probable cause.” Pet. App. 12 n.3. As a result, petitioner “waived appellate review of this argument.” *Ibid.*

Petitioner preserved a challenge only to the indictment, therefore, and not to the preliminary hearing. Review of this case would tie the Court’s hands, artificially restricting it to a subset of relevant considerations. A case complicated by a partial waiver like this would not provide a suitable vehicle for review.

2. In any event, review of the second question would be unwarranted even if it were cleanly presented. Petitioner does not attempt to show that there is any material disagreement among the lower courts as to the underlying legal issue. He cites no case from any jurisdiction other than the Sixth Circuit. In the absence of any conflict, review is not warranted.

That is especially so because the lower courts are just beginning to address the Court’s recent holding

on this issue in *Manuel*. See Pet. 18 n.1. Thus far, the lower courts are of one mind concerning *Manuel*. In addition to being unwarranted, review is therefore premature.

The Sixth Circuit—where this case originates—is illustrative. Prior to the Court’s issuance of *Manuel*, the Sixth Circuit held in *Sanders v. Jones*, 845 F. 3d 721 (6th Cir. 2017), that a grand jury indictment broadly precludes Fourth Amendment malicious prosecution claims. In his appellate brief, petitioner relied extensively on *Sanders*. See Pet’r C.A. Br. 9, 11, 14, 24, 25, 26, 28, 29, 37 (Dkt. No. 25). After *Manuel*, however, that court reached a different result in *King v. Harwood*, 852 F.3d 568 (6th Cir. 2017).

King held that any presumption of probable cause created by a grand jury indictment may be rebutted by evidence that (1) “a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence”; (2) “the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff”; and (3) “the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony.” *King*, 852 F.3d at 587-588.

In requesting en banc rehearing before the Sixth Circuit, petitioner asserted that “*King* and *Sanders* are in direct conflict”; accordingly, “en banc review” was “warranted to address the conflict between *Sanders* and *King*.” C.A. Reh’g Pet. 5 (Dkt. No. 35).

Although the Sixth Circuit denied petitioner’s request for en banc rehearing, *this Court* subse-

quently resolved the issue. On January 8, 2018, the Court simultaneously denied certiorari in *King* (see 138 S. Ct. 640) and granted, vacated, and remanded in *Sanders* (see *ibid.*), “for further consideration in light of *Manuel*.”

On remand, the *Sanders* court reversed its earlier decision, recognizing that the outcome was compelled by *Manuel*. As that panel explained, “[a]fter our ruling, the Supreme Court rejected the notion that ‘a grand jury indictment or preliminary examination’ serves to ‘expunge’ any possible ‘Fourth Amendment claim.’” *Sanders v. Jones*, 2018 WL 1616961, at *1 (6th Cir. 2018). In light of *Manuel*, the Court adopted the reasoning of *King*. *Ibid.*

The law of this Sixth Circuit is now harmonious after *Manuel*—every panel has rejected petitioner’s theory. Petitioner has not identified any court *anywhere* that has considered *Manuel* and nonetheless held that a grand jury indictment bars a Fourth Amendment claim in these circumstances. Review is thus not warranted.

3. Indeed, *Manuel* resolves this question. In *Manuel*, an officer found a vitamin bottle containing pills during a traffic stop, and he suspected that the pills were illegal drugs. *Manuel*, 137 S. Ct. at 915. A field test and a test by a technician back at the police station both came back negative. *Ibid.* The technician nonetheless asserted in a report that the pills were illegal narcotics. *Ibid.* Based on the report, a judge determined that there was probable cause for the charge, thus authorizing the continued detention of the plaintiff. *Ibid.* About two weeks later, a grand jury indicted the plaintiff on the basis of this evidence. *Id.* at 915 n.2.

After the plaintiff had been in custody for 48 days, the state dismissed the drug charges. *Manuel*, 137 S. Ct. at 915-916. The plaintiff then brought a civil claim for violation of his Fourth Amendment rights. *Id.* at 916.

In finding his claim cognizable, the Court expressly rejected the assertion that “a grand jury indictment or preliminary examination” serves to “expunge” any possible “Fourth Amendment claim.” *Manuel*, 137 S. Ct. at 920 n.8. Rather, the Court recognized that the legal process—and the results it produces—is only as good as the evidence put before it. Thus, in *Manuel*, “[l]egal process did not expunge [the plaintiff’s] Fourth Amendment claim because the process he received,” including the grand jury indictment, “failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime.” *Id.* at 919-920. Put differently, if “the legal proceeding establishing probable cause” is “tainted” and “the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person’s Fourth Amendment rights.” *Id.* at 920 n.8.

Manuel, moreover, accords with earlier Supreme Court authority. In *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993), the prosecutor was alleged to have fabricated evidence. A grand jury later returned an indictment. *Id.* at 264. As the Court recognized, a prosecutor is not immune from suit merely because “a suspect is eventually arrested, indicted, and tried.” *Ibid.* If the rule were otherwise, “every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial.” *Ibid.*

So too with *Rehberg*, which provided police officers with a limited grant of absolute immunity for grand jury testimony and “preparatory activity, such as a preliminary discussion in which the witness relates the substance of his intended testimony” to a prosecutor. 566 U.S. at 370. However, *Rehberg* explicitly declined to extend absolute immunity to “*all* activity that a witness conducts outside of the grand jury room.” *Id.* at 370 n.1.⁴

Petitioner relies (Pet. 16-17) instead on *Ex parte United States*, 287 U.S. 241 (1932), and its progeny. There, the Court held that a federal judge could not refuse to issue an arrest warrant when presented

⁴ Petitioner claims that, “under his jurisdiction’s rather unique system,” he took respondent “before a judicial commissioner immediately following her arrest.” Pet. 21. This, he asserts, renders all his conduct subject to *Rehberg* immunity. *Ibid.* There are several deficiencies with this theory.

First, this is the very argument that the court of appeals held was waived. See Pet. App. 12 n.3. Petitioner cannot, therefore, rely on it now. Petitioner’s argument about some statute limitations (Pet. 21 n.2) is also waived, because petitioner has not asserted a statute of limitations defense in his answer, and because he did not advance that argument in summary judgment.

Second, that this system is “unique”—and that petitioner cites no other court ever considering a system like it—is yet further reason to deny review. The Court should have no interest in addressing an issue that matters for this jurisdiction only.

Third, petitioner is wrong “to suggest that he cannot be held liable for the false statements made in the warrant affidavits because his testimony before the judicial commissioner was based on the false statements.” Pet. App. 16. When officers set the wheels of a prosecution in motion with fabricated evidence, a Fourth Amendment claim is proper. *Id.* at 16-17. It is the initiation of legal charges based on fabricated evidence—not petitioner’s testimony—that is the basis of the claim.

with a valid indictment. *Id.* at 250-251. The Court concluded that “the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause *for the purpose of holding the accused to answer.*” *Id.* at 250 (emphasis added). *Ex parte United States* thus prevents a defendant from getting “a do-over” that could lead to conflicting determinations of probable cause and “legal dissonance” in the course of a single criminal proceeding. *Kaley v. United States*, 134 S. Ct. 1090, 1099 (2014). *Ex parte United States* and its progeny govern the criminal context and do not apply “for the purpose of contesting the existence of the elements of a later civil action for malicious or retaliatory prosecution.” *Moore v. Hartman*, 571 F.3d 62, 68 (D.C. Cir. 2009).

4. Against this backdrop, the court of appeals properly held that respondent was entitled to take her case to the jury.

Petitioner “accepts as true for the purpose of this appeal that his statements that [respondent] was speeding and subsequently resisted arrest were false.” Pet. App. 10. Petitioner, moreover, “was the only witness at the preliminary hearing” and “his false statements were instrumental in the stages leading up to the ultimate indictment, so set the prosecution in motion.” *Ibid.* And petitioner’s “false statements were material to [respondent’s] prosecution because there is no indication of evidence in the record that would allow the charges against [respondent] to proceed to the grand-jury stage absent [petitioner’s] false testimony.” *Ibid.* Finally, petitioner’s “false statements do not consist solely of grand jury testimony.” *Ibid.*

The court of appeals thus correctly found that, in these circumstances, the evidence taken in petitioner's favor establishes a Fourth Amendment claim, notwithstanding the presence of a grand jury indictment.

5. Petitioner's attempt at a narrower, case-specific argument is not helpful. Petitioner asserts that, here, the charges that petitioner fabricated differ from the grand jury indictment. Pet. 17-18. This argument fails for multiple reasons.

First, it is telling that petitioner must cite (Pet. 17-18) outside the lower court decisions to make this argument. The lower courts did not so much as *recognize* petitioner's argument that the grand jury indictment stemmed from one additional, different charge than that pursued by petitioner—much less assign any legal significance to it. That petitioner must attempt to construct a whole new factual record to press his argument proves that it is the most extreme form of error correction.

Second, the distinction that petitioner attempts to draw is illusory. The deposition transcript to which petitioner cites—which has not been analyzed by any court—suggests that petitioner initially charged respondent with “Reckless Driving” and “Resisting Arrest.” Dep. of Kyle Anderson 7 (D. Ct. Dkt. No. 60-3). And the grand jury indicted respondent on “Reckless Driving,” “Evading Arrest by Motor Vehicle,” and “Resisting Arrest.” *Ibid*.

In short, the grand jury considered two *identical* charges to that brought by petitioner—and then considered a derivative third charge, which turned on the very same conduct. Given that petitioner concedes for present purposes that the Court must as-

sume he fabricated the charges (Pet. App. 10), and that he was the sole cause of the prosecution (*ibid.*), the return of the grand jury indictment does nothing to undermine respondent's Fourth Amendment claim.

Third, petitioner's related argument (Pet. 17)—that there “is no record of what was presented to the grand jury” and that the “sole witness before the grand jury * * * did not recall what he said or what he did to prepare for his testimony”—is nothing short of perverse. In petitioner's view, when an officer fabricates evidence in bringing charges, the failure of the prosecutor to maintain records as to the grand jury proceedings should accrue to the officer's benefit. That would be a bizarre conclusion—and it has no basis in law.

Rather, as the Sixth Circuit correctly concluded in *King* (and applied below), the law is straightforward. If an officer fabricates evidence, causes charges to be brought against a citizen, and the citizen can assert this claim without using grand jury testimony, then a Fourth Amendment claim may proceed. Petitioner's focus on the absence of evidence from the grand jury proceeding does not alter that analysis.

C. The request for qualified immunity error correction is insubstantial.

Petitioner has one last argument—qualified immunity. Again, there is no basis for review.

Petitioner concedes for purposes of this appeal, as he must, that he *falsely* accused respondent of crimes and set a prosecution in motion, all while knowing she was innocent. Pet. App. 10a. *Of course* this is a violation of respondent's clearly established rights. A holding to the contrary—that police do not

have a clearly established duty to refrain from fabricating evidence of a citizen’s guilt—would be shocking.

1. The premise of petitioner’s request for qualified immunity is deeply flawed. Petitioner asserts that the Sixth Circuit was required to “cite a case where an officer was held liable for ‘malicious prosecution’ when the suspect was not confined during the pendency of criminal proceedings,” among a host of other requirements. See Pet. 26-27. But this is the wrong inquiry entirely.

Because qualified immunity “gives government officials breathing room to make reasonable but mistaken judgments,” it turns on whether “a reasonable official would understand that *what he is doing* violates that right.” *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). “Where an official could be expected to know that certain *conduct* would violate statutory or constitutional rights,” the law is clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added).

As a result, the Court has repeatedly underscored that the “salient question” for the “clearly established” prong of the qualified immunity test “is whether the state of the law at the time of an incident provided fair warning to the defendants that *their alleged conduct* was unconstitutional.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (emphasis added) (internal quotation marks and alterations omitted). That is, “the dispositive question is ‘whether the violative nature of *particular* conduct is clearly es-

tablished.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017).⁵

In sum, the qualified immunity inquiry focuses on whether a reasonable officer would be aware that his *conduct* was unlawful. It does not require an officer to know whether or not he could later be held liable in a civil suit.

In use of force cases, for example, if courts have not addressed analogous circumstances to those at issue, then an officer may have reasonable uncertainty about what conduct was lawful—and qualified immunity may apply. The same is true in search cases. It is no surprise, therefore, that most of the Court’s recent qualified immunity cases—including those relied upon by petitioner—arise in the use-of-force or search contexts. See, *e.g.*, *White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam).

But this case is very different. The essential claim—as petitioner acknowledges—is that he made “false statements” in “the course of setting the prosecution of [respondent] in motion.” Pet. App. 10. *All* reasonable officers know that it is unlawful to fabricate evidence and to lie about whether a citizen committed a crime. Whether or not an officer might later be able to assert a *Rehberg*-style defense to a

⁵ See also *Armstrong v. Daily*, 786 F.3d 529, 556 (7th Cir. 2015) (“The issue is not whether issues concerning the availability of a *remedy* are settled. The qualified immunity defense focuses instead on whether the official defendant’s *conduct* violated a clearly established constitutional right.”); *Stoot v. City of Everett*, 582 F.3d 910, 927 (9th Cir. 2009) (“The qualified immunity evaluation must therefore focus on an officer’s duties, not on other aspects of the constitutional violation.”).

civil claim says nothing at all about the question relevant to qualified immunity—“whether the state of the law at the time of an incident provided fair warning to the defendants that *their alleged conduct* was unconstitutional.” *Tolan*, 134 S. Ct. at 1861.

Notably, petitioner never asserts that the prohibition on fabricating evidence was not clearly established. Nor could he. Courts have long held that it violates the Constitution to fabricate evidence. See, e.g., *Buckley*, 509 U.S. at 261. That conclusively resolves the qualified immunity analysis.

For these reasons, the court of appeals observed that petitioner’s argument on qualified immunity “misses the point.” Pet. App. 18. The proper “inquiry,” the court held, was “whether [petitioner’s] alleged actions—arresting and detaining [respondent] based on false pretenses and then seeking an arrest warrant based on these false statements—violated [respondent’s] clearly established constitutional rights.” *Ibid.* As the court below explained, the answer to that question is straightforward. *Ibid.*

2. Even on petitioner’s flawed terms, there is no basis for qualified immunity.

The Sixth Circuit’s decision in *King* forecloses any assertion of qualified immunity here. See Pet. App. 19. In holding that “individuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has ‘made, influenced, or participated in the decision to prosecute the plaintiff’” by means of, for example, “‘knowingly or recklessly’ making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants” (*King*, 852 F.3d at 582-583), the Sixth Circuit relied in part on its 1996

decision in *Smith v. Williams*, 78 F.3d 585 (6th Cir. 1996) (per curiam) (table), and this Court’s decision in *Malley v. Briggs*, 475 U.S. 335, 340-345 (1986).

Spurlock v. Satterfield, 167 F.3d 995, 1002 (6th Cir. 1999), also forecloses any assertion of qualified immunity here. See Pet. App. 18-19. Petitioner’s attempted distinctions (Pet. 25-26) have no relevance as to the clarity of petitioner’s obligation not to fabricate evidence.

Beyond *King* and *Spurlock*, scores of authority had clearly established that officers violate an individual’s Fourth Amendment rights by fabricating evidence. See, e.g., *Sykes v. Anderson*, 625 F.3d 294, 312 (6th Cir. 2010) (liability where officer “stated a deliberate falsehood or showed reckless disregard for the truth”); *Gregory v. City of Louisville*, 444 F.3d 725, 758 (6th Cir. 2006) (“This Court has held investigators subject to suit under § 1983 for making materially false statements either knowingly or in reckless disregard for the truth to establish probable cause for an arrest.”); *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003) (“An investigator may be held liable under § 1983 for making material false statements either knowingly or in reckless disregard for the truth to establish probable cause for an arrest.”); *Hutsell v. Sayre*, 5 F.3d 996, 1003 (6th Cir. 1993) (“If a police officer obtains a warrant through material false statements made either knowingly or in reckless disregard for the truth, he may be sued for under [sic] § 1983 for a Fourth Amendment violation.”).

3. Finally, review is unwarranted in this case because, if anything, the Court should reverse the doctrine of qualified immunity in its entirety. While that argument was not available to the court of appeals—

and thus was not one that could be pressed there—it is available as a means for this Court to resolve the case.

As Justice Thomas explained in concurrence, there is significant and “growing concern” with the validity of the Court’s “qualified immunity jurisprudence.” *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part and concurring in the judgment). See also William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 46-49 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11-12 (2017).

Review of this case would, therefore, require determination of whether qualified immunity should continue to apply in cases like this. But, for all the reasons we have explained, this is not an appropriate case for further review of any kind.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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