No. 17-294

In The Supreme Court of the United States

KAREN THOMPSON,

Petitioner,

v.

KELLY SOO PARK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, LEAGUE OF CALIFORNIA CITIES, AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Ninth Circuit err in holding that evidence can be material for purposes of a Section 1983 claim alleging deprivation of Compulsory Process or denial of a fair trial when the defendant was acquitted at trial?

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICI CURIAE[1]

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United

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[1] No counsel for a party authored the following amici brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No persons other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

Amici, through counsel, ensured that counsel of record for petitioners and for respondents herein received notice of the intention to file this amici brief more than ten days prior to the due date for the amici brief. All parties, through their counsel, have consented to the filing of this brief, and copies of their respective written consent are submitted to the Court concurrently with this brief.

States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The League of California Cities ("League") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a nonprofit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter with the potential to affect all California counties.

Amici and their members have an interest in ensuring that the standards governing liability for police misconduct are clear and that liability is affixed only when appropriate. Amici have determined that the

Ninth Circuit's holding in the underlying case here improperly exposes police officers and other members of the prosecutorial "team" to not simply potential liability, but inevitable, ongoing entanglement in litigation concerning conduct regarding disclosure and presentation of evidence in a criminal prosecution that does not rise to the level of a constitutional violation.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision here vastly increases the exposure of police officers and other members of the prosecution "team" to not simply potential liability, but ongoing, inevitable, routine entanglement in litigation following the acquittal of criminal defendants. As the petition notes, the Ninth Circuit's holding that a claim for violation of "Compulsory Process" under the Sixth Amendment and follow-on due process claim may be brought even though the plaintiff was acquitted of criminal charges, is at odds with the decisions of other circuits, as well as this Court which squarely tie such claims to a showing that the testimony in question would have led to a different outcome at trial. (Petition, pp. 13-19, 21-26.) These points alone justify and indeed necessitate review by this Court.

Yet, the need for review is underscored by the sheer magnitude of the Ninth Circuit's holding, and what amounts to a sea change in the law regarding civil rights claims premised on the fairness of a criminal trial.

1. Although couched as resolving a claim under the Sixth Amendment for Compulsory Process, nonetheless the Ninth Circuit decision makes it clear that it embraces a broad rule of liability allowing due process claims to be premised on virtually any trial-based right to defend against criminal charges, including the most ubiquitous of claims – failure to disclose exculpatory, material evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). In a footnote disclaiming any controlling circuit precedent on the ability to bring a *Brady* claim following an acquittal, the court plainly embraces precisely such claims noting: "[A]n acquittal does not preclude a Section 1983 claim arising out of a fundamental constitutional violation." (Pet. App. at 31a-32a n.19; *Park v. Thompson*, 851 F.3d 910, 927 n.19 (9th Cir. 2017).) Rare indeed, is the criminal prosecution in which the defense does not routinely make a *Brady* claim. The net result is that where such requests or motions are made and denied, an acquitted defendant may bring a civil rights suit attempting to second-guess the trial judge's determination of the *Brady* issue. It is difficult to conceive of a larger pool of potential, if eventually meritless, claims.

2. The Ninth Circuit's conclusion that materiality is not measured by the outcome of a criminal proceeding in the context of a civil rights claim is at odds with this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars Section 1983 claims that impugn the validity of an underlying criminal conviction. As Justice Ginsburg noted in writing for the Court in *Skinner v. Switzer*, 562 U.S. 521, 536-37 (2011), by

their very nature *Brady* claims are precluded by *Heck* because the showing of required prejudice necessarily goes to whether the defendant was convicted. The rule proposed by the Ninth Circuit here creates the bizarre result that while convicted prisoners are barred from bringing *Brady* claims by *Heck*, an acquitted defendant may bring such a claim based on precisely the same conduct. This is not and cannot be the law.

3. The Ninth Circuit's decision will not only spawn wholesale litigation of follow-on *Brady* and other trial-based due process claims by defendants who have successfully defeated criminal charges, but the resulting proceedings will be lengthy, complex and uncertain. Virtually all such claims require full retrial of the underlying criminal proceeding. This will likely require the appearance of every previous trial witness, criminal defense counsel, as well as the various members of the prosecution team – police officers, DA Investigators and prosecutors themselves – in order to provide the jury with a context for determining whether or how a plaintiff has been damaged by the withholding of particular evidence or testimony. How is a jury to measure how much stronger a defense would have been had particular evidence been admitted, or how much distress a criminal defendant suffered as an inherent product of criminal prosecution as opposed to the need to confront such charges in the absence of particular testimony or evidence? While it is all too easy to say that this is a matter left to the jury, resolution of such claims untethered to any meaningful standard – such as actual effect on the verdict – is

alternatively an open ended invitation to award extravagant damages unconnected to any rational means of calculation, or to jettison any attempt at quantifying such damages and settle instead for nominal damages of a minuscule amount, the latter a doubtful justification for the inordinate adverse impact such claims will have on the judicial system.

The Ninth Circuit decision is bad law, and worse policy. The petition for a writ of certiorari should be granted.

WHY CERTIORARI IS WARRANTED

THE NINTH CIRCUIT'S DECISION IMPROPERLY EXPANDS POTENTIAL LIABILITY AND WILL ENTANGLE POLICE OFFICERS AND OTHER MEMBERS OF THE PROSECUTION TEAM IN LENGTHY, COMPLEX LITIGATION WITHOUT ADVANCING ANY INTEREST SERVED BY THE UNDERLYING CONSTITUTIONAL PROVISIONS.

A. The Ninth Circuit's Decision Allows Acquitted Defendants To Bring Claims Premised On Virtually Every Unfavorable Ruling At Trial – Including Denial Of The Standard *Brady* Motion.

The claim before the Ninth Circuit concerned a failure to afford the plaintiff her right to obtain favorable testimony from witnesses under the "Compulsory

Process" provisions of the Sixth Amendment. Nonetheless, the Ninth Circuit made it clear that its decision allowing such claims to be brought by an acquitted defendant is intended to have broad application to virtually any constitutional claim that can be brought in the context of criminal trial proceedings or couched as a due process claim.

The Ninth Circuit's decision rests on the premise that binding circuit precedent already establishes that a criminal defendant can bring a due process claim arising from unfair trial proceedings even if the criminal defendant was eventually acquitted. In *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994), the court held that even though the plaintiff was acquitted, he could still maintain a due process claim premised on the prosecution team having intimidated the judge in the criminal trial into improperly instructing the jury. According to the *Haupt* court, the fact that the plaintiff was acquitted simply went to the issue of the amount of damages sustained, as opposed to whether a due process violation had occurred and inflicted any injury at all. *Id.* at 287.

In explaining that *Haupt* necessitated recognition of the plaintiff's Compulsory Process claim under the Sixth Amendment and due process claim here, the Ninth Circuit went out of its way to make it clear that an acquitted criminal defendant could bring a civil rights action in order to relitigate virtually any ruling from the criminal trial that involved a "fundamental constitutional violation," including claims based upon

withholding exculpatory evidence under *Brady v. Maryland*.

In responding to the defendant's contention that this court's decision in *Chavez v. Martinez*, 538 U.S. 760 (2003) had expressly overruled a case on which *Haupt* had relied – *Cooper v. Dupnick*, 963 F.2d 1220 (9th Cir. 1992) (en banc) – the court noted that in 2011 a three-judge panel had left open the issue of whether a *Brady* claim could be brought following an acquittal. (Pet. App. at 31a-32a n.19; *Park*, 851 F.3d at 927 n.19, citing *Smith v. Almada*, 640 F.3d 931 (9th Cir. 2011).) The Ninth Circuit observed that two of the judges, in dicta, noted that they would find such claims to be barred, while a third judge would have allowed such claims under *Haupt*. *Id.* Thus, the Ninth Circuit here viewed itself as having an open field to make it clear that *Haupt* allows an acquitted defendant to bring virtually *any* previously rejected constitutional claim – including a claim based upon alleged withholding of exculpatory evidence under *Brady*:

> *Haupt* remains controlling precedent on the question before us: an acquittal does not preclude a Section 1983 claim arising out of a fundamental constitutional violation.

(Pet. App. at 32a n.19; *Park*, 851 F.3d at 927 n.19.)

As a result, the Ninth Circuit's opinion is a clarion call for acquitted defendants to bring civil suits to relitigate virtually any "fundamental" constitutional claim that was rejected in a criminal proceeding. Perhaps because of its unique facts – the rare situation of

the prosecutorial team somehow intimidating a trial judge – *Haupt* prompted no free ranging due process claims of the sort the Ninth Circuit decision here expressly authorizes and invites. Motions requesting that the prosecution turn over all potentially exculpatory evidence are a routine feature of everyday criminal practice. Almost every acquitted criminal defendant will therefore at least have some sort of colorable civil rights claim to the extent a *Brady* request or motion was made and rejected.

As the Ninth Circuit acknowledges, the Sixth, Tenth and Eleventh Circuits have rejected post-acquittal *Brady* claims, with the Eleventh Circuit also rejecting the very sort of Compulsory Process claim asserted here. (Pet. App. at 26a-27a & n.16; *Park*, 851 F.3d at 925 & n.16.) The Ninth Circuit's decision therefore vastly expands potential liability for, and litigation of, constitutional claims arising from criminal proceedings. While such cases are presently rare, given that convicted defendants must secure a reversal before bringing suit under *Heck v. Humphrey*, 512 U.S. 477, and other circuits had rejected such claims by acquitted defendants, the Ninth Circuit's decision will make such claims ubiquitous. The Ninth Circuit's unwarranted expansion of liability for virtually any constitutional claim arising from a criminal trial regardless of the outcome of that trial, requires the intervention of this Court.

B. The Ninth Circuit's Decision Is Inconsistent With This Court's Recognition That *Heck v. Humphrey* Applies To Claims By Convicted Prisoners Premised On Alleged Constitutional Violations Concerning The Fairness Of A Criminal Trial.

In expressly acknowledging that its decision conflicts with the Eleventh Circuit's resolution of a virtually identical issue *in Kjellsen v. Mills*, 517 F.3d 1232 (11th Cir. 2008), the Ninth Circuit chides its sister circuit for ignoring the difference between evaluating a constitutional violation for purposes of reviewing a criminal sentence, and ascertaining whether a civil claim for damages will lie in a particular case. (Pet. App. at 27a-28a; *Park*, 851 F.3d at 925.) Yet, the Ninth Circuit's conclusion that the substantive nature of a constitutional violation may vary – i.e., whether the violation was in fact "material" – depending on the context in which it arises, is untenable. Indeed, this Court has expressly recognized that a single standard must be applied in determining whether a constitutional violation has occurred, both for purposes of reversing a conviction, and ultimately whether a civil suit may be brought.

In *Heck v. Humphrey*, 512 U.S. 477, 489, the Court held that where the plaintiff has been convicted, no Section 1983 claim may be brought where success on the claim would "necessarily" imply the invalidity of the underlying criminal conviction, unless and until the conviction is reversed. The Court analogized to the

tort of malicious prosecution, which requires a favorable termination of the initial litigation as a prerequisite to bringing suit. *Id.* at 484-86.

In *Skinner v. Switzer*, 562 U.S. 521, the Court held that *Heck* did not bar a Section 1983 claim by convicted prisoner seeking access to DNA evidence that might be used in a subsequent proceeding to attack his conviction. Writing for the Court, Justice Ginsburg noted that such a claim would not "necessarily" imply the invalidity of the underlying criminal conviction, because it was not certain what the results of DNA testing might show – it might, or might not exonerate the plaintiff. Significantly, Justice Ginsburg emphasized that there were certain claims that were invariably tied to the propriety of the underlying criminal conviction because the violations themselves had a materiality requirement – most notably claims under *Brady v. Maryland*:

> Unlike DNA testing, which may yield exculpatory, incriminating, or inconclusive results, a *Brady* claim, when successful postconviction, necessarily yields evidence undermining a conviction: *Brady* evidence is, by definition, always favorable to the defendant and material to his guilt or punishment.

Id. at 536.

In sum, "*Brady* claims have ranked within the traditional core of habeas corpus and outside the province of § 1983." *Id.* Indeed, *Heck* itself arose from a *Brady*

claim. *Heck*, 512 U.S. at 479, 490 (claim that prosecutors and an investigator had "'knowingly destroyed' evidence 'which was exculpatory in nature and could have proved [petitioner's] innocence'").

The Ninth Circuit provides no logical explanation for why the standards for assessing materiality with respect to constitutional violations occurring in the context of trial proceedings should differ, depending upon whether the constitutional challenge is brought in the context of a criminal or civil proceeding. In fact, the Ninth Circuit's distinction creates the anomalous result that an acquitted defendant could bring a *Brady* or Compulsory Process claim under circumstances where a convicted defendant would be foreclosed by *Heck*, even though the alleged prosecutorial team misconduct might be the same in each case.

Neither logic nor law supports the distinction the Ninth Circuit proposes between constitutional claims litigated in the context of criminal, as opposed to civil proceedings.

C. The Litigation Spawned By The Ninth Circuit's Decision Will Be Lengthy, Complex And Uncertain, Without Meaningfully Advancing Any Of The Interests Served By The Constitutional Provisions At Issue.

The sheer number of lawsuits that will be spawned by the Ninth Circuit's creation of an entirely new category of post acquittal lawsuits will necessarily create a substantial burden on the court system. That

adverse impact is magnified by the fact that such cases will necessarily be lengthy, complex and uncertain.

Any constitutional claim concerning a limitation on the plaintiff's ability to present a defense at a criminal trial will, by its nature, require complete relitigation of the case in the civil action. How will a jury be able to assess the potential significance that particular evidence or testimony would have had in the criminal case, and its impact on plaintiff's defense and related emotional state, without seeing that evidence firsthand? This means calling virtually every witness from the criminal trial so the jury can assess the strength or weakness of the plaintiff's and prosecution's case.

In addition, a jury would certainly have to hear from criminal defense counsel to determine how such evidence might have been employed, or how the defense might have responded to any counter argument by the prosecution. And, although prosecutors themselves might be immune from liability in these subsequent civil suits (*Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976)), nothing immunizes them from presenting testimony and they will surely be called to do so. It is impossible to imagine a civil case premised on the plaintiff's inability to present particular evidence or testimony in the context of a criminal trial without hearing from a prosecutor as to how such evidence would be countered.

A jury in a follow-on civil action would also have to review all the physical evidence, to similarly assess

the impact that withheld evidence had on the strength of the plaintiff's defense to the criminal charges, and determine what, if any, injury a plaintiff sustained by not having the evidence available.

Indeed, in performing the latter determination, a rational means to assess the existence, let alone extent of any injury, seems dubious. How is a jury to logically assess whether a plaintiff sustained emotional distress from somehow being deprived of particular evidence or testimony separate from the significant emotional distress no doubt sustained by having to confront criminal charges in the first place? And how is a jury, in a vacuum, to determine whether the plaintiff suffered greater emotional distress from being prevented from calling a particular witness at all, as opposed to possibly watching the witness crumble under withering cross-examination?

The Ninth Circuit's decision here leaves such difficult conceptual issues unaddressed, yet, the impracticality of resolving such questions undermines the Ninth Circuit's justification for allowing such claims and compels rejection of the Ninth Circuit's analysis. This Court has made it clear that violation of a constitutional right must result in actual, concrete injury in order to be actionable under Section 1983. *Carey v. Piphus*, 435 U.S. 247, 254, 264 (1978). It has expressly rejected the notion that there is any inherent injury stemming from violation of a constitutional right in a vacuum, noting that:

> [W]ere such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants. Such damages would be too uncertain to be of any great value to plaintiffs, and would inject caprice into determinations of damages in § 1983 cases.

Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) (citation omitted).

Yet, the Ninth Circuit's newly minted post acquittal claim for violations of due process and trial related constitutional violations require a jury to perform precisely that sort of impossible mental gymnastics, thus leaving defendants open to wholly capricious damage awards, untethered to any logical means of calculation.

Nor can the problem be sidestepped by simply inviting an award of nominal damages. As a threshold matter, this still requires some assessment of "injury" which, in the context of the panoply of actions that occur during a criminal trial is almost impossible to rationally determine. At the same time, if the notion is that post acquittal trial-based claims are inevitably relegated to nominal damages status, it is difficult to justify the inordinate adverse impact that litigation of such claims will have on the court system.[2]

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[2] Nor, despite this Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 115 (1992), will nominal or otherwise relatively minor damage awards deter the proliferation of such claims, particularly in the Ninth Circuit, where even extremely low damage awards

The difficulty of defining and assessing any injury attributable to trial related constitutional violations underscores the fact that, as this Court has recognized, such claims are necessarily tied to the ultimate resolution of the charges against a defendant. *Skinner*, 562 U.S. at 536. Whether brought under the general rubric of due process, or couched with regard to a particular right such as Compulsory Process or disclosure of exculpatory evidence, the ultimate goal of these provisions is to assure that a criminal defendant is not convicted as a result of means prohibited by the Constitution. In the context of a criminal case, there is no due process, *Brady*, or Compulsory Process claim existing in a vacuum – all are tied to the ultimate outcome of the underlying criminal proceeding.

State tort claims for malicious prosecution provide ample redress for acquitted defendants by application of narrow, long accepted, and clearly defined standards. In contrast, the Ninth Circuit's recognition of a post acquittal civil claim for damages arising from alleged constitutional irregularities during a criminal trial is legally unsupportable and logistically devastating to the state and federal court systems. It will spawn complex, highly uncertain lawsuits that will ensnare virtually every participant in the state criminal proceedings in ongoing litigation, without advancing the core purpose of the very constitutional provisions on

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have nonetheless been deemed sufficient to support large attorney fee awards. *See Bravo v. City of Santa Maria*, 810 F.3d 659, 666-67 (9th Cir. 2016) (damage award of $5,002 supports fee award of $1,023,000).

which such claims are based. The Court should therefore grant the petition and summarily reverse the decision of the Ninth Circuit, or grant plenary review in order to expressly repudiate such claims.

CONCLUSION

For the foregoing reasons, amici curiae International Municipal Lawyers Association, League of California Cities, and California State Association of Counties respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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