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9 On behalf of the Respondent.

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1 JUSTICE SOTOMAYOR: Or the absence of  
2 it?

3 MR. KATYAL: It doesn't. There's two  
4 different constitutional violations, Justice  
5 Sotomayor, we have identified both in our  
6 complaint and in the courts below, as well as  
7 here. The Fourth Amendment, which does have a  
8 probable cause element. And the district court  
9 at page 56a said McDonough's claim is the  
10 absence of probable cause. And so with respect  
11 to the Fourth Amendment.

12 With respect to the Fifth Amendment,  
13 the elements don't actually talk about due --  
14 don't talk about probable cause; instead, they  
15 talk about is there a reasonable likelihood --

16 JUSTICE SOTOMAYOR: So why do you --

17 MR. KATYAL: -- that the indictment --

18 JUSTICE SOTOMAYOR: -- why do you need  
19 an acquittal? That at least is the  
20 government's position. Yours is not quite  
21 that. But why -- if we're going to import  
22 malicious prosecution that waits for a  
23 favorable termination, is it necessary for your  
24 argument that we adopt something if it's the  
25 closest analogy that we --

1           MR. KATYAL: It's not at all  
2 necessary, Justice Sotomayor. It is  
3 sufficient, and we'd certainly win under that.  
4 That's part of -- that's our second theory.

5           But our first theory, you're  
6 absolutely right, and it's a much more  
7 straightforward way of deciding this case, and  
8 it tracks Justice Kagan's opinion for the Court  
9 in Manuel, decide narrowly and decide simply  
10 that the favorable term -- that -- that common  
11 law analogy here is malicious prosecution, and  
12 you borrow the limitations rule of malicious  
13 prosecution.

14           JUSTICE ALITO: Well, Mr. Katyal --

15           MR. KATYAL: And that's all you have  
16 to do.

17           JUSTICE ALITO: -- this case -- this  
18 case has my head spinning because --

19           MR. KATYAL: Mine too.

20           JUSTICE ALITO: -- you were asked to  
21 determine when a claim accrues, but I don't  
22 know what provision of the Constitution this is  
23 based on, and, therefore, I don't know what the  
24 elements of this claim are.

25           And depending on the elements, that --

1 they may point to different accrual rules, and,  
2 certainly, they might point to different common  
3 law analogies.

4 So can you clarify this? I mean, you  
5 say it's based on the Fourth Amendment, the  
6 Fifth -- the due process, I don't know whether  
7 it's procedural or substantive or both, it's  
8 based on the Sixth Amendment.

9 So what's it based on?

10 MR. KATYAL: So -- so, Justice Alito,  
11 we agree with the Solicitor General that in  
12 this case, you don't need to specify because  
13 the Fourth and Fifth Amendments -- Fourth and  
14 Fourteenth Amendment Due Process Clause swim to  
15 exactly the same result.

16 That is, you can have a common law  
17 analogy like malicious prosecution that covers  
18 both Fourth Amendment and Fourteenth Amendment  
19 purposes. Now here --

20 JUSTICE ALITO: Why -- why -- why do  
21 they -- I'm not sure they swim to the same  
22 result.

23 JUSTICE GORSUCH: I'm pretty sure they  
24 don't swim at all.

25 (Laughter.)



1 JUSTICE ALITO: The -- the Fourth  
2 Amendment usually is satisfied if there's  
3 probable cause. So that would seem to suggest  
4 that probable cause -- the absence of probable  
5 cause is an element of your Fourth Amendment  
6 claim.

7 Procedural due process requires a  
8 deprivation. So that seems to require an  
9 element of causation. Substantive due process  
10 doesn't require any of that. Sixth Amendment,  
11 I have no idea how that applies here. So --

12 MR. KATYAL: Right. So --

13 JUSTICE ALITO: -- you still can't  
14 tell me what it's based on?

15 MR. KATYAL: No, we -- we have --

16 JUSTICE ALITO: Is this penumbras and  
17 emanations from all kinds of things?

18 MR. KATYAL: -- Justice Alito, we have  
19 identified the Fourth and Fourteenth Amendments  
20 time and time again. The district court says  
21 so. The -- the Second Circuit, at pages 2, 3,  
22 4, 6, 7, 8, all talk about the due process  
23 challenge we make here.

24 And you're absolutely right, there is  
25 a little daylight between probable cause, as

1 Justice Sotomayor was saying, and the  
2 reasonable probability that a prosecutor  
3 wouldn't have done what he did but for the  
4 fabricated evidence.

5 But, in a case like this, it doesn't  
6 matter. We agree that, in some hypothetical  
7 case, there might be a difference. It's just  
8 not presented here.

9 JUSTICE GORSUCH: May I --

10 MR. KATYAL: And that's why they never  
11 made these arguments below. They never made  
12 them in the brief in opposition. The first  
13 time you're hearing about this delineation is  
14 in the red brief.

15 JUSTICE GORSUCH: May I -- may I try  
16 --

17 JUSTICE GINSBURG: If we're not  
18 talking about hypothetical cases, is the  
19 argument that you're presenting -- is it in the  
20 end academic because the defendant is the  
21 prosecutor and the prosecutor would be immune?

22 MR. KATYAL: Absolutely not, for  
23 reasons, again, the Solicitor General said  
24 absolute immunity's not before this Court and  
25 it hasn't been passed on below. But for two

1 reasons, Justice -- Justice Ginsburg, we think  
2 that's wrong.

3           Number one, it's definitely not  
4 academic because, even at best, absolute  
5 immunity would only protect prosecutors, and as  
6 the amici briefs before you talk about,  
7 fabrication of evidence claims often inhere  
8 against police. And the rule you set here is  
9 not -- and investigators. The rule you set  
10 here is not just about prosecutors and when  
11 claims against them accrue but when any law  
12 enforcement official does.

13           And then, second, if there were a  
14 remand, we would obviously win because of the  
15 Second Circuit's decision in Zahrey, which says  
16 that if there's a reasonable probability that a  
17 prosecutor, when they fabricate evidence, might  
18 introduce that evidence later on, then there is  
19 no absolute immunity. And Justice Thomas's  
20 opinion in Michaels in 2001 said "that was very  
21 likely correct."

22           And it follows from two different  
23 opinions of this Court.

24           JUSTICE KAGAN: But -- but, if I  
25 could, it's a similar question to what exactly

1 you're claiming, because you had a malicious  
2 prosecution claim in the original complaint and  
3 that was the one that the courts below  
4 dismissed on these prosecutorial immunity  
5 grounds.

6 So how is this claim different from  
7 that claim? And I guess I had thought that one  
8 way it would be different was that this claim  
9 is just about the use of fabricated evidence.  
10 Is that what you're claiming?

11 And, if not that, how is it different  
12 from the original malicious prosecution claim?

13 MR. KATYAL: It's -- it's -- as I said  
14 at the outset, it's the use and maintenance of  
15 the criminal prosecution. And that's exactly  
16 what the common law has always said. And  
17 there's a bazillion cases on this in our brief  
18 and the CAC amicus brief at pages 24 to 25.

19 JUSTICE KAGAN: But is -- is that to  
20 say that the difference between your two claims  
21 was one was about the initiation of proceedings  
22 and the other was about the continuation of the  
23 proceedings?

24 MR. KATYAL: No, they're -- they're  
25 different. As our reply -- reply brief

1 explains, they're different elements. So, for  
2 example, for a pure malicious prosecution  
3 claim, you actually have to show malice.

4 And that's one reason why, Justice  
5 Ginsburg, absolute immunity might exist for a  
6 pure malicious prosecution claim.

7 For a fabrication of evidence claim  
8 rooted in either the Fourth or Fourteenth  
9 Amendment, malice is not actually an element.  
10 Rather, you have to show there was a  
11 fabrication of evidence that caused the result,  
12 the deprivation of liberty. It's just those  
13 two elements. That's cases in many different  
14 circuits.

15 And so there is a difference between  
16 the two, and it does have bite, particularly  
17 when we deal with something like absolute  
18 immunity because absolute immunity, one of the  
19 hearts of it since this Court's decision in  
20 1871 is that this Court won't second-guess the  
21 purity of motives of a government official.

22 And, obviously, malicious prosecution  
23 qua malicious prosecution forces a court to do  
24 that. So there's a stronger argument.

25 JUSTICE ALITO: When you allege the

1 fabrication of evidence, you're saying you're  
2 not necessarily alleging malice?

3 MR. KATYAL: It's -- it's not  
4 necessarily an element of the complaint -- of  
5 -- of a -- of a fabrication of evidence claim.  
6 That's how every lower court, to my knowledge,  
7 has interpreted it. There still would be some  
8 sort of recklessness or some sort of mens rea,  
9 but it wouldn't -- it wouldn't necessarily be  
10 the actual malice that malicious prosecution  
11 required.

12 JUSTICE ALITO: So you think that the  
13 -- the reckless presentation of evidence that  
14 turns out to be false constitutes the  
15 fabrication of evidence? That would support  
16 your claim?

17 MR. KATYAL: It certainly could, Your  
18 Honor. Of course, that's an element of the  
19 offense. That's not what's presented here.  
20 You granted certiorari on the very limited  
21 question of what is the limitations rule for  
22 claims like this.

23 And there are all sorts of policy  
24 reasons why we think you should adopt a  
25 favorable termination requirement, at least as

1 a limitations rule, because it'll avoid  
2 collateral proceedings --

3 JUSTICE GORSUCH: Well, how do we --

4 MR. KATYAL: -- and duplicative  
5 proceedings.

6 JUSTICE GORSUCH: -- how do we adopt a  
7 favorable termination requirement for purposes  
8 of a limitations analysis only? It would seem  
9 to me it's either part of the claim or it's not  
10 part of the claim.

11 And I would have thought that  
12 plaintiffs in -- in your client's position  
13 normally would say it's not part of the claim  
14 because that's a higher burden. And it's only  
15 because of the happenstance here that we want a  
16 longer limitations period that we want to tack  
17 it in and create this rather bespoke tort that  
18 we cannot identify where it swims from or to.

19 MR. KATYAL: Right.

20 JUSTICE GORSUCH: And it -- it -- I  
21 just wonder whether we're kind of coming at  
22 this one backwards, and before deciding how  
23 long the limitations period is, we ought maybe  
24 to take a case where we decide whether it  
25 exists and what its elements are, without the

1 complication of addressing the limitations  
2 period, where litigation interests may be  
3 slightly different than they would be in the  
4 ordinary case.

5 MR. KATYAL: So, Justice Gorsuch, this  
6 Court has said several times that the -- there  
7 is sometimes daylight between the limitations  
8 period and when a cause accrues. Think of  
9 Justice Scalia's opinion in Wallace.

10 JUSTICE GORSUCH: Pretty unusual --  
11 pretty unusual, though, right?

12 MR. KATYAL: It -- it is unusual. But  
13 Wallace is a very good example of that,  
14 particularly Footnote 3. And, here, I think  
15 that makes sense.

16 JUSTICE GORSUCH: We usually say,  
17 though, the limitation period starts to run  
18 when all of the elements are present. I mean,  
19 we learn -- everyone learns that in the first  
20 year of law school, right?

21 MR. KATYAL: Not where I went to law  
22 school. That's not --

23 JUSTICE GORSUCH: Well, that may be  
24 true. That may be true.

25 (Laughter.)



1 JUSTICE GORSUCH: And -- and -- and --  
2 and I -- I -- I -- you know, maybe not where I  
3 went to law school either, but -- but one  
4 should learn that in the first year of law  
5 school. Can we agree on that?

6 MR. KATYAL: We -- we -- well, we do  
7 agree that is the standard rule, but for claims  
8 like this, actually, it makes a lot of sense.  
9 Think about Wallace because, in Wallace, the  
10 Court said there is daylight and the reason for  
11 that is it cited Section 187 of the Wood  
12 treatise, and that very sentence it cited said,  
13 yes, there's daylight not just for the false  
14 imprisonment claim that was at issue in Wallace  
15 but also for malicious prosecution.

16 It's the same sentence, and it makes  
17 particular sense here because the reason for  
18 malicious prosecution's favorable termination  
19 requirement is not really that it's an element  
20 of the offense but, rather, that it voids all  
21 of the policy concerns that -- that -- that we  
22 talk about in our briefs.

23 So, if you look at Keyton's treatise  
24 at page -- this is cited in our reply brief at  
25 page 8, it says the following: "The

1 requirement of termination is probably a matter  
2 of ripeness, a belief that malicious  
3 prosecution actions should not be tried at a  
4 time when they try to chill testimony. It is  
5 primarily important not as an independent  
6 element."

7           And so, when you're dealing with this  
8 unique thing, I think this is the right rule.  
9 It allows the Court to do, I think, a very  
10 narrow, straightforward thing, which is to just  
11 say, look, the whole point of the favorable  
12 termination requirement is to avoid collateral  
13 duplicative litigation, to make sure that we're  
14 not chilling defendants who now have to walk  
15 out of their federal criminal trial while it's  
16 ongoing and file a lawsuit and possibly risk  
17 their Fifth Amendment incrimination rights and  
18 resources and distraction and all of that.

19           I mean --

20           JUSTICE GINSBURG: What about just  
21 staying the civil proceeding until the criminal  
22 prosecution is over?

23           MR. KATYAL: So it's possible, I  
24 think, sometimes to stay, but, as the  
25 government points out, stays are discretionary

1 at the district court and there have been  
2 example after example in which criminal and --  
3 in which the civil litigation has not been  
4 stayed.

5 And I think it's important to note  
6 that the only policy argument they've been able  
7 to come up with, Justice Ginsburg, for that  
8 stay idea is the idea of faded memories or  
9 something like that.

10 But, here, you've got the Government  
11 of the United States representing most  
12 prosecutors, the lion's share of prosecutors  
13 saying no, we're not as concerned about that,  
14 and those problems of faded memories occur just  
15 as much under their rule because they adopt a  
16 discovery -- they adopt a discovery rule. So  
17 it can be years later.

18 And, also, this Court's decision in  
19 Heck alone will delay many of these claims for  
20 anyone who has been convicted. So weighed  
21 against whatever you have on faded memory,  
22 you've got duplicative litigation, the fact  
23 that people in the real world won't file these  
24 lawsuits if they're facing criminal trials,  
25 which is what their rule requires, and that'll

1 lead to less deterrence and undermine the  
2 compensatory rationales of Section 1983.

3 JUSTICE KAVANAUGH: What torts would  
4 you bring -- tort suits would you bring under  
5 state law under -- on these facts?

6 MR. KATYAL: Under state law, we'd  
7 bring something like the tort of malicious  
8 prosecution.

9 JUSTICE KAVANAUGH: There is no  
10 separate tort?

11 MR. KATYAL: I -- I don't know that  
12 there's a fabrication of evidence tort. There  
13 may be some criminal remedies or something like  
14 that, but one of the points of Section 1983, a  
15 historic point, has been to provide a federal  
16 remedy, a federal cause of action, in cases  
17 like this.

18 So there's also -- we've been really  
19 talking about two different theories led by  
20 Justice Sotomayor's question: One, decide only  
21 the limitations rule. Second, as Justice --  
22 Justice Gorsuch said, adopt it as an element of  
23 the offense. There's also a third theory, the  
24 continuing violation theory.

25 We have to win just any one of these.

1 He's got to defeat them all. As Justice  
2 Ginsburg said --

3 JUSTICE KAGAN: But before you -- you  
4 go to that, Mr. Katyal, and maybe I'm just  
5 being dense here, but I'm still trying to  
6 figure out, you said it's a -- for a state  
7 tort, it would be malicious prosecution. That  
8 was true of your -- the other count in your  
9 complaint as well, the one that was dismissed.

10 I mean, this fabrication of evidence  
11 claim seems to be, I mean, just a subset of  
12 that. You know, there are lots of ways. You  
13 can bring a malicious prosecution. One is by  
14 fabricating evidence. One is by doing  
15 something else.

16 How is it a different claim?

17 MR. KATYAL: Well, because I think,  
18 for 1983 purposes, when this Court does the  
19 analysis that you prescribed in Manuel, going  
20 back to Carey versus Piphus, you use that as  
21 the starting point. You look to the analogue.  
22 And you can have two different claims,  
23 malicious prosecution, a pure one, or  
24 fabrication of evidence, that both look back to  
25 that and common law antecedent, but as

1 applied --

2 JUSTICE KAGAN: Right. I'm -- I'm --  
3 I guess I'm struggling with how it's a  
4 different constitutional claim. I -- I  
5 understand how there might be two different  
6 constitutional claims that would look to the  
7 same common law precedent, but how is this a  
8 different constitutional claim?

9 MR. KATYAL: Well, there -- there are  
10 two different claims here, the Fourth Amendment  
11 and the Fourteenth Amendment, as I was saying  
12 to Justice Alito.

13 Here, I don't think it matters, but I  
14 could imagine --

15 JUSTICE KAGAN: No. But as -- I'm --  
16 I'm talking about -- you had a count that was  
17 dismissed.

18 MR. KATYAL: Yeah.

19 JUSTICE KAGAN: How is this different  
20 from the one that was dismissed?

21 MR. KATYAL: It's different because,  
22 as I -- as I said earlier, the elements for a  
23 fabrication claim, at least for 1983 purposes,  
24 are different, because they involve -- they  
25 don't involve malice and things like that. So

1 it's just -- that's the way the law works.

2 JUSTICE KAGAN: What are the things  
3 like that? Because the malice, I don't know.  
4 I mean, really?

5 MR. KATYAL: So -- so malicious  
6 prosecution requires four things: the  
7 initiation or continuation of a criminal  
8 proceeding against a plaintiff; termination in  
9 the plaintiff's favor; lack of probable cause;  
10 and actual malice. And probable cause and  
11 malice don't apply to all fabrication of  
12 evidence claims. That's the way lower courts  
13 have interpreted it.

14 May I reserve?

15 CHIEF JUSTICE ROBERTS: Thank you.

16 JUSTICE GINSBURG: Fabricating  
17 evidence -- deliberately fabricating evidence  
18 isn't malice?

19 MR. KATYAL: It -- it -- it often is.  
20 It's just -- our only point is it's not always.  
21 That's all, Justice Ginsburg.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Mr. Wall.

25

1                                   ORAL ARGUMENT OF JEFFREY B. WALL  
2                                   FOR THE UNITED STATES, AS AMICUS CURIAE,  
3                                   IN SUPPORT OF REVERSAL

4                                   MR. WALL: Mr. Chief Justice, and may  
5 it please the Court:

6                                   The parties' presentations may make  
7 this case seem more difficult than it is. If  
8 Petitioner were seeking damages for a  
9 conviction based on fabricated evidence, it is  
10 clear under Heck malicious prosecution would be  
11 the most analogous common law tort, and  
12 favorable termination would be an element of  
13 the 1983 claim. That's Heck itself.

14                                   The same is a fortiori true when  
15 Petitioner seeks damages for an indictment  
16 based on fabricated evidence. That's not  
17 simply akin to malicious prosecution. That's  
18 the essence of malicious prosecution at common  
19 law, being wrongfully subjected to the criminal  
20 process in the first place.

21                                   Favorable termination is therefore an  
22 element of the 1983 claim. The limitations  
23 period began to run only upon Petitioner's  
24 acquittal. That is, in the government's view,  
25 the straightforward and correct way to resolve



1 the case.

2 JUSTICE GORSUCH: So it's always an  
3 element now? Before, it was sometimes an  
4 element. But now it's always an element?

5 MR. WALL: Oh, Petitioners on -- on --  
6 I understand Petitioner's first theory to be  
7 that it's sometimes an element or you can  
8 borrow --

9 JUSTICE GORSUCH: It swims in and out?

10 MR. WALL: To be clear, that has never  
11 been the United States' theory. We disagree  
12 with Petitioners on his first and third  
13 theories.

14 JUSTICE GORSUCH: Why wouldn't we be  
15 better off, before trying to figure out what  
16 the limitations period is, actually take a case  
17 and figure out whether this tort exists and  
18 what its elements actually are? Because even  
19 you and the Petitioner cannot agree on the  
20 elements of this claim.

21 MR. WALL: Well, I guess, Justice  
22 Gorsuch --

23 JUSTICE GORSUCH: And we don't know  
24 where it swims from.

25 MR. WALL: I don't want to speak for

1 Petitioner. I can tell you what the United  
2 States' view is, which is that Petitioner had  
3 two claims. He could have brought a Fourth  
4 Amendment constitutional claim for a seizure  
5 without probable cause. Doesn't have to do  
6 with malicious prosecution, that's your  
7 concurrence in Cordova, that claim's not before  
8 you. He's got a common law malicious  
9 prosecution claim under New York law if he  
10 wants to bring that.

11 His second constitutional claim is a  
12 procedural due process claim. It's akin to  
13 Agurs or Brady or Giglio. It's no different  
14 than if there were perjured testimony. That's  
15 not only a Fourth Amendment claim, that's a  
16 Fourteenth Amendment claim, that short of a  
17 seizure, I have otherwise been deprived of  
18 liberty.

19 JUSTICE GORSUCH: Well, but -- but  
20 that's a great argument for a case in which the  
21 -- the matter's actually before us. And your  
22 compatriot doesn't agree with you --

23 MR. WALL: Well, if --

24 JUSTICE GORSUCH: -- that it's just a  
25 procedural process claim.

1                   MR. WALL: Justice Gorsuch, if there  
2 were a circuit split on that --

3                   JUSTICE GORSUCH: So shouldn't we  
4 maybe --

5                   MR. WALL: -- or some reasonable  
6 disagreement, but the Court has held that there  
7 is a procedural due process claim with respect  
8 to fabricating evidence to obtain a conviction.

9                   The only question then is, well, what  
10 if they deprive your liberty in other ways  
11 short of a conviction? The courts of appeals  
12 have said that's also a Fourteenth Amendment  
13 claim. We agree with that. And since the  
14 courts of appeals have been uniform on that and  
15 there's just this timeliness question, I don't  
16 know that the Court needs to get into that  
17 merits question, but --

18                   JUSTICE ALITO: Well, now you've  
19 confused --

20                   MR. WALL: -- I'm happy to talk about  
21 it. I mean, we -- we think the elements are  
22 you've got fabricated evidence, it's material  
23 to a deprivation of liberty, no different than  
24 if it were a Brady claim or a Giglio claim or  
25 an Agurs-Mooney claim. I mean, all of them --

1 JUSTICE GORSUCH: Except you think  
2 that the element also includes favorable  
3 termination, and your compatriot doesn't. And  
4 we haven't had much consideration of that  
5 issue.

6 And, for one, I'm not sure I see why  
7 it would be an element, I mean, just -- just to  
8 put it out there. Pretty bad to use fabricated  
9 evidence, whether you win or you lose, it seems  
10 to me. No?

11 MR. WALL: So, Justice Gorsuch, two  
12 things. Yes, there is disagreement with us on  
13 whether -- with Petitioner on whether you  
14 incorporate the element. But, if you look at  
15 Justice Scalia's opinion in Heck, what he was  
16 saying was, when you're attacking the state  
17 judicial process and that doesn't end favorably  
18 to you, your remedy for that is habeas; you've  
19 got to go get that result set aside before you  
20 can bring the damages claim.

21 JUSTICE GORSUCH: If you're attacking  
22 collaterally the conviction, but maybe  
23 sometimes you're not.

24 MR. WALL: Well, but I think all of  
25 the reasons there why you're attacking the

1 state judicial process are why the common law  
2 tort, the analogous tort of malicious  
3 prosecution, adopted this favorable termination  
4 requirement, out of respect for the ongoing  
5 state criminal proceeding and out of a belief  
6 that that was the proper role for habeas, not  
7 for damages claims.

8           So I agree with you, favorable  
9 termination is not an element of the  
10 constitutional claim. We can prosecute a -- a  
11 line attorney who fabricates evidence and puts  
12 it in a trial --

13           JUSTICE KAVANAUGH: What -- what --

14           MR. WALL: -- no matter how the trial  
15 ends, but it is an element of the damages claim  
16 under 1983.

17           JUSTICE KAVANAUGH: Can I -- can I  
18 pick up on Justice Kagan's question from  
19 earlier? How is a fabricated evidence claim  
20 different from a malicious prosecution claim?  
21 It would seem every fabricated evidence claim  
22 is a malicious prosecution claim, not the  
23 reverse.

24           MR. WALL: Oh, I think there is  
25 overlap in the sense that you'll often have a

1 constitutional claim and you'll have a common  
2 law claim, but the -- the elements are  
3 different.

4 So, as the Court's been exploring, at  
5 common law --

6 JUSTICE KAVANAUGH: You don't -- you  
7 think there's a fabricated evidence claim that  
8 would not fall within the usual elements of  
9 malicious prosecution?

10 MR. WALL: Well, in malicious  
11 prosecution, you had to show a lack of probable  
12 cause. That was the question, whether the  
13 prosecutor was proceeding against you without  
14 valid legal basis. Under Brady and Giglio and  
15 Agurs, it doesn't matter if the government  
16 could have proceeded against you on the basis  
17 of the evidence before it.

18 Kyles says Brady's not a  
19 sufficiency-of-the-evidence test. If you don't  
20 turn over exculpatory evidence or you introduce  
21 perjured testimony, it doesn't matter that a  
22 jury could have found you guilty. The question  
23 under those cases is materiality.

24 JUSTICE ALITO: But don't you have to  
25 show causation if it's a procedural due process

1 claim?

2 MR. WALL: You have to show  
3 materiality, Justice Alito. You've got to show  
4 under Kyles a reasonable probability that it  
5 affected the outcome.

6 JUSTICE ALITO: And what's the  
7 difference between that and probable cause?

8 MR. WALL: I think that what Kyles  
9 suggests is it's not just a question of whether  
10 there was probable cause that a juror could  
11 have found a grand juror to hold you over for  
12 trial or a petit juror to -- to convict you on  
13 the basis of the evidence. It's could it have  
14 had an effect on the proceeding?

15 So imagine a case where the evidence  
16 of guilt is not overwhelming and a reasonable  
17 grand juror or petit juror could have gone  
18 either way. A court could easily say, oh,  
19 look, there was probable cause to send the  
20 person to trial. But you still -- and the  
21 Court's held in Kyles and later cases -- you've  
22 still got the procedural due process claim if  
23 there is a reasonable probability it affected  
24 the outcome.

25 JUSTICE KAGAN: Do you think that

1       there's a possible claim which is just there  
2       was a introduction of fabricated evidence that  
3       was so awful, it's itself a violation of the  
4       Constitution, kind of shocks the conscience?

5               MR. WALL:  We -- we don't think for  
6       two reasons, Justice Kagan.  One, the Court  
7       said it's very reluctant to expand substantive  
8       due process because it doesn't have reliable  
9       guideposts in the area.  And, two, as early as  
10      Mooney in 1934 looking at a claim of false  
11      evidence at trial, the Court said it's  
12      procedural due process.

13             And I do think that's the right way to  
14      think about it.  A prosecutor who does  
15      something shocking --

16             JUSTICE KAGAN:  If there were such a  
17      claim, that would not have as an element  
18      favorable termination, correct?

19             MR. WALL:  No, I -- I think we would  
20      -- even if you said, look, this sounds in  
21      substantive due process rather than procedural  
22      due process, I think we'd still say, look,  
23      that's about something the prosecutor did to  
24      you.  The common law analogy is malicious  
25      prosecution.  And despite all your claims that



1 the prosecutor harmed you, if that ended in a  
2 conviction, you've still got to go to habeas to  
3 try to get that set aside before you can start  
4 bringing damages claims against the state  
5 officials who were involved in the prosecution.

6 But I do think the right way to think  
7 about this is procedural due process. What the  
8 prosecutor does is shocking. We could, should,  
9 and would prosecute that person. But, if you,  
10 the criminal defendant, haven't suffered a  
11 deprivation of liberty as a result --

12 JUSTICE KAGAN: And what is the  
13 deprivation of liberty for a person who is not  
14 in detention and is going to -- and has been  
15 acquitted?

16 MR. WALL: I think, here, the -- the  
17 obvious one that the Respondent conceded below,  
18 so I don't think it's before the Court, is the  
19 travel restrictions, the surrendering of the  
20 passport and all the rest. Petitioner also  
21 points to the having to show up for trial. I'd  
22 caution the Court away from relying on that in  
23 light of the concession because there is a  
24 circuit split on that, about whether, if you're  
25 just required to show up to a hearing, that's a

1 deprivation of liberty for Fourteenth or Fifth  
2 Amendment purposes.

3           So we'd point to the travel  
4 restrictions, and I think Respondent conceded  
5 it below, so you don't need to get into it.

6           Again, the merits of the claim aren't  
7 before the -- the Court. I don't think there's  
8 a split on this in the lower courts, but you  
9 could take it up in another case.

10           As we understand it, the question here  
11 is just --

12           JUSTICE SOTOMAYOR: Mr. Wall --

13           MR. WALL: -- assuming it's procedural  
14 due process, how does the limitations period  
15 run?

16           JUSTICE SOTOMAYOR: -- I -- I worry  
17 about importing the favorable termination rule  
18 for malicious prosecution because it has a lot  
19 of history behind it, including what counts as  
20 a favorable termination.

21           If there is proof that evidence has  
22 been fabricated, that it was material in the  
23 sense that it made a difference in the  
24 proceedings, why should I, as we do in  
25 malicious prosecution that has a totally

1 different set of policy principles underlying  
2 it, why should we import all that history into  
3 this false fabrication claim or tort?

4 MR. WALL: So two things, Justice --

5 JUSTICE SOTOMAYOR: I -- I understand  
6 importing the statute of limitations on a  
7 Heck-Preiser principle. I'm talking about, why  
8 is it necessary to import the same concepts of  
9 favorable termination?

10 MR. WALL: So I think that's my  
11 problem, Justice Sotomayor, is because when  
12 you're looking to the common law -- and Heck is  
13 clear about this, if you look at pages 484 and  
14 489-90 of Justice Scalia's opinion -- you're  
15 not just kind of borrowing in some loose sense  
16 what the common law did. You are looking at  
17 the way it did it and asking yourself, should  
18 we adopt that?

19 And the common law treated this as an  
20 element, so Justice Scalia in Heck said -- and  
21 the claims there were Brady claims and  
22 unfavorable -- tainted lineup claims, and he  
23 said, look, the -- the tort of malicious  
24 prosecution in common law had as an element  
25 favorable termination in order to prevent

1 ongoing attacks on the -- the state criminal  
2 process.

3 We're adopting that element. And so  
4 we're saying that the 1983 claim doesn't  
5 accrue. And we understand that to be the right  
6 way to do this. And then the only question is  
7 we know -- if the fabricated evidence had been  
8 used at trial and there had been a conviction,  
9 we know favorable termination would be an  
10 element. That is Heck. You could not -- and  
11 no one disputes that, I think.

12 And then the only question is, well,  
13 if you're trying to challenge the front end of  
14 the criminal process rather than the back end,  
15 should you have a different rule? And we would  
16 say no, it's still malicious prosecution is the  
17 most analogous tort --

18 JUSTICE SOTOMAYOR: It's not quite --

19 MR. WALL: -- and we know from Heck  
20 the way to do that.

21 JUSTICE SOTOMAYOR: -- because you  
22 just said to me that the use of fabricated  
23 evidence, whether someone's convicted or not,  
24 is, standing alone, wrong.

25 MR. WALL: Oh, it is wrongful for a

1 prosecutor to do it. You have a constitutional  
2 claim, though, only if it results in the  
3 deprivation of your liberty. And you have a  
4 damages claim only once you can show that the  
5 state criminal process that you are attacking  
6 has been terminated favorably to you. And that  
7 is Heck itself.

8 JUSTICE SOTOMAYOR: But why does that  
9 matter, is what I'm saying to you. If -- if  
10 the ill is keep -- using this evidence -- and  
11 for some people, using it will result in  
12 charges being dismissed before a jury is sworn,  
13 but being in the criminal system for a long  
14 period of time, why should those people have to  
15 show a favorable termination in the same way  
16 that malicious prosecution has been defined?

17 MR. WALL: Oh --

18 CHIEF JUSTICE ROBERTS: Very briefly,  
19 Mr. Wall.

20 MR. WALL: For all the same reasons  
21 they have to show it when they are attacking  
22 any other part of the state judicial process,  
23 which is to say the policy reasons that Justice  
24 Scalia gave in Heck and that we set forward in  
25 our brief.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. O'Connor.

4 ORAL ARGUMENT OF THOMAS J. O'CONNOR  
5 ON BEHALF OF THE RESPONDENT

6 MR. O'CONNOR: Mr. Chief Justice, and  
7 may it please the Court:

8 Let me tell you my head has been  
9 spinning from this case for a lot longer than  
10 yours. What we've heard in parts of these  
11 arguments are rather incomprehensible  
12 statements.

13 First, we have a pure malicious  
14 prosecution as opposed to, I assume, an impure  
15 malicious prosecution.

16 JUSTICE GINSBURG: It's what common  
17 law --

18 MR. O'CONNOR: We have --

19 JUSTICE GINSBURG: -- what common law  
20 crime was most analogous. It's not a malicious  
21 prosecution claim, but if we're looking at the  
22 question as what -- how would you type it?  
23 What is the closest common law claim?

24 MR. O'CONNOR: There is none.

25 JUSTICE GINSBURG: There is no claim

1 at common law when a prosecutor deliberately  
2 falsifies evidence in order to convict an  
3 innocent person?

4 MR. O'CONNOR: I think -- I'm not sure  
5 there is one, and I think that this type of  
6 conduct is so stunning and so in contradiction  
7 of our basic fundamental policies that it  
8 stands alone --

9 JUSTICE GINSBURG: Then --

10 MR. O'CONNOR: -- as a constitutional  
11 violation.

12 JUSTICE GINSBURG: Then --

13 MR. O'CONNOR: Now there are, of  
14 course, those criminal cases where, after a  
15 conviction, as a result of perjured testimony,  
16 that, of course, is a preeminent due process  
17 violation.

18 However, in those cases, and I hark  
19 back to Justice Alito's exchange, the word  
20 "materiality" used in those cases is not used  
21 in the evidentiary sense. It is used in the  
22 proximate cause sense, and that is an element  
23 of -- of the analysis in those cases.

24 JUSTICE GINSBURG: Well, you say that,  
25 if there's a -- if there's a due process claim,

1 it's substantive, and I find that very hard to  
2 fathom, because isn't it -- fundamental  
3 fairness -- a fundamentally fair trial is what  
4 you're entitled to as a matter of procedural  
5 due process, and how can your trial be  
6 fundamentally fair if the prosecutor has just  
7 made up evidence to convict you?

8 MR. O'CONNOR: Well, I understand your  
9 point. I -- I follow the root of shocking the  
10 conscience when it comes to categorizing this  
11 type of a claim. But I think reasonable people  
12 can disagree on -- on where it actually falls.  
13 It certainly falls under the due process  
14 umbrella.

15 The determination of the court of  
16 appeals was correct in this case for two  
17 reasons. One, the Petitioner has failed to  
18 state a discrete constitutional claim based  
19 upon fabricated evidence.

20 This Court has been clear that where a  
21 1983 claim alleges an absence of probable  
22 cause, including where fabricated evidence is  
23 used, all of the pretrial deprivations of  
24 liberty that go hand in hand with the criminal  
25 prosecution are encompassed in the Fourth



1 Amendment.

2 CHIEF JUSTICE ROBERTS: I -- I'm not  
3 sure I understand your point, that you -- maybe  
4 this is repetitious, but you think there is no  
5 cause of action in a situation like this?

6 Let's put the prosecutorial immunity  
7 to one side if we're dealing with police  
8 fabrication.

9 MR. O'CONNOR: If -- what we have  
10 heard and what we have read in the briefs is  
11 the mischief that it's caused where the parties  
12 do not identify, pinpoint the constitutional  
13 right involved, even after decades of urging by  
14 the --

15 CHIEF JUSTICE ROBERTS: Do you think  
16 there is one? If you were representing the  
17 other side, what -- what would you say is  
18 the -- is the claim? Is there -- is there a  
19 claim in a case of this sort?

20 MR. O'CONNOR: There may be a claim  
21 under what I perceive to be the substantive due  
22 process clause.

23 JUSTICE GINSBURG: Then, well, let's  
24 go back to my question. Why is it substantive  
25 due process when the plaintiff is saying, I was

1 deprived of the most fundamental procedural  
2 right; that is, to have a fair trial  
3 proceeding? Why isn't that evidently  
4 procedural due process?

5 MR. O'CONNOR: Well, of course, you're  
6 right. The trial wasn't fair because this  
7 atrocious -- allegedly atrocious perjury was  
8 committed. But, in terms of procedural due  
9 process, I -- I think the procedures have not  
10 been challenged.

11 It is the dramatic allegation that  
12 there was perjury throughout, and --

13 JUSTICE GINSBURG: But it was --  
14 that's what made it a corrupt process.

15 MR. O'CONNOR: Okay. I'm not -- I'm  
16 not going to dispute that with you, Judge  
17 Ginsburg.

18 JUSTICE SOTOMAYOR: So what remains of  
19 your argument if that's true?

20 MR. O'CONNOR: Pardon me, Judge?

21 JUSTICE SOTOMAYOR: If it's a  
22 procedural due process violation, what remains  
23 of your argument? If you accept Justice  
24 Ginsburg's view --

25 MR. O'CONNOR: It -- it still falls

1 under the Fourteenth Amendment, exclusive of  
2 any claims or injuries or deprivations that  
3 fall within the Fourth Amendment.

4 JUSTICE SOTOMAYOR: All right. So  
5 we're there. So how does that affect or not  
6 affect the statute of limitations?

7 MR. O'CONNOR: In the --

8 JUSTICE SOTOMAYOR: So it's a  
9 procedural due process violation. If it's  
10 being used throughout the trial, this  
11 fabricated evidence, why doesn't each use and  
12 until there's an acquittal constitute either a  
13 continuing violation or a finishing of the  
14 accrual time?

15 MR. O'CONNOR: Well, first -- first of  
16 all, my view is that it is not a procedural due  
17 process violation.

18 JUSTICE SOTOMAYOR: I -- I accepted  
19 that. But you said that Justice Ginsburg's  
20 view, you weren't going to argue with.

21 MR. O'CONNOR: In that -- in that  
22 scenario, each use would be a -- a violation of  
23 the due process clause. And you would -- and  
24 since it's a isolated, distinctive use, it  
25 would accrue when it was used and when the

1 defendant had knowledge of it.

2 JUSTICE KAGAN: Mr. O'Connor, is what  
3 you're saying -- and -- and tell me if I'm  
4 wrong about what you're saying, because I might  
5 very well be wrong about what you're saying,  
6 but I'll just hazard this theory of it, which  
7 is, when the claim has as one of its components  
8 that there's a deprivation of liberty, then it  
9 makes some sense to have a favorable  
10 termination date as part -- as an element of  
11 that claim.

12 But you're suggesting -- as I hear  
13 you, you're suggesting that there's a claim  
14 that doesn't have anything to do with a  
15 deprivation of liberty. It arises even without  
16 and irrespective of any deprivation of liberty,  
17 just because of -- of the fabrication itself.

18 And if you had such a claim, that  
19 wouldn't really suggest that a favorable  
20 termination date is part of the claim  
21 because -- because it has nothing to do with  
22 the claim.

23 MR. O'CONNOR: That's right.

24 JUSTICE KAGAN: The claim is only  
25 about the use. It has nothing to do with the

1 deprivation of liberty.

2 Is that what you're saying?

3 MR. O'CONNOR: That's correct. That  
4 claim is indifferent to either probable cause  
5 or any termination.

6 JUSTICE KAGAN: So -- but the --  
7 what -- the problem is that the Petitioner says  
8 it's not making that claim.

9 MR. O'CONNOR: It's hard to say what  
10 claim the Petitioner is making. It -- it  
11 started out with -- with two claims, a  
12 malicious prosecution claim and a fabrication  
13 of evidence claim.

14 The malicious prosecution claim was  
15 dismissed. The Second Circuit affirmed the  
16 dismissal and it -- the dismissal remains  
17 unchallenged.

18 So the plaintiff comes along with  
19 its -- with -- with the claim that it labels  
20 fabrication of evidence, but it describes its  
21 nature, both in its main brief in the court of  
22 appeals and its reply, it's a quick --

23 JUSTICE GINSBURG: Go back to our  
24 original -- our original colloquy is not  
25 whether this is a malicious prosecution claim.

1 This is a fabrication of evidence in order to  
2 convict.

3 What is the closest analogy at common  
4 law? And you -- you said there is none in  
5 answer to my prior question. If -- if it isn't  
6 -- if malicious prosecution isn't the closest  
7 analogy, what is?

8 MR. O'CONNOR: I'm not sure there is a  
9 closest analogy. But what I was --

10 JUSTICE GINSBURG: Does that mean  
11 there is no such claim?

12 MR. O'CONNOR: Pardon me, Judge?

13 JUSTICE GINSBURG: Then -- then  
14 there's no -- no -- there's no claim at --

15 MR. O'CONNOR: There doesn't have to  
16 be a common law analogue for there to be a  
17 constitutional claim, particularly in this  
18 instance, where the claim is committing perjury  
19 either during the grand jury presentation or  
20 during trial.

21 JUSTICE GINSBURG: But don't we have  
22 to analogize it to something in order to  
23 determine what limitation period will apply?

24 MR. O'CONNOR: I don't think that's  
25 necessary, no, because if -- if it is a

1 self-standing claim that is indifferent to  
2 probable cause or favorable termination or any  
3 termination, then the presumption is that the  
4 standard accrual rule would apply.

5 But, as I --

6 JUSTICE BREYER: It's a presumption,  
7 but in this case, if you let people to bring  
8 lawsuits while a criminal trial is going on at  
9 the same time, they're bringing a civil lawsuit  
10 against some of the people who are heavily  
11 involved in the case, and you're -- you're  
12 going to mix up many cases, and people will  
13 watch what they say or -- who knows.

14 But there's a pure policy reason for  
15 saying, however you characterize this suit,  
16 wait 'til the case is over until you bring it.  
17 And, therefore, the statute of -- you can't  
18 bring it while the case is still going on. I  
19 mean, that's basically the argument I got out  
20 of these briefs, if I'm right.

21 Okay. What's the answer to that --

22 MR. O'CONNOR: The --

23 JUSTICE BREYER: -- in your opinion?

24 MR. O'CONNOR: -- the Second Circuit  
25 acknowledges this type of a claim --

1 JUSTICE BREYER: Uh-huh.

2 MR. O'CONNOR: -- in limited  
3 circumstances, for example, where, although  
4 there is sufficient evidence to satisfy  
5 probable cause, the 1983 plaintiff alleges that  
6 there is unrelated independent evidence that is  
7 fabricated.

8 JUSTICE BREYER: And I'm not asking  
9 something complicated. I'm just saying,  
10 whatever you call it, whatever evidence, I  
11 don't care, I'm interested in the policy  
12 argument that you shouldn't allow a person to  
13 bring this claim until the criminal trial is  
14 over. And the reason is a contrary rule risks  
15 getting everything mixed up in the criminal  
16 trial. That's the -- I take it -- am I -- that  
17 seems to be an important argument against what  
18 the Second Circuit did.

19 Now I'm just repeating myself, but I  
20 just would like you to deal directly with that  
21 kind of question.

22 MR. O'CONNOR: In both Heck --

23 JUSTICE BREYER: Whatever you want to  
24 call it in terms of characterizing the action.  
25 I'm not interested in that for the moment. I'm



1 interested in the words that I used, "mixed  
2 up."

3 MR. O'CONNOR: In -- in Heck and  
4 Wallace, this Court envisioned the criminal  
5 case and the civil case being pursued at the  
6 same time. And in Wallace, the Court stated  
7 that, under these circumstances, the district  
8 court is in the best position to sift through  
9 things and see whether a prudential stay is  
10 appropriate.

11 CHIEF JUSTICE ROBERTS: Well, but, I  
12 mean, it's still problematic even with a stay.  
13 You have a -- a complaint.

14 I mean, I think it's -- it is a  
15 serious concern while the criminal prosecution  
16 is going on to say, well, let's file a lawsuit  
17 against, you know, the -- the assistant  
18 district attorney, and, you know, that might --  
19 see if that makes him a little less inclined,  
20 you know, to -- to enter into a plea agreement  
21 or -- or other situations.

22 It does complicate all that's going on  
23 in what, for a criminal defendant falsely  
24 accused, as it turns out, is also -- is already  
25 in a pretty dire place. And I can certainly

1 see that suing the people who are trying to  
2 prosecute you may not be the best strategy.

3 MR. O'CONNOR: Well, in -- in the  
4 Second Circuit, the prudential stay has been in  
5 use for decades with no -- no untoward results.  
6 And --

7 CHIEF JUSTICE ROBERTS: Well, how do  
8 you know that? I mean -- I mean -- by a  
9 prudential stay, you mean -- presumably, you  
10 have to file a complaint before you can get a  
11 stay, right?

12 MR. O'CONNOR: Yes.

13 CHIEF JUSTICE ROBERTS: Well, then  
14 that seems to present most of the problems that  
15 are -- are at issue. Sure, you have a stay so  
16 you're not taking the depositions of people who  
17 are also being -- testifying in the criminal  
18 case, but you do have to spell out your  
19 allegations, and that can certainly be very  
20 prejudicial.

21 MR. O'CONNOR: Well, I think there are  
22 -- requiring the case -- requiring -- using the  
23 traditional accrual rule provides a prompt  
24 appraisal of what possible misconduct may be  
25 going on. It enables the municipal employers

1 and officials to review it, to investigate, and  
2 to preserve records. And it -- it is also fair  
3 to the plaintiff to be able to pursue this  
4 claim, these claims, some of which have nothing  
5 to do with the outcome. And therein lies the  
6 -- the valuable role of -- of the district  
7 court.

8           So I think that it wouldn't -- I'd be  
9 disappointed if the Court sacrificed the  
10 correct to the convenient. And there's  
11 something to be said for maintaining --  
12 particularly in this area, where there's a lot  
13 of confusion, maintaining an orderly approach  
14 to accrual.

15           JUSTICE SOTOMAYOR: I'm sorry, if this  
16 behavior, if it's true -- I'm not assuming  
17 anything -- if a prosecutor fabricates  
18 evidence -- and you said it's stunning and  
19 shocks the conscience, that's how you described  
20 it --

21           MR. O'CONNOR: Yes.

22           JUSTICE SOTOMAYOR: -- why would we  
23 care about how long it would take to seek  
24 redress from that prosecutor? Something that  
25 shocks the conscience appears to me to be so

1       egregious that we should ensure, even with  
2       delayed time, that the victim of that conduct  
3       would not be deprived of a day in court because  
4       of a hastily imposed statute of limitations.

5               MR. O'CONNOR: Well, first of all,  
6       that would be just an allegation, which is why  
7       a prompt investigation would be needed. And it  
8       would be only fair to apprise the particular  
9       defendants what the new --

10              JUSTICE SOTOMAYOR: Well, it seems to  
11       me that most prosecutors in a contested trial  
12       know that the defendant is still claiming his  
13       or her innocence and, by implication, is still  
14       claiming that the evidence at the trial -- that  
15       there's something wrong with it.

16              So it's not as if speed is in the  
17       essence in notifying the prosecutor that  
18       there's a potential claim there.

19              MR. O'CONNOR: Well, let me -- in this  
20       case, after the -- after the defendant was  
21       acquitted in this case, he had two years and  
22       three months to file this action in a timely  
23       manner, embracing both of the claims.

24              So the idea that because you're using  
25       the traditional accrual rule, that you're --

1 you're putting the defendant's back against the  
2 wall as a practical matter is not true.

3 CHIEF JUSTICE ROBERTS: Well, it may  
4 not be true in this case, but it depends in  
5 other cases when the accrual would occur. I  
6 don't think we can establish a rule based on  
7 the fact that the individual in this case had  
8 two years and three months when other  
9 individuals may not have anywhere near that  
10 time.

11 MR. O'CONNOR: Granted. But,  
12 Mr. Chief Justice, in any statute of  
13 limitations case or issue, you're going to have  
14 examples that appear to be unfair.

15 So I -- I -- on -- on the other side  
16 of that question, if a defendant feels that  
17 there is improper conduct, that there is  
18 perjury, that there is manufactured evidence,  
19 he chooses his remedies and he is really bound  
20 by what the -- what the law provides for -- for  
21 get --

22 CHIEF JUSTICE ROBERTS: Well, we're  
23 trying to figure that out. In -- in a  
24 situation like this, you know, it may take a  
25 little -- a little bit of time to get the

1 pieces of your shattered life, because of  
2 fabricated evidence, pulled together before you  
3 can suddenly decide, okay, now -- now we're  
4 going to sue the people who did this to me.

5 MR. O'CONNOR: Well, I -- I  
6 understand.

7 JUSTICE GINSBURG: You do say  
8 something in your brief, I think, that was  
9 puzzling. You say that an acquittal at trial  
10 means that the use of false testimony at that  
11 trial didn't deprive him of liberty. You say  
12 he's been acquitted, so he's at liberty.

13 But what about his liberty from the  
14 time he was indicted through to the end of that  
15 trial? Wasn't he deprived of liberty in that  
16 interval?

17 MR. O'CONNOR: Yes, but, again, I -- I  
18 think that falls for the most part within his  
19 Fourth -- Fourth Amendment claim, which was  
20 dismissed.

21 So, to continue with my argument --

22 JUSTICE GINSBURG: So -- but -- but  
23 now -- now you're saying he -- he was deprived  
24 of liberty, but not for due process purposes,  
25 only for Fourth Amendment purposes?

1                   MR. O'CONNOR: I'm sorry, Judge. I  
2 couldn't understand.

3                   JUSTICE GINSBURG: You said -- you  
4 said he was deprived of liberty. By having to  
5 undergo a trial, he was deprived of liberty.  
6 But you say --

7                   MR. O'CONNOR: I'm not sure that just  
8 being compelled to undergo a trial constitutes  
9 a deprivation of liberty.

10                  JUSTICE GINSBURG: What about all the  
11 time that he lost? Let's say he's a contractor  
12 and he -- he can't take a long-term contract  
13 because he might be in prison while the  
14 contract would still be running its course.

15                  MR. O'CONNOR: Sure. These are --  
16 these are -- these complaints fall under the  
17 rubric of custody. Custody is a Fourth  
18 Amendment concept, and that would -- that type  
19 of a claim, that type of damage, would come  
20 under the Fourth Amendment umbrella under the  
21 constitutional division of labor that this  
22 Court set forth in Footnote 8 of Manuel.

23                  JUSTICE KAGAN: I thought that that  
24 division of labor was about things that  
25 happened prior to a judicial process starting

1 and things that happened afterward.

2 MR. O'CONNOR: No. That, in fact,  
3 involved pretrial deprivations -- deprivations  
4 of right up to the time of trial. And, you  
5 know, when you read -- when you read Albright  
6 and you read Manuel, I mean, the Court is  
7 basically saying to the due process people:  
8 Stay the heck out of this area. This is  
9 occupied by the Fourth Amendment.

10 So the problem that the Petitioner has  
11 is most, if not all, of his claim has been  
12 dismissed. Look at how he has described the  
13 nature of his fabrication of evidence claim in  
14 his -- in his brief before the -- before the  
15 court of appeals.

16 His brief, page 4, it is a  
17 quintessential malicious prosecution claim.  
18 And he says the same thing in his reply at page  
19 2, and then, subsequently, he says it's based  
20 on the initiation of a criminal proceeding  
21 based upon fabricated evidence.

22 JUSTICE KAVANAUGH: Your --

23 MR. O'CONNOR: Now --

24 JUSTICE KAVANAUGH: -- your rule could  
25 encourage -- correct me if I'm wrong -- could



1 encourage the filing of 1983 suits while the  
2 criminal process is ongoing?

3 MR. O'CONNOR: I didn't hear the  
4 beginning of your question, Judge. I'm sorry.

5 JUSTICE KAVANAUGH: Your proposed rule  
6 for this case could encourage the filing, the  
7 routine filing even, of 1983 suits during the  
8 midst of the criminal proceedings, isn't that  
9 correct?

10 MR. O'CONNOR: That is correct. I  
11 don't discount that, yes.

12 JUSTICE KAVANAUGH: And that's not a  
13 problem, you don't think, to -- in the orderly  
14 division of how this should proceed, to have  
15 the criminal process come to a conclusion and  
16 then, if there's going to be a tort suit, to  
17 have that follow on? Why isn't that not a more  
18 orderly --

19 MR. O'CONNOR: It may be more orderly,  
20 but it's incorrect. If there's not a legal  
21 reason to do it, I would discourage the Court  
22 from doing it.

23 If the claim has accrued, if all of  
24 its elements are --

25 JUSTICE KAVANAUGH: Well, just if

1 the -- if the law is murky, and we're -- we can  
2 choose one path or another reasonably as a  
3 matter of law, wouldn't we choose the more  
4 orderly, practical approach, which would  
5 suggest, I think, let's not encourage the  
6 filing routinely of 1983 suits in the midst of  
7 the criminal process?

8 MR. O'CONNOR: It's kind of a loaded  
9 question, Judge, I think. Perhaps. Perhaps.  
10 I'll grant you that. But I -- I just don't  
11 think it's the right way to go.

12 This is an area that could use some  
13 rigor. It's kind of a thick one. And -- and I  
14 -- I think we --

15 JUSTICE KAVANAUGH: Well, on the  
16 rigor, you -- you say that a stay is routinely  
17 granted in the Second Circuit, I believe you  
18 said.

19 MR. O'CONNOR: It is used in -- in the  
20 appropriate cases.

21 JUSTICE KAVANAUGH: And doesn't the  
22 stay reflect the concept or the idea that it  
23 would not be orderly to have these two things  
24 going on simultaneously?

25 MR. O'CONNOR: I think it's more based

1 upon a review of the claims in the specific  
2 case. And if the judge feels that, whoa, you  
3 know, we better hold things up here because  
4 there is a direct conflict and one party may be  
5 prejudiced if they continue at the same time, I  
6 -- I think that's really where the analysis is.

7           So, basically, the -- the Petitioner  
8 is asking the Court, I know my malicious  
9 prosecution case has been dismissed, but I want  
10 you to review this claim as though it was a  
11 malicious prosecution claim. And in doing so,  
12 he is importing elements from a malicious  
13 prosecution claim into the analysis of the  
14 fabricated evidence claim.

15           Now, two years ago, this Court in  
16 County of Los Angeles versus Mendez warned that  
17 you shouldn't do this. You shouldn't use  
18 elements from a discrete 1983 case to assess  
19 the validity of an independent and discrete  
20 1983 case.

21           So I think that because of this  
22 tortured argument importing unrelated elements  
23 merely to salvage a time-barred case, it  
24 defaces the -- the -- the Petitioner's claim,  
25 transforming it into something else. And

1 that's why I conclude that he -- that the  
2 Petitioner hasn't really set forth a discrete  
3 constitutional claim.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Four minutes,  
6 Mr. Katyal.

7 REBUTTAL ARGUMENT OF NEAL K. KATYAL  
8 ON BEHALF OF THE PETITIONER

9 MR. KATYAL: Thank you, Mr. Chief  
10 Justice.

11 I -- I just have one point. Justice  
12 Gorsuch, you asked Mr. Wall why decide this  
13 case when there's daylight between the  
14 government and the Petitioner about whether the  
15 termination requirement is a necessary element.

16 And we think this Court should resolve  
17 this because of the massive circuit split  
18 that's outlined in the petition and leave open  
19 the question of whether it's a mandatory  
20 element.

21 And we think so for two reasons. One  
22 of the policy concerns that the Chief Justice  
23 pointed to, Justice Sotomayor, Justice Breyer,  
24 and Justice Kavanaugh, about not wanting to  
25 force people to file during their criminal

1 trial, and this is really important, as the  
2 amici say, there's a rampant problem of  
3 fabrication of evidence.

4 And as Justice Ginsburg says, that's  
5 the kind of quintessential due process  
6 violation this Court has recognized since  
7 Mooney.

8 And the second point, most notably,  
9 contrary, Justice Gorsuch, to the premise of  
10 your question, it's quite remarkable to  
11 actually have the federal government agreeing  
12 with this former criminal defendant on this  
13 issue and saying the policy concerns -- as  
14 Justice Kavanaugh says, the orderly and  
15 practical policy concerns are ones that say  
16 that a favorable termination rule, at least at  
17 a minimum, should be imported as a limitations  
18 rule.

19 That would safeguard the policy  
20 concerns, all the different policy concerns  
21 that the favorable termination requirement has  
22 had at common law, and you then leave for  
23 another day the further question, is it an  
24 absolutely mandatory element on the merits?

25 We think that's the simplest way to

1 resolve this case. There are other theories  
2 like continuing violation and the like and I'm  
3 happy to answer any questions on -- on that.

4 Otherwise --

5 JUSTICE GORSUCH: Is what you're  
6 arguing for really a form of equitable tolling?

7 MR. KATYAL: Well, I think equitable  
8 tolling is different for reasons -- it's a  
9 different strand, as this Court recognized in  
10 that 1985 case, Wilson versus Garcia, but I  
11 guess we wouldn't have an objection if the  
12 Court wanted to fashion an equitable tolling  
13 rule.

14 We don't think you have to here. We  
15 think instead you can do what Judge Boggs did  
16 in the Sixth Circuit, what Judge Motz did in  
17 the Fourth Circuit, and what the Ninth Circuit  
18 did as well, and say this first theory that  
19 favorable termination is a limitations rule,  
20 just import that, it tracks Justice Scalia's  
21 opinion in Wallace, and leave it at that.

22 JUSTICE ALITO: Just -- just to  
23 clarify for my own thinking, what are the  
24 elements of your claim?

25 MR. KATYAL: The elements of the claim

1 are the -- are -- are -- are the four that I  
2 read to you earlier, so it's initiation or  
3 continuation of a criminal proceeding;  
4 termination of the proceeding; lack of probable  
5 cause -- oh, excuse me, it's -- sorry, that's  
6 the malicious prosecution.

7 For -- for fabrication of evidence,  
8 it's fabrication of evidence caused a  
9 deprivation of liberty. It tracks very much  
10 what Mr. Wall had -- had said in his  
11 presentation to you.

12 And we agree very much that there is a  
13 difference between probable cause and the Fifth  
14 Amendment standard.

15 JUSTICE ALITO: So, in -- in every  
16 case in which someone is prosecuted, will there  
17 not be the deprivation of liberty under your  
18 understanding?

19 MR. KATYAL: Well -- well, there --  
20 there -- there could be some deprivations of  
21 liberty but often not. They could not -- they  
22 may not have the travel restrictions we point  
23 to here. So, here, that's --

24 JUSTICE ALITO: So, if they're just --  
25 if they're just released on their own

1       recognizance, then there would be no  
2       deprivation of liberty, but if there are any  
3       other restrictions, every other case where  
4       there are any restrictions imposed, there would  
5       be the deprivation of liberty?

6               MR. KATYAL: Well, I -- I -- I think  
7       there might or might not. As this case comes  
8       to the Court, Petition Appendix 10(a) says they  
9       conceded a deprivation of liberty here.

10              JUSTICE ALITO: No, I'm just trying to  
11       understand --

12              MR. KATYAL: Yeah.

13              JUSTICE ALITO: -- the elements.  
14       So, really, the only important element is the  
15       fabrication of evidence.

16              MR. KATYAL: And causation, which  
17       turns out to be crucial in a lot of these  
18       cases.

19              JUSTICE ALITO: Causation of what?

20              MR. KATYAL: So -- cause -- you have  
21       to show that the fabrication itself caused a  
22       deprivation of liberty. So, if, for example,  
23       there's a massive amount of other evidence or  
24       something like that, then that doesn't cause a  
25       deprivation of liberty.



1                   If there are no further questions.

2                   CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel. The case is submitted.

4                   (Whereupon, at 12:06 p.m., the case  
5 was submitted.)

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