No. 18-485

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Court granted certiorari to decide when the statute of limitations on a Section 1983 claim alleging fabrication of evidence begins to run. Rather than engage in any meaningful way with that question—or with the opening brief—Smith disputes whether McDonough has a Section 1983 claim at all, whether Smith is shielded by absolute immunity, and whether the Second Circuit's ruling on a separate claim somehow forecloses this one. Those arguments are wrong, forfeited, and not encompassed within the question presented.

McDonough's opening brief scrupulously follows this Court's approach to analyzing the "contours and prerequisites" of a Section 1983 claim. *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920-921 (2017) ("*Manuel I*"). The "constitutional right at issue" is the right not to be deprived of liberty on the basis of fabricated evidence, which violates both the Fourth and Fourteenth Amendments. *Id*. at 920 (internal quotation marks omitted). The "most analogous tort" is malicious prosecution. *Id*. The statute of limitations for that tort does not begin to run until criminal proceedings terminate in a defendant's favor. The reasons for that common law rule—to avoid parallel litigation and conflicting resolutions in different courts—apply equally here and are fully consonant with the constitutional right to be protected. *Id*. at 921. The Court should therefore adopt that limitations rule and hold that McDonough's claim is timely.

Smith complains that McDonough has "resolutely refuse[d]" to identify the constitutional right at issue. Resp. Br. 1. That is simply untrue: Smith violated the Fourth and Fourteenth Amendments by fabricating evidence that led to criminal proceedings and hence the deprivation of McDonough's liberty. Pet. App. 10a, 57a, 105a-106a; JA249-253, ¶¶ 1198-1213. This Court does not need to take up in this case whether Smith violated the Fourth Amendment, the Fourteenth Amendment, or both. Nor need it decide *all* the elements that McDonough will eventually have to prove to win on the merits. Those are not jurisdictional questions, they are not encompassed within the question presented, and they do not affect when the statute of limitations on McDonough's claim began to run. *See* U.S. Br. 13. Wherever

McDonough's claim is textually housed, the common law analog is the same, and the compelling reasons for delaying the onset of the limitations period are the same.

Smith also argues that the liberty deprivation suffered by McDonough cannot be attributed to the fabricated evidence. According to Smith, McDonough "does not assert a lack of probable cause," and any deprivation of liberty was caused solely by the existence of probable cause rather than by the fabricated evidence. Resp. Br. 23-24. That is wrong. Most obviously, the District Court found that McDonough *did* sufficiently allege a lack of probable cause. Pet. App. 56a, 105a. Further, although McDonough must show that "the deprivation of liberty" was "a legally cognizable result of the initial misconduct" to obtain compensatory damages under Section 1983, *Zahrey* v. *Coffey*, 221 F.3d 342, 351 (2d Cir. 2000); *see Carey* v. *Piphus*, 435 U.S. 247, 254-255 (1978), the absence of probable cause is only one way to make that showing. As the Second Circuit has recognized, fabricated evidence may contribute to the decision to initiate and maintain criminal proceedings—and thus cause a liberty deprivation—even where there is other evidence establishing probable cause. *See Garnett* v. *Undercover Officer C0039*, 838 F.3d 265, 277 (2d Cir. 2016); *see also Black* v. *Montgomery Cty.*, 835 F.3d 358, 369-372 (3d Cir. 2016); *Halsey* v. *Pfeiffer*, 750 F.3d 273, 285 (3d Cir. 2014) (describing prosecutor's acknowledgment that "he would not have charged" the defendant in the absence of the fabricated evidence).

Smith also suggests that McDonough's fabrication of evidence claim is somehow subsumed within his

Section 1983 malicious prosecution claim. *See* Resp. Br. 1-2. Not so. As Smith and the Second Circuit recognized, Section 1983 claims based on fabrication of evidence and malicious prosecution are distinct, Pet. App. 15a & n.12, and have "different elements," Resp. Br. 2. To state the obvious, McDonough's fabrication of evidence claim involves *fabricating evidence*, while his malicious prosecution claim focuses on Smith's malice and the lack of justification for the criminal proceedings. The dismissal of one claim thus does not entail the dismissal of the other. And *distinct* constitutional claims can share the same common law analog. *See, e.g.*, *Heck* v. *Humphrey*, 512 U.S. 477, 483-484 (1994).

Finally, Smith opines that the Second Circuit's rule would be better for both civil rights plaintiffs and prosecutors. But that is flatly "contradicted by those who know best." *Wallace* v. *Kato*, 549 U.S. 384, 397 (2007). The criminal defense and civil rights bars have overwhelmingly rejected the Second Circuit's limitations rule. *See* Criminal Defense Organizations et al. Amicus Br. 3-25; Innocence Network Amicus Br. 15-38; Criminal Justice Institute Amicus Br. 4-13. And so have the Department of Justice and an organization comprised largely of former prosecutors. *See* U.S. Br. 9-28; *see also* Center on the Administration of Criminal Law et al. ("CACL") Amicus Br. 6-23.

In short, the Second Circuit's rule is unsupported by precedent or policy. This Court should reverse.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR MCDONOUGH'S SECTION 1983 CLAIM DID NOT BEGIN TO RUN UNTIL FAVORABLE TERMINATION UNDER THIS COURT'S "ANALOGOUS TORT" ANALYSIS.

This Court has repeatedly set forth the proper analytical approach for answering the question presented. *Manuel I*, 137 S. Ct. at 920. The "threshold inquiry" is "to identify the specific constitutional right at issue." *Id*. (internal quotation marks omitted). Then, to determine the "rule of accrual" for that constitutional right, "courts are to look first to the common law of torts." *Id*. Specifically, courts must pinpoint "the most analogous tort" at common law, which "guide[s] * * * the definition" of the Section 1983 claim. *Id*. at 920-921. Sometimes that means "adopt[ing] wholesale the rules that would apply in a suit involving the most analogous tort," though not in every case. *Id*. at 920. "In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Id*. at 921. McDonough's opening brief followed to a tee this well-trod framework. Smith all but ignores it.

The "constitutional right at issue" here, *id*., is a violation of two provisions of the Constitution. *See* JA251-253, ¶¶ 1209-1213; Pet. Br. 2, 23, 39-43. First, depriving McDonough of liberty on the basis of fabricated evidence is a "classic * * * violation" of the Due Process Clause. *Zahrey*, 221 F.3d at 348; *see* Pet. Br. 39-41; U.S. Br. 13-15. It is also an "unreasonable * * * seizure[]" of his person, in violation of the Fourth Amendment. U.S. Const. amend. IV, *see*

Albright v. *Oliver*, 510 U.S. 266, 277-280 (1994) (Ginsburg, J., concurring); Pet. Br. 41-42. Even Smith does not appear to dispute that to deprive a person of liberty on the basis of fabricated evidence violates the Constitution; it is, after all, "self-evident" that "those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 100 (1st Cir. 2013) (internal quotation marks omitted). Smith and his amici instead argue that McDonough has somehow erred in his contention—seconded by the United States—that there is no need for the Court to use this case to decide whether the deprivation of McDonough's liberty is best viewed as a violation of the Fourth Amendment, the Fourteenth Amendment, or both. But as McDonough explained, nothing turns on that distinction here because the Fourth and Fourteenth Amendments both lead to the same limitations rule.

The next step in the analysis is to identify the "common-law cause of action" that "provides the closest analogy to claims of the type considered here." *Heck*, 512 U.S. at 484; *Wallace*, 549 U.S. at 388. For McDonough's claim, the most analogous cause of action is malicious prosecution. *See* Pet. Br. 14-15, 23-24; U.S. Br. 17-20. Although Smith acknowledges that common law principles "guide" the definition of Section 1983 claims, he does not bother to identify any common law tort that is more analogous to McDonough's claim than malicious prosecution. Resp. Br. 15 (quoting *Manuel I*, 137 S. Ct. at 921). There is no disagreement, then, on this core issue: "The common-law cause of action" that "provides the closest analogy to claims of the

type considered here" is malicious prosecution. *Heck*, 512 U.S. at 484; *Wallace*, 549 U.S. at 388.[1]

Accordingly, the limitations rule applicable to malicious prosecution at common law "guide[s]" the Court's consideration of when the limitations period began to run on McDonough's Section 1983 claim based on fabrication of evidence. *Manuel I*, 137 S. Ct. at 921; *Wallace*, 549 U.S. at 388-389. At common law, the limitations clock for malicious prosecution is subject to a "distinctive" rule: It begins to run at favorable termination. *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015) (noting "distinctive" rule for malicious prosecution); *see Manuel I*, 137 S. Ct. at 924 (Alito, J., dissenting) (noting "unique accrual rule" for malicious prosecution). If applied to McDonough's Section 1983 claim, that rule would serve the essential function of mediating parallel civil and criminal proceedings and would assist criminal defendants in vindicating their rights. *See* Pet. Br. 28-30. As in *Wallace*, the "distinctive" common law limitations rule should therefore govern fabrication of evidence claims like McDonough's. 549 U.S. at 388-389.

The United States argues that there is "no distinctive accrual rule for claims of malicious prosecution at common law." U.S. Br. 10, 21. Instead, the United States contends that favorable termination is

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[1] Smith suggests that malicious prosecution would not be an appropriate analog if lack of probable cause is not an element of McDonough's ultimate claim. Resp. Br. 3-4. But the fact that a Section 1983 claim and a common law claim do not share identical elements does not mean that they are not analogous, and, again, Smith does not identify a better analogy.

simply an "element" of the tort of malicious prosecution, dictating the limitations period under the "standard" rule for accrual. *Id.* But a key reason favorable termination is an element of the common law tort of malicious prosecution is precisely because it delays the onset of the limitations period. *Heck*, 512 U.S. at 484-486; *see Erlin* v. *United States*, 364 F.3d 1127, 1131 (9th Cir. 2004). In other words, the element regulates the relationship between parallel proceedings for a tort that will necessarily invite such proceedings. *See* W. Page Keeton et al., Prosser and Keeton on Torts § 119, at 874 (5th ed. 1984) (favorable termination requirement reflects "a belief that the malicious prosecution action should not be tried at a time when it might tend to chill testimony in the criminal action"). Given that an essential function of requiring favorable termination is to control the onset of the limitations period, it makes perfect sense for the Court simply to adopt the limitations rule directly.

Indeed, the very treatise this Court cited in *Wallace* to support its conclusion that false arrest claims are subject to a "distinctive" limitations rule, 549 U.S. at 389 (citing 2 H. G. Wood, A Treatise on the Limitation of Actions at Law and in Equity § 187d(4), at 878 (rev. 4th ed. 1916)), describes malicious prosecution claims in identical terms. The treatise explains that, although limitations periods for personal injury actions generally begin to run "from the date of the injury," both false imprisonment and malicious prosecution are subject to a different rule: "Limitations begin to run against an action for false imprisonment when the alleged false imprisonment ends; and against an action for malicious prosecution when the prosecution is ended or abandoned." Wood,

supra, § 187d(4), at 878 (footnotes omitted). The Court should do here what it did in *Wallace*: apply the common law's "distinctive" limitations rule for malicious prosecution to McDonough's analogous Section 1983 claim. 549 U.S. at 389. Under that analysis, McDonough's suit is timely, and the Court need not address whether favorable termination is an element of his claim.[2]

II. MCDONOUGH'S CLAIM IS TIMELY UNDER THE "STANDARD" RULE FOR ACCRUAL.

A. Because *Preiser* And *Heck* Foreclose Section 1983 Claims Before Favorable Termination, Such Claims Do Not Accrue Until That Point.

Under the "standard" accrual rule, a limitations period does not begin to run until a "plaintiff is permitted to file suit." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 106 (2013). Under *Preiser* and *Heck*, McDonough was not permitted to file suit until he was acquitted, rendering his suit timely.[3]

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[2] As this Court recognized in *Wallace*, a criminal defendant may be entitled to bring a Section 1983 suit before the statute of limitations begins to run. 549 U.S. at 389-390 & n.3. *Heck* and *Preiser*, however, would likely bar suit prior to favorable termination in most cases. *See infra* pp. 9-13.

[3] Smith states in passing that this argument is waived. Resp. Br. 11. That is clearly wrong. McDonough raised the argument in the Second Circuit. Br. for Plaintiff-Appellant 30, *McDonough* v. *Smith*, No. 17-296 (2d Cir. Mar. 23, 2017) (arguing that *Heck* bars claims that "necessarily would impugn the integrity of the entire process and any conviction"). And the Second Circuit passed on it. Pet. App. 15a-16a; *see* U.S. Br. 28.

That conclusion flows from two settled legal propositions. First, when a person in state custody wishes to challenge the lawfulness of that custody, "his sole federal remedy is a writ of habeas corpus." *Preiser* v. *Rodriguez*, 411 U.S. 475, 500 (1973); *see Heck*, 512 U.S. at 481. Second, a person in custody cannot circumvent the exclusivity of habeas by filing a damages action under Section 1983; if awarding damages would "necessarily imply the invalidity" of a person's state custody, that person must proceed first through habeas. *Heck*, 512 U.S. at 487. It follows from these propositions that McDonough was unable to challenge the lawfulness of his custody through a Section 1983 suit while he was still in custody—*i.e.*, before the termination of the criminal proceedings. That is a matter of "[s]imple legal logic, resting upon settled case law." *Medtronic, Inc.* v. *Mirowski Family Ventures, LLC*, 571 U.S. 191, 198 (2014).

1. Smith does not challenge either of those legal propositions. Nor does he dispute that "a person released on personal recognizance" with travel restrictions pending trial—as McDonough was—"is in custody for purposes of the federal habeas corpus statutes" throughout the criminal proceedings. *Justices of Bos. Mun. Court* v. *Lydon*, 466 U.S. 294, 301 (1984). Instead, citing *Wallace*, he claims that "where there is no outstanding judgment, the *Heck* bar is irrelevant." Resp. Br. 30. That misses the point. Although *Heck* dealt with a state prisoner who was in custody pursuant to a criminal conviction, the logic of that opinion plainly applies to other forms of custody. *Preiser* had explained that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody," 411 U.S. at 484, and held that a person seeking release from

custody must proceed through habeas rather than Section 1983, *id*. at 500. Though *Preiser* did not by its own terms cover actions for damages, *Heck* explained that *Preiser* cannot be circumvented by filing a Section 1983 "damages claim[] that [would] call into question the lawfulness of conviction *or confinement*," 512 U.S. at 483 (emphasis added)—that is, the "legality" of a person's "custody," *Preiser*, 411 U.S. at 484.

As Smith points out, *Wallace* described *Heck* as "delay[ing] what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success in that tort action would impugn." 549 U.S. at 393. But the Court was describing the holding of *Heck* in the context of its facts. Nowhere in *Wallace* or *Heck* does the Court hold that other forms of "*extant*" custody are governed by a different rule. Indeed, the upshot of Smith's position is that a criminal defendant in prison awaiting trial could challenge his or her detention through a Section 1983 damages suit—an outcome that cannot be squared with *Heck* and *Preiser*. Further, although *Wallace* rejected the proposition that "an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside," that has no bearing here. *Id*. McDonough's position is that an action that would impugn *present state custody* cannot be brought until that custody ends or is successfully challenged through habeas.[4]

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[4] The Court in *Wallace* noted that the plaintiff there "could have filed suit as soon as the allegedly wrongful arrest occurred." 549 U.S. at 388. But the Court was describing when the

Wallace did not address whether Section 1983 suits are barred when they would necessarily undermine the validity of present custody. Indeed, neither petitioner's nor respondents' briefs in *Wallace* cited *Preiser* or considered the Court's dictates regarding the breadth of the term "custody." Those concepts simply were not implicated: The criminal defendant in *Wallace* was not in custody when he filed suit; any restriction on filing a Section 1983 suit would have been immaterial during his initial false imprisonment because the statute of limitations did not begin to run, *id*. at 390; and a suit challenging the criminal defendant's *initial* arrest would not necessarily have impugned his custody following legal process. *See Heck*, 512 U.S. at 487 n.7; Federal Courts Scholars Amicus Br. 26-27; Criminal Justice Institute Amicus Br. 18. *Wallace* therefore did not present—let alone decide—the question at issue here.

2. Smith's only remaining argument against the application of *Heck* and *Preiser* is that McDonough's suit, if filed before his acquittal, would not have impugned the validity of the restrictions on his liberty. *See* Resp. Br. 30-31. That is incorrect. As explained in McDonough's opening brief and by the United States, the gravamen of McDonough's suit is that he was wrongfully subjected to the initiation and maintenance of criminal proceedings based on fabricated evidence. If McDonough had successfully challenged the institution or maintenance of criminal

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elements of the Section 1983 claim were met, not whether *Preiser* and *Heck* would have erected a bar to suit.

proceedings against him, then the restrictions on his liberty would be invalid and his custody unlawful.[5]

B. The Court Should Adopt Favorable Termination As An Element Of McDonough's Section 1983 Claim.

If the Court determines that it must look to the elements of McDonough's claim to answer the limitations question, it should hold that favorable termination is required. Smith's short response to this argument is wholly unpersuasive; indeed, his entire discussion does not cite a single case or other legal authority. Resp. Br. 19-21.

Smith's main contention is that favorable termination should not be required "because a valid 'fabrication' claim can be brought by an individual against whom the government has probable cause to proceed." *Id.* at 19-20. First of all, the purpose of requiring favorable termination is to "avoid[] parallel litigation" and "conflicting resolutions." *Heck*, 512 U.S. at 484 (internal quotation marks omitted). Regardless of whether lack of probable cause is an element of a Section 1983 claim based on fabrication of evidence, requiring criminal proceedings to terminate before a criminal defendant sues for damages performs the important functions identified in *Heck*.

Further, while courts have allowed Section 1983 claims based on fabrication of evidence to proceed

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[5] That is true whether or not probable cause is an element of McDonough's Section 1983 claim. Either way, to obtain compensatory damages McDonough will have to show some causal connection between the fabrication and the deprivation of liberty, *Zahrey*, 221 F.3d at 350-351, necessarily demonstrating that the deprivation was unlawful.

even when there is probable cause, *see, e.g.*, *Spencer* v. *Peters*, 857 F.3d 789, 801 (9th Cir. 2017), they have still generally required a causal link between the fabricated evidence and the deprivation of liberty to recover compensatory damages, *see supra* p. 3.[6] Favorable termination will often be probative of causation: If a defendant is acquitted, it will tend to show that the criminal case would not have been brought or maintained without the fabricated evidence; if a conviction is vacated on appeal or habeas review, it will tend to show that the fabricated evidence caused the wrongful charges and conviction in the first place. U.S. Br. 25-26.

Smith also contends that favorable termination should not be required because a criminal defendant might have a valid Section 1983 claim even if he has been convicted. Resp. Br. 20. The simple response is that convicted defendants are already barred by *Heck* from filing a civil suit seeking damages based on the fabrication of evidence to the extent that suit would necessarily impugn the conviction. 512 U.S. at 486-487. If the suit would *not* impugn the criminal conviction, it is difficult to see how the fabrication of evidence could have caused any deprivation of liberty for the defendant. *See Black*, 835 F.3d at 370-371.[7] The broad amicus support from the criminal

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[6] In the *Brady* context, this Court has recognized that a deprivation of liberty may be attributable to the denial of due process even where there is otherwise sufficient evidence to convict. *See Kyles* v. *Whitley*, 514 U.S. 419, 434-435 (1995).

[7] It is possible to imagine Section 1983 suits involving fabricated evidence that might have a different common law analog and that might not have favorable termination as an element. Pet. Br. 25-26. But in a case like this, where the proper analogy is

defense and civil rights bars, moreover, reinforces that delayed accrual would not disadvantage criminal defendants seeking to vindicate their constitutional rights. *See supra* p. 4.

III. MCDONOUGH'S SUIT IS TIMELY UNDER THE CONTINUING VIOLATION DOCTRINE.

This Court has repeatedly applied the continuing violation doctrine to hold that a limitations period begins when a legal violation ends. *See* Pet. Br. 44-45. Here, McDonough alleges that Smith violated his constitutional rights by initiating and maintaining criminal proceedings against him on the basis of fabricated evidence. *See id.* at 23. In other words, the existence of the criminal proceedings was itself a wrong. *See Whelan* v. *Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (Silberman, J., joined by Ginsburg, J.). Because Smith's violation of McDonough's constitutional rights continued until his acquittal, the statute of limitations did not begin to run until that point, rendering his suit timely. Pet. Br. 44-50. Smith's arguments to the contrary lack merit.

First, Smith suggests that the Court rejected the continuing violation doctrine in *Wallace*. *See* Resp. Br. 32-33. That is incorrect. *Manuel I* makes clear that the application of that doctrine to Section 1983 suits has not yet been addressed by this Court. *See* 137 S. Ct. at 921-922 & n.10. If anything, *Wallace* supports the continuing violation doctrine: The

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malicious prosecution, a criminal defendant's claim should not accrue under the "standard" rule until criminal proceedings terminate.

Court held that the statute of limitations for false arrest begins to run when the false arrest *ends*, not when it begins, suggesting that false arrest is a kind of continuing wrong. *See* 549 U.S. at 389-391. Of course, the fact that damages may continue to mount after a wrong occurs does not render the wrong continuous. *See id.* But here the underlying *wrong* was continuous. *See Manuel* v. *City of Joliet*, 903 F.3d 667, 669 (7th Cir. 2018) ("*Manuel II*"); *Whelan*, 953 F.2d at 673.

Second, Smith asserts that even if the continuing violation doctrine applies to Section 1983 claims like this one, McDonough's claim is untimely because he failed to allege "at least one timely instance of culpable conduct" within the limitations period. Resp. Br. 34. That is incorrect. Smith deprived McDonough of liberty by initiating and maintaining criminal proceedings against him on the basis of fabricated evidence. *See* Pet. Br. 23. That unlawful deprivation of liberty extended through jury deliberations, which Smith acknowledges occurred within the three-year limitations period. *See* Resp. Br. 37-38. Under the continuing violation doctrine, McDonough's Section 1983 claim is timely.

Smith, moreover, agrees that where a criminal defendant alleges that he has been convicted as a result of fabricated evidence, his "trial must be evaluated as a whole," and his Section 1983 claim does "not accrue until judgment [is] entered." *Id.* at 37. Smith does not explain why the wrongful initiation and maintenance of criminal proceedings based on fabricated evidence should be "evaluated as a whole" only if those proceedings lead to a conviction rather than an acquittal. The same approach should

apply where the criminal defendant has suffered a liberty deprivation as a result of fabricated evidence. The Court should hold that under the continuing violation doctrine, the statute of limitations begins to run when the constitutional violation ends, rendering McDonough's suit timely.

IV. SMITH'S ARGUMENTS TO THE CONTRARY FAIL.

A. McDonough Has Identified The Constitutional Right At Issue.

Smith also offers a grab-bag of other forfeited and meritless arguments.

First, Smith faults McDonough for failing to "identify the specific constitutional right at issue." Resp. Br. 1 (internal quotation marks omitted); *see also* States Amicus Br. 11. That is plainly untrue.

McDonough has repeatedly identified the constitutional rights at issue. In the District Court, on appeal to the Second Circuit, and before this Court, he has alleged not that his rights were violated under "some[]" unidentified provision of the Constitution, Resp. Br. 13-14 (internal quotation marks omitted), but that his rights were violated under the Fourth Amendment and Due Process Clause. *See* Pet. Br. 12, 41-43; JA32; JA46-47, ¶ 19; JA251-253, ¶¶ 1209-1213. Nor is there any ironclad rule that plaintiffs must choose a single provision of the Constitution.[8] Many claims "implicate more than one of

[8] In any event, the Fourth Amendment is incorporated against the States by the Due Process Clause of the Fourteenth Amendment. *See Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961). In

the Constitution's commands." *Soldal* v. *Cook Cty.*, 506 U.S. 56, 70 (1992). Nor is it essential for this Court to decide whether the fabrication of evidence violates *both* the Fourth Amendment and the Due Process Clause. *See* Pet. Br. 42-43; U.S. Br. 13. The statute of limitations for the violation of both amendments begins to run at the same time. Pet. Br. 39-44.

Smith disagrees in large part because, in his view, there is a sharp divide between the Fourth Amendment and Due Process Clause, such that McDonough has two separate constitutional claims: One, under the Fourth Amendment, for the deprivation of his liberty prior to the start of trial; and one, under the Due Process Clause, for the deprivation of his liberty after the start of trial. Resp. Br. 2, 10. But there is "no principled reason to draw that line." *Manuel I*, 137 S. Ct. at 920 n.8.[9]

There is no textual or doctrinal basis to say that a person cannot be deprived of liberty in violation of due process before a criminal trial begins. As the United States explains, the "constitutional right at issue in this case naturally sounds in due process." U.S. Br. 7. It is conceded that McDonough was deprived of liberty before trial. Pet. App. 10a. And the "Due Process Clause * * * provides protection for convicted prisoners and pretrial detainees alike." *Bell* v. *Wolfish*, 441 U.S. 520, 554 (1979). Courts have thus consistently found due process violations

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that sense, McDonough is alleging the violation of a single constitutional provision.

[9] Nor has Smith ever raised this distinction until his merits brief in this Court, forfeiting the argument.

for events before trial. *See, e.g.*, *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2473 (2015); *Klen* v. *City of Loveland*, 661 F.3d 498, 516 (10th Cir. 2011).

Similarly, the fact that "[l]egal process has gone forward" does not "extinguish [a] detainee's Fourth Amendment claim." *Manuel I*, 137 S. Ct. at 918-919. The Fourth Amendment regulates pre-conviction legal process, "[w]hatever its precise form." *Id.* at 920 n.8. A pre-trial seizure can last through trial and ceases at "*conviction*." *Id.* (emphasis added); *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring) (defendant remains "'seized' for trial, so long as he is bound to appear in court"). The Fourth Amendment does not suddenly vanish the moment a trial commences.

Second, Smith contends that introducing fabricated evidence at trial violates only *substantive* due process, and therefore McDonough's Section 1983 claim must accrue immediately at that point. Resp. Br. 23-25. Once again, this argument was never raised below and is thus forfeited. Putting that aside, using fabricated evidence in judicial proceedings is a quintessential corruption of the process due to a criminal defendant. *See Albright*, 510 U.S. at 273 n.6 (plurality op.). As the First Circuit stated, "we are unsure what due process entails if not protection against deliberate framing under color of official sanction." *Limone* v. *Condon*, 372 F.3d 39, 45 (1st Cir. 2004); *see Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). Further, even if Smith is correct that McDonough's due process claim should be labeled "substantive" rather than "procedural," the limitations rule would be the same. Malicious prosecution is still the most analogous tort at common

law, *Preiser* and *Heck* would still apply, and the due process violation continued until McDonough's acquittal.

Smith also asserts that there was no due process violation because McDonough "was acquitted at trial," and thus "the trial proceedings did not deprive [him] of liberty." Resp. Br. 25. That argument crumbles on minimal scrutiny: McDonough was deprived of liberty by *being subject to criminal charges*, whether or not he was acquitted. Numerous courts of appeals, recognizing that common-sense reality, have allowed due process claims after acquittal. *See Black*, 835 F.3d at 371 (collecting cases). Indeed, there was "no dispute" below "that McDonough suffered a liberty deprivation * * * when he was arrested *and stood trial*." Pet. App. 10a (emphasis added). Smith cannot now retract that concession. *See United States* v. *Galletti*, 541 U.S. 114, 120 n.2 (2004) ("Respondents have forfeited this argument by failing to raise it in the courts below.").

B. The District Court's Dismissal Of McDonough's Section 1983 Claim Alleging Malicious Prosecution Has No Bearing On His Section 1983 Claim Alleging Fabrication Of Evidence.

As noted, Smith does not contest that malicious prosecution is the proper analogy for McDonough's claim. If anything, he maintains that the analogy is too good: Because McDonough's Section 1983 claim alleging malicious prosecution was dismissed by the Second Circuit on the ground of absolute immunity, Smith contends, McDonough's fabrication of evidence claim should be dismissed too. *See* Resp. Br. 1-2. First of all, the question of absolute immunity is not

before the Court. Pet. Br. 24-25 n.7, U.S. Br. 29-30. Neither the District Court nor the Court of Appeals passed on the question, and Smith waived the issue by failing to raise it in his brief in opposition.

Second, this Court has already held that a prosecutor's act of fabricating evidence in his capacity as an investigator is not shielded by absolute immunity. *See Hartman* v. *Moore*, 547 U.S. 250, 262 n.8 (2006); *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 276 (1993). And the Second Circuit has indicated that absolute immunity would not shield a prosecutor who "fabricate[s] evidence in his investigative role" when it is "reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that [the plaintiff] would be indicted and arrested." *Zahrey*, 221 F.3d at 353-354. Justice Thomas has said that the Second Circuit's approach to prosecutorial immunity is "likely correct." *Michaels* v. *McGrath*, 531 U.S. 1118 (2001) (Thomas, J., dissenting from denial of certiorari). And the mere fact that McDonough's Section 1983 claim is *analogous* to malicious prosecution does not mean the immunity analysis would be the same. *See Buckley*, 509 U.S. at 274 n.5 (noting "there is no common-law tradition of immunity" for fabrication).[10]

[10] Counts I and II of the Complaint are independent bases for relief, and do not rise and fall together. Indeed, a complaint is "sufficient" if "*any* one" of its "alternative statements" is "sufficient." Fed. R. Civ. P. 8(d)(2) (emphasis added).

V. PRACTICAL AND POLICY CONCERNS STRONGLY MILITATE IN FAVOR OF STARTING THE LIMITATIONS PERIOD AT FAVORABLE TERMINATION.

The Second Circuit's limitations rule is bad policy. Forcing criminal defendants to file civil suits while criminal cases are pending will drain resources, threaten disclosure of legal strategies, and undermine the "Fifth Amendment right against self-incrimination." U.S. Br. 23. Moreover, civil plaintiffs would face doctrinal obstacles under *Preiser* and *Heck* to bringing suit, as well as practical obstacles to securing counsel before their criminal cases conclude. Allowing the statute of limitations to run—and even expire—while those obstacles are in place would be "irrational, arbitrary and unjust." Innocence Network Amicus Br. 15; *see* Criminal Defense Organizations et al. Amicus Br. 23-24. Further, criminal defendants could use a civil suit to "chill testimony in the criminal action" or "obtain from the prosecutor discovery not available in the pending criminal proceeding." U.S. Br. 22 (internal quotation marks omitted).

None of Smith's three contrary policy arguments holds water. *First*, Smith asserts that this Court should not adopt a rule that leaves public officials "unsure" when a claim accrues. Resp. Br. 39. But a rule that depends on what a criminal defendant knew or should have known will not make officials any more sure of "the precise moment when the statute of limitations [begins] to run." U.S. Br. 27. Indeed, determining the relevant accrual date under the Second Circuit's rule will require "[i]ntrusive" and time-consuming discovery. CACL Amicus Br.

17. Smith also raises the possibility of delay as a criminal case "wends its way through the courts" before favorable termination. Resp. Br. 39. But this Court adopted that very rule in *Heck*. And, again, the Second Circuit's discovery rule could lead to equally long delays.

Second, Smith argues that the Second Circuit's limitations rule should be affirmed because "favorable termination" can be difficult to determine. Resp. Br. 40. But in the mine run of cases, the rule will be clear: Each party will be able to "determine[ ]" when the limitations period begins simply by "referring to the docket in the criminal case." CACL Amicus Br. 17. McDonough's case is typical: It favorably terminated the day he was acquitted.

Relatedly, Smith asserts that the favorable termination rule prejudices criminal defendants by offering prosecutors "a powerful incentive to ensure that the proceedings do not terminate favorably." Resp. Br. 42. Smith has it backwards. The more significant problem—confirmed by amici actually representing the interests of criminal defendants—is that forcing defendants to file civil suits while criminal charges are still pending would "imperil the possibility of a favorable plea agreement" or, even worse, "cause the prosecutor to revoke the plea offer entirely, add charges or enhancements, or seek a harsher sentence upon conviction." CACL Amicus Br. 13; *see* Criminal Defense Organizations et al. Amicus Br. 11.

Third, Smith asserts that problems of parallel litigation and conflicting judgments can be dealt with through the power "to stay the civil action." Resp. Br. 40 (quoting *Wallace*, 549 U.S. at 393-394). As the United States has noted, however, stays are not

guaranteed: The decision will "remain in the discretion of the district court." U.S. Br. 23 n.6. And criminal defendants will still have to "set out [their] theory of fabrication in a timely filed complaint" and devote significant time and attention to the stay litigation. *Id.* Even if a stay is granted, "the litigation over a stay could itself distract the prosecution and defense from the more pressing criminal proceeding." *Id.* A regime of discretionary stays will also needlessly burden federal courts. *See* Federal Courts Scholars Amicus Br. 31-32. There is no good reason to "clog federal dockets with dormant constitutional suits" that "will languish for years," and this Court should decline to do so. *Id.*; *see also* Criminal Defense Organizations et al. Amicus Br. 12; Cause of Action Institute Amicus Br. 13.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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