No. 18-485

IN THE

Supreme Court of the United States

EDWARD D. 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

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Petitioner's action, brought under 42 U.S.C. § 1983, asserted separate claims for "malicious prosecution" and "fabrication of evidence," both based on allegations that Respondent used fabricated evidence before the grand jury that indicted Petitioner and at Petitioner's trial, which ended in an acquittal. The "malicious prosecution" claim, which required a showing of a lack of probable cause, was dismissed by the district court on the ground that it was barred by absolute immunity. The court of appeals affirmed, and petitioner has not sought review of that ruling.

The courts below held that the "fabrication of evidence" claim, which does not require a showing of a lack of probable cause and therefore could be brought even by an individual who was lawfully indicted and convicted, was time-barred.

The question presented is:

Whether the statute of limitations for a claim for "fabrication of evidence" does not begin to run until the favorable termination of criminal proceedings even though the claim could be brought by an individual who was lawfully indicted and convicted.

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INTRODUCTION

Just two Terms ago, this Court reiterated that "the threshold inquiry in a § 1983 suit … requires courts to 'identify the specific constitutional right' at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *see also Cordova v. City of Albuquerque*, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment)). Petitioner resolutely refuses to do that. Instead, the Question Presented refers to "a Section 1983 claim based on fabrication of evidence." Pet. i. Petitioner uses that formulation repeatedly. *See*, *e.g.*, Br. of Petitioner 3, 4, 15, 16, 19, 20, 28. Petitioner then argues that "[t]he common law tort of malicious prosecution is the most analogous tort to [Petitioner's] fabrication of evidence claim" (Br. of Petitioner 20; *see* Br. of Petitioner 3, 14-15, 23, 27), so the Court should adopt the accrual rule that, Petitioner asserts, applies to malicious prosecution.

The Constitution refers to neither "fabrication of evidence" nor "malicious prosecution." Petitioner appears to believe that it is unnecessary to identify a specific constitutional violation because, in Petitioner's view, whatever the constitutional violation in this case is, the correct "analogy" is to malicious prosecution. *See* Br. of Petitioner 3, 14-15, 20, 23, 27. The federal government takes the same position. *See*, *e.g.*, Amicus Br. of the U.S. 7-8, 17-20.

But a claim that Petitioner himself denominated a § 1983 claim for "malicious prosecution"—Count II of the complaint filed in the district court (*see* J.A. 253-54)—was dismissed by the district court on the ground that it was barred by absolute immunity. The court of

appeals affirmed the dismissal of that claim, and Petitioner has not sought review of that holding. Petitioner barely acknowledges this fact, and the federal government's argument simply ignores it. Petitioner, and the federal government, are therefore in the position of asserting that Petitioner's remaining claim in this case—a "fabrication of evidence" claim—is "analogous" to a separate claim, with different elements, that Petitioner pled, that was dismissed, and that is not before the Court.

The correct analysis of Petitioner's complaint begins by recognizing that the conduct alleged in the complaint injured Petitioner at two distinct points, implicating two different constitutional rights. *See Manuel*, 137 S. Ct. at 920 n.8 (there is a "constitutional division of labor" between rights applicable pretrial and those applicable at trial). First, according to Petitioner, Respondent obtained the indictment against Petitioner by presenting fabricated evidence to the grand jury. Under *Manuel*, that allegation states a claim under the Fourth Amendment. Second, the complaint alleges that Respondent used fabricated evidence against Petitioner at Petitioner's trial. That allegation asserts a violation of the Due Process Clause.

The Due Process Clause issue at Petitioner's trial is straightforward. Petitioner was acquitted. The state's actions at the trial therefore did not deprive him of liberty. Without a deprivation of liberty, there cannot be a violation of the Due Process Clause. For that reason, it is unclear how Respondent's conduct at trial could have violated Petitioner's rights at all, so the question of an accrual date may not even arise as to that aspect of Petitioner's claim. To be sure, the Court need

not rule out the possibility that government misconduct during a criminal trial may be so outrageous as to constitute a violation of the Due Process Clause—perhaps on a theory of substantive due process—even if the defendant is acquitted. But in such a situation, the claim plainly accrues when the conduct occurs (subject to the requirement that the defendant know or have reason to know of the violation). That is because the outcome of the criminal proceeding is irrelevant to the existence of any constitutional violation. It would, therefore, make no sense to have accrual turn on the date when those proceedings terminate.

Petitioner's allegation that he was wrongfully indicted asserts a claim under the Fourth Amendment, by virtue of this Court's decision in *Manuel*. That claim is made in the count of the complaint in which Petitioner alleged "malicious prosecution." That is, in fact, the entire thrust of Petitioner's brief: that the constitutional violation he is alleging closely resembles malicious prosecution. But the count of Petitioner's complaint alleging "malicious prosecution" was dismissed. The claim that is before the Court—what Petitioner, in his complaint, called a "fabrication of evidence" claim—is a separate claim recognized by the Second Circuit.

The Second Circuit concluded, rightly or wrongly, that a "malicious prosecution" claim accrues upon favorable termination of the proceedings—but is barred here by absolute immunity. And the Second Circuit emphasized, in its opinion below, that what it calls a claim based on fabricated evidence "'is *distinct* from a malicious prosecution claim.'" Pet. App. 15a n.12 (quoting *Bailey v. City of New York*, 79 F. Supp. 3d 424, 446 (E.D.N.Y. 2015)) (emphasis added by the court of

appeals). The distinction is that, according to the Second Circuit's cases, a "fabrication of evidence" claim, unlike a "malicious prosecution" claim, does not require a showing of a lack of probable cause. *See, e.g.*, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 129-30 (2d Cir. 1997) (explicitly rejecting, in Section 1983 action, the argument that "as there was probable cause for [the plaintiff's] arrest—independent of the allegedly fabricated evidence—the fabrication of evidence is legally irrelevant"); *Jovanovic v. City of N.Y.*, 486 F.App'x 149, 152 (2d Cir. 2012) (in a Section 1983 action for fabrication of evidence, "[p]robable cause is not a defense.")

Because probable cause is not a defense to a claim for "fabrication of evidence," that claim can be successfully brought by a person who was lawfully indicted—or, for that matter, by a guilty person. For that reason, it again makes no sense to postpone the accrual of that claim (assuming it is a valid claim) until the favorable termination of proceedings. The claim may be valid even if there is no favorable termination.

The reason the courts below did not rule that both the claims against Respondent are barred by absolute immunity—Respondent is, after all, a prosecutor accused of wrongfully initiating a prosecution—is precisely that the Second Circuit draws this distinction between "fabrication of evidence" and "malicious prosecution." The Second Circuit reasons that the "fabrication of evidence" claim pertains to the performance of investigative functions. We have preserved the argument that the "fabrication" claim should also be dismissed on grounds of absolute immunity, and the Court could affirm on that ground.

But in any event, the "fabrication of evidence" claim, which is the only one that is before the Court, is one for which the court of appeals' accrual date—not the date of the termination of criminal proceedings—is plainly appropriate.

STATEMENT

1. In September 2009, during the Working Families Party primary election in Troy, New York, a plot to influence the outcome of that election through the use of forged absentee ballots and ballot applications was uncovered. Those forged applications were submitted to Petitioner, a Rensselaer County election board commissioner responsible for processing such applications, who then approved them. Rensselaer County's elected District Attorney disqualified himself from the investigation and any potential prosecution because several of the alleged conspirators had previously worked on his political campaign, and requested the appointment of a special prosecutor.

A New York state court judge subsequently appointed Respondent as a Special District Attorney to lead that investigation. Following Respondent's investigation, in January 2011 a grand jury indicted Petitioner on thirty-eight counts of felony forgery in the second degree and thirty-six counts of felony criminal possession of a forged instrument in the second degree. Petitioner's first trial ended in a mistrial on March 7, 2012. He was acquitted at his second trial on December 21, 2012.

2. On December 18, 2015, Petitioner filed the instant action under 42 U.S.C. § 1983 alleging that several defendants, including Respondent, had violated his

constitutional rights by fabricating evidence and using it against him before the grand jury and in both his trials. As relevant here, his complaint pleads two claims.[1] Count I, denominated as falling under the Fourth, Fifth, Sixth, and Fourteenth Amendments, asserts a 42 U.S.C. § 1983 claim for his "Constitutional Right Not to be Deprived of Liberty as a Result of Fabrication of Evidence," citing two Second Circuit decisions recognizing such a right. J.A. 251-52 (citing *Zahrey v. Coffey*, 221 F.3d 342, 344 (2d Cir. 2000) and *Ricciuti*, 124 F.3d 123).

Count I alleges that Petitioner was deprived of, *inter alia*,

> (a) the right to be free from unreasonable searches and seizures; (b) the right not to be deprived of liberty without due process of law; (c) the right not to due process of law, both procedural and substantive [sic]; (d) the right to be free from malicious arrest and/or prosecution without probable cause; and (e) the right to a fair trial.

J.A 252, ¶ 1210. Count II likewise refers to Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights, but it asserts a § 1983 claim for a "Constitutional Right Not to be Prosecuted Maliciously without Probable Cause," citing a Second Circuit decision recognizing such a right. J.A. 253 (citing *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110 (2d Cir. 1995)). In Count

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[1] The third claim, ostensibly arising under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), was not brought against Respondent and is not before the Court.

II, Petitioner sets out the same list of alleged liberty deprivations that was provided in Count I. J.A. 253 ¶ 1215. In Petitioner's opposition to Respondent's motion to dismiss in the district court, he described his fabrication claim as a "due process and/or fair trial claim," and his malicious prosecution claim as implicating his Fourth Amendment rights only. Pl.'s Opp. MTD 8, 13, ECF No. 108.

Respondent and other defendants filed 12(b)(6) motions to dismiss. The district court dismissed the "malicious prosecution" claim against Respondent on absolute immunity grounds. The court also granted all motions to dismiss Petitioner's "fabrication of evidence" claims as untimely.

3. On appeal, the Second Circuit agreed with the district court's ruling that Petitioner's malicious prosecution claim against Respondent was barred by absolute immunity, observing that "even though [the] complaint suggests that, at times, [Respondent] was acting in an investigatory capacity, 'the distinction between a prosecutor's investigative and prosecutorial functions is immaterial to a malicious prosecution claim, since prosecutors are generally immune from such claims.'" Pet. App 17a-18a.

The Second Circuit rejected Petitioner's argument that his "fabrication of evidence" claim was timely because it was analogous to malicious prosecution, which, the court said, accrues upon favorable termination. The court reasoned that "[t]he constitutional right violated by fabricated evidence" suffered a complete violation, regardless of Respondent's role, "when the fabricated evidence was

used by [Respondent] against [Petitioner.]" *Id.* at 14a-15a.

The court also held that *Heck v. Humphrey*, 512 U.S. 477 (1994), did not delay accrual of Petitioner's § 1983 claim given his acquittal, as *Wallace v. Kato*, 549 U.S. 384 (2007), held that *Heck*'s deferred accrual bar applied only to claims that would necessarily controvert an "outstanding criminal judgment." Pet. App. 16a (quotation marks omitted). Finally, the court rejected Petitioner's argument that his "fabrication" claim constituted a continuing violation lasting until his acquittal, reasoning that use of the allegedly fabricated evidence in the grand jury and at trial were separate wrongful acts, and that "[t]he cause of action accrued when McDonough became aware of the fabricated evidence, which was, at the latest, during the first trial." *Id.* at 17a. It also concluded that the mere continuation of the prosecution did not constitute a continuing violation. *Id.*

SUMMARY OF ARGUMENT

I. Petitioner's § 1983 claim based on allegations of fabrication of evidence is time-barred to the extent it states a claim at all. In the courts below, as well as in this Court, Petitioner has refused to identify the specific constitutional right his § 1983 "fabrication of evidence" claim implicates. But whether one analyzes the claims as Petitioner has set them out, or by reference to any constitutional rights they could implicate, the answer is the same: Petitioner's claim is barred.

A. In the courts below, Petitioner advanced two different § 1983 claims: one predicated on "malicious prosecution," and the other predicated on the

"fabrication of evidence." Under Second Circuit precedent—which Petitioner invoked and embraced—the malicious prosecution version of the § 1983 claim required proof of a deprivation of rights without probable cause and proof of a favorable termination. Conversely, the fabrication of evidence claim did *not* require Petitioner to establish a lack of probable cause or favorable termination. The Second Circuit dismissed the claim premised on malicious prosecution as barred by absolute immunity grounds, and it dismissed the claim based on fabrication of evidence as time-barred.

Assuming the Court accepts the taxonomy of claims that Petitioner and the Second Circuit have presented, it is clear that his "fabrication of evidence" claim is time-barred. The very thing that distinguishes a § 1983 claim premised on fabrication of evidence from one premised on malicious prosecution is that the former is intended to punish the fabrication of evidence *regardless* of whether the government actor had probable cause for his actions—indeed, regardless of whether the defendant was guilty or innocent. And because a "fabrication of evidence" claim does not require favorable termination of the proceedings, it does not require the claimant to wait for that favorable termination for his claim to accrue.

Petitioner would have the Court treat his fabrication of evidence claim as if it were a claim for malicious prosecution, but *that* claim was dismissed on absolute immunity grounds, and Petitioner does not argue for a different result here. If fabrication of evidence presents a distinct basis for bringing a § 1983 claim, then what makes it distinct is that it accrues at the time of the violation, so long as the claimant knew or should have

known of that violation. This Court need go no further to affirm the judgment below.

B. Petitioner's claim based on fabrication of evidence is equally barred if one carries out this Court's directive to assess the viability of a § 1983 claim by first looking to the constitutional right at issue. Here, Petitioner alleges fabrication of evidence at two different stages of his criminal prosecution. The first concerns fabrication of evidence to obtain his indictment. The second involves the use of that allegedly fabricated evidence at trial.

To the extent Petitioner claimed that he was indicted through the use of fabricated evidence *without* probable cause, then that claim would sound in the Fourth Amendment, but that was also the claim that the courts below held was barred by absolute immunity. Petitioner does not challenge that holding here. To the extent Petitioner claimed that the government fabricated evidence where it *had* probable cause to indict, based on untainted evidence, that claim would seemingly allege a violation of substantive due process—a claim that fabrication would still shock the conscience even if the indictment was otherwise validly obtained. But that claim does not, and cannot, turn on the favorable termination of the prosecution; the very point of that claim is that the Constitution is violated regardless of whether the proceeding *ever* terminates in the claimant's favor. As such, that claim should accrue, assuming it is a valid claim, at the time of the violation, provided that the claimant knows or should know of it.

As for Petitioner's claim based on fabrication at trial, the analysis is much the same. Again, any such claim would have to allege that the government violates

substantive due process when it knowingly uses false evidence at trial, even if, as here, the defendant was acquitted. Because that claim is indifferent to the defendant's guilt, there is no basis to wait for a favorable termination for the claim to accrue. A claim based on a violation of substantive due process accrues at the time of the violation, not if or when the claimant subsequently obtains a favorable termination.

II. Petitioner's remaining arguments in support for his special accrual rule are equally erroneous.

A. Although Petitioner contends that this Court's decision in *Heck v. Humphrey* required him to wait for a favorable termination before he could sue, that is plainly incorrect. As this Court subsequently explained in an analogous situation in *Wallace v. Kato*, *Heck*'s rule that a defendant may not pursue a claim that would call his conviction into doubt only applies where there exists an outstanding criminal judgment. Petitioner never had an outstanding criminal judgment because he was never convicted, and thus the *Heck* rule is irrelevant. Petitioner contends that this Court's decision in *Preiser v. Rodriguez* calls for a different result, but that argument fails for three independently sufficient reasons: it is waived; it is foreclosed by this Court's decision in *Wallace*; and it ignores the fact that the only remaining claim in this case is the substantive due process "fabrication" claim that does not require a showing of a lack of probable cause and therefore does not undermine the basis on which Petitioner was in custody.

B. *Wallace* is also the foundation of the answer to Petitioner's argument that his claim was timely under the continuing violation doctrine—that a new claim

freshly accrued every day that he was subject to judicial proceedings based on fabricated evidence. As *Wallace* explained, while a claimant might continue to suffer additional injury during a prolonged deprivation of rights, a claim accrues when a claimant *first* suffers injury, not when the claimant stops suffering injury. Petitioner had all the elements necessary to bring his claim predicated on fabrication of evidence as soon as he was aware of the alleged fabrication. His claim accrued at that time, even if his injuries continued for a longer period. Regardless, there is no contention that the government used fabricated evidence at any time within the limitations period, so the continuing violations doctrine could not help Petitioner even if it applied (which it does not).

C. Petitioner contends that his accrual rule is superior from a policy perspective, but considerations of sound policy cut the other way. The normal rule is that a claim accrues once the elements of the claim have been established and the claimant has notice of the claim. That rule ensures that claims are brought relatively promptly to the time of the violation and fosters all the attendant virtues—avoiding fading memories, providing repose, promoting finality—that statutes of limitations are intended to promote. Conversely, waiting for a favorable termination not only delays the resolution of fabrication claims—claims that, again, having nothing to do with whether a favorable termination is obtained—but provides an unclear starting line for the claim. Most litigation concerning malicious prosecution involves a dispute about whether or when the claimant obtained a favorable determination. There is no need to import that confusing and unnecessary element into a claim premised on fabrication.

Petitioner raises the specter of adverse consequences that will occur if a Section 1983 claim is litigated while the criminal prosecution is ongoing, but that concern is vastly overblown. The Court has anticipated this precise issue and has said that the solution is for trial judges to manage the civil litigation to avoid difficulties. That is what trial courts do in other instances in which there are parallel criminal and civil proceedings.

Nor is favorable termination the right rule for the kind of claim that Petitioner purports to be bringing. The gravamen of that claim is that what the government did was wrong—egregiously wrong—even if the government was entitled to detain the defendant, or even convict him. Grafting a favorable termination requirement on to that kind of claim will prevent deserving claimants from recovering for that specific kind of wrong because they were not able to establish a favorable termination. Petitioner appears content to sacrifice those claimants in order to obtain his ill-fitting accrual rule. This Court should reject that rule and affirm.

ARGUMENT

I. Petitioner's Claims Based On The Alleged Fabrication Of Evidence Are Time-Barred To The Extent They State A Constitutional Violation At All.

Petitioner conspicuously makes no attempt to answer what this Court has described as "[t]he threshold inquiry in a § 1983 suit: [the obligation] to 'identify the specific constitutional right' at issue." *Manuel*, 137 S. Ct. at 920 (citations omitted); *see also*

Cordova, 816 F.3d at 661 (Gorsuch, J., concurring in the judgment) ("If a party wishes to claim a constitutional right, it is incumbent on him to tell us where it lies, not to assume or stipulate with the other side that it must be in there *someplace*."). Section 1983 is not "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more." *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012); *see also Graham v. Connor*, 490 U.S. 386, 394 (1989). It is only "[a]fter pinpointing" the specific right at issue that a court can "determine the … rules associated with[ ] an action seeking damages for its violation." *Manuel*, 137 S. Ct. at 920.

In fact, Petitioner is asserting two separate constitutional violations, implicating two different constitutional provisions. There is a "constitutional division of labor" between the constitutional analysis appropriate to "'*pretrial* deprivations of liberty,'" *id.* at 920 n.8 (citing *Albright*, 510 U.S. at 274) (emphasis added by the Court in *Manuel*) and the analysis that applies to the criminal trial. *See id.*

First, Petitioner asserts that Respondent wrongfully persuaded a grand jury to indict him without probable cause. That claim asserts a putative violation of the Fourth Amendment. *See Manuel*, 137 S. Ct. at 918. Second, Petitioner asserts that Respondent introduced fabricated evidence at his criminal trials. That claim asserts a right under the Due Process Clause.

Instead of identifying the different constitutional analysis appropriate to different stages of a criminal proceeding, the Petitioner's complaint contained a "fabrication of evidence" count and a "malicious

prosecution" count, both brought under § 1983. The "malicious prosecution" count was dismissed by the district court; the district court's holding was affirmed by the court of appeals; and Petitioner has not sought review. So, with his actual "malicious prosecution" claim foreclosed, Petitioner now repeatedly asserts that "fabrication of evidence" is "analogous" to malicious prosecution.

In fact, both Petitioner and the federal government greatly overstate the significance of analogies to common law causes of action in determining when a § 1983 claim accrues. The Court has repeatedly cautioned that "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S. Ct. at 921 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). Whatever the proper role of analogies, though, the notion that a plaintiff who pleads two distinct claims, one of which is dismissed on grounds of absolute immunity, can then change course and insist that the remaining claim was, all along, actually "analogous" to the one that was dismissed—surely that stretches the use of analogies too far, and is another reminder of the importance of "'identify[ing] the specific constitutional right' at issue." *Manuel*, 137 S. Ct. at 920 (citation omitted).

In any event, whether Petitioner's claims are analyzed in the terms in which he pled them or, as they should be, by considering the constitutional principles (if any) that they invoke, the outcome is the same: the judgment of the court of appeals should be affirmed.

A. Even If Claims Of "Malicious Prosecution" And "Fabrication Of Evidence" Are Cognizable Under § 1983, Those Claims Are Barred In This Case.

Petitioner's complaint stated two counts against Respondent. Both counts asserted claims under § 1983. Both listed "the Fourth, Fifth, Sixth and Fourteenth Amendments" as the basis for the claims. *See* J.A. 252, 253. Count I was labeled "Constitutional Right Not to Be Deprived of Liberty as a Result of Fabricated Evidence," and Count II was labeled "Constitutional Right Not to be Prosecuted Maliciously Without Probable Cause." J.A. 251, 253.

The Second Circuit recognizes both a § 1983 claim for "malicious prosecution" and a § 1983 claim for "fabrication of evidence." Under Second Circuit law, those are "*distinct* claims"—a point that the Second Circuit, in this case, went out of its way to emphasize. *See* Pet. App. 15a n.12. And the Second Circuit has identified some critical differences between "malicious prosecution" and "fabrication of evidence." That is why Petitioner himself pled them as separate counts. And it is why the lower courts treated them differently—dismissing Count I, the "fabrication of evidence" claim, because it is time-barred, and Count II, the "malicious prosecution" claim, on grounds of absolute immunity.

Specifically, a § 1983 "malicious prosecution" claim, according to the Second Circuit, requires the plaintiff to show a lack of probable cause to institute a proceeding and a favorable termination of the proceeding. *See, e.g.*, *Mitchell v. City of N.Y.*, 841 F.3d 72, 79 (2d Cir. 2016); *Cameron v. City of N.Y.*, 598 F.3d 50, 63 (2d Cir. 2010); *Ricciuti*, 124 F.3d at 130. The courts below accordingly

ruled that the "malicious prosecution" claim did not accrue until Petitioner was acquitted. But whether that ruling was right or wrong—an issue we address below—the courts below dismissed the "malicious prosecution" claim on grounds of absolute immunity, and Petitioner does not challenge that holding in this Court. The central argument made by both Petitioner and the federal government is that the remaining claim in this case should be treated *as if* it were a common law claim for malicious prosecution. But there *was* such a claim in this case. It was rejected on absolute immunity grounds and Petitioner has not sought to revive it.

Under the Second Circuit's decisions, a "fabrication of evidence" claim, by contrast with a "malicious prosecution" claim, can be brought even if there was probable cause. The Second Circuit has been clear on this point. In *Jovanovic v. City of New York*, 486 F. App'x 149, 152 (2d Cir. 2012), the Second Circuit flatly stated that in a § 1983 action for fabrication of evidence, "[p]robable cause is not a defense." *See also Garnett v. Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016) ("[P]robable cause, which is a Fourth Amendment concept, should not be used to immunize a police officer who violates an arrestee's non-Fourth Amendment constitutional rights."). In *Ricciuti v. New York City Transit Authority*, 124 F.3d 123 (2d Cir. 1997), the court—after holding that there was probable cause for an arrest—explicitly rejected, in emphatic terms, the argument that "as there was probable cause for [the] arrest—independent of the allegedly fabricated evidence—the fabrication of evidence is legally irrelevant." *Id.* at 129-30. The court in *Ricciuti* accordingly held that it was error for a district court to grant the defendants' motion for summary judgment on

the "fabrication of evidence" claim, even though there had been probable cause to proceed against the plaintiff.

The Second Circuit's recent decision in *Rentas v. Ruffin*, 816 F.3d 214 (2d Cir. 2016), makes especially clear the significance of the rule that a "fabrication" claim, unlike a "malicious prosecution" claim, can be brought even when there was probable cause to proceed against the plaintiff. The plaintiff in *Rentas* was acquitted after having been detained for three years; like Petitioner, he brought both a "malicious prosecution" and a "fabrication" claim. The Second Circuit ruled that there was a jury question whether probable cause existed on the malicious prosecution claim. *Id.* at 221. But the Second Circuit then held that on the "fabrication" claim, the plaintiff would be entitled to only nominal damages—not compensatory damages for his prolonged detention—if the jury concluded that probable cause did exist. *See id.* at 224.

The Second Circuit, and other courts of appeals that make "fabrication of evidence" actionable even when there is probable cause, seem to take the position that some government conduct is so egregious that it should give rise to a constitutional claim even if that conduct had no effect on the outcome of the proceeding. For example, in *Ricciuti*—the foundational Second Circuit case on this point, which Petitioner cited in the "fabrication" count of his complaint—the court stated:

> No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate

> false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice.

124 F.3d at 130. As we will show below, this claim is best seen as a substantive due process claim—that government conduct that shocks the conscience violates the Due Process Clause for that reason alone. Second Circuit cases do refer to the "fabrication of evidence" claim as a due process claim. *Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000); *Ricciuti*, 124 F.3d at 130.[2]

But whatever the soundness of the Second Circuit's view, a "fabrication of evidence" claim does not, and cannot, require a favorable termination of the proceedings. That is because a valid "fabrication" claim

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[2] Similarly, some of the Second Circuit's opinions addressing the "fabrication of evidence" claim refer to a deprivation of liberty as an element of that claim. *See, e.g.*, Pet. App. 10a; *Zahrey*, 221 F.3d at 349. Because a "fabrication" claim can be brought even when there is probable cause, this cannot refer to the deprivation of liberty attributable to criminal charges being instituted against the § 1983 plaintiff—in a "fabrication" case, any deprivation of liberty resulting from those charges can be supported by probable cause. *See Rentas*, 816 F.3d at 224; *supra* pp. 17-19.

The Second Circuit's reference to "liberty" means simply the "liberty" not to be subjected to proceedings at which fabricated evidence is used, irrespective of whether the use of that evidence affects the outcome of the proceeding. The point of calling a deprivation of liberty an "element" of the claim is that a plaintiff cannot prevail simply by showing, for example, that evidence was fabricated by government officials but never used in any proceeding.

can be brought by an individual against whom the government has probable cause to proceed. Indeed, it can be brought by an individual who is guilty. When, or how, the criminal proceeding is concluded has no bearing on the validity of a "fabrication of evidence" claim.

In other words, there may be no *favorable* termination at all to a case in which the accused has a valid "fabrication" claim. That necessarily follows from the principle that the Second Circuit emphasizes repeatedly: that a "fabrication of evidence" claim—unlike a "malicious prosecution" claim—may be brought by an individual even if the government has enough untainted evidence of that individual's guilt to establish probable cause and obtain a conviction. Under Petitioner's proposed rule, such an individual's claim would never accrue. Obviously that cannot be right.

It therefore makes no sense to use the date that the proceedings end as the accrual date. The claim accrues when the wrong was done—when the government acted in a way that, in the courts' view, requires a constitutional sanction no matter what its consequences. Fabrication of evidence can, of course, be a crime, and the statute of limitations for the criminal offense would begin to run when the act was committed, subject to a notice requirement. The "fabrication" claim that the Second Circuit recognizes is comparable to a criminal offense: it is wrongful conduct in and of itself. The limitations period should operate in the same way.

That is enough to require that the judgment below be affirmed. Taking Petitioner's claims, and the Second Circuit's law, at face value, the claim that supposedly accrues upon a favorable termination is barred by absolute immunity. The only claim that remains is one

that accrued when the wrong was done (subject to the requirement, standard in statute of limitations cases, that the plaintiff know or have reason to know of the wrong). That was the accrual date that the court of appeals specified.

B. When Claims Relating To The Indictment Are Properly Characterized Under The Constitution, They Are Barred, To The Extent They Exist At All.

The outcome is the same when Petitioner's claims are cast, as they ought to have been, in terms of specific constitutional violations.

1. Any Claim That Petitioner Was Indicted Without Probable Cause, Which Would Arise Under The Fourth Amendment, Is Barred By Absolute Immunity.

Under *Manuel v. City of Joliet*, Petitioner's claim that he was indicted without probable cause, on the basis of fabricated evidence, states a claim under the Fourth Amendment. *See Manuel*, 137 S. Ct. at 914. The Court in *Manuel* left open the question when that Fourth Amendment claim accrues. But that accrual issue is not before the Court in this case. The claim that Petitioner was indicted without probable cause was the claim raised in Count II of Petitioner's complaint—the count labeled "malicious prosecution." As we have noted, under the Second Circuit cases that Petitioner invoked, "malicious prosecution" requires a showing of a lack of probable cause—just what a Fourth Amendment claim requires. *See Manuel*, 137 S. Ct. at 913-14. In fact, the claim in *Manuel* itself was presented, by the § 1983 plaintiff in that case, as a "malicious prosecution" claim.

See Pet. for Cert. i, *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) (No. 14-9496), 2015 WL 9855124 quoted at 137 S. Ct. 923 (Alito, J., dissenting). And in holding that the Fourth Amendment was the source of a claim that an individual was wrongly indicted, the Court in *Manuel* relied on the views of five Justices in *Albright*—another case in which the claim resembled one for "malicious prosecution." *See Albright v. Oliver*, 510 U.S. 266, 270 & n.4 (1994) (plurality opinion).

The "malicious prosecution" claim in this case therefore should be viewed as raising a Fourth Amendment issue. And that claim was dismissed on grounds of absolute immunity and is not before this Court. This Court therefore need not—and should not—reach the question of when that claim accrued. Because Petitioner has not challenged the ruling on absolute immunity, the accrual question, as to the Fourth Amendment claim, cannot affect the outcome of this case.

The lower courts concluded that that claim accrued when Petitioner was acquitted. *See* Pet. App. 14a (court of appeals), 94a (district court). But it is far from clear that that conclusion is correct: the lower courts may have been excessively influenced by their characterization of the claim as the tort of "malicious prosecution" rather than the correct characterization of the claim as one asserting an unreasonable "seizure" under the Fourth Amendment. The Court in *Manuel* was explicit in saying that the Fourth Amendment seizure ends when the trial begins. 137 S. Ct. at 920 n.8. Logically, therefore, that would be the date on which the claim accrues. The Court has held that a Fourth Amendment claim can accrue while a criminal trial is

ongoing. *See Wallace*, 549 U.S. at 393. And a Fourth Amendment claim can be brought even by a defendant who is convicted. *Heck*, 512 U.S. at 487 n.7. That suggests that the date of a favorable termination—which may not exist—cannot be the accrual date for a claim that an individual was wrongly indicted.

In any event, the complexity of this question is an additional reason for the Court not to address it in a case, like this one, in which it is not presented.

2. Petitioner's "Fabrication Of Evidence" Claim, As It Pertains To The Grand Jury Proceedings, If It Asserts A Constitutional Claim At All, Is A Substantive Due Process Claim Barred By The Statute Of Limitations.

As we have shown, Petitioner's surviving claim is simply that fabricated evidence was used against him. That claim does not depend upon a lack of probable cause. *See*, *e.g.*, *Garnett*, 838 F.3d at 278 ("[U]sing probable cause as a shield would unduly limit an arrestee's right to relief when a police officer fabricates evidence."); *Ricciuti*, 124 F.3d at 130 ("To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice."). Because this claim—the only surviving claim—does not assert a lack of probable cause, Petitioner's indictment, and any accompanying restraints on him, cannot be attributed to the actions asserted in connection with this claim.

It is therefore unclear why this claim asserts a constitutional violation at all. It does not assert a seizure without probable cause, in violation of the Fourth Amendment, because it does not assert a lack of probable cause. It does not assert that the initiation of criminal proceedings deprived Petitioner of liberty without due process, because any such deprivation of liberty was the result of a finding of probable cause, which this claim does not challenge.

If there is a constitutional violation, it would presumably have to be a substantive due process violation, based on the view that some government conduct is sufficiently outrageous that it violates the Constitution in and of itself. As we have noted, that seems to be the view that motivated the Second Circuit and other courts that have recognized a constitutional claim for "fabrication of evidence." *See*, *e.g.*, *Ricciuti*, 124 F.3d at 130; *Spencer v. Peters*, 857 F.3d 789, 801 (9th Cir. 2017); *Halsey v. Pfeiffer*, 750 F.3d 273, 293 (3d Cir. 2014).

It goes without saying that fabrication of evidence is reprehensible. An individual who fabricates evidence can be prosecuted for a crime. Lawyers who tolerate such conduct can be subject to professional disciplinary sanctions. But if there is no incursion on an individual's liberty traceable to the fabrication of evidence, it may not infringe on a constitutional right.

There is, however, again no need for the Court to resolve that issue in this case. If there is a constitutional violation of this kind, it accrues when the allegedly outrageous act occurred, subject only to a notice requirement. That is because, as with the Second Circuit's "fabrication of evidence" claim, the conclusion

of the proceedings is irrelevant to the existence of the violation. If this constitutional claim exists, it will be available to any defendant—even one who has been indicted on the basis of probable cause, and even one who has been found guilty on the basis of sufficient untainted evidence. Because such a claim may be brought even when there is no favorable termination of the proceedings, the date (if any) on which that occurs has no bearing on the accrual of the claim. The wrong is complete when it occurs, and it accrues at that point, or whenever the plaintiff becomes aware of it—as the court below held.

3. When Claims Relating To The Alleged Use Of Fabricated Evidence At Trial Are Properly Characterized Under The Constitution, They Are Barred, To The Extent They Exist At All.

Petitioner's claims about the use of fabricated evidence at trial are governed by the Due Process Clause. *See Manuel*, 137 S. Ct. at 920 n.8. The Due Process Clause is violated only if a person is "deprive[d] of liberty." Petitioner was acquitted at trial. Therefore the trial proceedings did not deprive Petitioner of liberty, and it is unclear how anything Petitioner did in the course of the trial could give rise to a claim under the Due Process Clause.

The Court has repeatedly ruled, in cases in which a criminal defendant has sought to overturn a conviction, that government misconduct that interfered with the truth-finding process of the criminal trial does not violate the Due Process Clause unless it had some effect on the outcome of the trial. It is well-established, for example, that the government's failure to disclose

exculpatory or impeaching evidence to a defendant, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), does not violate the Constitution unless the evidence was material. *See United States v. Agurs*, 427 U.S. 97, 106 (1976) ("[S]ince it was not material on the issue of guilt, [Brady's] entire trial was not lacking in due process"). Even a claim that the government knowingly used perjured testimony requires a showing of materiality. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 679-80 (1985); *Napue v. Illinois*, 360 U.S. 264 (1959). The burden the government must overcome to show a lack of materiality may be very high: for example, if the government knowingly introduces perjured testimony, it must show that the use of the evidence was harmless beyond a reasonable doubt. *Bagley*, 473 U.S. at 679-80 n.9 (plurality opinion). But if that burden is met, there has been no violation of the Due Process Clause requiring a reversal of the conviction.

It should follow, then, that when a defendant is acquitted, as Petitioner was, there is *a fortiori* no due process violation. The trial did not result in a deprivation of liberty at all. Again, the Court need not, in this case, foreclose the possibility that some government misconduct at trial may be so egregious that it amounts to a constitutional violation—presumably, a substantive due process violation—even if the trial ended in an acquittal. But, as before, any claim asserting such a constitutional violation would accrue when the violation occurred, or when the defendant learned or should have learned of it. If the violation exists irrespective of its effect on the outcome of the trial—which must necessarily be true in this case, because Petitioner was acquitted—then the date on which that outcome occurred is irrelevant. To the extent

that Petitioner is asserting a valid claim for a constitutional deprivation based on Respondent's conduct at trial, the court of appeals applied the correct accrual rule.

II. Petitioner's Remaining Arguments Are Erroneous And Should Be Rejected.

In addition to Petitioner's erroneous argument that his § 1983 claim accrues only upon favorable termination, Petitioner offers several other grounds to reverse the decision below: that his claim was timely under *Heck*; that his claim was timely under the continuing violation doctrine; and a collection of policy arguments supposedly justifying his proposed accrual rule. All of those arguments are incorrect as well.

A. *Heck* And *Preiser* Are Irrelevant.

Petitioner argues that this Court's decisions in *Heck* and *Preiser v. Rodriguez*, 411 U.S. 475 (1973), independently barred this claim prior to acquittal. But the *Heck* bar, which prohibits a § 1983 damages suit when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," 512 U.S. at 487, applies "*only* when there exists … an 'outstanding criminal judgment.'" *Wallace*, 549 U.S. at 393 (emphasis added). Because Petitioner was never convicted, the Second Circuit correctly ruled that *Heck* did not apply. Pet. App. 15a-16a. Petitioner's approach would create another "bizarre extension of *Heck*," *Wallace*, 549 U.S. at 393. This Court should reject it.

1. *Heck* Does Not Apply Here Because Petitioner Was Never Convicted.

In *Heck*, a state prisoner serving a sentence for manslaughter "filed suit under § 1983 raising claims which, if true, would have established the invalidity of his outstanding conviction." *Wallace*, 549 U.S. at 392. The prisoner did not seek to overturn his conviction or sentence; he sought only monetary damages. Nevertheless, the Court found that even a claim for damages is not cognizable when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487.

Petitioner now invokes *Heck* to delay the accrual of his claim, arguing that his fabrication of evidence claim arose only upon his acquittal because he could not have brought suit before then. Br. of Petitioner 32. But the Court subsequently and carefully defined the limits of the *Heck* bar in *Wallace*—it applies only when there is an outstanding criminal judgment. 549 U.S. at 393. Wallace was arrested and convicted of first-degree murder. That conviction was ultimately vacated, however, and the charges were dropped. *Id.* at 386-87. Wallace then brought a § 1983 suit seeking damages for his unlawful arrest. *Id.* at 387. On appeal, this Court considered whether his suit was timely. Hoping for a later accrual date, Wallace argued that *Heck* "compell[ed] the conclusion that his suit could not accrue until the State dropped its charges against him." *Id.* at 392.

The Court rejected that argument as going "well beyond *Heck*." *Id.* at 393. The *Heck* bar "delays 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." *Id.* *Heck* "rested [its] conclusion upon 'the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of *outstanding* criminal judgments.'" *Id.* at 392 (quoting *Heck*, 512 U.S. at 486) (emphasis added). But there is no bar from bringing "an action which would impugn *an anticipated future conviction*." *Id.* at 393.

While the Court acknowledged that a false arrest claim might tread the same ground as a future criminal proceeding, "it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended." *Id.* at 393-94; *see also Heck*, 512 U.S. at 487 n.8 ("[I]f a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial abstention may be an appropriate response to the parallel state-court proceedings."). Finding *Heck* posed no obstacle, the Court held that Wallace's claim accrued "immediately upon his false arrest."[3] *Wallace*, 549 U.S. at 390 n.3.

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[3] Though the petitioner's claim accrued then, the common law's "distinctive" treatment of the torts of false arrest and false imprisonment meant that statute of limitations commenced after the date of accrual. *See* *Wallace*, 549 U.S. at 388-90; *id.* at 390 n.3 ("While the statute of limitations did not begin to run until petitioner became detained pursuant to legal process, he was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time."). Wallace thus could have sued for his false arrest immediately, but the statute of limitations did not run until legal process began. That distinction is irrelevant here: Petitioner argues he was barred from suing until favorable

Wallace forecloses Petitioner's argument—where there is no outstanding judgment, the *Heck* bar is irrelevant. Like the § 1983 plaintiff in *Wallace*, whose claim accrued at the moment of his arrest, Petitioner could bring his fabrication claim as soon as he had a "complete and present cause of action," *Rawlings v. Ray*, 312 U.S. 96, 98 (1941), which occurred when Petitioner learned of the fabrication and it was used against him. Pet. App. 10a. He did not need to wait for acquittal to sue.

2. Petitioner's Newly-Minted Argument Under *Preiser* Is Foreclosed By *Wallace*.

Petitioner now attempts to contest this by invoking *Preiser* for the first time in these proceedings. *Preiser* held that a convicted prisoner could not bring a § 1983 claim where "the relief he seeks is a determination that he is entitled to immediate release or speedier release"; in such situations, habeas corpus is the sole remedy. 411 U.S. at 500. But Petitioner claims that *Preiser*, when read together with *Heck*, in fact stands for a far broader proposition: that a suit that would have the effect of challenging the validity of *any* custody cannot be brought prior to the claimant's release from that custody—regardless of whether that custody stems from a conviction. *See* Br. of Petitioner 33.

To the extent that this Court even considers Petitioner's new *Preiser* argument, it should reject it. For one thing, as the case comes to this Court, Petitioner does not even challenge the lawfulness of his pre-trial

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termination and so the claim did not *accrue* until then. Br. of Petitioner 34.

custody; his only remaining claim is one based on "fabrication of evidence," which is, as we have explained, a substantive due process claim that does not involve showing a lack of probable cause. That claim can be brought even if Petitioner was lawfully indicted and bound over for trial. The validity of his custody is therefore simply not at issue here.

Wallace forecloses Petitioner's *Preiser* argument as well. Petitioner tries to distinguish it by contending, in a footnote, that *Wallace* had no occasion to analyze *Preiser*'s effect on accrual—"[a]t the time the suit was filed, the plaintiff was not in custody." Br. of Petitioner 34 n.10. As the plaintiff was no longer in custody, Petitioner argues, *Preiser* did not bar a § 1983 damages claim challenging the lapsed custody's validity. But *Wallace* stated that the plaintiff could have sued even while in custody: "*There can be no dispute* that petitioner could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary detention." *Wallace*, 549 U.S. at 388 (emphasis added); *see* also 390 at n.3 ("This is not to say, of course, that petitioner could not have filed suit immediately upon his false arrest. . . . [H]e was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time."); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (stating, in the context of reviewing a § 1983 claim, that "as the Court of Appeals noted below a suspect who is presently detained may challenge the probable cause for that confinement").

B. Petitioner's Claim Is Not Timely Under The Continuing Violation Doctrine.

Petitioner contends that even if his claim first accrued when he had notice of it, it would still be timely

under the continuing violation doctrine because the claim would "accrue[] afresh from day to day" throughout the criminal proceedings. while he suffered injury. Br. of Petitioner 45 (quoting *Hamilton v. Manhattan Ry. Co.* 9 N.Y.S. 313, 315 (Sup. Ct. 1890)). That is incorrect. Not only is Petitioner's claim not subject to the continuing violation doctrine, but it would be untimely even if it were.

1. The Continuing Violation Doctrine Does Not Apply To Petitioner's Claim.

Petitioner's contention that he was subject to a continuing violation is incorrect for several reasons. This contention, too, runs squarely into this Court's decision in *Wallace*, a decision Petitioner does not even mention in connection with this argument. *Wallace* held both (1) that ongoing detention merely "forms part of *the damages*" for Fourth Amendment, pretrial-detention claims and (2) that such claims do not accrue on "the date of [plaintiff's] release from custody," but, rather, when the wrongful act or omission resulting in detention occurs. 549 U.S. at 388, 390-91 (emphasis added).

Specifically, after Wallace served eight years in prison, the courts overturned his conviction on the ground that his confession was the product of an unlawful arrest. *Id.* at 387. Wallace then sought damages under § 1983 for the years of detention that followed from the false arrest. In deciding when the limitations period began to run on that Fourth Amendment claim, the Court applied "the standard rule that [accrual occurs] when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id.* at 388 (quotation marks and citations omitted) (alteration in original). And the

Court recognized that Wallace "could have filed suit as soon as the allegedly wrongful [warrantless] arrest occurred, subjecting him to the harm of involuntary detention." *Id.*

That "standard rule" makes short work of Petitioner's continuing violation theory. Petitioner was injured, if ever, as soon as he was "subject[ed] … to … harm." *Id.* At that point, he had notice of a "complete and present cause of action," and his claim accrued. *Id.* As the Second Circuit explained below, "[t]he continuation of the prosecution does not, by itself, constitute a continuing violation that would postpone the running of the statute of limitations until his acquittal." Pet. App. 17a.

To be sure, Petitioner may have suffered additional injury during the course of any deprivation of right, but a claim accrues when the plaintiff has suffered *some* injury, and not the full measure of the injury ultimately claimed. *Wallace*, 549 U.S. at 391; *see also Manuel*, 137 S. Ct. at 927 ("[While] damages resulting from an unlawful seizure may continue to mount during the period of confinement caused by the seizure … no new Fourth Amendment seizure claims accrue after that date." (Alito, J., dissenting)).

2. Even If The Continuing Violation Doctrine Did Apply, Petitioner's Claim Would Still Not Be Timely.

Even where the doctrine applies, the continuing violation doctrine renders a claim timely only if "an act contributing to the claim occurs within the filing period." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). Petitioner's surviving claim is for violation of his

"Constitutional Right Not to be Deprived of Liberty as a Result of Fabrication of Evidence." J.A. 251. Petitioner filed suit on December 18, 2015. Pet Br. 30. Assuming arguendo the doctrine applies to § 1983 suits, it cannot apply here unless Petitioner alleges "an act contributing to the claim"—*i.e.*, an act depriving him of liberty as a result of fabrication of evidence, which is the Second Circuit claim he now presses—occurred on or after December 18, 2012. He does not.

a. Even Where The Continuing Violation Doctrine Applies, The Violation Must Extend Within The Limitation Period.

The Court has made clear that the continuing violation doctrine requires at least one timely instance of culpable conduct. In *Havens Realty Corp. v. Coleman*, the Court held that the Fair Housing Act's limitations period did not bar claims based on a "continuing violation manifested in a number of incidents—including *at least one* that is asserted to have occurred within the 180-day period." 455 U.S. 363, 381 (1982) (emphasis added). *Morgan* followed suit with respect to Title VII's 180 or 300 day deadline to file a charge with the Equal Opportunity Employment Commission, noting that "the employee need only file a charge within 180 or 300 days of *any act that is part of the hostile work environment*." 536 U.S. at 118 (emphasis added). Thus, where culpable conduct beyond the limitation period is part of a continuing violation that includes at least one instance of culpable conduct within the period, the non-barred conduct redeems its older relatives.

Petitioner's other cited decisions do not contradict the *Havens* and *Morgan* rule that the continuing violation doctrine applies only if at least one instance of culpable conduct occurs within the limitation period.[4] Likewise, Petitioner's cited decisions involving malicious prosecution claims are inapposite for the reasons discussed earlier in Part I: the statute of

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[4] *See Hamilton v. Manhattan Ry. Co.*, 9 N.Y.S. 313, 314 (Sup. Ct. 1890) (a six-year limitation bars recovery for damages arising more than six years before the action commenced); *Drews v. Williams*, 23 So. 897, 899-900 (La. 1898) (observing, with respect to a one-year limitation, that "[i]njury runs from the day the damage was sustained (Rev. Civ. Code, § 3502), but the pleader must prove that the damages were incurred the year preceding the institution of the suit"); *Whelan v. Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (continuing tort requires "at least one injurious act within the limitation period"); *Foss v. Whitehouse*, 48 A. 109, 112 (Me. 1901) (*barring* recovery for damages claims plaintiff could have raised in an earlier, successfully prosecuted tort suit); *Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001) (limitation statute for alleged Eighth Amendment violation via refusal to provide medical treatment did not start until the duty to treat ended, *i.e.*, upon release from custody); *DePaola v. Clarke*, 884 F.3d 481, 487 (4th Cir. 2018) (observing with respect to an Eighth Amendment claim for refusal to provide medical treatment that "this principle does not apply to claims that fail to identify acts or omissions within the statutory limitation period that are a component of the deliberate indifference claim"); *Shackelford v. Staton*, 23 S.E. 101, 102 (N.C. 1895) (rejecting plaintiff's argument that the limitation period ran from the date on which she was damaged by clerk of the court's failure to index a judgment, and holding that the period ran from the date of the clerk's last omission, *i.e.*, the day he ceased to be a clerk).

limitations for a malicious prosecution claim cannot begin to run before proceedings terminate favorably where a court has concluded that favorable termination is an element of the claim. *See Wilkinson v. Goodfellow-Brooks Shoe Co.*, 141 F. 218, 221 (C.C.E.D. Mo. 1905) (holding, in "an action for malicious prosecution," that "the institution of the proceedings and the subsequent appeal, if wrongfully done, constitute but one continuous tort for the purpose of this case"). But there is no longer a malicious prosecution claim in this case. Petitioner's surviving claim, for "fabrication of evidence," can accrue not just before, but even in the absence of, favorable termination. The limitations period for that claim therefore began to run once Petitioner learned of the uses of the allegedly fabricated evidence.

b. Petitioner Cannot Identify Any Violation In Connection With His Indictment Or Trial That Would Give Him A Timely Claim Under The Continuing Violation Doctrine.

The relevant uses of allegedly fabricated evidence in this case fall into two groups: (1) the presentation of allegedly fabricated evidence to the grand jury that indicted Petitioner; and (2) the use of allegedly fabricated evidence at the trial itself.

To the extent Petitioner claims misconduct caused him to be indicted and bound over for trial, that cannot form the basis of a continuing violation. For one thing, that claim must assert that probable cause was lacking; otherwise the claim cannot establish a causal connection to the indictment or to any resulting deprivation of liberty. *See supra* pp. 17-19 & note 2. The claim that asserts a lack of probable cause is Petitioner's "malicious

prosecution" claim, which is barred by absolute immunity and is not before the Court. *See supra* pp. 21-23. The "fabrication of evidence" substantive due process claim that is before the Court does not involve a showing of a lack of probable cause and is therefore unconnected to any deprivation of liberty resulting from the indictment.

Even if a claim that the indictment was procured without probable cause *were* before the Court, *Wallace* precludes any argument that such a claim states a continuing violation, as we have explained. *See supra* pp. 32-33.

As for the alleged use of fabricated evidence at Petitioner's trials, the fact that Petitioner was acquitted precludes any use of the "continuing violation" doctrine. A defendant who alleges that he was *convicted* because of fabricated evidence has a basis to claim that his trial must be evaluated as a whole and that his claim did not accrue until judgment was entered. Even then, it is unnecessary to use the "continuing violation" rubric. The analysis follows straightforwardly from the language of the Due Process Clause: the judgment of conviction deprives such a defendant of liberty, and the trial is then considered to determine if he received due process.

When a defendant is *acquitted*, the continuing violation doctrine is even more obviously inapplicable. The judgment of acquittal obviously does not deprive such a defendant of liberty, and there is no reason to examine the overall fairness of the trial. In fact, in this case the *only* event that occurred within the three year limitations period was the jury's verdict acquitting Petitioner—and, whatever else might be said, an

acquittal certainly does not violate a defendant's rights. Petitioner filed this suit on December 18, 2015 (Pet. App. 6a); closing arguments in his second trial were heard, and jury deliberations began prior to December 18, 2012. Pet. App. 52a-53a.

Even apart from the specific facts of this case, however, when a defendant is acquitted, and therefore not deprived of liberty, it is unclear that any actions the government took at trial, however wrongful in some other sense, can violate the defendant's constitutional rights. But if those actions do violate the Constitution—perhaps on a substantive due process theory, as we have said—they are just that: actions that violated the Constitution, unconnected to the verdict of the jury. It may be appropriate, in deciding whether there is a substantive due process violation, to consider the acts of misconduct in the aggregate; that will depend on the nature of the acts and the contours of the applicable substantive due process principle, if any. But in any event, the constitutional claim accrues, at the latest, when the last such act occurred. Nothing after that could have adversely affected the defendant in any sense.

C. Policy Considerations Favor Starting The Limitations Period Once The Claimant Learns That Fabricated Evidence Has Been Used To Deprive The Claimant of Liberty

The Second Circuit's rule is sound policy as well as sound law.

First, applying the standard accrual rule "serves the same 'basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and

certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Young v. United States*, 535 U.S. 43, 47 (2002) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (alteration in original)).

Petitioner asserts that public officials "will be unable to calculate with certainty when their Section 1983 liability draws to a close" under the Second Circuit's rule. Br. of Petitioner 52. But his own theory offers public officials little certainty and less repose. Because favorable termination may come in the form of long-delayed post-conviction relief, claims could suddenly accrue decades after the alleged injury—regardless of when the claimant learned about the fabrication. So long as the criminal case's disposition wends its way through the courts—at trial, on appeal, on collateral attack—officials would remain unsure of whether they might suddenly be subject to suit. A statute of limitations in which a favorable termination years after a conviction "retroactively extend[s]" a cause of action for a *pre-conviction* violation is "hardly a statute of repose." *Wallace*, 549 U.S. at 395. The sudden, belated accrual of a fabrication claim would likewise give no notice "to preserve beyond the normal limitations period evidence that will be needed for their defense." *Id.* As the Court has specifically noted, to argue that "law enforcement officers would prefer the possibility of a later § 1983 suit to the more likely reality of an immediate filing… is both implausible and contradicted by those who know best." *Id.* at 397.

Put another way, the accrual rule Petitioner attacks is the rule that we already have. Many causes of action accrue when a claimant "knew or should have known" of their injury, and the courts and litigants have taken it in

stride. *See, e.g.*, *Merck & Co. v. Reynolds*, 559 U.S. 633, 645-46 (2010) (cataloging claims that "accrue when the litigant first knows or with due diligence should know facts that will form the basis for an action" (citing authority)). Petitioner asserts that the "favorable termination" rule is more definite than this rule, but there is no reason to believe that is true. *See generally Cordova*, 816 F.3d at 664 (Gorsuch, J., concurring in the judgment). Some states treat the "favorable termination" element as requiring that the termination of criminal proceedings indicates innocence. *Miles v. Paul Mook of Ridgeland, Inc.*, 113 So. 3d 580 (Miss. Ct. App. 2012). Others view it as requiring only that the criminal prosecution be dismissed, even if by a *nolle prosequi*. *Glover v. City of Wilmington*, 966 F. Supp. 2d 417, 426 (D. Del. 2013). Indeed, as then-Judge Gorsuch observed, New Mexico has dropped the favorable-termination element altogether: "[U]nder the terms of New Mexico tort law it's settled that a plaintiff doesn't need to prove any kind of favorable termination at all." *Cordova*, 816 F.3d at 662 (Gorsuch, J., concurring in the judgment). There is no reason for this Court to import a requirement that has proven troublesome and to push aside the normal accrual rules that have worked well.

Second, and related, the Second Circuit's rule is more workable. Petitioner bemoans the potential for parallel proceedings, but *Wallace* specifically addressed this issue, and specifically rejected the argument that it justifies a delayed accrual date. As *Wallace* observed, when a claimant files a claim "related to rulings that will likely be made in a pending or anticipated criminal trial," "it is within the power of the district court and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case… is

ended." *Wallace*, 549 U.S. at 393-94; *see also Heck* 512 U.S. at 487 n.8 ("[I]f a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings"). It is simply not that unusual for criminal and civil actions dealing with overlapping matters to be pending simultaneously. For example, the government, or private parties, may bring civil actions at the same time as a criminal prosecution dealing with the same subject and the same defendants. There is no special accrual rule in those circumstances; trial judges manage the cases in an appropriate way.

In cases alleging misconduct in connection with a criminal prosecution, it is especially important that claims be filed in a timely fashion, even if they are ultimately stayed. Law enforcement officers deal with dozens, sometimes hundreds, of cases in a year. It will be difficult for them to testify accurately, long after the fact, about the specific details of a case that did not stand out in any way, unless they are on notice that they might have to do so. For that reason, the Court has explicitly recognized that "[s]tates and municipalities have a strong interest in timely notice of alleged misconduct by their agents." *Wallace*, 549 U.S. at 397 (quoting Brief for State of Illinois et al. as *Amici Curiae* 18).

Third, a favorable termination element poses the risk of barring meritorious claims. Petitioner expresses concern that "filing a civil suit will provoke prosecutors to seek greater penalties, or to avoid dropping charges, in the proceedings against them." Br. of Petitioner 55. This is exactly backwards. Insofar as the Court is concerned about abusive government actors, adopting a

rule whereby they can be sued only upon favorable termination offers those actors a powerful incentive to ensure that the proceedings do not terminate favorably—especially given the potential lack of clarity about what a "favorable termination" is.

Respondent recognizes that § 1983 is meant "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). "A rule of law foreclosing civil recovery against police officers who fabricate evidence, so long as they have other proof justifying the institution of the criminal proceedings against a defendant, would not follow the statute's command or serve its purpose." *Halsey*, 750 F.3d at 292-93. Nor would it serve the statute's purpose to foreclose civil recovery whenever officers can obtain an unfavorable termination.

These are not hypothetical considerations. For example, in *Margheim v. Buljko*, 855 F.3d 1077 (10th Cir. 2017), the court held that the plaintiff could not pursue his constitutional claims for unlawful post-process, pre-trial detention because prosecutors nolled his case, and the federal courts held that the *nolle prosequi* was not a favorable termination. *See also Donahue v. Gavin*, 280 F.3d 371, 384 (3d Cir. 2002) (holding that a *nolle prosequi* does not indicate innocence where "[t]he prosecutor simply reasoned that [the plaintiff] was not likely to receive any additional jail time if convicted in a retrial").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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