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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the statute of limitations on a claim for damages based on the alleged use of fabricated evidence to institute criminal proceedings, brought under 42 U.S.C. 1983, begins to run when the defendant discovers that fabricated evidence has been introduced in the criminal proceedings or when those proceedings are terminated in the defendant's favor.

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INTEREST OF THE UNITED STATES

The question presented in this case is when the statute of limitations begins to run on a claim against local officials under 42 U.S.C. 1983 based on the alleged use of fabricated evidence to institute criminal proceedings. The courts of appeals generally apply the same accrual rules for constitutional tort claims against state officers under Section 1983 to claims against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Ruff* v. *Runyon*, 258 F.3d 498, 502 (6th Cir. 2001) (collecting cases). The United States has a substantial interest in the circumstances in which federal officers may be held liable for damages in civil actions for alleged violations of constitutional rights, as well as in the procedures available for safeguarding those rights.

STATEMENT

1. In 2009, petitioner Edward McDonough was serving as a commissioner of the Board of Elections for Rensselaer County, New York. Pet. App. 4a. This case concerns an alleged scheme by respondent Youel Smith and others to falsely accuse petitioner of participating in absentee-ballot fraud during the 2009 primary elections in Troy, New York, a city within Rensselaer County.

According to petitioner, several individuals associated with the Democratic and Working Families parties in Troy attempted to affect the outcome of the 2009 Working Family Party primary election in Troy by forging signatures and providing false information on dozens of absentee-ballot applications, and then falsely voting with the fraudulently obtained absentee ballots. Pet. App. 4a, 25a-27a. As commissioner, petitioner approved the forged applications, but he claims not to have known that they were forged. *Id.* at 4a-5a.

Upon the fraud's discovery, the district attorney for Rensselaer County disqualified his office from the investigation and any subsequent prosecution based on his personal connections to suspected participants in the fraud. Pet. App. 5a, 28a-29a. After the Rensselaer County Court appointed respondent as special prosecutor for any criminal action related to the fraud, petitioner alleges that respondent and several co-defendants engaged in a scheme to frame petitioner for the fraud. *Id.* at 5a, 28a-41a.

Among other things, petitioner alleges that respondent presented to a grand jury, and then to two petit juries, false testimony, forged voter affidavits, and faulty DNA evidence. Pet. App. 5a-6a, 35a-41a. On January 28, 2011, a grand jury charged petitioner with 38 counts

of felony forgery and 36 counts of felony criminal possession of a forged instrument, in violation of New York law. *Id.* at 5a, 36a, 40a. The first trial against petitioner ended in a mistrial. *Id.* at 5a-6a. A second trial ended in an acquittal on December 21, 2012. *Id.* at 6a, 40a-41a.

2. On December 18, 2015, petitioner filed this action under 42 U.S.C. 1983, claiming that respondent and several co-defendants had violated his constitutional rights "not to be deprived of liberty as a result of fabrication of evidence" and "not to be prosecuted maliciously without probable cause." Compl. Counts I, II (capitalization altered); see *id.* ¶¶ 1209-1218. Petitioner asserted both claims under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution. *Id.* ¶¶ 1210, 1215. As a result of the defendants' conduct, petitioner alleged that he was "deprived of his liberty," *id.* ¶ 1198; "likely will suffer * * * injury to his character and good reputation; great mental anguish and pain, and irreparable injury in his profession," *id.* ¶ 1205; and "sustained exorbitant criminal defense attorney fees and costs," *id.* ¶ 1206. He requested $6 million in compensatory damages, $2 million in punitive damages, and attorneys' fees and costs. *Id.* at 173-174.

a. In September 2016, the district court dismissed petitioner's first claim—the "fabrication of evidence claim," Pet. App. 47a—as untimely. *Id.* at 20a-84a. The court observed that a Section 1983 claim is subject to the statute of limitations applicable to personal-injury claims in the State in which the federal court sits, which in New York is three years. Pet. App. 47a (citing N.Y. C.P.L.R. 214(5) (McKinney 2003)). The court reasoned that "fabrication of evidence claims accrue," and the statute of limitations begins to run, "when the plaintiff learns, or should have learned, that the evidence was

fabricated." *Id.* at 48a. And it determined that petitioner knew or should have known of all of the fabricated evidence at some point more than three years before he filed his complaint in December 2015. *Id.* at 52a-53a.

The district court declined to dismiss petitioner's second claim—the "malicious prosecution claim." Pet. App. 48a; see *id.* at 47a-48a. Unlike a "fabrication of evidence claim," the court reasoned that a malicious-prosecution claim "'does not accrue until the criminal proceedings have terminated in the plaintiff's favor.'" *Id.* at 47a (quoting *Heck* v. *Humphrey*, 512 U.S. 477, 489 (1994)) (brackets omitted). Because petitioner was not acquitted of the charges until December 21, 2012, the court concluded that he timely filed his malicious-prosecution claim on December 18, 2015. *Id.* at 48a.

b. Two months later, the district court dismissed the malicious-prosecution claim against respondent on absolute-immunity grounds. Pet. App. 85a-137a. The court determined that petitioner had adequately pleaded a malicious-prosecution claim under the Fourth Amendment based on respondent's use of fabricated evidence to initiate criminal proceedings without probable cause. *Id.* at 95a-106a. But it concluded that respondent was entitled to "absolute prosecutorial immunity" from that claim. Pet. App. 106a. The court explained that "[p]rosecutors are entitled to absolute immunity when they engage in activities 'intimately associated with the judicial phase of the criminal process.'" *Ibid.* (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976)). It reasoned that, "because the initiation and pursuit of a criminal prosecution are quintessential prosecutorial functions, the prosecutor has absolute immunity for the initiation and conduct of a prosecution unless he proceeds in the clear absence of all jurisdiction." *Id.* at

109a-110a (brackets, citation, and internal quotation marks omitted). And the court found no basis to conclude that respondent had acted in the clear absence of jurisdiction. *Id.* at 110a-111a.

Following the dismissal of all claims against respondent, the district court entered judgment as to respondent under Federal Rule of Civil Procedure 54(b) and certified its decisions dismissing the claims against him for interlocutory appeal. Pet. App. 4a.

3. The court of appeals affirmed the district court's orders. Pet. App. 1a-19a.

The court of appeals described petitioner's claims against respondent as (1) a due-process claim based on fabricated evidence and (2) a malicious-prosecution claim. Pet. App. 3a. As to the due-process claim, the court reasoned that "[u]nder the Fifth and Fourteenth Amendments' Due Process Clauses, individuals have 'the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer.'" *Id.* at 10a (citation and internal quotation marks omitted). It stated that a fabrication-of-evidence claim accrues "(1) when a plaintiff learns of the fabrication and it is used against him, and (2) his liberty has been deprived in some way." *Ibid.* For petitioner, the court reasoned, that was "at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented." *Id.* at 13a-14a.

The court of appeals rejected the reasoning of other circuits that "due process fabrication" claims accrue "only after criminal proceedings have terminated because [they] are analogous to claims of malicious prosecution, which require termination of the criminal proceeding in the defendant's favor before suit may be brought." Pet. App. 12a. In the Second Circuit's view,

"the nature of [petitioner]'s due process claim is different from a malicious prosecution claim." *Id.* at 8a. The court concluded that "[b]ecause the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues." *Id.* at 13a.

The court of appeals likewise rejected petitioner's argument that his due-process claim is timely because his prosecution represented a "continuing violation" as long as the proceedings continued. Pet. App. 16a (citation omitted). "Characterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as a single series of interlocking events," it reasoned, "does not postpone accrual of claims based on individual wrongful acts." *Ibid.* (citation omitted).

The court of appeals also affirmed the dismissal of the malicious-prosecution claim. Pet. App. 17a-18a. The court explained that prosecutors "are entitled to absolute immunity when acting as advocates for the state, such as initiating prosecutions or at trial." *Id.* at 18a. Because petitioner's malicious-prosecution claim "relates only to [respondent]'s prosecutorial function," the court held that absolute immunity applied. *Ibid.*

SUMMARY OF ARGUMENT

The statute of limitations for a Section 1983 claim seeking damages for the initiation of criminal proceedings based on fabricated evidence does not begin to run until those proceedings are terminated in the criminal defendant's favor.

I. Section 1983 creates a species of tort liability for the vindication of federal constitutional rights, informed by general common-law principles. Under those principles, a claim generally accrues, and the limitations period begins, when the plaintiff has a complete and present cause of action. Thus, to determine when the statute of limitations begins to run on a Section 1983 claim, a court generally must determine the elements of the claim. Under this Court's precedents, that requires (1) identifying the specific constitutional right at issue, (2) determining the common-law cause of action that provides the closest analogy to the constitutional claim, and (3) deciding which of the elements of that common-law cause of action are consistent with "the values and purposes of the constitutional right." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 921 (2017).

II. Applying that analysis, the statute of limitations on petitioner's Section 1983 claim did not begin to run until he was acquitted of the criminal charges against him. The constitutional right at issue in this case naturally sounds in due process. It is well established that the knowing use of fabricated evidence to obtain a conviction violates due process where the fabricated evidence is material to the verdict. Although petitioner was acquitted, the courts of appeals have generally held that the knowing use of fabricated evidence may violate due process even absent a conviction, where the defendant can show that the evidence was used to bring about some other deprivation of liberty, as petitioner alleges it was here through the initiation of criminal proceedings.

The most analogous common-law tort to such a claim is malicious prosecution, the gravamen of which is that the plaintiff was improperly subjected to criminal pros-

ecution to the detriment of his liberty, property, or reputation. One element of a common-law malicious-prosecution claim is that the allegedly unfounded prosecution was eventually terminated in the tort plaintiff's favor. As an element of petitioner's Section 1983 claim, a favorable-termination requirement would serve all the same interests it does at common law. It would be consistent with the due-process principles underlying petitioner's claim, and it would reinforce broader Section 1983 principles.

For those reasons, a Section 1983 plaintiff seeking damages for the initiation of criminal proceedings based on fabricated evidence should not have a complete and present cause of action until the criminal proceedings are terminated in his favor. Because petitioner filed his Section 1983 claim within three years of the favorable termination of the criminal proceedings against him, his claim is timely. The court of appeals' judgment therefore should be reversed.

III. On remand, the district court should likely dismiss petitioner's Section 1983 claim against respondent on the ground of absolute immunity. Section 1983 incorporates certain common-law immunities that were well established when it was enacted in 1871. And "at common law prosecutors were immune from suits for malicious prosecution and for defamation," including for "the knowing use of false testimony before the grand jury and at trial." *Burns* v. *Reed*, 500 U.S. 478, 485 (1991). As petitioner's argument in this Court makes clear, his claim against respondent is based on such conduct.

ARGUMENT

THE STATUTE OF LIMITATIONS FOR A SECTION 1983 CLAIM SEEKING DAMAGES FOR THE INITIATION OF CRIMINAL PROCEEDINGS BASED ON FABRICATED EVIDENCE DOES NOT BEGIN TO RUN UNTIL THOSE PROCEEDINGS ARE TERMINATED IN THE CRIMINAL DEFENDANT'S FAVOR

The fabrication and use of evidence in a criminal proceeding is reprehensible conduct. The United States can bring criminal charges against a prosecutor who willfully violates an individual's constitutional rights through the use of fabricated evidence, see 18 U.S.C. 242, or conspires with a witness or police officer to do so, see 18 U.S.C. 241. This case concerns when an individual prosecuted on the basis of such evidence may bring a claim for damages under 42 U.S.C. 1983—specifically, when such a claim must be filed to be timely.

The parties agree that New York's three-year statute of limitations for personal-injury claims provides the relevant limitations period. Pet. App. 9a; see N.Y. C.P.L.R. 214(5) (McKinney 2003). The question before the Court is when that period began to run. Petitioner offers three avenues for answering that question in his favor: (1) adopting what he calls the distinctive accrual rule of malicious prosecution for his fabrication-of-evidence claim, Pet. Br. 19-30; (2) defining when a Section 1983 plaintiff in these circumstances has a complete and present cause of action and applying the standard accrual rule, *id.* at 31-44; or (3) holding that any constitutional violation continued throughout the criminal proceedings, such that the limitations period did not begin until the proceedings ended, even if petitioner had a complete cause of action before that time, *id.* at 44-50.

In the government's view, the second of those options is the correct one. There is no distinctive accrual rule for claims of malicious prosecution at common law. But because the plaintiff must show, as an element of his malicious-prosecution claim, that the criminal proceedings terminated in his favor, the statute of limitations cannot begin to run on such a claim until the criminal proceedings are over. For all the reasons that the common law adopted a favorable-termination requirement for malicious-prosecution claims, the Court should adopt the same requirement for petitioner's closely analogous claim under Section 1983 that a prosecutor used fabricated evidence to initiate charges against him. See pp. 20-29, *infra*. Because petitioner filed his Section 1983 claim within three years of the favorable termination of criminal proceedings against him, the Court need not address the difficult questions that would arise under petitioner's alternative continuing-violations theory. Although the judgment below should be reversed, on remand, petitioner's claim is likely barred by prosecutorial immunity.

I. The Statute Of Limitations On A Section 1983 Claim Seeking Damages For The Initiation Of Criminal Proceedings Based On Fabricated Evidence Begins To Run When The Plaintiff Has A Complete And Present Cause Of Action

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. 1983. As this Court

has explained, the statute "creates a species of tort liability" for vindicating federal constitutional rights. *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994) (citation omitted). For certain aspects of that cause of action, such as the statute of limitations, federal law "looks to the law of the State in which the cause of action arose." *Wallace* v. *Kato*, 549 U.S. 384, 387 (2007); see 42 U.S.C. 1988(a). For others, the federal rules "conform[] in general to common-law tort principles." *Wallace*, 549 U.S. at 388.

"[T]he accrual date of a [Section] 1983 cause of action" is one of those aspects governed by general common-law principles without "reference to state law." *Wallace*, 549 U.S. at 388. Under those principles, "it is '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.'" *Ibid.* (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. Of Cal., Inc.*, 522 U.S. 192, 201) (1997) (citation omitted) (brackets in original). To determine when a Section 1983 claim accrues, a court therefore generally must determine when the elements of the cause of action will be met. "At that point—and not before—he can file a suit." *Green* v. *Brennan*, 136 S. Ct. 1769, 1777 (2016). "So only at that point—and not before—does he have a 'complete and present' cause of action." *Ibid.*

The Court's precedents provide a clear roadmap for that determination. The "threshold" task is to "'identify the specific constitutional right' at issue." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920 (2017) (citation omitted); see *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). After all, Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights

elsewhere conferred." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). Only "[a]fter pinpointing" the right at issue, may a court "determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel*, 137 S. Ct. at 920.

To then determine the elements of the Section 1983 claim, courts again "look * * * to the common law of torts." *Manuel*, 137 S. Ct. at 920. As the Court has explained, "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." *Carey* v. *Piphus*, 435 U.S. 247, 257 (1978); see *Heck*, 512 U.S. at 483; *Wilson* v. *Garcia*, 471 U.S. 261, 277 (1985). Those pre-existing rules, "defining the elements of damages and the prerequisites for their recovery," provide valuable guidance in defining the contours of constitutional torts under Section 1983. *Carey*, 435 U.S. at 257-258.

In particular, the Court's precedents require (1) identifying the common-law cause of action that provides "the closest analogy" to the type of constitutional claim at issue, *Heck*, 512 U.S. at 484, and (2) incorporating the elements (or other rules) of that common-law cause of action that are consistent with "the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921; see, *e.g.*, *Wallace*, 549 U.S. at 388-390 (incorporating the accrual rule for false imprisonment); *Heck*, 512 U.S. at 483-487 (incorporating the favorable-termination element from malicious prosecution).

II. A Section 1983 Plaintiff Seeking Damages For The Initiation Of Criminal Proceedings Based On Fabricated Evidence Does Not Have A Complete And Present Cause Of Action Until Those Proceedings Terminate In His Favor

Under this Court's analysis that looks to the closest analogous tort at common law, a Section 1983 plaintiff seeking damages for the initiation of criminal proceedings based on fabricated evidence does not have a complete and present cause of action until those proceedings are terminated in his favor.

A. Petitioner's Section 1983 Claim Asserts A Constitutional Right To Be Free From Criminal Prosecution On The Basis Of Fabricated Evidence

Before determining the proper elements of a constitutional tort, "it is necessary to isolate the precise constitutional violation" that has been alleged. *Baker*, 443 U.S. at 140; see *Manuel*, 137 S. Ct. at 920. In the Section 1983 claim at issue here, petitioner alleges that respondent and respondent's co-defendants violated his "constitutional right not to be deprived of liberty as a result of fabrication of evidence." Compl. 171 (capitalization altered). Petitioner's complaint lists the Fourth, Fifth, Sixth, and Fourteenth Amendments as potential bases for that right. *Id.* ¶ 1210. The government agrees with petitioner (Pet. Br. 42-43) that the Court does not need to determine the particular source of the right, because the contours of the constitutional right will not vary in any respect relevant here depending on where it is housed. To the extent the Court addresses the constitutional question, however, petitioner's claim most naturally sounds in due process.

1. It is well established that "a conviction obtained through use of false evidence, known to be such by representatives of the State," violates the Due Process

Clause of the Fourteenth Amendment. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); see *Miller* v. *Pate*, 386 U.S. 1, 7 (1967) ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."); *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) (recognizing a due-process violation where "perjured testimony" is "knowingly used by the State authorities to obtain [a] conviction"); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (due process "cannot be deemed to be satisfied * * * if a State has contrived a conviction through * * * a deliberate deception of court and jury").

Although petitioner does not allege that he was *convicted* on the basis of fabricated evidence—he was in fact acquitted of the charges, see p. 3, *supra*—the courts of appeals have generally held that the knowing use of fabricated evidence may violate due process even absent a conviction, where the defendant can show that she was "deprive[d] * * * of her liberty in some [other] way." *Whitlock* v. *Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012), cert. denied, 568 U.S. 1143 (2013); see *Black* v. *Montgomery Cnty.*, 835 F.3d 358, 371 (3d Cir. 2016) ("[A]n acquitted criminal defendant may have a stand-alone fabricated evidence claim against state actors under the due process clause of the Fourteenth Amendment if there is a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged."), cert. denied, 137 S. Ct. 2093 (2017); *Zahrey* v. *Coffey*, 221 F.3d 342, 348 (2d Cir. 2000) (holding that depriving someone of their liberty on the basis of fabricated evidence is a "classic constitutional violation: the deprivation of his liberty without due process of law").

Petitioner relies on that authority in asserting his Section 1983 claim. See Compl. ¶¶ 170-171 (citing *Zahrey*, *supra*). The parties do "no[t] dispute" that petitioner "suffered a liberty deprivation" as a result of the criminal proceedings. Pet. App. 10a; see Compl. ¶ 1199 (alleging that, upon his arraignment, petitioner was required to "remain within the jurisdiction of the Court and surrender any passport"). And both the district court and the court of appeals analyzed the claim principally in those terms. See Pet. App. 8a-17a (discussing the timeliness of petitioner's "due process claim"); *id.* at 49a (analyzing the timeliness of petitioner's claim as arising "under the due process[] clauses of the Fifth and Fourteenth Amendments"). As the courts below recognized, and petitioner implicitly acknowledges in his complaint, his claim that local officials unjustly deprived him of liberty through the use of fabricated evidence most naturally arises under the Due Process Clause of the Fourteenth Amendment.

2. Petitioner also suggests (Br. 42) that his fabrication-of-evidence claim could arise under the Fourth Amendment or even the Sixth Amendment. The Fourth Amendment is an unlikely home for petitioner's asserted constitutional right. The "Fourth Amendment does not speak of unreasonable 'prosecutions,' and instead refers only to unreasonable 'searches and seizures.'" *Britton* v. *Maloney*, 196 F.3d 24, 28 (1st Cir. 1999) (citation omitted), cert. denied, 530 U.S. 1204 (2000). Although this Court has recognized that the Fourth Amendment "establishes the minimum constitutional 'standards and procedures' not just for arrest but also for ensuing 'detention,'" *Manuel*, 137 S. Ct. at 917 (citation omitted), being subjected to the judicial process is not naturally considered a "seizure" within the

meaning of the Fourth Amendment. See *Brower* v. *County of Inyo*, 489 U.S. 593, 596 (1989) ("Violation of the Fourth Amendment requires an intentional acquisition of physical control.").[1]

As to the Sixth Amendment, petitioner states that the "Second Circuit has suggested that fabrication of evidence could arise under the Sixth Amendment, which guarantees a fair trial before an impartial jury." Pet. Br. 42 n.13 (citing *Morse* v. *Fusto*, 804 F.3d 538, 547 n.7 (2d Cir. 2015), cert. denied, 137 S. Ct. 126 (2016)). The Sixth Amendment guarantees "[i]n all criminal prosecutions" "the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. VI. The suggestion, however, that it also protects the right not to be subject to criminal prosecution based on fabricated evidence seems to stem from mistaken dicta in a Second Circuit decision interpreting the Due Process Clause.[2] The

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[1] In *Albright* v. *Oliver*, 510 U.S. 266 (1994), the Court declined to recognize a freestanding substantive due-process right "to be free from criminal prosecution except upon probable cause," but "express[ed] no view" as to whether the plaintiff might have a Fourth Amendment claim. *Id.* at 268, 275 (plurality opinion). In her concurring opinion, Justice Ginsburg reasoned that restrictions imposed to secure a defendant's court attendance during trial, such as travel restrictions, may constitute a continuing "seizure." *Id.* at 277-278.

[2] In *Morse*, the Second Circuit stated that it had been "'inconsistent as to whether' fabrication of evidence claims 'arise under the Sixth Amendment * * * or under the due process clauses of the Fifth and Fourteenth Amendments.'" 804 F.3d at 547 n.7 (citation and brackets omitted). But the decisions it cited were both grounded in due process. See *Zahrey*, 221 F.3d at 348; *Ricciuti* v. *N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (discussing "the protection[s] of due process of the law and fundamental justice") (citing *Mooney, supra*).

promise of a "fair trial in a fair tribunal is a basic requirement of due process." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 551 (1976).

B. Malicious Prosecution Is The Most Analogous Common-Law Tort To Petitioner's Constitutional Claim

Having identified the constitutional right at issue, the Court next "must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel*, 137 S. Ct. at 920. The Court has looked to common-law torts for valuable guidance in making that determination. See, *e.g.*, *Hartman* v. *Moore*, 547 U.S. 250, 258 (2006); *Wallace*, 549 U.S. at 388-389; *Heck*, 512 U.S. at 483-484; *Carey*, 435 U.S. at 257-258. And while identifying the closest analogy to particular constitutional claims can sometimes present a difficult question, that is not so here.

1. At common law, a person who institutes criminal proceedings "against another from wrongful or improper motives, and without probable cause to sustain it," is liable for the tort of malicious prosecution. Martin L. Newell, *A Treatise on the Law of Malicious Prosecution* § 5, at 6 (1892); see Restatement (Second) of Torts § 653, at 406 (1977) (Restatement). The elements are generally described as (1) "[a] suit or proceeding has been instituted without any probable cause therefor"; (2) "[t]he motive in instituting [that proceeding] was malicious"; and (3) "[t]he prosecution has terminated in the acquittal or discharge of the accused." Thomas M. Cooley, *A Treatise on the Law of Torts* 181 (1880); see Newell § 8, at 10 (same); Restatement § 653, at 406 (combining first two elements); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 871 (5th ed. 1984) (dividing first element into two). The

"gravamen" of such a claim is that "the plaintiff has improperly been made the subject of legal process to his damage." 2 Simon Greenleaf, *A Treatise on the Law of Evidence* 498 (7th ed. 1858).

The common-law tort thus protects the defendant's interest in "freedom from unjustifiable and unreasonable litigation," as well as his interests in reputation, property, and liberty. 1 Fowler V. Harper et al., *Harper, James and Gray on Torts* § 4.2, at 457 (3d ed. 2006). Malicious prosecution is a "wrong to character or reputation," by virtue of the unfounded allegations; an injury "to property, on account of the necessary cost and expense of defending against unfounded demands or accusations"; and may include "an injury to the person, as connected with false imprisonment." 1 Francis Hilliard, *The Law of Torts or Private Wrongs* § 1, at 412 (1866) (emphasis omitted); see George W. Field, *A Treatise on the Law of Damages* § 685, at 543 (1876) ("[W]henever a person sustains damages to his reputation, life, limb, liberty, or property, by reason of a malicious prosecution, he may recover therefor.").

Petitioner alleges precisely that sort of wrong and seeks redress for exactly those types of harms. He alleges that respondent violated his constitutional rights by initiating unfounded criminal proceedings against him based on fabricated evidence. Compl. ¶ 1211. He seeks damages for the deprivation of his liberty during the proceedings, *id.* ¶¶ 1198-1199; for the costs of defending against such unjustified litigation, *id.* ¶ 1206; and for the reputational and professional harm he has suffered and expects to suffer because of the respondent's "malicious actions," *id.* ¶¶ 1205, 1207. In other words, he is seeking recovery for the harm to "his rep-

utation, life, limb, [and] property, by reason of a malicious prosecution" brought by respondent. Field § 685, at 543.[3]

2. The court of appeals rejected the analogy to malicious prosecution, but failed to identify any other analogous tort. See Pet. App. 12a-13a. The court observed that the "injury" in a fabrication-of-evidence claim "occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted." *Id.* at 13a. It reasoned that the "harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding." *Ibid.* It thus concluded that "the nature of [petitioner]'s due process claim is different from a malicious prosecution claim." *Id.* at 8a.

Contrary to the court's suggestion, however, the harm in a malicious prosecution is not in the eventual resolution of the criminal proceedings either. As discussed above, the harms redressed by the common-law tort stem from the *initiation* of the criminal proceedings. It is the malicious initiation of such proceedings that wrongfully deprives the defendant of his liberty, property, or reputation. Petitioner likewise seeks to recover for those same kinds of harms stemming from the

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[3] Whether all such damages are compensable in a Section 1983 action of this sort is a separate question not presented here. See *Carey*, 435 U.S. at 258-259 ("[T]he rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question."); *Siegert* v. *Gilley*, 500 U.S. 226, 233 (1991) ("[An] injury to reputation by itself [i]s not a 'liberty' interest protected under the Fourteenth Amendment.") (citation omitted).

same sort of violation. The court of appeals' focus on those harms therefore only underscores that malicious prosecution is plainly the most analogous common-law claim for a Section 1983 plaintiff who seeks damages for the use of fabricated evidence to initiate criminal proceedings against him.[4] That conclusion is only reinforced by the court of appeals' failure to identify any other analogous common-law claim.

C. The Court Should Adopt The Favorable-Termination Requirement As An Element Of The Constitutional Tort

1. Because the common-law tort of malicious prosecution is the most appropriate analogy, the Court must determine which of the tort's elements should be incorporated into petitioner's constitutional claim. Although Section 1983 is not "simply a federalized amalgamation of pre-existing common-law claims," *Rehberg* v. *Paulk*, 566 U.S. 356, 366 (2012), the Court has recognized that "[c]ommon-law principles are meant to guide * * * the definition of [Section] 1983 claims," *Manuel*, 137 S. Ct. at 921. The relevant question is whether the elements of the common-law cause of action are consistent with "the values and purposes of the constitutional right at issue." *Ibid.*

Petitioner argues (Br. 19-30) that the Court need not engage in that analysis. He contends (Br. 19) that, as in *Wallace*, the Court can simply borrow the accrual rule from the most analogous common-law tort without "delv[ing] into what the elements of [his] constitutional claim are." In *Wallace*, false imprisonment supplied the

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[4] A different analogy to the common-law tort of false imprisonment may apply to a claim seeking damages for an arrest based on fabricated evidence. See Pet. App. 13.

most analogous common-law tort to the plaintiff's Section 1983 claim. See 549 U.S. at 389. The Court explained that false imprisonment "is subject to a distinctive rule" that the "[l]imitations begin to run * * * when the alleged false imprisonment ends," *ibid.*, even though a false-imprisonment plaintiff has a complete cause of action "immediately upon his false arrest," *id.* at 390 n.3. And it determined that the same rule should apply to the constitutional tort. See *id.* at 391-392.

Petitioner observes (Br. 28-29) that "the statute of limitations for the tort of malicious prosecution does not begin to run until favorable termination." Unlike with false imprisonment, however, that is not by virtue of any "distinctive" limitations rule. Pet. Br. 29. Rather, it is because favorable termination is an element of a malicious-prosecution claim. As a practical matter, because the other elements of the claim concern the *initiation* of those same proceedings, see p. 17, *supra*, the favorable-termination element is always the last element to be met. As a result, the plaintiff does not have a complete and present cause of action until the criminal proceedings are terminated, at which point the statute of limitations begins to run under the standard accrual rule. If the Court incorporates a favorable-termination element into the constitutional tort at issue here, the same will be true of petitioner's Section 1983 claim. But unlike in *Wallace*, the Court cannot avoid considering the elements by adopting a "distinctive" malicious-prosecution accrual rule that does not exist at common law.

2. Turning to the elements, the Court should adopt a favorable-termination requirement for petitioner's Section 1983 claim. Indeed, all of the reasons for the requirement at common law apply equally here. It is

consistent with the constitutional values that petitioner's claim seeks to vindicate, and it reinforces broader Section 1983 principles.[5]

a. At the outset, a favorable-termination requirement would serve the same "ripeness" interest as in malicious-prosecution actions. Keeton § 119, at 874. At common law, the element ensures that a malicious-prosecution action is not "tried at a time when it might tend to chill testimony in the criminal action, when the issues may still be narrowed by the criminal process, and when the civil dispute might still be resolved by compromise or other nonjudicial measures if the criminal trial can but proceed to an end." *Ibid.*; see Dan B. Dobbs, *The Law of Torts* § 590 (2d ed. 2018). And it "avoids parallel litigation over the issues of probable cause and guilt." *Heck*, 512 U.S. at 484 (quoting 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:5, at 24 (1991)).

A Section 1983 claim for damages based on the wrongful initiation of criminal proceedings, if permitted to proceed in parallel with the criminal case itself, could be similarly disruptive. The pending threat of damages may "chill testimony in the criminal action," Keeton § 119, at 874, undermining the truth-seeking function of the criminal proceeding. At the same time, the civil suit might be used to obtain from the prosecutor discovery not available in the pending criminal proceeding. See *Degen* v. *United States*, 517 U.S. 820, 825-826 (1996)

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[5] Because favorable termination would be an element of a damages action under Section 1983, rather than a limitation on the scope of the constitutional right, it would not affect the United States' ability to prosecute those who willfully violate individuals' constitutional rights. See 18 U.S.C. 241, 242.

(contrasting the "limited discovery" to which defendants are entitled in a criminal proceeding with the broader standards available in a civil suit). Conversely, the requirement on a defendant to timely bring such a suit during the pendency of criminal proceedings, in which the defendant must plead the basis for his fabrication claims and expose himself to the possibility of civil discovery, may undermine the criminal defendant's Fifth Amendment right against self-incrimination. A favorable-termination element would prevent these harms.[6]

b. A favorable-termination requirement also would promote interests of consistency and respect for the judicial process. As this Court recognized in *Heck*, as an element of malicious prosecution, the requirement "precludes the possibility of the claimant * * * succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." 512 U.S. at 484 (quoting Speiser § 28:5, at 24); see *Fisher* v. *Bristow*, (1779) 99 Eng. Rep. 140 (K.B.) 140 ("[O]therwise he might recover in the action,

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[6] To be sure, a district court could address some of these concerns by staying proceedings in the civil suit, while the criminal proceedings or a subsequent appeal or habeas proceeding continues. See *Heck*, 512 U.S. at 487 n.8. But even a stayed civil damages suit may affect the testimony in the pending criminal proceedings, and the possibility of a stay would not relieve the criminal defendant from the obligation to set out his theory of fabrication in a timely filed complaint. Moreover, whether to grant a stay would remain in the discretion of the district court, and the litigation over a stay could itself distract the prosecution and defense from the more pressing criminal proceeding.

and yet be afterwards convicted on the original prosecution."). It also prevents a criminal defendant from bringing a "collateral attack on [his] conviction through the vehicle of a civil suit." *Heck*, 512 U.S. at 484; see Dobbs § 590 ("If the accused was convicted, a malicious prosecution action should be impermissible because courts should not be permitted to collaterally attack the conviction.").

In *Heck*, the Court relied on the interests in consistent judgments and preventing collateral attacks on criminal judgments to incorporate the favorable-termination element into a constitutional tort seeking "to recover damages for allegedly unconstitutional conviction or imprisonment." 512 U.S. at 486; see *ibid.* ("[C]ivil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments."). The adoption of the element here would further those same interests and prevent a criminal defendant from using a Section 1983 claim to "collateral[ly] attack" his indictment or eventual conviction "through the vehicle of a civil suit." *Id.* at 484 (citation omitted); see *Kaley* v. *United States*, 571 U.S. 320, 328 (2014) ("The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime.").

c. In addition, a favorable-termination requirement would serve an important evidentiary purpose. At common law, the favorable-termination element of malicious prosecution exists in part "for what it shows about probable cause or guilt-in-fact" of the accused. Keeton § 119, at 874. A criminal prosecution that terminates in a final conviction undermines the plaintiff's claim that the prosecution was unfounded to begin with, and was initiated without probable cause. See Hilliard § 29, at

457; Melville M. Bigelow, *Elements of the Law of Torts* 72 (1878) ("[J]udgment against the party prosecuted would, it is deemed, show that the prosecutor had reasonable ground for his conduct."). Conversely, where a prosecution ends favorably to the accused, that resolution may serve as "evidence of the want of probable cause for the prosecution." *Whitfield* v. *Westbrook*, 40 Miss. 311, 317 (1866); see *Lunsford* v. *Dietrich*, 9 So. 308, 310 (Ala. 1891); Restatement §§ 663-665, at 429-433.

In the due-process context, this Court has explained that the knowing use of fabricated evidence to obtain a conviction violates due process only where there is a "reasonable likelihood" that the evidence "could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976); cf. *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999) ("[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). Although petitioner's due-process claim is based on the deprivation of his liberty that resulted not from a conviction, but from the initiation of criminal proceedings, courts of appeals to recognize such a claim have properly required that the fabricated evidence was material to the charging decision. See *Black*, 835 F.3d at 371 (requiring "a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged"); *Morse*, 804 F.3d at 547 (finding that a prosecutor may be liable for harm caused by fabricated evidence that was "material to the grand jury's decision to indict").

Just as the termination of criminal proceedings in a manner favorable to the accused can provide support

for the plaintiff's allegation that the prosecution was initiated without probable cause, it also can indicate that the allegedly false evidence used to initiate charges was material to the charging decision. If a defendant is able to obtain an acquittal at trial when given the opportunity to rebut the fabricated evidence, that will tend to show that the evidence—which the prosecutor presented without rebuttal at the charging stage—was material to the grand jury's decision to indict. Conversely, if the fabricated grand jury evidence is not presented at trial, is excluded from evidence, or is rebutted, and a conviction is *still* obtained, that conviction will tend to show the fabricated evidence was likely not material to the charging decision. And where a defendant obtains a favorable termination on appeal or in habeas proceedings by challenging the introduction of fabricated evidence leading to a conviction as a violation of due process, such a reversal of the conviction will necessarily include a finding that the fabricated evidence was material to the petit jury, see *Agurs*, 427 U.S. at 103—and therefore will tend to suggest that it was material to the grand jury as well. As with its value in proving the presence or lack of probable cause, the termination of proceedings will not necessarily be dispositive proof of materiality. But its strong evidentiary value counsels in favor of the element's inclusion in the constitutional tort.

d. A favorable-termination requirement likewise would provide potential litigants and the courts with clear notice of the point at which "the plaintiff has 'a complete and present cause of action'" and when the limitations period begins to run. *Wallace*, 549 U.S. at 388 (citation omitted). A clear demarcation of that period will prevent costly disputes about the moment at which a criminal defendant became aware or should

have become aware of the use of fabricated evidence, which would be inevitable under the court of appeals' approach but are "foreign to the central purposes of [Section] 1983." *Wilson*, 471 U.S. at 272.

Notably, in this case, neither lower court determined the precise moment when the statute of limitations began to run on petitioner's claim, reasoning only that he learned (or should have learned) of respondent's use of fabricated evidence at some point more than three years before filing suit. See Pet. App. 13a-14a (concluding the petitioner must have learned of the evidence "at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial"); *id.* at 52a-53a (concluding only that it was "prior to December 18, 2012"). The lower courts were able to avoid pinpointing that date because petitioner did not bring suit until nearly three years after the end of his second criminal trial. But on the court of appeals' approach, there will be future cases in which the particular timing matters. Avoiding "useless litigation on [such] collateral matters" led the Court to adopt a clear rule for determining the appropriate limitations period to borrow from state law for Section 1983 claims in *Wilson*. 471 U.S. at 275. The same "federal interests" in "certainty[] and the minimization of unnecessary litigation" counsel in favor of adopting a favorable-termination element here. *Ibid.*

e. Finally, a favorable-termination element would be consistent with principles of federal-state comity. Petitioner indirectly invokes those principles when he contends (Br. 32-35) that this Court's decision in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), would independently prevent a defendant from seeking damages for the initiation of criminal proceedings prior to the favorable termination of those proceedings. In *Preiser*,

the Court held that the federal habeas statute provides "the exclusive remedy" in federal court for a prisoner who "attack[s] the validity of his confinement." *Id.* at 489. Petitioner argues that even a defendant released on personal recognizance is in "custody" for purposes of the federal habeas statute, such that habeas offers "the exclusive remedy for a state prisoner who challenges the fact or duration" of that custody. Pet. Br. 34 (citation omitted). According to petitioner, *Heck* "extended *Preiser* to a suit seeking monetary damages under Section 1983," like petitioner's suit, "where awarding damages would 'call into question the lawfulness'" of that custody. *Ibid.* (citation omitted).

The court of appeals rejected petitioner's argument, reading this Court's decision in *Heck* to apply "only when there exists a *conviction or sentence* that has not been invalidated" but would be put into question by the damages award. Pet. App. 16a (emphasis altered). Since petitioner was never convicted, the court of appeals reasoned that "the *Heck* rule" never applied to his Section 1983 claim. *Ibid.* (citation omitted). But regardless whether *Preiser*, as interpreted by *Heck*, would have barred petitioner's Section 1983 claim before the favorable termination of his criminal proceedings, the principles supporting that decision—namely, avoiding "unnecessary friction between the federal and state court systems" and "'a proper respect for state functions,'" *Preiser*, 411 U.S. at 490-491 (citation omitted)—also support requiring the favorable termination of state criminal proceedings before asking a federal court to consider a Section 1983 claim that would call those proceedings into question.

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For all these reasons, a Section 1983 plaintiff seeking damages for the wrongful initiation of criminal proceedings based on fabricated evidence should be required to prove that the criminal proceedings were terminated in his favor as an element of his Section 1983 claim. Until that event occurs, the Section 1983 plaintiff does not have a complete and present cause of action, and his Section 1983 claim does not accrue. See *Heck*, 512 U.S. at 489-490. Because petitioner filed his Section 1983 claim within three years of the favorable termination of the criminal proceedings against him, his claim is timely. The court of appeals' judgment to the contrary therefore should be reversed.[7]

III. ON REMAND, PETITIONER'S CLAIM LIKELY SHOULD BE DISMISSED ON THE BASIS OF ABSOLUTE PROSECUTORIAL IMMUNITY

In the district court, respondent argued that, even if petitioner's fabricated-evidence claim was timely, it was barred by absolute prosecutorial immunity. Neither

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[7] Because incorporating a favorable-termination requirement into petitioner's Section 1983 claim resolves this case, the Court need not reach petitioner's alternative theory that, even if his claim arose before the end of criminal proceedings, the violation "continued" until those proceedings terminated. See Pet. Br. 44-50. Unlike the elements question, that theory raises difficult questions under this Court's precedents. Although the analysis should similarly follow "common-law tort principles," *Wallace*, 549 U.S. at 388; see *id.* at 388-390, the malicious-prosecution analogy provides no help. Such a claim does not "continue" in the manner petitioner suggests, because it does not arise at all until the criminal proceedings are terminated. And if the Court were to reject the malicious-prosecution analogy, it is not clear what other common-law tort, if any, could guide the analysis. See Pet. Br. 25-27 (explaining why neither false imprisonment nor abuse of process is analogous to petitioner's claim).

the district court nor the court of appeals passed on that argument. Because this Court is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the government agrees that the "question of absolute immunity is properly left for remand." Pet. Br. 25 n.7. On remand, however, the district court should likely dismiss petitioner's fabrication-of-evidence claim against respondent on absolute-immunity grounds.

Although Section 1983 does not expressly provide for a "defense of official immunity," certain common-law immunities "were so well established in 1871, when [Section] 1983 was enacted, that '[this Court] presume[s] that Congress would have specifically so provided had it wished to abolish' them." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993) (citation omitted).[8] As the Court has observed, "at common law prosecutors were immune from suits for malicious prosecution and for defamation," and "this immunity extended to the knowing use of false testimony before the grand jury and at trial." *Burns* v. *Reed*, 500 U.S. 478, 485 (1991) (citation omitted); see *Buckley*, 509 U.S. at 269-270.

To be sure, "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Buckley*, 509 U.S. at 273 (citation

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[8] The same immunity analysis does not apply to prosecutions by the United States under 18 U.S.C. 241 and 242. See *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.").

omitted). In *Buckley*, this Court found immunity inappropriate for a prosecutor who allegedly fabricated evidence at an "entirely investigative" stage, well before any criminal proceedings had begun—though the Court declined to address whether such conduct would constitute a "constitutional violation[] for which [Section] 1983 provides a remedy." *Id.* at 261, 274-275. Following *Buckley*, the Second Circuit has held that, although a prosecutor is absolutely immune from liability based on his presentation of false evidence to a grand jury, the same prosecutor may be held liable for fabricating evidence in an investigative capacity if "it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury." *Zahrey*, 221 F.3d at 353-354. In his complaint, petitioner relied on that authority in alleging a "fabrication of evidence" claim against respondent distinct from his "malicious prosecution" claim. Compl. Counts I, II, at 170, 171.

The government has serious doubts about following the Second Circuit's approach in *Zahrey* in this case. As an initial matter, it is not clear that Section 1983 should provide a remedy for the fabrication of evidence itself, rather than its subsequent use to harm the plaintiff. See *Buckley*, 509 U.S. at 281 (Scalia, J., concurring) ("I am aware of[] no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."). It is also far from clear that the alleged fabrication of evidence in this case—all of which, petitioner alleges, was done in an effort "to initiate and continue [a] scapegoat prosecution" against him, Compl. ¶ 345, and much of which allegedly occurred after those proceedings began, see

Pet. Br. 8-12—was done by respondent acting in an investigative capacity.

But even putting those concerns aside, petitioner emphasizes repeatedly in this Court that he seeks to hold respondent liable *not* for the fabrication of evidence itself, but for the wrongful "initiation and maintenance of criminal proceedings" on the basis of that evidence. *E.g.*, Pet. Br. 3, 4, 26, 28, 30, 46. He analogizes respondent's conduct to malicious prosecution. And he complains (Br. 49) of respondent's "wrongful use of fabricated evidence * * * throughout the criminal proceedings." In the government's view, "[i]nsofar as [the claim is] based on respondents' supposed knowing *use* of fabricated evidence before the grand jury and at trial—acts which might state a claim for denial of due process—traditional defamation immunity provides complete protection from suit under [Section] 1983." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring) (citations omitted). In short, petitioner is correct that his claim for fabrication of evidence is analogous to one for malicious prosecution, but the analogy only drives home that petitioner's fabrication claim is likely barred by prosecutorial immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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