No. 20-1788

In the Supreme Court of the United States

CITY OF NEW YORK, NEW YORK, ET AL., PETITIONERS

v.

JARRETT FROST

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff may bring a due process claim under 42 U.S.C. § 1983 challenging pretrial detention based on fabricated evidence but supported by probable cause independent of the challenged evidence.

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INTRODUCTION

In June 2014, a New York jury acquitted Respondent Jarrett Frost of murder. He had spent three and a half years at Rikers Island, in part because (as Petitioners must accept at summary judgment) detectives had forwarded coerced, untrue statements from a witness to prosecutors. The prosecutors, in turn, had used those statements in their decision to keep pursuing their case against Mr. Frost. After his acquittal, Mr. Frost sued in federal court under 42 U.S.C. § 1983. The Second Circuit held that he could pursue a Fourteenth Amendment due process claim challenging the use of fabricated evidence resulting in his pretrial detention. Any other rule, the Second Circuit holds, "would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997).

1. That straightforward conclusion does not implicate any certworthy conflict among the courts of appeals. The Second, Third, Fifth, and Eleventh Circuits have all squarely held that a § 1983 plaintiff may bring a due process claim challenging pretrial detention based on fabricated evidence, even if there was independent probable cause. The Ninth and Tenth Circuits, as Petitioners concede, have suggested that they agree. And while Petitioners claim that the Fourth and Eighth Circuits disagree, those courts' decisions do not address the question presented here. The question presented is whether a § 1983 plaintiff may pursue a due process claim challenging pretrial detention based on fabricated evidence but supported by "probable cause independent of the challenged evidence." Pet. i. But the Fourth and Eighth Circuit

decisions on which Petitioners rely merely hold that a Fourth Amendment claim is the appropriate vehicle when a pretrial detention was *not* supported by probable cause.

The lone circuit to split with this consensus is the Seventh. It mistakenly believed that this Court decided the question presented in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017). But this Court's later decision in *McDonough v. Smith*, 139 S. Ct. 2149, 2155 & n.2 (2019)— which the Seventh Circuit has not yet confronted—makes clear that *Manuel* did no such thing.

2. Given the Seventh Circuit's ill-considered outlier view and the absence of circuit conflict otherwise, this Court's intervention would be premature. Even assuming there is some tension between the views of the Second Circuit, on the one hand, and the views of the Fourth and Eighth Circuits, on the other, the Fourth, Seventh, and Eighth Circuits have not considered the reasoned views of the other circuits or the effect of *McDonough*. Indeed, the Fourth Circuit hasn't addressed this area of the law since *Manuel*. Given the state of play, this Court's immediate intervention would leave it without the benefit of any well-reasoned court of appeals opinion taking Petitioners' view of the question presented.

3. The Second Circuit's approach is also sound. Fabricating evidence isn't "due process of law." U.S. Const. amend. XIV, § 1, cl. 3. And nothing in *Manuel* or this Court's other decisions holds that the Fourth Amendment preempts other constitutional provisions in the context of pretrial detention. In fact, this Court has held just the opposite. The Fourth Amendment may supply a general "probable cause" standard, but

meeting that low bar does not exhaust the Constitution's command that no state shall "deprive any person of … liberty … without due process of law." *Id.* Fabricating evidence is an independent wrong working independent harm redressable under § 1983.

The Court should deny review.

STATEMENT

A. Legal background

This Court's precedent establishes two principles central to this case. *First*, a § 1983 plaintiff may bring a Fourth Amendment claim challenging a criminal pretrial detention as unsupported by probable cause "even after the start of 'legal process'"—*i.e.*, after a judge's probable cause determination. *Manuel v. City of Joliet*, 137 S. Ct. 911, 914 (2017). *Second*, neither *Manuel* nor any other decision of this Court has confronted whether a § 1983 plaintiff may pursue a due process claim challenging his pretrial detention resulting from fabricated evidence but supported by independent probable cause. To the contrary, the Court recently *assumed* in *McDonough v. Smith*, 139 S. Ct. 2149, 2155 & n.2 (2019), that a § 1983 plaintiff *may* pursue a due process claim for pretrial deprivation of liberty based on fabricated evidence.

1. a. In *Manuel*, this Court held that a § 1983 plaintiff may bring a Fourth Amendment claim challenging a "pretrial detention unsupported by probable cause" even when that detention extends beyond "the judge's determination of probable cause." *Id.* at 914, 919 (citations omitted). Elijah Manuel alleged that he had been held in jail for seven weeks after a judge, relying exclusively on allegedly fabricated evidence, found probable cause to believe that he had committed

a crime. *Id.* at 914-15. The Court explained that "[t]he Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause." *Id.* at 918. And the state can violate that prohibition not only "when the police hold someone without any reason before the formal onset of a criminal proceeding," but also when "that deprivation occurs after legal process commences"—like when "a judge's probable cause determination is predicated solely on a police officer's false statements." *Id.* Accordingly, this Court concluded that Manuel could bring a Fourth Amendment claim challenging his pretrial confinement. *Id.* at 918-20.

The Court limited its decision to "the complaint … that a form of legal process resulted in pretrial detention unsupported by probable cause." *Id.* at 919. In that circumstance, "the right allegedly infringed lies in the Fourth Amendment." *Id.* The Court did *not* decide whether a § 1983 plaintiff may bring a due process claim challenging a pretrial detention or other deprivation of liberty resulting from fabricated evidence but independently *supported* by probable cause. The Court noted that "[a]ll that the judge had before him" in Manuel's case "were police fabrications," so "[t]he judge's order holding Manuel for trial therefore lacked any proper basis." *Id.*

b. In determining that the Fourth Amendment was the proper provision for Manuel's claim, the Court looked to its earlier decision in *Albright v. Oliver*, 510 U.S. 266 (1994). *See Manuel*, 137 S. Ct. at 918-19. In *Albright*, the § 1983 plaintiff did not allege fabrication of evidence, but instead only that an officer wrongfully filed a criminal information that he had sold a substance "which looked like an illegal drug"—something that, of course, "did not state an offense" under state

law. 510 U.S. at 268-69. And although the plaintiff complained of violation of a right "to be free from criminal prosecution except upon probable cause," he brought only a due process claim rather than a Fourth Amendment claim. *Id.* at 269-71.

In that context, the *Albright* plurality declined "to recognize a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause," 510 U.S. at 268 (plurality), because the Fourth Amendment, not the Fourteenth, speaks specifically to "probable cause," *id.* at 273-74; *accord Manuel*, 137 S. Ct. at 918 (*Albright* plurality held that a claim that "a policeman's unfounded charges" "were (allegedly) unsupported by probable cause" sounded in the Fourth Amendment). The reason a § 1983 plaintiff may have a Fourth Amendment claim in that circumstance is that "the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime." *Manuel*, 137 S. Ct. at 919-20.

2. *McDonough* confirmed that the Court has not yet determined whether a § 1983 plaintiff may bring a due process claim challenging a pretrial deprivation of liberty based on fabricated evidence. *McDonough* held that a § 1983 claim challenging the use of fabricated evidence to pursue criminal charges accrues when criminal proceedings end in the § 1983 plaintiff's favor. *Id.* at 2153. In reaching that conclusion, the Court assumed that the plaintiff's "fabrication of evidence" claim "sound[ed] in denial of due process," as the Second Circuit had held below. *Id.* at 2154-55 & n.2. The Court embraced that assumption over the dissent's complaint that the case should have been dismissed as improvidently granted given

McDonough's failure to definitively "'identify[] the specific constitutional right' at issue." *Id.* at 2161 (Thomas, J., dissenting) (quoting *Manuel*, 137 S. Ct. at 920).

The Court also made clear that there is no rule that the Fourth Amendment is the only constitutional provision securing the rights of pretrial detainees. In assuming that McDonough's claim sounded in due process, the Court "express[ed] no view as to what other constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a 42 U.S.C. § 1983 action." *Id.* at 2155 n.2. The Court noted that "[c]ertain wrongs affect more than a single right" and thus "can implicate more than one of the Constitution's commands." *Id.* (quoting *Soldal v. Cook County*, 506 U.S. 56, 70 (1992)). To be sure, due process may give way to a "more 'explicit textual source of constitutional protection'" against a particular "sort of governmental conduct." *Soldal*, 506 U.S. at 70. But when "multiple violations are alleged," the Court doesn't seek to identify "the claim's 'dominant' character." *Id.* "Rather," the Court "examine[s] each constitutional provision in turn." *Id.*

B. Factual and procedural background

In January 2011, Jarrett Frost was arrested and charged with murder. He was then detained at Rikers Island until June 2014, when a jury acquitted him of all charges. After his release, Mr. Frost brought a civil-rights action in federal court against Petitioners, including the City of New York and the officers who made the case against him. He charged them with violating his Fourth Amendment and due process rights by using fabricated evidence to support his detention

before trial. The court of appeals held that Mr. Frost's Fourth Amendment claim failed because there was probable cause to believe that he committed the murder even without the fabricated evidence. But it concluded that a jury should decide whether Petitioners violated his due process rights by fabricating evidence that critically influenced the decision to prosecute him.

1. In July 2010, New York City detectives began investigating a murder to identify the shooter. *See* Pet. App. 4a-5a. Mr. Frost at first was considered a witness rather than a suspect. Pet. App. 5a-6a.

The investigation stalled. Then, in early 2011, detectives obtained a statement from a supposed witness, Leon Vega. Months earlier, Vega had told police that he did not see the shooter. But now, facing felony charges relating to a separate crime, Vega identified Mr. Frost as the shooter. *Id.*

A week later, Mr. Frost was arrested for second-degree murder, manslaughter with intent to cause physical injury, and second-degree criminal possession of a weapon. Pet. App. 6a. He was then arraigned, sent to Rikers Island, and indicted. *Id.* In June 2014, a jury acquitted Mr. Frost of all charges. *Id.* Mr. Frost had spent nearly three and a half years at Rikers. *Id.*

2. After his release, Mr. Frost sued Petitioners in federal court, bringing claims under 42 U.S.C. § 1983, as relevant here, for violation of his Fourth Amendment and due process rights. Pet. App. 9a.

Petitioners moved for summary judgment. *Id.* In opposing the motion, Mr. Frost submitted a declaration from Vega stating that Vega had "falsely identified Frost" as the shooter "because he was facing a felony charge, and [the detectives] made clear to

[him] that he would need to identify Frost as the shooter in order to get a deal." Pet. App. 10a. Vega stated that "he 'would never have identified Frost as the shooter if the detectives hadn't told [him] to do so'" and that he had "refused to testify against [Frost]" at trial "because [he] did not want to continue a lie." *Id.*

The district court granted summary judgment for Petitioners. As to Mr. Frost's Fourth Amendment claim, the court found that no reasonable juror would credit what it saw as the conclusory allegations in Vega's declaration and that there was probable cause to arrest and prosecute Mr. Frost even without Vega's earlier statement inculpating him. Pet. App. 75a-77a. The court also dismissed Mr. Frost's due process claim, reasoning that he had already failed to meet the less demanding standard on his Fourth Amendment claim. Pet. App. 84a-85a.

3. The court of appeals affirmed as to Mr. Frost's Fourth Amendment claim, finding that "there was probable cause to prosecute Frost, even without Vega's identification." Pet. App. 14a. But it reversed as to Mr. Frost's due process claim, finding it not barred by probable cause. Pet. App. 18a-32a.

The court of appeals first explained that a police officer violates a defendant's due process rights when he "creates false information likely to influence a jury's decision and forwards that information to prosecutors." Pet. App. 18a (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)). Unlike a Fourth Amendment claim, such a due process claim does not turn on probable cause. Pet. App. 18a, 25a-26a (citing *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 277-78 (2d Cir. 2016)). Indeed, the presence of probable cause is precisely what requires "an

entirely different mode of analysis." Pet. App. 28a. Even if an arrest valid under the Fourth Amendment "accounted for at least some portion of the deprivation of a § 1983 plaintiff's liberty," the due process question is whether the plaintiff "suffer[ed] a deprivation of liberty as a result of an officer's fabrication" that "critically influenced the decision to prosecute." Pet. App. 26a (cleaned up). The court noted that its holding was consistent with *Manuel*, which addressed only whether "a § 1983 plaintiff could challenge his pretrial detention based on purportedly fabricated evidence under the Fourth Amendment, even after a judge determined that this evidence constituted probable cause." Pet. App. 32a n.14.

Applying that test, the court of appeals held that Mr. Frost's due process claim was for a jury to decide. Based on Vega's declaration, the court explained, there was a genuine dispute about whether Vega's identification of Mr. Frost as the shooter was coerced and whether the prosecutors "used it to seek Frost's detention at [R]ikers Island and to bring him to trial," "thereby resulting in a deprivation of his liberty." Pet. App. 18a-19a, 30a. In concluding otherwise, the district court had usurped the role of the jury as factfinder by rejecting the credibility of Vega's declaration. Pet. App. 19a-25a.

Judge Kearse dissented. Pet. App. 46a-57a. In her view, "where the allegedly fabricated evidence has not been replicated at trial," as here, a due process claim "fail[s] as a matter of law.'" Pet. App. 46a (alteration in original; citation omitted). And under *Manuel*, she also opined, the Fourth Amendment alone governs challenges to pretrial restraint based on fabricated evidence, so Mr. Frost could not bring a due process claim. Pet. App. 48a-49a.

REASONS FOR DENYING THE PETITION

This case does not warrant this Court's review. There is no certworthy split; the sky is not falling; and, in any event, the Second Circuit's decision is correct.

Petitioners first claim that there is a circuit split requiring this Court's immediate intervention because "[a]t least four circuits have rejected due process-based fabrication claims in some or all pretrial contexts." Pet. 17. But the only issue here is whether there is circuit disagreement *on the question presented*—whether a § 1983 plaintiff may bring a due process claim challenging his pretrial detention as resting on fabricated evidence *where there is* "*probable cause independent of the challenged evidence*." Pet. i (question presented; emphasis added). And that question does not implicate any certworthy split. There is broad consensus—among the Second, Third, Fifth, and Eleventh Circuits, likely to be joined by the Ninth and Tenth in an appropriate case—that such claims may proceed.

Only the Seventh Circuit has squarely answered the question presented in the negative, doing so with little reasoning and without considering *McDonough* or other circuits' more considered views. Contrary to Petitioners' headcount, the Third, Fourth, and Eighth Circuits have not barred a § 1983 plaintiff from bringing a due process claim when fabricated evidence results in pretrial detention supported by independent probable cause. The Third Circuit has held just the opposite, and the Fourth and Eighth Circuits haven't addressed the question. That leaves just the Seventh Circuit's disagreement, which may resolve itself and so does not warrant this Court's review now.

Petitioners next claim that the Court must intervene to protect law enforcement from being subjected to two standards. Yet they never explain why they should not have to both (1) have probable cause and (2) refrain from deliberately fabricating evidence. Nor can they identify any slew of unmanageable due process cases, despite the Second Circuit's adherence to its due process rule for more than two decades.

Finally, the merits. In the end, Petitioners' position is that deliberate fabrication of evidence should be constitutionally unreviewable whenever officers can meet the low bar of showing probable cause. That argument is wrong. Fabricating evidence to deprive someone of his liberty offends bedrock principles of due process. The Fourth Amendment does not displace those principles just because it provides a general standard for pretrial seizures.

I. There is no certworthy circuit split over whether a § 1983 plaintiff can bring a due process claim based on fabricated evidence where his pretrial detention was supported by probable cause.

There is no certworthy disagreement among the courts of appeals about whether a § 1983 plaintiff may pursue a due process claim challenging pretrial detention based on fabricated evidence but supported by otherwise untainted probable cause. All but one of the circuits that have squarely addressed the issue—the Second, Third, Fifth, and Eleventh Circuits—have held that such claims may go forward. And, as Petitioners concede, other circuits have suggested they would follow suit. Only the Seventh Circuit has held otherwise, wrongly concluding in thinly reasoned opinions overlooking *McDonough* that *Manuel*

abrogated its prior precedent allowing due process claims to proceed.

Petitioners claim that the Third, Fourth, and Eighth Circuits also bar such due process claims. But the Third Circuit has held just the opposite, and the Fourth and Eighth Circuit's decisions do not address the question presented here. Instead, the Fourth and Eighth Circuits have addressed only circumstances in which there was no probable cause—a situation triggering the Fourth Amendment's more specific requirements. *Compare* Pet. i (question presented is limited to cases with "probable cause independent of the challenged evidence").

Neither the Seventh Circuit's outlier view nor the possibility that the Fourth or Eighth Circuit would side with the Seventh Circuit in a future case warrants this Court's intervention. The Fourth Circuit hasn't issued a decision in this area since *Manuel*. And neither the Seventh nor the Eighth Circuit has reconsidered its suggestion that the Fourth Amendment is the exclusive source of pretrial rights in light of *McDonough* or other circuits' more reasoned opinions.

A. The Second, Third, Fifth, and Eleventh Circuits have held that a § 1983 plaintiff may pursue a due process claim based on fabricated evidence where his pretrial detention was supported by independent probable cause.

The Second, Third, Fifth, and Eleventh Circuits have all held that a § 1983 plaintiff may bring a due process claim challenging the use of fabricated evidence in a decision to prosecute even where probable cause supported his pretrial detention.

1. The Second Circuit below held that a § 1983 plaintiff may bring a due process claim, even where there was probable cause to arrest him, where the police "create[d] false information likely to influence a jury's decision and forward[ed] that information to prosecutors." Pet. App. 18a (quoting *Ricciuti*, 124 F.3d at 130). The court explained that "a criminal defendant's right to a fair trial" "protects against deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision, *were that evidence presented to the jury*." Pet. App. 27a, 30a (emphasis in original).

The Second Circuit rejected Petitioners' argument that *Manuel* bars such due process claims. *See* Pet. App. 32a n.14. Although *Manuel* "held that a § 1983 plaintiff could challenge his pretrial detention based on purportedly fabricated evidence under the Fourth Amendment, even after a judge determined that this evidence constituted probable cause," it said nothing to preclude a fair trial claim based on due process. *Id.*

2. The en banc Fifth Circuit too has held that a § 1983 plaintiff may bring a Fourteenth Amendment due process claim based on "the imposition of false charges arising from the fabrication of evidence." *Cole v. Carson*, 935 F.3d 444, 450-51 & n.25 (5th Cir. 2019) (en banc). The court confirmed that *Manuel* does not change the calculus. "*Manuel* holds that 'pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows the start of legal process in a criminal case.'" *Id.* at 451 n.25 (quoting *Manuel*, 137 S. Ct. at 918). But *Manuel* did not hold "that the Fourth Amendment provides the exclusive basis for a claim asserting pre-trial deprivations based on fabricated evidence." *Id.*

3. The Eleventh Circuit likewise has held that a § 1983 plaintiff may pursue a due process claim challenging his pretrial detention based on fabricated evidence. In *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1328 (11th Cir. 2015), the court held that the plaintiff stated a claim for § 1983 conspiracy based both on false charges (under the Fourth Amendment) and "unjust incarceration" (under the Fourteenth Amendment). The plaintiff had alleged an agreement between two officers to frame him for a crime he did not commit, resulting in his unjust detention before he was ultimately acquitted. *Id.* at 1327-28. That conduct, the court concluded, could implicate both the Fourth and Fourteenth Amendments. *See id.* at 1328.

4. a. Similarly, in *Black v. Montgomery County*, 835 F.3d 358, 371 (3d Cir. 2016), the Third Circuit agreed "that an 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." That claim does not require "lack of probable cause," unlike a Fourth Amendment malicious prosecution claim, because it targets a distinct harm: "no sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence." *Id.* at 369-70 (citation omitted). "When falsified evidence is used as a basis to initiate the prosecution of a defendant," the court explained, the defendant suffers harm "regardless of whether the totality of the evidence, excluding the fabricated evidence, would have given the state actor a probable cause defense in a future malicious

prosecution action." *Id.* at 369 (cleaned up; quoting *Halsey v. Pfeiffer*, 750 F.3d 273, 289 (3d Cir. 2014)).

b. Despite recognizing that *Black* allows plaintiffs to "pursue such a claim as a violation of due process," Pet. 17, Petitioners suggest that this case implicates some split with the Third Circuit in light of *DeLade v. Cargan*, 972 F.3d 207 (3d Cir. 2020). But *DeLade* expressly did not address the question presented here. In *DeLade*, the Third Circuit held "that a claim alleging unlawful arrest and pretrial detention that occur *prior to a detainee's first appearance before a court* sounds in the Fourth Amendment—and not the Due Process Clause of the Fourteenth Amendment." *Id.* at 208 (emphasis added). That holding, as the court emphasized, was narrowly limited to the brief detentions occurring before the § 1983 plaintiff's first appearance before a judge. *Id.* at 212 n.4. The Third Circuit "recognize[d] that claims of unlawful pretrial detention may concern restraint *after* a criminal detainee's initial appearance before a court," but noted that no such claim was before it. *Id.*

Unlike the issue in *DeLade*, the issue in Mr. Frost's case is whether a § 1983 plaintiff may bring a fabricated-evidence claim challenging his detention beyond an initial judicial determination of probable cause. *See* Pet. App. 25a-26a. Thus, unsurprisingly, Petitioners are forced to concede that "the Third Circuit reserved decision" on the question presented here and to speculate about what that court "would" do in some future case. Pet. 20. No split there.

B. Petitioners concede that the Ninth and Tenth Circuits would entertain a due process challenge to pretrial detention based on fabricated evidence.

Petitioners admit that the Ninth and Tenth Circuits "have also suggested that pretrial use of allegedly fabricated evidence is actionable under the Due Process Clause" even though "they have not addressed the issue since this Court decided *Manuel*." Pet. 22. That concession reaffirms that this Court's intervention is not warranted.

1. In the Ninth Circuit, "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001). The Ninth Circuit has recently reaffirmed that fundamental principle in the context of an *Alford* plea causing the § 1983 plaintiff "to spend nearly two decades in prison." *Spencer v. Peters*, 857 F.3d 789, 796, 799-800 (9th Cir. 2017). And contrary to Petitioners' contention that it "ha[s] not addressed the issue since this Court decided *Manuel*," Pet. 22, the Ninth Circuit held in 2018 that a § 1983 plaintiff survived summary judgment on his due process claim that an officer fabricated evidence causing him to "be[] criminally charged." *Caldwell v. City & County of San Francisco*, 889 F.3d 1105, 1112-18 (9th Cir. 2018). The court has not suggested that it would reach a different result in a case like Mr. Frost's.

2. The Tenth Circuit too has endorsed due process claims based on the pretrial use of fabricated evidence. In *Klen v. City of Loveland*, 661 F.3d 498, 506-07, 515-17 (10th Cir. 2011), the court held that it

would violate due process for the prosecution to defeat a motion to dismiss criminal proceedings by relying on fabricated evidence where the defendant (and later § 1983 plaintiff) later pleaded no contest to avoid trial or even jail time. *Cf. Truman v. Orem City*, 1 F.4th 1227, 1240-41 (10th Cir. 2021) (clearly established due process "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer" defeats qualified immunity). And as Petitioners also concede, *Shimomura v. Carlson*, 811 F.3d 349, 351-52, 361-62 (10th Cir. 2015), did not resolve the question presented here, instead concluding only that a plaintiff could not bring a procedural due process claim challenging his arrest and service with a summons and complaint that the prosecutor later dismissed.

C. The Fourth and Eighth Circuits have not addressed the question presented, much less created a circuit split, because their decisions have not confronted pretrial detention supported by probable cause.

1. Petitioners claim that the Fourth Circuit splits with the decision below because it recognizes a due process claim only for claimants who were convicted based on fabricated evidence, rather than those who were merely detained before trial. *See* Pet. 18. That contention lacks merit, because the Fourth Circuit has not squarely held that a § 1983 plaintiff may not bring a due process claim challenging pretrial detention based on fabricated evidence but supported by independent probable cause.

a. Start with *Massey v. Ojaniit*, 759 F.3d 343 (4th Cir. 2014). Petitioners fixate on the court's supposed rule that a due process claim requires

"conviction and subsequent incarceration." Pet. 18 (quoting *Massey*, 759 F.3d at 354). But the court held no such thing. It merely stated, in a case involving a plaintiff who had been convicted (rather than acquitted, like Mr. Frost), that "to state a claim for a due process violation," "a plaintiff must plead adequate facts to establish that the loss of liberty—i.e., his conviction and subsequent incarceration—resulted from the fabrication [of evidence]." *Massey*, 759 F.3d at 354 (citing *Washington v. Wilmore*, 407 F.3d 274, 282-83 (4th Cir. 2005) (citing *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000))). That was a description of the facts before the court, not a rule statement. *See id.* at 346-47, 354.

The court's citations leave no doubt on that score. *Massey*'s language paraphrased the statement in *Washington* about another plaintiff who faced a "loss of liberty—*i.e.*, [his] conviction … and subsequent incarceration." 407 F.3d at 282-83. As in *Massey*, the court in *Washington* didn't purport to address acquittal, much less say that acquitted § 1983 plaintiffs cannot bring due process claims. And in *Zahrey*, the Second Circuit *allowed* an acquitted § 1983 plaintiff's due process claim to proceed. *See* 221 F.3d at 346, 348-49. There is thus little doubt that if the Fourth Circuit faced a claim like Frost's, *Massey* would not bar it on the ground that the plaintiff hadn't been convicted.

The Third Circuit's example is instructive. In *Black*, the Third Circuit rejected the argument Petitioners make here, that prior precedent required a conviction simply because an earlier decision arose in the context of a conviction. *Black* explained that the court's precedent had "left open the question of whether such a claim would be viable if a plaintiff was

acquitted" and that, when squarely considered, there was no meaningful distinction between claims arising from trials resulting in convictions and claims arising from trials resulting in acquittals. 835 F.3d at 369-71. In both situations, "[f]abricated evidence is an affront to due process of law" and a "'corruption of the truth-seeking function of the trial process.'" *Id.* at 370 (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)).

The problems with Petitioners' reliance on *Massey* don't end there. *Masssey* rests on a causation holding not implicated here—the plaintiff's failure "to plead facts to indicate that [the defendant's] fabrication caused his convictions or that the convictions were the reasonably foreseeable result of the fabrication." 759 F.3d at 356. That reasoning tracks the Second Circuit's reasoning here: Mr. Frost "raised a triable issue" on his due process claim "regarding causation" because "a reasonable jury could have found that [the fabricated evidence] 'critically influenced' the decision to prosecute" him. Pet. App. 26a (quoting *Garnett*, 838 F.3d at 277).

b. Petitioners can't create a split with *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012), either. To be sure, the Fourth Circuit said in a brief footnote that "[b]ecause the Fourth Amendment provides 'an explicit textual source' for § 1983 malicious prosecution claims, the Fourteenth Amendment provides no alternative basis for those claims." *Id.* at 646 n.2 (citations omitted). But the court wasn't confronting the question presented here. Instead, it was addressing a situation involving an allegation that a seizure was not supported by probable cause. *See id.* at 647. The court did not confront whether a § 1983 plaintiff may bring a due process claim for a pretrial deprivation

when there *is* probable cause independent of the fabricated evidence—the question presented here.

2. Petitioners also claim (at 18-20) that the Second Circuit's decision here conflicts with *Johnson v. McCarver*, 942 F.3d 405, 410 (8th Cir. 2019). Although there is some tension between *Johnson* and the Second Circuit's decision here, that tension has not ripened into square disagreement on the question presented.

First, *Johnson* did not squarely address the question presented here, whether a § 1983 plaintiff may pursue a due process claim challenging pretrial detention based on fabricated evidence but supported by independent probable cause. Instead, the court rejected Tom Johnson's Fourth Amendment and due process claims, in the qualified-immunity context, merely because there was "arguable probable cause" allowing the officer to avoid liability. *Id.* at 409-10. That arguable probable cause barred Johnson's Fourth Amendment claim. *Id.* at 410. But without a finding that the officers had actual probable cause, the court was left with Johnson's argument that the officers "lacked probable cause." *Id.* It was in that context that the court made the conclusory and seemingly broad assertion that "[a]ny deprivation of [a plaintiff's] liberty before his criminal trial … is governed by the Fourth Amendment." *Id.* That language would not foreclose a claim like Mr. Frost's, which accepts that there was actual, objective probable cause, untainted by the allegedly fabricated evidence, to believe the § 1983 plaintiff committed a crime.

Second, and in any event, the Eighth Circuit rested its holding on the mistaken notion that *Manuel* "abrogated" its prior precedent, *id.* at 411 (citing

Moran v. Clarke, 296 F.3d 638, 646-47 (8th Cir. 2002) (en banc)), which permitted a § 1983 plaintiff to pursue a due process claim based on fabricated evidence, *see Moran*, 296 F.3d at 646-47. But that reasoning makes little sense in light of *McDonough*, which makes clear that *Manuel* did *not* rule out due process claims based on fabricated evidence in the context of pretrial detention. *See supra* pp. 5-6. And nothing in *Johnson* suggests that the Eighth Circuit considered *McDonough*, which had been decided only a few months earlier. The briefing in *Johnson* concluded before this Court issued its opinion in *McDonough*; the parties never brought the decision to the Eighth Circuit's attention, *see* Dkt. No. 18-1148 (8th Cir.); and the Eighth Circuit has not taken any other opportunity to assess the effect of *McDonough* on its analysis in *Johnson*, let alone on the question presented here.

D. The Seventh Circuit's approach is the poorly reasoned outlier.

The Seventh Circuit alone has held that "a § 1983 claim for unlawful pretrial detention rests *exclusively* on the Fourth Amendment," *Lewis v. City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019), and applied that holding to bar a due process claim based on the alleged fabrication of evidence used to detain a § 1983 plaintiff before trial, *see Young v. City of Chicago*, 987 F.3d 641, 645 (7th Cir. 2021). But that limited and poorly considered disagreement with the Second, Third, Fifth, and Eleventh Circuits (and likely the Ninth and Tenth too) does not warrant this Court's review, especially not right now.

The Seventh Circuit's rule rests on the incorrect premise that *Manuel* answered the due process

question presented here. Before *Manuel*, the Seventh Circuit had held that "the deliberate manufacture of false evidence contravenes the Due Process Clause." *Whitlock v. Brueggemann*, 682 F.3d 567, 585 (7th Cir. 2012). In *Lewis*, the Seventh Circuit conclusorily reasoned that its earlier due process precedent "is incompatible with *Manuel*." *Id.* at 475, 479. And *Young* just parroted that reasoning. *See* 987 F.3d at 645-46. Since *Lewis*, however, this Court issued *McDonough*, which makes clear that a Fourth Amendment claim and a due process claim are *not* necessarily incompatible under *Manuel* by assuming just the opposite. *See supra* pp. 5-6, 20-21.

The Seventh Circuit has not yet revisited *Lewis* in light of either *McDonough* or the more considered views of other circuits. In *Smith v. City of Chicago*, 3 F.4th 332, 336-39 & n.2 (7th Cir. 2021), for example, despite acknowledging that *McDonough* involved a due process claim, the court considered only a Fourth Amendment claim because the plaintiff abandoned his due process claim. In an appropriate case involving the question presented here, the Seventh Circuit may well reevaluate its reasoning in *Lewis* in light of *McDonough* and the circuit consensus.

* * *

In short, there is no certworthy circuit split over whether a § 1983 plaintiff may bring a due process claim challenging pretrial detention based on fabricated evidence but supported by independent probable cause. Only the Seventh Circuit has squarely rejected such a claim, and its outlier approach is ripe for that court's reconsideration in light of *McDonough* and the more considered views of the other circuits. Indeed, the Second, Third, Fifth, and Eleventh Circuits have

all held that such due process claims may proceed, and the Ninth and Tenth Circuits, as Petitioners concede, have suggested that they will follow suit. And contrary to Petitioners' claim of a deeper split, the Fourth and Eighth Circuits simply have not squarely addressed the question presented.

II. The question presented does not warrant this Court's intervention.

All here agree "that police falsification of evidence is reprehensible and should not occur in the pretrial context or any other." Pet. 26. In Petitioners' view, however, § 1983 plaintiffs should not be able to sue over that reprehensible behavior so long as pretrial detention is supported by probable cause, and this Court should promptly intervene to say so. But there is no substantial disagreement on that question and no injustice for this Court to correct. Quite the opposite.

A. The absence of a certworthy split makes this Court's intervention premature, ill-advised, and likely unnecessary.

This Court's review is premature because the Seventh Circuit may yet eliminate the circuit disagreement by reconsidering *Lewis* and joining the consensus among the other courts of appeals that have addressed the question presented. As explained above, only the Seventh Circuit has squarely departed from the uniform view that a § 1983 plaintiff may pursue a due process claim challenging pretrial detention based on fabricated evidence but supported by untainted probable cause. To reach that result, the Seventh Circuit incorrectly concluded—without considering *McDonough*—that *Manuel* bars such due process claims. And the Fourth and Eighth Circuit

decisions on which Petitioners rely instead hold that the Fourth Amendment is the correct provision where the claim is that pretrial detention was unsupported by probable cause—and without confronting *McDonough*. *Supra* pp. 17-21. Petitioners want this Court to extrapolate from those decisions to assume that those courts of appeals would bar a due process claim where there *is* untainted probable cause and then grant review based on that hypothetical future disagreement plus the Seventh Circuit's outlier view.

That doesn't work, of course, because this Court counts holdings, not hypotheses. The only exception here should be for the Seventh Circuit, which may yet reassess its outlier position in light of *McDonough*. If the Seventh Circuit continues to adhere to its current position (or if the Fourth or Eighth Circuit addresses the question presented), the Court could consider review at that time. The only thing that immediate review guarantees is that the Court will not have the benefit of any well-reasoned lower court opinion taking Petitioners' view of the question presented.

B. Petitioners' recycled merits arguments do not call for this Court's intervention.

To convince the Court that its review is important now, Petitioners raise meritless arguments about why § 1983 plaintiffs should not be permitted to bring due process claims based on fabricated evidence.

1. Petitioners first suggest that police who fabricate evidence should be able to win summary judgment just by showing probable cause. Pet. 24. Permitting due process claims, they say, "renders the Fourth Amendment essentially superfluous" because it allows § 1983 plaintiffs to challenge "the same injury" under two constitutional provisions. Pet. 25.

They claim that this Court needs to intervene to protect them from being subjected "to two (potentially inconsistent) standards for the same conduct." Pet. 26 (citation omitted).

The problem with Petitioners' argument is their premise that lack of probable cause and fabrication of evidence cause "the same injury" or result from the same conduct. Law enforcement may lack probable cause and yet refrain from fabricating evidence. Conversely, they may have probable cause and still choose to fabricate evidence. Ultimately, Petitioners' premise is that it's okay for police to fabricate evidence before trial so long as they already have probable cause. That's just as wrong as it sounds. *See also Truman*, 1 F.4th at 1236 n.3 ("[A] fabrication of evidence claim implicates the Constitution, notwithstanding its failure to satisfy the elements of a malicious prosecution claim."); *infra* pp. 27-33.

Nor is the due process standard—articulated by multiple lower courts, *see supra* pp. 12-17—somehow "ill-defined." Pet. 26. Don't fabricate evidence. That bedrock, commonsense prohibition, which this Court has long recognized in the trial context, *see infra* pp. 27-28, is not hard to understand. It's no surprise that the Court assumed in *McDonough* "that the Second Circuit's articulations of the [pretrial due process] right … and its contours are sound," 139 S. Ct. at 2155, and nothing in the petition suggests that the Court should grant cert to address that correct assumption here.

2. Petitioners' next complaint is that "claims of fabrication and falsification are easy to allege in civil litigation, yet difficult to disprove." Pet. 27. But that is just a complaint about the challenges of civil

litigation generally—and, of course, it is the plaintiff, not the defendant, who bears the burden of proof. Defendants have all the ordinary tools for helping courts weed out frivolous and insubstantial claims.

Moreover, Petitioners' fixation on the Second Circuit's case-specific summary judgment analysis below ignores the difficulty of making out due process claims based on fabricated evidence as a general matter. In several cases Petitioners cite (at 26 n.5), the due process claims could not survive dismissal, summary judgment, or judgment on the pleadings. *Medina v. City of New York*, No. 20-cv-0797, 2021 WL 1700323, at *5 (S.D.N.Y. Apr. 29, 2021); *Norales v. Acevedo*, No. 20-cv-2044, 2021 WL 739111, at *8-9 (S.D.N.Y. Feb. 24, 2021); *Gutierrez v. New York*, No. 18-cv-3621, 2021 WL 681238, at *16-19 (E.D.N.Y. Feb. 22, 2021). And in cases that went forward, the plaintiff established that there was no probable cause—meaning that claims would go forward under *Manuel* in *any* circuit. *See, e.g.*, *Walsh v. City of New York*, No. 19-cv-9238, 2021 WL 1226585, at *4-5 (S.D.N.Y. Mar. 31, 2021); *Buari v. City of New York*, No. 18-cv-12299, 2021 WL 1198371, at *14-15 (S.D.N.Y. Mar. 30, 2021); *Appling v. City of New York*, No. 18-cv-5486, 2021 WL 695061, at *5-6 (E.D.N.Y. Feb. 23, 2021).

What's left is the rare due process case that goes to a jury precisely because a jury could find that the defendants fabricated evidence leading to the plaintiff's pretrial detention. *See, e.g.*, *Ashley v. City of New York*, 992 F.3d 128, 143 (2d Cir. 2021). Even though the Second Circuit's rule "has been the law" for more than "twenty years," it has not had "the dire results that the City predicts from the perfectly routine application of its principles to the facts here." *Garnett*, 838 F.3d at 280. Four Second Circuit cases since 1997, *see*

Pet. 26 n.5, hardly portend the crippling threat of litigation Petitioners say they fear. Instead, Mr. Frost's action is one of the "unusual case[s] in which a police officer cannot obtain a summary judgment in a civil action charging him with having fabricated evidence used in an earlier criminal case." *Black*, 835 F.3d at 372 (citation omitted).

3. Finally, Petitioners claim that it is important to apply an objective rather than a subjective standard in this area. But that argument again conflates the distinct injuries arising from lack of probable cause and fabrication of evidence. Probable cause wouldn't shield prosecutors' exercise of discretion they otherwise possess based on "suspect reasons" such as "the defendant's race or religion." *Wade v. United States*, 504 U.S. 181, 186 (1992). It shouldn't shield fabrication of evidence either.

III. The decision below is correct.

A. A § 1983 plaintiff may bring a due process claim challenging pretrial detention resulting from fabricated evidence but supported by untainted probable cause.

Due process protects criminal defendants from pretrial deprivations of liberty based on fabricated evidence. That is true even where there was probable cause independent of the fabricated evidence. And a person "depriv[ed] of any rights … secured by the Constitution" may sue for redress. 42 U.S.C. § 1983.

This Court has long recognized that knowingly using false evidence to deprive a defendant of liberty is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Using false evidence to obtain a conviction, the Court

has instructed, violates a defendant's right to due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942). That prohibition should not apply any differently to pretrial deprivations of liberty. Satisfying the Fourth Amendment's low bar for bringing charges does not authorize decisions to prosecute or detain a defendant based on lies or fake evidence, which are independently wrongful regardless of whether untainted evidence meets the general probable-cause standard. No matter when it occurs, fabrication of evidence is "a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104.

Nor is there any basis for treating pretrial deprivations of liberty differently where a defendant is ultimately acquitted. The due process prohibition on "knowingly us[ing] false evidence" is "implicit in any concept of ordered liberty." *Napue*, 360 U.S. at 269. It "is virtually self-evident." *Devereaux*, 263 F.3d at 1074-75. When a defendant would not have been criminally charged, prosecuted, or otherwise deprived of his liberty but for the fabricated evidence, that corruption violates his due process rights. Petitioners' rule, in contrast, "would insulate the ineffective fabricator of evidence while holding accountable only the skillful fabricator." *Black*, 835 F.3d at 370.

B. Petitioners' arguments are meritless.

Petitioners complain that the court of appeals' decision below conflicts with *Manuel* and impermissibly recognizes a substantive due process right when the Fourth Amendment alone "sets the standards for pretrial detention." Pet. 16. Those contentions lack merit.

1. Petitioners claim that under *Manuel*, a § 1983 plaintiff may not pursue a due process claim

challenging a pretrial deprivation of liberty based on fabricated evidence because the Fourth Amendment supplies the only rules for "claims challenging pretrial deprivations of liberty." Pet. 12. But the Court held no such thing in *Manuel*, as *McDonough* makes clear.

In *Manuel*, the Court held that a § 1983 plaintiff may bring a Fourth Amendment claim challenging a "pretrial detention unsupported by probable cause" even when that detention extends beyond "the judge's determination of probable cause." 137 S. Ct. at 914, 919 (citations omitted). But the Court limited its decision to the claim "that a form of legal process resulted in pretrial detention unsupported by probable cause." *Id.* at 919. When probable cause does not support a detention, "the right allegedly infringed lies in the Fourth Amendment" because probable cause is "what *that* Amendment"—and not the Fourteenth—"makes essential for pretrial detention." *Id.* at 919-20 (emphasis added). The Court did *not* decide whether a § 1983 plaintiff may bring a due process claim challenging a pretrial detention that *is* supported by probable cause but nonetheless results from the distinct harm of fabricating evidence. That latter question is the one presented here.

Two years later, *McDonough* confirmed that *Manuel* had not decided that due process question. In *McDonough*, the Court *assumed* that a § 1983 plaintiff may bring a due process claim challenging a pretrial deprivation of liberty based on fabricated evidence. 139 S. Ct. at 2155 & n.2; *supra* pp. 5-6. That would have been a strange assumption if it were simply wrong, especially given the dissent's gripe—quoting *Manuel*—that the majority should not have plowed ahead without "identify[ing] the specific

constitutional right at issue." *Id.* at 2161 (Thomas, J., dissenting) (quoting *Manuel*, 137 S. Ct. at 920).

2. Petitioners nevertheless claim that *Manuel* announced a "constitutional division of labor" relegating all claims challenging pretrial detention to the Fourth Amendment. Pet. 12 (quoting *Manuel*, 137 S. Ct. at 920 n.8). But that isn't what the Court said in *Manuel* or the plurality said in *Albright*. Neither decision held that the Fourth Amendment preempts claims based on distinct harms cognizable under the Fourteenth Amendment Due Process Clause.

a. In *Manuel*, the Court simply observed that the Fourth Amendment "provides 'standards and procedures' for the detention of suspects *pending trial*," 137 S. Ct. at 920 n.8 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975)), while the Fourteenth Amendment Due Process Clause provides grounds for "challenging the sufficiency of the evidence to support a conviction and any ensuing incarceration," *id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). But just because the Fourth Amendment supplies general standards for pretrial detention does not mean the Due Process Clause has no work to do before trial. The question here is not which constitutional provision supplies the general standards for a particular stage of the criminal trial process, but whether the distinct wrong of using fabricated evidence to deprive someone of his liberty offends due process of law.

As the Court has explained, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (quoting *Soldal*, 506 U.S. at 70). And while due process may give way to a "more

'explicit textual source of constitutional protection'" against a particular "sort of governmental conduct," *Soldal*, 506 U.S. at 70, the Fourth Amendment is not "the beginning and end of the constitutional inquiry whenever a seizure occurs," *James Daniel Good Real Prop.*, 510 U.S. at 51. Depending on "the purpose and effect of the Government's action," the Court may also need to ask whether the government's conduct complied with the Due Process Clause. *Id.* at 52. The Court reaffirmed those very principles in *McDonough* when it assumed that McDonough's claim "sound[ed] in denial of due process" and "express[ed] no view as to what other constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a 42 U.S.C. § 1983 action." 139 S. Ct. at 2155 n.2 (citing, *inter alia*, *Soldal*, 506 U.S. at 70).

b. *Albright* is even less helpful to Petitioners. There, a plurality of the Court held only that a claim "to be free from criminal prosecution except upon probable cause"—an explicit Fourth Amendment concept—must proceed under the Fourth Amendment rather than the Fourteenth Amendment Due Process Clause. 510 U.S. at 268. The Court did not address the question presented here, whether using fabricated evidence to detain a defendant before trial violates the Due Process Clause even if that detention otherwise clears the Fourth-Amendment-probable-cause requirement's low bar. In fact, Kevin Albright did not even claim any fabrication of evidence, instead complaining that an officer mistakenly charged him "with the sale of a substance which looked like an illegal drug"—something that was not "an offense under Illinois law." *Id.* at 268-69.

Put in context, *Albright* undermines Petitioners' position. As Justice Souter explained, "[t]he Court has previously rejected the proposition that the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure)." *Id.* at 286 (Souter, J., concurring in the judgment). And as discussed above, lack of probable cause—a Fourth Amendment injury—and fabrication of evidence—a recognized due process violation—are not the same injury and need not even result from the same conduct, as this case shows. The due process problem is not that the state cannot satisfy the general "standards for pretrial detention," Pet. 16, but that a state may not "deprive any person of … liberty … without due process of law." U.S. Const. amend. XIV, § 1, cl. 3. A deprivation of liberty resulting from fabricated evidence is "without due process of law" whenever it occurs. *See supra* pp. 27-28.

c. What's more, this Court has already held that the Fourth Amendment is *not* the only constitutional provision protecting pretrial detainees. For example, the Court reaffirmed in *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (quoting *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)), that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." And pretrial detainees "may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law" as well. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). It is impossible to square those decisions with Petitioners' purported discovery of a preemption clause in the Fourth Amendment.

3. To be sure, there may be causation questions—in this case, for a jury—about whether fabricated evidence actually influenced a decision resulting in a § 1983 plaintiff's deprivation of liberty. But those questions do not mean the Due Process Clause just falls away. Petitioners' contrary view—that the Fourth Amendment preempts any other constitutional provisions just because the challenge involves pretrial detention, *see* Pet. 16—raises all kinds of troubling questions. For example, what would stop a prosecutor from targeting a defendant for detention "for suspect reasons" such as "the defendant's" race or religion," *Wade*, 504 U.S. at 186, given that the Fourth Amendment doesn't secure "the equal protection of the laws," U.S. Const. amend. XIV, § 1, cl. 4? *But see* Br. of United States in Opp. 15-16, *Cordova-Soto v. United States*, No. 15-945, 136 S. Ct. 2507 (2016) ("Even when the government exercises discretion that is not otherwise subject to review, invidious government action that is based on, for instance, 'race or religion,' is subject to review." (quoting *Wade*, 504 U.S. at 185-86)). Petitioners' view is not, and should not be, the law.

* * *

This case doesn't merit this Court's review. All the courts of appeals that have addressed the question presented have concluded that a § 1983 plaintiff may pursue a due process claim challenging pretrial detention based on fabricated evidence but supported by independent probable cause. The sole exception is the Seventh Circuit, whose thinly reasoned decisions misapprehend *Manuel*, as *McDonough* makes clear. There is no reason for this Court to correct the Seventh Circuit's error before the Seventh Circuit has its own chance to do so.

The consensus makes sense. Just because the Fourth Amendment requires "probable cause" before trial doesn't mean that a state may "deprive any person of … liberty … without due process of law." U.S. Const. amend. XIV, § 1, cl. 3. And though it should go without saying in this country, fabricating evidence is not "due process of law."

CONCLUSION

The petition should be denied.

Respectfully submitted.

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