No. 20-1788

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

JARRETT FROST,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Frost concedes that the circuits are split on whether the Due Process Clause supports a claim that fabricated evidence led to a pretrial detention. He attempts to minimize the split but cannot deny its existence. Nor are his attempts successful: the split is both deep and entrenched. Frost's speculation that it might somehow resolve itself is baseless; only this Court can resolve it.

The question at issue is an important and foundational one. And the Second Circuit's answer to it contravenes two principles deeply rooted in the Court's precedents: (1) the Fourth Amendment defines the process that is due regarding pretrial detentions; and (2) the objective standard of probable cause is critical in helping to balance society's interests in vigorous enforcement of the criminal law with the individual's interest in avoiding unjustified deprivations of liberty.

Meanwhile, Frost does not dispute that this case presents an excellent vehicle for resolving the question presented. His brief in opposition contests neither the Second Circuit's holding that probable cause supported his pretrial detention as a matter of law, nor the fact that the supposedly fabricated evidence never reached the criminal jury. Frost also consented to the district court's entry of a stay of any dispositive motion practice or trial on his fabricated evidence claims pending the outcome of the proceedings in this Court. *See* July 13, 2021 Order, SDNY No. 15-cv-4843 ECF No. 143. There is no obstacle to the Court's review. The Court should grant the petition.

A. The conceded circuit split is clear and intractable.

a. Respondent concedes that following the Court's decision in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), the circuits remain split as to whether a § 1983 plaintiff may pursue a due process-based claim that police officers' use of fabricated evidence led to his pretrial detention (Opp. 21). The Second and Fifth Circuits have said yes. But, as Frost concedes (Opp. 21), in *Lewis v. City of Chicago*, 914 F.3d 472, 479 (7th Cir. 2019), the Seventh Circuit has said no. *Lewis* was a considered opinion approved of by the entire court. *Id.* at 475 n.1. And, though Frost quibbles on the point, the Eighth Circuit has agreed with the Seventh. *See Johnson v. McCarver*, 942 F.3d 405, 410-11 (8th Cir. 2019).

The Fourth Circuit has likewise held that the Due Process Clause cannot provide an "alternative basis" for a fabrication claim because the Fourth Amendment is the "explicit textual source" for such claims. *Evans v. Chalmers*, 703 F.3d 636, 646 n.2 (4th Cir. 2012) (quotation marks omitted). Relying on *Manuel*, the Third Circuit has also held that the Due Process Clause cannot house a claim alleging fabrication before the defendant's initial appearance, without suggesting that its answer would be different when considering a claim challenging detention pending trial. *Delade v. Cargan*, 972 F.3d 207, 211-13 (3d Cir. 2020). And Frost agrees with petitioners that the Ninth, Tenth, and Eleventh Circuits would recognize a due process-based claim (*see* Pet. 22-23; Opp. 14-17). The circuits are thus nearly evenly split.

b. Frost tries to recast the split as a shallow one by suggesting that, aside from the Seventh Circuit, the circuits on petitioners' side have left open whether

plaintiffs may pursue due process-based challenges to pretrial detentions allegedly tainted by fabricated evidence in those cases where any Fourth Amendment claim is defeated by the presence of probable cause. But it would be passing strange if a due process claim were to spring into existence only once a parallel Fourth Amendment claim had failed. No court has suggested that it works that way.

Quite to the contrary. The Eighth Circuit has rejected due process-based fabricated evidence claims while simultaneously rejecting parallel Fourth Amendment or malicious prosecution claims because actual or arguable probable cause supported the challenged law enforcement conduct. *See Stockley v. Joyce*, 963 F.3d 809, 821-23 (8th Cir. 2020); *Johnson*, 942 F.3d at 410-11; *Matthews v. McNeil*, 821 F. App'x 666, 667-68 & n.3 (8th Cir. 2020). Similarly in *Evans*, the Fourth Circuit categorically rejected a due process-based claim premised on the alleged pre-trial fabrication of evidence, and simultaneously rejected a Fourth Amendment claim based on the same facts. 703 F.3d at 646-49 & n.2.

Nor is Frost correct (Opp. 8-9) that the Second Circuit has adopted his theory that the absence of a viable Fourth Amendment claim paves the way for a due process-based fabrication claim. In the Second Circuit, both types of claims may and sometimes do proceed to trial in the same case. *See, e.g.*, *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 270 (2d Cir. 2016). Frost's efforts to minimize the split are premised on a theory that no circuit has espoused.

b. No better founded is Frost's speculation (Opp. 22) that this Court's decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), may prompt a spontaneous resolution of the circuit split. After all, *McDonough*

merely assumed the existence of a due process-based claim that fabricated evidence led to a pretrial deprivation of liberty, *id*. at 2155, 2160 n.9; it did not decide whether such a claim exists.

Perhaps because *McDonough* did not answer that question, the Seventh Circuit has never suggested that it might revisit *Lewis* in light of *McDonough*. In fact, the Seventh Circuit has twice declined to revisit *Lewis* post-*McDonough*. *See Kuri v. City of Chicago*, 990 F.3d 573, 575 (7th Cir. 2021); *Young v. City of Chicago*, 987 F.3d 641, 645-46 (7th Cir. 2021). The Seventh Circuit has been clear and consistent: under *Manuel*, the Due Process Clause governs convictions based on fabricated evidence; the Fourth Amendment governs pretrial detentions based on fabricated evidence. *Patrick v. City of Chicago*, 974 F.3d 824, 834-35 (7th Cir. 2020); *Lewis*, 914 F.3d at 476-80.

Likewise, there is no sign that the Eighth Circuit will revisit *Johnson* in light of *McDonough*. Contrary to Frost's assertion (Opp. 20-21), *Johnson* was clear that *Manuel* abrogated the Eighth Circuit's prior caselaw, and required the dismissal of a due process-based claim that fabricated evidence was used to secure a pretrial detention. 942 F.3d at 410-11. And like the Seventh Circuit, the Eighth Circuit has adhered to that rule post-*McDonough*. *See Stockley*, 963 F.3d at 821; *Matthews*, 821 F. App'x at 667 n.3.

Similarly, since *McDonough* the Fourth Circuit has both acknowledged that *Manuel* considered claims concerning pretrial restraints of liberty to arise under the Fourth Amendment, *see Everette-Oates v. Chapman*, No. 20-1093, 2021 U.S. App. LEXIS 21770, at *17-*18 n.5 (4th Cir. July 22, 2021), and repeated its prior holding that a due process-based fabrication claim requires proof of conviction and subsequent

subsequent incarceration to be viable, *see Burgess v. Goldstein*, 997 F.3d 541, 553 (4th Cir. 2021). And *Delade v. Cargan*, the Third Circuit's examination of the impact of *Manuel* on fabrication claims, postdated *McDonough* as well. *See* 972 F.3d at 211-12.

There is no suggestion that any of these four circuits would change approach in light of *McDonough*; the split can be resolved only through the grant of certiorari.

B. Frost downplays and distorts this Court's repeated pronouncements that the Fourth Amendment defines the process that is due for pretrial detention.

Frost's defense of the Second Circuit's rule fails to account for a robust series of this Court's precedents. In *Manuel*, of course, the Court recognized a "constitutional division of labor" between the Fourth Amendment, which governs challenges to pretrial deprivations of liberty, and the Due Process Clause, which governs claims that trial evidence was insufficient to support a conviction and incarceration. 137 S. Ct. at 920 n.8. The decision expressly addressed a Fourth Amendment claim alleging that a police officer's fabrication of evidence led to an unlawful detention.

Manuel's understanding of the Fourth Amendment as the exclusive basis for challenging the determination to detain an individual pending trial has a rich history. In *Gerstein v. Pugh*, this Court recognized that the Fourth Amendment, which was "tailored explicitly for the criminal justice system," defines the "process that is due" to suspects detained pending trial. 420 U.S. 103, 125 n.27 (1975) (quotation marks omitted). The Court reiterated the point in *United*

States v. James Daniel Good Real Property, 510 U.S. 43, 50 (1993): only one constitutional guarantee, the Fourth Amendment, governs the "arrest [and] detention of criminal suspects." And in *Albright v. Oliver*, the Court observed that the Fourth Amendment was drafted specifically to address "the matter of pretrial deprivations of liberty." 510 U.S. 266, 274 (1994) (plurality).

Frost misreads this Court's decisions concerning the interplay between the Due Process Clause and the Fourth Amendment. To be sure, civil rights claims sometimes implicate both provisions; for example, when a criminal proceeding spawns a civil asset forfeiture action in which the government seeks to take ownership of property (Opp. 30-31). *See James Daniel Good*, 510 U.S. at 51-52. But Frost's claim concerns an investigation into criminal wrongdoing and his resulting detention pending a criminal trial (Opp. 6-7). That claim implicates only the Fourth Amendment, which defines the "process that is due" to pretrial detainees. *James Daniel Good*, 510 U.S. at 50 (quotation marks omitted); *Gerstein*, 420 U.S. at 125 n.27 (quotation marks omitted). And while the Due Process Clause may protect pretrial detainees from mistreatment while they are confined (*see* Opp. 32, citing *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)), this Court has never held that someone detained pending a criminal trial may resort to the Due Process Clause to challenge the detention itself.

Next, Frost wonders how, if *Gerstein*, *James Daniel Good*, and *Manuel* are right about the Fourth Amendment's application to pretrial detentions, a pretrial detainee could pursue a claim against a prosecutor for race-based selective enforcement (Opp. 33). The answer is clear: the pretrial detainee would assert a

selective enforcement claim under the Equal Protection Clause to address an alleged constitutional wrong that is at right angles to the interests addressed by the Fourth Amendment. By contrast, where the Fourth Amendment itself governs the "process that is due" regarding the determination to detain a criminal defendant pending trial, *James Daniel Good*, 510 U.S. at 50 (quotation marks omitted), the Due Process Clause has no role to play in a challenge to that detention.

C. *McDonough v. Smith* only highlights the need for the Court's intervention.

Frost's heavy reliance on *McDonough* is misplaced (Opp. 10-12, 21-24). *McDonough* merely assumed the existence of a due process-based claim alleging that the use of fabricated evidence led to a pretrial deprivation of liberty. If anything, *McDonough* only highlights the need for this Court to resolve the fundamental question.

a. Frost is mistaken in depicting *McDonough* as inconsistent with cases like *Lewis* and *Johnson*. In essence, he treats this Court's mere *assumption*—that the Second Circuit is correct in ruling that the Due Process Clause bars the use of fabricated evidence to secure a pretrial deprivation of liberty, 139 S. Ct. at 2155, 2160 n.9—as if it were a holding. But the assumption was just that—an assumption. *McDonough*'s holding addressed when that assumed claim would accrue for the purpose of the statute of limitations. *Id*. at 2154-55.

In any case, Frost's suggestion that lower courts should draw guidance from *McDonough*'s assumption only strengthens the case for certiorari. *Manuel* described a "division of labor" where the Fourth

Amendment governs detentions through the time of trial, at which point the Due Process Clause takes over. 137 S. Ct. at 918-20 & n.8. If *McDonough* is thought to be in tension with *Manuel* on this point, that is only a further reason to grant review.[1]

The dissenting opinion in *McDonough* bolsters the case for certiorari still more. Rather than assuming away the antecedent questions about the basis for and contours of the plaintiff's claim, the three dissenting justices would have dismissed the writ as improvidently granted and "await[ed] a case in which the threshold question of the basis of a 'fabrication-of-evidence' claim is cleanly presented." 139 S. Ct. at 2162 (Thomas, J., dissenting). This is that case.

b. In addition to reading too much into *McDonough*'s assumption, Frost also ignores how the reasoning behind its holding cuts against him on the merits. *McDonough* identified the tort of malicious prosecution as the appropriate common-law analogue for determining the contours of the claim assumed to exist. 139 S. Ct. at 2156. To be sure, the Court reached that conclusion when determining that the due-process plaintiff would need to show that the criminal proceedings against him terminated in his favor, because such a due process claim would constitute a "challenge [to] the validity of the criminal proceedings" themselves. *Id.* at 2158. But the Court's common-law analogy suggests that a plaintiff would also need to show a lack of probable cause—another established element of the malicious prosecution tort.

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[1] Unlike Frost, McDonough was not detained pretrial, and he challenged the use of allegedly fabricated evidence before a grand jury and at trial. *McDonough*, 139 S. Ct. at 2154. Frost ignores these factual differences when claiming that *McDonough* controls here.

See Nieves v. Bartlett, 139 S. Ct. 1715, 1726 (2019) (determining that plaintiffs asserting § 1983 claims for retaliatory arrest must generally show a lack of probable cause, in part based on consideration of common-law analogues); *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006) (adopting a probable cause standard for retaliatory prosecution claims).

This point reflects a deep and consistent theme in the law—not just under the Fourth Amendment, but across the common-law torts of malicious prosecution, false imprisonment, and false arrest as well—that probable cause plays an indispensable role in balancing society's interests in vigorous enforcement of the criminal law with the individual's interest in avoiding unjustified deprivations of liberty. *See Nieves*, 139 S. Ct. at 1724-27. Even if plaintiffs in Frost's shoes could sue under the Due Process Clause, there would be no basis for jettisoning the probable cause standard. Since there is no dispute here that probable cause supported Frost's pretrial detention even absent the allegedly fabricated evidence (Pet. App. 18a), his claim would fail under any formulation.

Nor does Frost grapple with how his proposed rule effectively takes qualified immunity off the table as well. If probable cause is no defense and an officer's subjective intent is the core issue, then fabricated evidence claims will be easy to allege, but difficult to get dismissed pretrial, on the ground of qualified immunity or any other. While Frost argues that police officers should have no objection to the ordinary course of civil litigation (Opp. 25-26), his preferred outcome would gut a key part of ordinary § 1983 litigation: the use of qualified immunity to relieve government officials such as police officers of the "substantial social costs" that litigation entails. *Anderson*

v. Creighton, 483 U.S. 635, 638 (1987). And while Frost claims that the Second Circuit's due process-based "fair trial" claim is rare (Opp. 26), twice in as many months, the Second Circuit has denied summary judgment on such claims challenging pretrial proceedings. *See Kee v. City of New York*, No. 20-2201-cv, 2021 U.S. App. LEXIS 26055, at *37-*45 (2d Cir. Aug. 30, 2021); *Smalls v. Collins*, No. 20-1099-cv/20-1331-cv, 2021 U.S. App. LEXIS 24882, at *44-*54 (2d Cir. Aug. 20, 2021). For these reasons too, the question presented has far-reaching import.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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