No. 18-485

IN THE
Supreme Court of the United States

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

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

BRIEF OF CRIMINAL DEFENSE ORGANIZATIONS, CIVIL RIGHTS ORGANIZATIONS, AND THE CATO INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE**

Amici curiae Brooklyn Defender Services, The Legal Aid Society, New York County Defender Services, Neighborhood Defender Service of Harlem, Center for Appellate Litigation, Appellate Advocates, Office of the Appellate Defender, Vermont's Office of the Defender General, and the New York State Association of Criminal Defense Lawyers provide criminal defense and related representation in the Second Circuit to the individuals that will be directly impacted by the decision below—innocent people prosecuted for crimes based on fabricated evidence. They are joined by fellow *amici curiae* the National Association of Criminal Defense Lawyers (NACDL), Human Rights Defense Center, Cato Institute, Association of Criminal Defense Lawyers of New Jersey, California Attorneys for Criminal Justice, and New Mexico Criminal Defense Lawyers Association—leading criminal defense and civil rights organizations outside of the Second Circuit that defend civil liberties, the rights of persons accused of crimes, and the interests of wrongfully convicted persons in asserting their constitutional rights.

Amici share the same fundamental concern with the decision below: It directly conflicts with controlling precedent from this Court, conflicts with the de-

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* Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

cisions of at least five other circuits, has no grounding in practical reality, imposes an unfair and unworkable burden on individuals exercising fundamental rights, and has enormous consequences for the orderly administration of justice. Only this Court can correct the Second Circuit's serious error and restore uniformity to federal law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below held that an individual must bring a claim for the unlawful fabrication of evidence under 42 U.S.C. § 1983 within three years of when that person "learned of the fabrication of the evidence and its use against him in criminal proceedings," and "was deprived of a liberty interest by," for example, an arrest or trial. *McDonough v. Smith*, 898 F.3d 259, 267 (2d Cir. 2018). For nearly all innocent defendants with valid claims, their claims would accrue immediately upon commencement of the proceedings—when they first learn the facts alleged at arraignment, they discern that some fact is fabricated, and bail is set. Consequently, to avoid the time bar, many criminal defendants will be forced to mount § 1983 suits either during a pending criminal trial or while still pursuing its appeal.

That result directly conflicts with this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that one of the elements an individual must plead and prove to win an evidence-fabrication claim is termination of the criminal proceeding in the accused's favor. The decision below literally begins to run the statute of limitations on claims that courts are required, under *Heck*, to dismiss. It also conflicts with this Court's broader pronouncements about the appropriate relationship between federal civil and

state criminal litigation. This Court has consistently held that federal civil litigation must come after the conclusion of state criminal proceedings, both to respect the prerogative of states to adjudicate alleged violations of state law and to bolster the strong judicial policy against inconsistent adjudications in parallel proceedings.

The decision below is also divorced from the practical reality of criminal defense and civil rights litigation. It forces an innocent defendant to make a Hobson's Choice. He can remain silent and hold the state to its fabricated proof—as is his absolute constitutional right—but in doing so risk losing his civil claim. Or he may demand a remedy for the fabrication—as is also his absolute constitutional right—but in doing so undercut the effectiveness of his criminal defense. No criminal defense lawyer would advise a client to bring a parallel civil rights claim during his criminal proceedings that could jeopardize rights or potential defenses. And prosecutors facing civil suits alleging misconduct by their offices (or by other law enforcement officers with whom they work regularly) are less likely to dismiss weak cases and more likely to hyper-aggressively pursue convictions, if only to immunize themselves—and the jurisdictions that elected them—against the civil suit.

The suit itself also prejudices the defendant. Allegations in the civil complaint lock the defendant into divulging myriad facts and details probably unknown to the prosecution, unleash the broad rules of civil discovery, and critically imperil the defendant's absolute right to remain silent during the criminal proceeding and require the state to prove its case beyond a reasonable doubt.

The decision below also has crushing practical consequences. Knowing use of fabricated evidence to bring about the conviction of a criminal defendant is among the most serious misconduct anyone in the criminal justice system can commit. It is also a disturbingly common cause of wrongful convictions. Statistics, anecdotes, cases, and *amici*'s own experience show just how widespread the problem of evidence fabrication is. Because of the decision below, a devastating number of meritorious fabrication-of-evidence claims will never see the light of day. In the Second Circuit alone, countless criminal defendants, along with *amici* who defend and fight for them, will suffer from the fallout of the decision below.

This Court must intervene now to correct this grave error. The issue is outcome determinative, there are no obstacles to review, and the decision below is in direct conflict with this Court's precedent and creates a yawning circuit split. This is a textbook case for the Court's review. The Court should grant the petition for certiorari.

ARGUMENT

I. The Decision Below Directly Conflicts with this Court's Precedents Governing the Relationship Between Civil and Criminal Cases

A. The Second Circuit's Decision Directly Conflicts with *Heck v. Humphrey*

The decision below directly conflicts with *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, this Court held that "[o]ne element that must be alleged and proved" in a § 1983 fabrication-of-evidence suit "is termination of the prior criminal proceeding in favor of the accused." *Id.* at 484. But the Second

Circuit's rule expressly contemplates that, to meet the statute of limitations, many plaintiffs will need to file § 1983 fabrication-of-evidence suits before criminal proceedings have terminated *at all*, let alone in the accused's favor. *See McDonough*, 898 F.3d at 266-67 (2d Cir. 2018). The Second Circuit's rule thus forces Plaintiffs to file suits that may be subject to mandatory dismissal under *Heck*. The decision below glossed over the obvious and direct conflict with *Heck*. Unsurprisingly, every other circuit to have considered the issue has come out the other way. *See* Pet. 13 (citing cases).

The Second Circuit's rule demands that criminal defendants and individuals pursuing criminal appeals flood the courts with unripe claims that courts will be obligated to dismiss. Even if courts stay these cases rather than dismiss them—something they have no obligation to do—this Court has consistently looked unfavorably on the "empty formality [of] requiring [plaintiffs] to file unripe … claims." *Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Such a requirement fails to "respect[] the limited legal resources available" to parties and courts. *Id.* And it encourages "piecemeal litigation," *id.*, a problem of particular relevance in § 1983 litigation because plaintiffs, like Mr. McDonough, often bring a fabrication-of-evidence claim alongside a claim that accrues after proceedings conclude, such as one for malicious prosecution. *See McDonough*, 898 F.3d at 264.

B. The Decision Below Is Inconsistent with this Court's Guidance About the Appropriate Relationship Between State Criminal and Federal Civil Proceedings

The Second Circuit's decision subverts a bedrock principle of federalism that state courts may "try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971). This Court has made clear that litigants should resolve criminal trials *first* before seeking relief from a federal court. *See Younger*, 401 U.S. at 46. Federal court interference in state criminal proceedings is reserved for "extraordinary circumstances, where the danger of irreparable loss is both great and immediate." *Id.* at 45. Otherwise, "there should be no interference" with this core state function. *Id.*

The decision below betrays this principle by inviting a flurry of § 1983 actions in federal court that directly implicate the validity of pending or future criminal actions in state court. *Younger* concerned the propriety of federal courts enjoining pending state criminal proceedings. But there is little practical difference between an injunction and a judgment in favor of a § 1983 plaintiff on a fabrication-of-evidence claim. Both usurp the state's ability to take the first pass at adjudicating the quality and legality of the state's evidence in support of allegations that a person has violated state law. Both fail to show a "proper respect for state functions." *Id.* at 44; *cf. Medina v. California*, 505 U.S. 437, 445-46 (1992).

The decision below also offends the longstanding "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Heck*, 512 U.S. at 485; *see Parke v. Raley*, 506 U.S. 20, 29-30 (1992); *Teague v.*

Lane, 489 U.S. 288, 308 (1989); *Vorhees v. Jackson*, 35 U.S. 449, 472-73 (1836). It is axiomatic that such a policy promotes "finality and consistency" and thereby protects the integrity of courts. *See Heck*, 512 U.S. at 485; *see also Montana v. United States*, 440 U.S. 147, 154 (1979) (noting the need to "foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions"). An evidence-fabrication claim is an accusation that the criminal adjudicatory process has been intentionally corrupted and, in the case of a conviction, has reached an incorrect and perhaps tortious result. By requiring many plaintiffs to bring such accusations in a separate court while the prosecution is still pending, the Second Circuit now demands precisely the sort of "parallel litigation over the issues of probable cause and guilt" that *Heck* expressly disallowed. 512 U.S. at 484. The decision below not only contemplates but demands adjudications of the state's evidence in parallel criminal and civil proceedings.

What's more, the Second Circuit's rule is plainly inconsistent with a "basic doctrine" of Anglo-American jurisprudence that courts of equity will not interfere with a criminal trial. *Younger*, 401 U.S. at 43-44; *see* Edwin Mack, *Revival of Criminal Equity*, 16 Harv. L. Rev. 389, 391 (1902); 42 Am. Jur. 2d Injunctions § 206 (2018). The "fundamental purpose" of this centuries-old rule is to preserve the role of the jury to weigh the state's allegations against a defendant, and to avoid multiple legal proceedings over the same transaction or occurrence. *See Younger*, 401 U.S. at 44. Yet the decision below would allow federal courts to adjudicate the veracity of state's evidence, and even confer equitable relief for its fabrication, to § 1983 plaintiffs who are simultaneously

defending themselves from the same evidence at criminal trial.

No other species of § 1983 claim that arises from the validity of the state's allegations against a defendant accrues before the termination of criminal proceedings. Section 1983 claims alleging that a prosecutor has withheld exculpatory evidence from the defendant, *see Brady v. Maryland*, 373 U.S. 83 (1963), accrue only after the termination of criminal proceedings. *See Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 390 (4th Cir. 2014); *Smith v. Gonzales*, 222 F.3d 1220, 1222-23 (10th Cir. 2000). The same is true of § 1983 claims alleging that the state failed to disclose evidence that might impeach the credibility of the state's own witnesses, as required by *Giglio v. United States*, 405 U.S. 150 (1972). *See Rosales-Martinez v. Palmer*, 753 F.3d 890, 896 (9th Cir. 2014). Malicious prosecution claims under § 1983, too, must wait until the conclusion of criminal proceedings. *See Manuel v. City of Joliet,* 137 S. Ct. 911, 921 (2017) (citing *Heck*, 512 U.S. at 484, 489). The Second Circuit's rule takes the opposite approach, and in doing so turns the relationship between civil and criminal litigation on its head—forcing an innocent accused to choose between vindicating simultaneously valid but competing rights.

II. The Decision Below Is Divorced from the Realities of Criminal Litigation

Given the massive liberty interest at stake in criminal cases, a defense attorney would rarely advise his client to file a concurrent § 1983 fabrication-of-evidence claim while the criminal case remains ongoing. Parallel litigation threatens to "undermine the [defendant's] Fifth Amendment privilege against

self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial [and vice-versa], or otherwise prejudice the case." *SEC. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980). Yet, the decision below requires that criminal defendants in many cases do just that, or else forfeit their claims. These risks are unnecessary and unfair, and serve no real countervailing state interest. They are also easily avoided by the bright-line rule adopted in the Third, Fifth, Sixth, Ninth, and Tenth Circuits.

A. Filing a § 1983 Claim During a Criminal Trial Incentivizes the Prosecutor to Secure a Conviction

Prosecutors understand that a conviction generally *Heck*-bars parallel civil claims and thus shields state officials from potential liability for any conduct during the criminal proceedings. Thus, commencing a § 1983 civil action for fabrication of evidence while a criminal case is still pending would encourage prosecutors to resist dismissals, make them more insistent on guilty pleas, and make them even less willing to concede that a case lacks strong evidentiary support or merit.

Prosecutors offended by allegations of misconduct in § 1983 fabrication-of-evidence suits may retaliate by more forcefully pursuing a conviction in the still-ongoing criminal proceeding. That risk is particularly salient in light of prosecutors' immense discretion and the nature of plea bargaining in the modern criminal justice system. Prosecutors are the system's most powerful actors. They have nearly unfettered discretion in making charging decisions, ne-

gotiating plea agreements, and dismissing cases. A criminal defendant's position in plea bargaining is naturally precarious given the wide discretion prosecutors may exercise. Thus, the potential risk of less leniency—or bad faith—in the bargaining process is enough to discourage some defendants from filing meritorious § 1983 claims while their criminal case remains pending. Given that plea bargaining is the presumptive path in a criminal proceeding, the decision below could effectively prevent the vast majority of innocent criminal defendants from ever bringing meritorious § 1983 misconduct cases.

Ideally, prosecutors do not abuse the broad discretion they are afforded, but instead negotiate in good faith to achieve just and equitable outcomes. The filing of a parallel civil § 1983 claim, however, necessarily makes the posture more adversarial. It shifts the prosecutor's goals in bargaining from the desire to accomplish justice to the desire to avoid potential liability for themselves, their law-enforcement colleagues, and their cities or towns. Indeed, in cases with obvious indicia of law enforcement misconduct—for example, a visibly brutalized defendant arraigned on a stand-alone "resisting arrest" charge—many prosecutors in *amici*'s jurisdictions already assume a liability-protective stance from the outset and, knowing civil suit is likely, refuse to dismiss or plea bargain in good faith. The mere specter, then, of civil liability, even without the forced filings contemplated by the decision below, introduces an improper factor to criminal dispositions: prosecutors will seek convictions to avoid liability for their colleagues and jurisdictions. The deluge of civil filings now demanded by the Second Circuit's rule would introduce this improper factor to thousands of new cases—delaying those criminal proceedings and

falsely incentivizing prosecutors to pursue weak cases.

B. Because of the Breadth of Civil Discovery, Parallel Civil and Criminal Litigation Harms Both Prosecutors and Defendants

The decision below does not account for the challenge of conducting contemporaneous civil and criminal discovery—a challenge faced by both the government and the defendant. By requiring defendants to institute parallel civil cases during criminal trials, the Second Circuit's rule threatens to open up prosecutors and defendants to the potentially extreme prejudice of broad civil discovery. Prosecutors and defendants alike could use civil suits to obtain evidence for use in their criminal trials, thus upsetting the careful limits that have been placed on criminal discovery to protect the orderly administration of criminal justice.

Civil discovery is extremely broad in scope. It "requires nearly total mutual disclosure of each party's evidence prior to trial." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987). Rule 26 permits broad discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case … information within this scope of discovery need not be admissible to be discoverable." Fed. R. Civ. P. 26(b)(1). In contrast, discoverable materials are described with specificity and detail in the criminal context. *See* Fed. R. Crim. P. 16.

One broad divergence between civil and criminal discovery is in the ability to conduct depositions. In the criminal context, a party is permitted to depose only its own witnesses, and only pursuant to a court order in "exceptional circumstances." Fed. R. Crim.

P. 15(a). By contrast, civil discovery rules allow depositions of any person whose testimony would be relevant to the subject of the action—including the accused plaintiff. *See* Fed. R. Civ. P. 26. To establish a § 1983 fabrication-of-evidence claim, plaintiffs require testimony from officers and prosecutors. This testimony is necessary to evaluate the veracity of the evidence presented in the criminal proceeding, to assess the intent of the producers of the evidence, and to establish the causal link between the fabricated evidence and the liberty harm. There is no doubt that prosecutors and law enforcement officers do not wish to be the subject of a deposition regarding the quality and character of evidence they have gathered in an open criminal prosecution. And there is no doubt that an accused defendant should not be the subject of a civil deposition regarding what he knows about purported evidence against him, and how he knows it, when simultaneously facing criminal charges based on the same evidence. The Second Circuit's rule is thus at odds with the structure and goals of the criminal justice system, placing every litigant in a bind as they navigate civil discovery while managing open criminal cases.

The government is the party that most often claims prejudice from contemporaneous discovery in civil and criminal proceedings, given that many of the restrictions in criminal discovery protect the prosecution. *See, e.g., Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962). The government usually resists civil disclosures because they "jeopardize ongoing criminal investigations or … confer an unwarranted benefit on the defendant in the pending criminal case and thereby prejudice the ongoing prosecution." Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 208 (1990).

But nothing in the law requires that a court postpone civil discovery or otherwise stay civil proceedings until the termination of the parallel criminal proceeding. *See Mid-America's Process Serv. v. Ellison*, 767 F.2d 684, 687 (10th Cir. 1985) (noting that the trial court exercises discretion in determining whether to postpone discovery). By requiring defendants to institute lawsuits against the very officials procuring evidence to convict them before the termination of ongoing criminal proceedings, the decision below creates a serious risk of governmental discovery abuse.

C. Filing a § 1983 Suit During a Criminal Trial Prejudices Both a Defendant's Criminal Defense and a Defendant's § 1983 Claim

Criminal defendants are severely prejudiced when they must file § 1983 suits during ongoing criminal proceedings.

As an initial matter, they put their own criminal defense at risk. The very filing of a § 1983 complaint requires a criminal defendant to publicly allege facts related to his pending criminal case. To survive a motion to dismiss, a complaint must "contain sufficient factual matter … to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Filing a complaint that meets the *Iqbal-Twombly* particularity standard may require the waiver of privilege over some information and consequently undermines effective criminal defense. At minimum, it requires an innocent accused to assert myriad facts—perhaps unknown to prosecutors—and reveal defense strategies to establish innocence before the criminal trial even begins. The particularity requirement thus

provides prosecutors with a complete preview of the defense narrative before a jury is even sworn.

Additionally, parallel criminal and civil cases endanger a defendant's Fifth Amendment right to remain silent. Innocent criminal defendants who pursue parallel claims will often be put to an impossible choice: testify in the civil case to meet the burden of production and persuasion, or decline to testify to protect their right to say nothing at all and hold the government to its burden of proof in the pending criminal trial.

The criminal defendant who declines to testify in the civil case prejudices the civil claim. A "claim of privilege is not a substitute for relevant evidence," and civil litigants who invoke privilege are still required to meet their evidentiary burdens. *United States v. Rylander*, 460 U.S. 752, 761 (1983). Thus, the government in a civil case may move for summary judgment based on the lack of testimony from the plaintiff and adverse inferences that can be drawn from the invoking of privilege. But the criminal defendant who testifies in the civil case—likely advised by a civil lawyer rather than a defender—prejudices the criminal defense. The innocent defendant's testimony in the civil action may necessitate divulging certain facts in the pending prosecution that could assist the government in unjustly procuring a conviction.

Thus, a civil plaintiff who is also the subject of a criminal prosecution is in a Catch-22: the defendant must make a "choice between being prejudiced in the civil litigation, if the defendant asserts … her Fifth Amendment privilege, or from being prejudiced in the criminal litigation if … she waives that privilege." *Louis Vuitton Malletier S.A. v. LY U.S.A., Inc.*,

676 F.3d 83, 97 (2d Cir. 2012); *see United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995). No plaintiff should be required to choose between being effectively compelled to give testimony and being protected from prosecutorial misconduct. Such a choice of evils is no choice at all. *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1089 n.10 (5th Cir. 1979). But the decision below demands just that result.

The decision below puts innocent criminal defendants in an unnecessary bind. It is adverse to the principle that court-imposed procedures should not require litigants to surrender one constitutional right in order to assert another. *See Simmons v. United States*, 390 U.S. 377, 393-94 (1968).

III. The Question Presented Is Exceptionally Important

The problems with the decision below are not merely doctrinal or logistical. Evidence fabrication is a serious, systemic problem. The decision below will effectively bar many credible claims of evidence fabrication by innocent defendants aggrieved by intentional, outrageous government misconduct. Without the ability to vindicate these claims, defendants in many cases will be entirely without remedy for their constitutional injuries, and state officials who have used false evidence to put innocent people behind bars will face no real consequences. That sort of injustice will hurt everyone—not just criminal defendants. It will undermine public confidence in the courts and increase the likelihood that citizens will be wrongfully convicted.

A. Evidence Fabrication is a Systemic Problem

Evidence fabrication is far from rare. Perhaps the best known sort of fabrication is police officers ly-

ing or stretching the truth on the stand or in documents to obtain a warrant, foreclose pretrial release, prevent the suppression of seized evidence, or secure a conviction. *See* Joseph Goldstein, *"Testilying" by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), http://perma.cc/KUC9-XCMU (investigation revealing more than 25 occasions since January 2015 in which judges or prosecutors found "a key aspect of a New York City police officer's testimony was probably untrue"). Prosecutors, under pressure to obtain convictions, often turn a blind eye to the practice, which provides an advantage that can be "too much … to resist." Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 732 (1987).

Fabrication can take even more brazen forms. In several widely publicized scandals, officers have been caught creating or manipulating physical evidence. *See* Paul Duggan, *"Sheetrock Scandal" Hits Dallas Police; Cases Dropped, Officers Probed After Cocaine "Evidence" Turns Out to be Fake*, Wash. Post, Jan. 18, 2002, at A12 (39 cases in Dallas dismissed when material that police laboratory had initially deemed cocaine was actually ground-up sheetrock); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 549 (2001) (Los Angeles police officers systematically planted evidence and coerced or fabricated witness statements). Officers have also been known to coerce or manufacture confessions, witness testimony, and identifications. *See* Goldstein, *supra* (describing case of officers falsely reporting witness identifications).

Amici have firsthand experience with the human cost of these evils. To take but one example, an at-

torney at one *amicus* organization represented David Ranta, charged with the 1990 killing of a prominent rabbi. Mr. Ranta maintained his innocence from day one. But, facing a purported eyewitness testifying against him and a typed confession with his signature on it, a jury convicted Mr. Ranta and a judge sentenced him to life imprisonment. Even after a woman came forward in 1995 and explained that her husband, and not Mr. Ranta, had killed the rabbi, Mr. Ranta's efforts to vacate or reverse his conviction were unsuccessful. Sixteen years later, however, another witness came forward and admitted that he committed perjury at the trial and that, before he picked Mr. Ranta out of a lineup, a detective had told him "to pick the man with the big nose." Mr. Ranta was finally exonerated and released in 2013 after spending 23 years in prison. *See* Frances Robles, *Man Framed by Detective Will Get $6.4 Million From New York City After Serving 23 Years for Murder*, N.Y. Times (Feb. 20, 2014), http://perma.cc/GSC4-Y6Q4.[1]

Shocking individual cases of fabrication are just the tip of the iceberg. Data suggests that a high percentage of wrongful convictions are based at least in part on fabricated evidence. For instance, 102 of the

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[1] The detective in Mr. Ranta's case, Louis Scarcella, played a role in securing at least fourteen other convictions that have since been vacated, many based on findings or serious accusations of official misconduct. *See Shawn Williams*, Nat'l Registry of Exonerations, http://perma.cc/TYF6-UDHN; Alan Feuer, *Another Brooklyn Murder Conviction Linked to Scarcella Is Reversed*, N.Y. Times (Jan. 11, 2018), http://perma.cc/85SN-HZYN.

first 362 DNA exonerations documented by The Innocence Project (28%) involved false confessions, a paradigmatic type of fabricated evidence. *DNA Exonerations in the United States*, Innocence Project, https://perma.cc/2BZ2-VUGJ (last visited Nov. 6, 2018). Of the 2,293 exonerations logged in the National Registry of Exonerations, 52% indicate official misconduct as a contributing factor; 57% feature perjury or a false accusation; and 24% involve false or misleading forensic evidence. *Exonerations by Contributing Factor*, Nat'l Registry of Exonerations, http://perma.cc/6WJE-2UBA (last visited Nov. 1, 2018). Misconduct was yet more frequent in murder convictions. *See id.*

And in *amici*'s experience, data gleaned from exonerations underestimates the frequency with which fabricated evidence is used against criminal defendants. It does not account for the many prosecutions that are dropped after fabrication comes to light. Nor does it account for fabricated evidence that is suppressed by a judge or disbelieved by a jury.

B. The Decision Below Will Functionally Bar Many Meritorious Evidence-Fabrication Claims

Predictably, all of this fabrication gives rise to many viable claims under § 1983. But the decision below will foreclose a large share of these claims. For the reasons described above, defendants who bring fabrication claims during their criminal proceedings could face dismissal under *Heck*. Criminal defendants whose proceedings take longer than three years to conclude, but who fail to sue, will be time-barred before their claims are even ripe. *See supra* section I.A.

But even defendants whose criminal proceedings take fewer than three years—and who therefore theoretically could bring their claims within the Second Circuit's limitations period—will face severe restrictions. Given the typical timelines of criminal proceedings, many criminal defendants may have only months following their criminal trials to file their civil claims. In the Bronx, for example, misdemeanor cases that reached jury verdicts between 2013 and 2017 were, on average, almost thirty months old. *See* Crim. Ct. of the City of N.Y., *Annual Report 2017*, at 49-50 (2018), http://perma.cc/2B34-XXZA. If a defendant in an average Bronx misdemeanor case had a viable fabrication-of-evidence claim accrue around the time of his arrest, he would have only six months to find counsel, duly investigate the claim, and file a complaint. And that is just for misdemeanors; proceedings tend to be longer for more serious charges, where the consequences of fabrication are even greater.

Elsewhere in America, the time constraints could be even more severe. As of 2013, for example, 539 inmates in Cook County Jail had been held for more than two years awaiting trial, and forty had been held for more than five years. *See* David Thomas, *Burke Criticizes Pretrial Jailing, Extended Stays, Chicago Daily Law Bulletin*, Dec. 11, 2015, http://perma.cc/TKN5-5Q9U.

The rule's practical harshness compounds for claims held by the most vulnerable defendants. For example, one *amicus* organization has several cases still in pretrial proceedings that have been open for more than three years, and the defendant in each of these cases has mental competency issues. Defendants with issues of mental incompetency are the

least capable of filing civil rights claims on their own or finding lawyers to help them. And because of the myriad procedural steps required to evaluate competency, these defendants' cases tend to last the longest. Likewise, serious homicide charges often remain on the courts' dockets for more than three years because homicide cases frequently have no statutory speedy trial requirement. *See, e.g.*, N.Y. Crim. Proc. Law § 30.30(3)(a). Homicide cases are also among the most likely to give rise to fabricated evidence—the evidence is often technical and involves forensics. And yet, given the severe consequences of conviction, a well-advised defendant would be particularly hesitant to file a parallel civil claim during a homicide prosecution. The decision below thus creates a perfect storm: its harshest effects fall on cases most likely to involve fabricated evidence and where defendants are least likely to be able to promptly file civil claims.

C. In Many Cases, an Evidence-Fabrication Claim Under § 1983 is the Only Effective Form of Redress

The error below would matter less if there remained other avenues of relief for someone in the petitioner's shoes. But in many cases where officials use false evidence against defendants, fabrication claims are the only adequate form of redress. Other constitutional torts will often be foreclosed or practically useless. If the fabricating official had "probable cause to believe the proceeding [could] succeed"—a notoriously low bar—or if he lacked malice, then the defendant cannot bring a claim for malicious prosecution. *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 417 (2d Cir. 1999). False arrest claims, beyond their own doctrinal limitations, generally pro-

vide such inconsequential relief that they are often not worth filing, particularly for defendants tried and incarcerated based on fabricated evidence.

Doctrines of immunity stand as additional barriers. Prosecutors have absolute immunity for all conduct undertaken in their capacity as advocates and, as the decision below demonstrates, that immunity covers even the knowing prosecution of charges based on fabricated evidence. *See* Pet. App. 17a-19a. Police officers have qualified immunity if reasonable officers could disagree about whether there was probable cause. *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). These hurdles do not stand in the way of fabrication claims. *See Ricciuti v. N.Y.C. Trans. Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (holding that presence of probable cause for an arrest does not immunize officer from evidence-fabrication claim and declining to give officer qualified immunity).

The petitioner's own case shows vividly how these barriers work in practice. The Second Circuit held that the prosecutor had absolute immunity from suit under a malicious prosecution theory. A false arrest claim would have been untimely and, even if legally viable, would provide inconsequential relief given that petitioner was subjected to two trials based on fabricated evidence. The evidence-fabrication claim was thus the petitioner's sole path to real recovery. Many more claims will meet a similar fate under the decision below.

IV. The Court Should Grant Certiorari Now

The decision below is an excellent vehicle for this Court's review. It squarely presents an acknowledged circuit split on an important question, this Court's reversal on the question presented would be

outcome determinative, and there are no jurisdictional or other barriers to this Court's review.

At a more practical level, this Court should grant review immediately because the decision below has enormous consequences for *amici* and for the administration of justice in the Second Circuit. Thousands of criminal defendants throughout the Second Circuit are harmed by the decision below, as are *amici*, whose efforts to defend them and vindicate their civil rights are gravely impeded.

The Second Circuit's rule will deter innocent clients with legitimate claims from filing civil suit by forcing them to choose between aggressively and completely defending themselves from the bad act or demanding a remedy from the bad actor. Or it will cause them to flood the courts with unripe claims to avoid the risks posed by the statute of limitations, wasting the resources of courts and litigants alike. Only this Court can correct the Second Circuit's error and restore uniformity to federal law.

CONCLUSION

Amici curiae respectfully urge that the Court grant the petition for certiorari.

Respectfully submitted,

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