No. 18-1093

In the Supreme Court of the United States

CITY OF JOLIET, ET AL.,

Petitioners,

v.

ELIJAH MANUEL,

Respondent.

On Petition for a Writ of Certiorari from the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STANLEY B. EISENHAMMER
Counsel of Record
PAMELA E. SIMAGA
Hodges, Loizzi, Eisenhammer,
Rodick & Kohn LLP
3030 Salt Creek Lane
Suite 202
Arlington Heights, IL 60005
847-670-9000
seisenhammer@hlerk.com

Counsel for Respondent

QUESTION PRESENTED

When did the Respondent's Section 1983 claim for a Fourth Amendment post-legal process detention claim accrue?

The overwhelming majority of circuits that have ruled on the issue, including the First, Second, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits, have held that such a claim accrues upon the favorable termination of the criminal proceedings against the criminal defendant turned civil plaintiff. Pet. App. 21a & n.4, 29a & n.9; *see also Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100-01 & n.10 (1st Cir. 2013). In the opinion below, the Seventh Circuit held that such a claim accrues when the detention pursuant to legal process ends. Under either rule, the Respondent's claim was timely.

No court has adopted the rule that the Petitioners now advocate in this Court.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, defendants-appellees below, are the City of Joliet, Illinois, Officer Terrence J. Gruber, Officer Thomas Conroy, Sergeant Scott P. Cammack, Officer Aaron Bandy, Officer Jeffrey German, Sergeant John Stefanski, Sergeant Joseph Rosado, and Officer Jeffrey Kneller.

Respondent Elijah Manuel was the plaintiff-appellant below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

FEDERAL CONSTITUTIONAL PROVISIONS

STATUTES

RULES

ORAL ARGUMENTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 903 F.3d 667 and reproduced at Pet. App. 1a-6a. This Court's previous opinion in this case is reported at 137 S. Ct. 911 and reproduced at Pet. App. 13a-45a. The Seventh Circuit's previous decision in this case is not published but is reprinted at 590 F. App'x 641 and reproduced at Pet. App. 46a-50a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit in favor of the Plaintiff-Respondent was entered on September 10, 2018. Pet. App. 7a-8a. On September 19, 2018, the Seventh Circuit extended the time to file a petition for rehearing *en banc* to and including October 9, 2018, and denied the petition for rehearing on October 24, 2018. Pet. App. 11a-12a. Justice Kavanaugh extended the Petitioners' time to file a petition for a writ of certiorari to February 21, 2019. No. 18A730. Petitioner filed the instant petition for writ of certiorari on February 21, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. IV.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ***.

INTRODUCTION

The Petitioners, the City of Joliet and certain of its police officers, presented a peculiar question to this Court—they ask this Court to decide if Respondent Elijah Manuel's claim is subject to a "special," delayed accrual rule or a "traditional" accrual rule. All of the circuits have uniformly chosen the former. Why then would the Petitioners ask this Court to apply a rule no court has ever adopted? Because they know that under all of the accrual points that have been applied by the circuit courts, Manuel's claim is timely. Accordingly, this case is a poor vehicle to review the accrual rule and there is no "compelling reason" to grant certiorari. Sup. Ct. Rule 10.

STATEMENT OF THE CASE

Police officers from the City of Joliet arrested Respondent Elijah Manuel and caused him to be detained for forty-eight days in county jail, all the while knowing there was no probable cause—indeed, no basis whatsoever—to believe he had committed any crime. This Court previously determined that, based on these facts, Manuel stated a claim for a Fourth Amendment cause of action under 42 U.S.C. § 1983. On remand, the Seventh Circuit decided that Manuel's claim was timely. Had Manuel's case gone before any other circuit court of appeal, the outcome would have been the same.

A. Factual Background[1]

Shortly after midnight on March 18, 2011, Respondent Elijah Manuel was riding in the passenger seat of his car in Joliet, Illinois, while his brother was driving. Pet. App. 17a. After allegedly observing Manuel's car fail to signal a turn, a pair of Joliet police officers pulled the car over. *Id.* One of the officers forced Manuel from the car, punched him, kicked him, and taunted him with a racial slur. *Id.*

The officers also searched Manuel. All they found was a vitamin bottle in his pocket with pills inside. *Id.* The officers conducted a field test on the pills for the presence of a controlled substance. *Id.* The pills tested negative, and Manuel protested his innocence of any wrongdoing. *Id.* Even though they had no evidence that he had committed a crime, the officers arrested Manuel and brought him to the police station. *Id.*

At the station, an evidence technician tested the pills again. The result again came back negative; there was no controlled substance. *Id.* The technician, however, lied in his report, stating that one of the pills was "found to be positive for the probable presence of ecstasy." *Id.*

Later that morning, another officer who had been at the scene of the arrest executed a criminal complaint under oath in the Will County, Illinois court. Pet. App. 17a-18a. Based on the police technician's report, as well as the police officer's arrest report claiming that "[f]rom [his] training and experience, [he] knew the pills to be ecstasy," the complaint charged Manuel with unlawful possession of a controlled substance. *Id.* Manuel was brought before the county court judge for determination of whether there was probable cause to justify his detention. Pet. App. 18a. The judge relied on the criminal complaint, which relied upon the evidence fabricated by the police, to erroneously determine that probable cause existed. *Id.* On the basis of that probable

[1] Because this case comes to the Court on appeal from a decision granting a motion to dismiss, this Court "must accept as true all the factual allegations in the complaint." *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

cause determination, Manuel was detained in county jail pursuant to legal process. *Id.*

On April 1, 2011, an Illinois State Police Laboratory test confirmed that the pills were neither ecstasy nor any other controlled substance. *Id.* The Joliet police did not disclose this report to the prosecutor or anyone else. *Id.* Manuel languished in county jail for more than a month more. *Id.*

Finally, after receiving a request from Manuel's public defender to turn over a copy of any test results regarding the pills, the prosecution obtained the state lab report and moved to dismiss the charges. Pet. App. 18a-19a. The county court accepted the State's motion and dismissed the charges. Pet. App. 19a. Manuel was released the next day, May 5, 2011—forty-eight days after his first court appearance. *Id.*

B. Procedural and Legal Background

On April 22, 2013, Manuel filed this lawsuit, *pro se*, against the City of Joliet and some of its police officers under 42 U.S.C. § 1983. Pet. App. 19a. After Manuel was appointed counsel, and upon a motion by the Defendants, the District Court judge dismissed Manuel's suit as untimely because circuit precedent did not recognize the existence of a pretrial Fourth Amendment claim after an initial appearance before a judge, that is, post-legal process. Pet. App. 19a-20a, 53a-54a. Instead, binding circuit court precedent held that such a claim must be brought under the due process clause and then only if a state law remedy did not exist. Pet. App. 19a-20a. Manuel appealed this decision and the Seventh Circuit affirmed. Pet. App. 49a-50a. According to the Seventh Circuit, "the Fourth Amendment falls out of the picture and the detainee's claim that the detention is improper becomes [one of] due process." Pet. App. 20a.

Because the Seventh Circuit's decision was an outlier, this Court granted Manuel writ of certiorari. *Manuel v. City of Joliet*, 136 S.Ct. 890 (2016) (*Manuel I*); Pet. App. 13a. In *Manuel I*,

all eight of the then-sitting justices agreed that the Fourth Amendment continued beyond the point of legal process, or an initial probable cause determination by a judge. Pet. App. 22a; Pet. App. 38a (Alito, J., dissenting). The six-justice majority left for remand the question of when precisely this newly affirmed Fourth Amendment claim accrued. Pet. App. 30a. In an opinion authored by Justice Kagan, six Justices agreed that the proper accrual rule "must closely attend to the values and purposes of the constitutional right at issue." Pet. App. 28a. Justice Alito, in a dissent joined by Justice Thomas, argued that the Court should have decided the accrual point rather than remanding the issue. Pet. App. 39a-40a (Alito, J., dissenting).

On remand, the Seventh Circuit determined that Manuel's claim accrued on May 5, 2011, the date he was released from jail, because that was the end of the government's unlawful seizure. *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018) (*Manuel II*); Pet. App. 2a. In so holding, the Seventh Circuit acted consistent with *Manuel I* and this Court's well-established precedent in *Heck v. Humphrey*, 512 U.S. 477 (1994), *Preiser v. Rodriguez,* 411 U.S. 475 (1973), and *Edwards v. Balisok*, 520 U.S. 641 (1997).

REASONS FOR DENYING PETITION

There is no conflict among the courts of appeals that Manuel's Fourth Amendment post-legal process detention claim would be timely. As a consequence, this Court should decline the Petitioner's request for appeal. Further, this case is a poor vehicle to review any circuit split which may exist.

I. The Circuits Are Not Split on the Question Presented by the Petitioners.

This Court only grants petitions for writ of certiorari for "compelling reasons." Sup. Ct. Rule 10. To state a compelling reason given the constitutional and federal questions raised here,

Petitioners should identify a split among the circuit courts of appeals. *See* Sup. Ct. Rule 10(a). But Petitioners' question presented does not reference any circuit split.

Though the question presented drafted by the Petitioners is three paragraphs long, it does not ask this Court to resolve any split among the circuits. Instead, the Petitioners ask this Court to review whether the Seventh Circuit's holding that:

> [A] Fourth Amendment claim for unlawful post-process, pretrial detention brought pursuant to § 1983 is subject to a special rule of delayed accrual, rather than the traditional rule under which a claim accrues when an injury first occurs—here respondent's first appearance in court, when a judge found probable cause for his pretrial detention based on an allegedly false criminal complaint.

Pet. Writ of Cert. i. No circuit court has ever ruled that the Fourth Amendment detention claim accrues upon the commencement of legal process. What is most remarkable about the Petitioners' question presented is that it mislabels a never-invoked rule—that a Fourth Amendment post-process, pretrial claim accrues at the time of a criminal defendant's first appearance in court—as "traditional" even though neither this Court nor any circuit court has adopted it. The question then goes on to mislabel the *uniform* rule of accrual—when all proceedings terminate in favor of the accused or when the criminal-defendant turned civil-plaintiff is released from detention—as a "special" rule. *See* Pet. App. 21a & n.4, 29a & n.9 (citing authority from the Second, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits that such accrual is upon a favorable termination of the proceedings); *see also Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100-01 & n.10 (1st Cir. 2013); Pet. App. 2a (Seventh Circuit holding that accrual occurs upon release from detention).

The circuit courts are not split. Of the two accrual theories identified by the Petitioners in the question presented, all of the circuits agree on one theory. The Petitioner-labeled "special" rule, that a post-process Fourth Amendment claim for seizure without probable cause accrues

when the proceedings terminate in favor of the accused or when the criminal-defendant turned civil-plaintiff is released, has been adopted by *all* circuit courts of appeals to have addressed the issue. Eight circuit courts of appeal have held that a Fourth Amendment post-process Section 1983 claim accrues upon the favorable termination of the proceedings against the criminal defendant. The Seventh Circuit, in the opinion below, held that Manuel's claim accrued when he was released from detention. Nevertheless, the Petitioners ask this Court to review the Seventh Circuit's application of the uniform rule in *Manuel II* in the hopes that this Court will adopt a rule that accrual occurs when legal process occurs—a rule no court has applied ever before.[2]

II. This Case Is a Poor Vehicle for Review Because Any Split Among the Circuits Is Not Dispositive of Manuel's Claim.

Even if the circuit courts are split on issues relevant to a Fourth Amendment, post-legal process seizure, this case is a poor vehicle to decide any of those issues. None of the splits are dispositive of Manuel's claim. Manuel's claim is timely regardless of which rule is applied. In addition, the history of this case makes it a poor vehicle for review because Petitioners conceded that Manuel's claim was timely.

A. Manuel's Claim Is Timely.

Under either of the two accrual points espoused by the circuit courts, Manuel's claim is timely. In *Manuel II*, the Seventh Circuit laid out the "potentially important dates":

> • March 18, 2011: Manuel is arrested and brought before a county court judge, who makes the required probable-cause finding because Manuel was arrested without a warrant.
>
> • March 31, 2011: Manuel is indicted by a grand jury.

[2] Respondent knows of no opinion adopting the accrual rule Petitioners seek and Petitioners, in the lengthy procedural history and in the Petition, never cite a case holding that a Fourth Amendment post-process pretrial detention claim accrues upon judicial process. *See* Pet. Writ of Cert.

• April 8, 2011: Manuel is arraigned.

• May 4, 2011: An assistant state's attorney moves to dismiss the charges, and the motion is granted.

• May 5, 2011: Manuel is released from jail.

• April 22, 2013: Manuel files his complaint.

Pet. App. 2a.

Under the accrual rule adopted by eight circuit courts of appeal, a civil plaintiff's Fourth Amendment post-process claim brought under Section 1983 accrues when the criminal proceedings terminate in favor of the accused. Pet. App. 21a & n.4, 29a & n.9 (citing authority from the Second, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits that accrual occurs upon a favorable termination of the proceedings); *see also Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100-01 & n.10 (1st Cir. 2013). Under this accrual theory, Manuel's claim is timely. Based upon an Illinois state police lab report, the local county prosecutor moved to dismiss the charges against Manuel, and the charges against him were ultimately dropped, on May 4, 2011. Accordingly, under the rule adopted by eight circuit courts, Manuel's Fourth Amendment claim for unlawful, post-legal process seizure accrued on May 4, 2011. Because he filed his suit on April 23, 2013, less than two years after the charges against him were dropped,[3] his claim is timely under the favorable termination of the proceedings accrual point.

In *Manuel II*, the Seventh Circuit took a slightly different approach and held that, instead of accruing upon a favorable termination of the proceedings, a post-legal process Fourth Amendment detention claim accrues when the accused is released or no longer detained. After dismissal of the relevant charges against him, Manuel was released from the county jail on May

[3] Pet. App. 2a ("The parties agree that . . . Illinois law, which supplies the period of limitations under *Wilson v. Garcia*, 471 U.S. 261 (1985), gave Manuel two years from the claim's accrual.").

5, 2011. Because he was released less than two years before he filed this suit on April 23, 2013, the Seventh Circuit ruled that his claim was timely. Pet. App. 2a ("We hold that Manuel's claim accrued on May 5, when he was released from custody. That makes this suit timely.").

Stated differently, Manuel's claim is timely under any accrual point that any circuit court of appeal has ever adopted.

B. Waiver

In addition, in the proceedings below, the Petitioners waived their right to argue that Manuel's claim is untimely. When this case was first before the Seventh Circuit Court of Appeals for oral argument, the Petitioners waived their right to say that Manuel's Fourth Amendment post-process claim was untimely. During oral argument, Judge Rovner of the Seventh Circuit plainly asked if the Seventh Circuit were to join the ten other circuits and recognize Manuel's Fourth Amendment claim, when did the Petitioners believe the statute of limitations would run? Oral Argument at 13:36, *Manuel v. City of Joliet*, 590 Fed. Appx. 641 (7th Cir. 2015) (No. 14-1581), http://media.ca7.uscourts.gov/sound/2014/ab.14-1581.14-1581_12_16_2014.mp3. Given that the only issues on appeal were whether Manuel had a post-legal process claim grounded in the Fourth Amendment and whether Manuel's claim was timely, the question could not have been a surprise. She did not ask what the other circuits had ruled with respect to the accrual period. Nor did she ask what Manuel thought the accrual period should be. Rather, she asked what the *Petitioners* thought the accrual period should be. She asked "if we did recognize such a claim, at what point *would you think* the statute of limitations would run?" *Id*. (emphasis added). Counsel for the Petitioners answered: "the time at which the proceedings were terminated in favor of that individual." *Id*. at 14:11. In giving this answer, counsel for Petitioners analyzed Section 1983, the Fourth Amendment, and how the claim at

issue resembles state-law malicious prosecution, properly indicating the accrual point would be the same. Judge Wood then asked counsel for the Petitioners whether "the constitutional tort would follow the same pattern as the state law does and follow favorable termination?" *Id.* at 14:30. He answered, "[t]hat is correct…" *Id*. at 14:45. Counsel for Petitioners made no effort to claim that Manuel's potential post-legal process Section 1983 claim, so long as it was based upon the Fourth Amendment, was untimely. *Id*.

During oral argument in *Manuel I*, Justice Kagan acknowledged the possibility that the Petitioners had waived or forfeited the issue of timeliness. Transcript of Oral Argument at 40:24-44:8, *Manuel v. City of Joliet*, 137 S.Ct. 911 (2016) (No. 14-9496), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/14-9496_feah.pdf. In addition, in her written opinion for this Court, she remanded the issue of accrual back to the Seventh Circuit, "unless it finds the City has previously waived its timeliness argument." Pet. App. 31a. Indeed, in *Manuel II*, the Seventh Circuit held that the Petitioners previously "conceded" that, if Manuel had a viable Fourth Amendment malicious prosecution claim, it was timely. Pet. App. 4a.

C. Other Splits Are Irrelevant.

None of the other circuit splits are dispositive of Manuel's claims. The circuits may disagree on whether a plaintiff must prove the elements of a state law malicious prosecution tort in addition to the elements of the constitutional claim and on whether a plaintiff must have been incarcerated to be "seized." But these issues do not need to be resolved in Manuel's case.

1. Some courts are split on the issue of detention and whether incarceration is the litmus test for a Fourth Amendment seizure. Some courts have adopted Justice Ginsburg's theory of seizure. Justice Ginsburg opined that a criminal defendant who is released on bond or on their

own recognizance may still be "seized" under the Fourth Amendment because the person "is scarcely at liberty" and "indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *Albright v. Oliver*, 510 U.S. 266, 278–79 (1994) (Ginsburg, J., concurring) (internal citations omitted); *see also Black v. Montgomery Cty.*, 835 F.3d 358, 366–67 (3d Cir. 2016), *as amended* (Sept. 16, 2016) ("We have described the analysis in Justice Ginsburg's *Albright* concurrence as compelling and supported by Supreme Court case law . . . . Further, we have explained that under this view, pre-trial restrictions of liberty aimed at securing a suspect's court attendance are all seizures[.]" (internal citations and quotations omitted)); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997); *Evans v. Ball*, 168 F.3d 856, 861 (5th Cir. 1999).

Conversely, in *Kingsland v. City of Miami*, the Eleventh Circuit held that a civil plaintiff who brought a Fourth Amendment post-legal process detention claim failed to show that she was "seized" for the purposes of the Fourth Amendment when she had to make two trips from New Jersey to Florida to appear for pre-trial hearings. 382 F.3d 1220, 1236 (11th Cir. 2004). However, this apparent conflict is not dispositive here because Manuel's 48-day incarceration in a county jail clearly constituted a seizure under the Fourth Amendment.

2. Courts are split over whether a post-legal process Fourth Amendment detention claim only requires a showing of a Fourth Amendment violation, or whether the plaintiff must also prove the elements of a traditional malicious prosecution tort including malice and favorable termination of the proceedings against the accused. *See, e.g.*, *Hernandez-Cuevas*, 723 F.3d at 101 (only requiring that a plaintiff show a Fourth Amendment constitutional violation); *Humbert v. Mayor and City Council of Baltimore City*, 866 F.3d 546, 555 (4th Cir. 2017) (same); *Castellano v. Fragozo*, 352 F.3d 939, 954 (5th Cir. 2003) (same); *Sykes v. Anderson*, 625 F.3d 294, 308-09

(6th Cir. 2010) (same); *see also, e.g.*, *McKenna v. City of Philadelphia*, 582 F.3d 447, 461 (3d. Cir. 2009) (requiring a plaintiff to also establish elements of state law malicious prosecution claim, including that defendant acted with malice); *Pitt v. District of Columbia*, 491 F.3d 494, 503-04 (D.C. Cir. 2007; *Margheim v. Buljko*, 855 F.3d 1077, 1082 (10th Cir. 2017) (same and noting the need for plaintiff to show that a favorable termination of the proceedings indicates actual innocence).

Malice is not required to establish a Fourth Amendment violation. Pet. App. 38a (Alito, J., dissenting) (citing to *Ashcroft v. Al-Kidd*, 563 U.S. 731, 736 (2011)). That said, the absence of a malice element will not make much practical difference in the mine run of cases—and certainly makes no difference here because Section 1983 requires all plaintiffs bringing suits against individuals to overcome qualified immunity. This defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see Hernandez-Cuevas*, 723 F.3d at 99 (adopting a purely constitutional approach so that a plaintiff need not show malice, but must still overcome qualified immunity).

But these distinctions are not dispositive here. Manuel's criminal charges were dismissed upon evidence of his innocence, and the Petitioners clearly acted with malice. Apart from the malicious arrest of Manuel without probable cause, the police officers beat Manuel during the arrest, called him a racial slur, and fabricated evidence. Pet. App. 17a. They also inexcusably failed to disclose the exculpatory drug test for over a month while Manuel remained in jail. *See* Pet. App. 18a. And that very exculpatory drug test was the basis for the county prosecutor to dismiss the charges against Manuel, showing his actual innocence.

Accordingly, this case is a poor vehicle to review any circuit splits which may exist for

Fourth Amendment post-legal process seizure claims.[4]

III. The Seventh Circuit Decision Is Consistent with this Court's Well-Established Precedent in *Manuel I* and *Wallace.*

The Seventh Circuit's decision below is correct and is firmly grounded upon this Court's precedent in *Manuel I* and other cases. The Seventh Circuit held that Manuel's claim was timely and accrued when he was released from detention. Pet. App. 3a (citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115-21 (2002), for the accrual upon the conclusion of "a continuing *wrong*, not of continuing *harm*" (emphasis in original)). In its decision, the Seventh Circuit properly noted that this Court's ruling in *Manuel I*—that the Fourth Amendment continues after legal process—limited the holding of *Wallace v. Kato*, 549 U.S. 384, 386-87, 389-90 (2007). Pet. App. 3a. Further, the Seventh Circuit correctly reasoned that *Wallace's* holding was inapposite as the plaintiff, Wallace, complained about an arrest rather than a post-legal process detention. Pet. App. 3a (citing *Wallace*, 549 U.S. at 386-87, 389-90).

Further, the Seventh Circuit properly relied on this Court's precedent to hold that "a claim cannot accrue until the would-be plaintiff is entitled to sue, yet the existence of detention forbids a suit for damages contesting that detention's validity." Pet. App. 5a. In so holding, the Seventh Circuit relied upon *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (holding that only a writ

[4] In addition, the question presented, in its present form, it is not a question of great importance. Though Petitioners argue that the Seventh Circuit rule extends the time under which "government defendants must preserve evidence in connection with every arrest warrant and probable cause finding" (Pet. of Writ. of Cert. 23), that is simply not so. As described above and as Petitioners acknowledge, the rule of most circuits is that a claim accrues when the proceedings terminate in favor of the accused. Pet. App. 21a & n.4, 29a & n.9 (citing authority from the Second, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits that accrual is upon termination of the proceedings); *see also Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100-01 & n.10 (1st Cir. 2013); Pet. App. 2a (Seventh Circuit holding that accrual occurs upon release). Here, Manuel was released one day after the charges were dismissed, meaning that the statute of limitations was extended only one day beyond the general rule of accrual. In addition, as Justice Sotomayor opined during oral argument in *Manuel I*, police officers and government entities are usually on notice of a plaintiff's proclaimed innocence long before the evidence bearing out their innocence comes to light. In addition, the "untoward" and "unconstitutional" government actions of fabricating evidence makes any concern over an extended statute of limitations irrelevant. Transcript of Oral Argument at 38:10-18, 39:21-40:14, *Manuel v. City of Joliet*, 137 S.Ct. 911 (2016) (No. 14-9496), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/14-9496_feah.pdf. Finally, in most cases, due to criminal defendants bonding out, the Seventh Circuit's rule of accrual upon release will start the statute of limitations running before the charges are dropped.

of habeas corpus, not a Section 1983 suit, can be used to obtain damages for custody based upon a criminal conviction), *Heck v. Humphrey*, 512 U.S. 477 (1994) (barring a Section 1983 suit for damages until a conviction has been set aside), and *Edwards v. Balisok*, 520 U.S. 641 (1997) (barring a Section 1983 suit over the revocation of good-time credits as it could undermine a judgment or conviction). Because it relied upon *Edwards*, the Seventh Circuit's decision did not simply rely on cases in which a conviction was at issue.

In the end, the Seventh Circuit's decision adhered to this Court's direction that any accrual rule "must closely attend to the values and purposes of the constitutional right at issue." Pet. App. 28a.

In addition, the Petitioners rely heavily upon Justice Alito's dissenting opinion in *Manuel I* to cast a shadow over *Manuel II*. The problem with that, of course, is that dissenting opinions are, by their very definition, not a holding of the court and are non-precedential. *See Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014) (explaining the necessity of discounting dissenting opinions even for the purposes of cobbling together a holding from a plurality opinion and other fractured opinions because "this is not the way to make binding precedent"). Accordingly, Petitioners improperly rely upon Justice Alito's dissenting opinion to call into question the Seventh Circuit's proper application of *Manuel I*.

In sum, the decision below, *Manuel II*, was correctly decided, and this Court should reject Petitioners' request for a writ of certiorari.

IV. *McDonough v. Smith* Is Irrelevant to the Question Presented and the Instant Case.

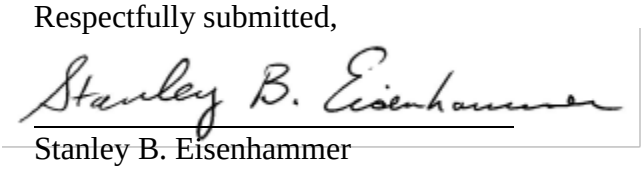
The outcome of *McDonough v. Smith*, will not resolve the question presented by the Petitioners. No. 18-485 (*cert. granted* Jan. 11, 2019). First, *McDonough* raises a due process claim, not a Fourth Amendment one, because the plaintiff was subject to trial on the basis of

fabricated evidence. *McDonough v. Smith*, 898 F.3d 259, 265 (2d. Cir. 2018), *cert. granted*, 2019 WL 166879 (Jan. 11, 2019) (No. 18-485). (However, *McDonough*'s claim is similarly premised on the fabrication of evidence which was used, in part, to criminally charge the plaintiff.) Second, the answer to the *McDonough* question will have no impact on Manuel's claims. Under both proposed accrual points in *McDonough*—when the charges were terminated against the plaintiff or when the plaintiff first became aware of the fabricated evidence—Manuel's claim would be timely. In sum, *McDonough* does not present the Fourth Amendment accrual question posed in the instant case, but regardless of this Court's answer to the *McDonough* question, Manuel's claim will be timely. Accordingly, and for the reasons stated above, this Court should still deny the Petitioners' request for certiorari.

CONCLUSION

This Court should deny the Petitioners' request for a writ of certiorari.

Respectfully submitted,



Stanley B. Eisenhammer
Counsel of Record for Petitioner
Pamela E. Simaga
Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP
3030 Salt Creek Lane, Ste. 202
Arlington Heights, IL 60005
(847) 670-9000
sbeinsenhammer@hlerk.com

565119_3