No. 18-1093

# In the Supreme Court of the United States

CITY OF JOLIET, ILLINOIS, ET AL.,

*Petitioners*,

v.

ELIJAH MANUEL,

*Respondent.*

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

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## INTRODUCTION

Respondent Elijah Manuel ("Manuel") cannot deny the three-way split over the proper accrual rule for pretrial, post-process Fourth Amendment claims that persists in the wake of the Seventh Circuit's decision on remand (*Manuel II*) from this Court's opinion in *Manuel I*. There is (1) the rule embraced by the only two members of this Court to reach the issue in *Manuel I*, by which such claims accrue when the §1983 plaintiff is unlawfully detained pursuant to legal process; (2) the rule adopted by several circuits, which imports the common-law elements of malicious prosecution and delays accrual until the favorable termination of the plaintiff's underlying criminal proceedings (if that ever occurs); and (3) the rule announced by the Seventh Circuit in *Manuel II*, which treats Fourth Amendment violations as continuing torts, delaying accrual until the §1983 plaintiff is released from custody.

Nor does Manuel offer any meaningful response to the showing by petitioners—the City of Joliet and several of its police officers (collectively, "the City")—that the Seventh Circuit's new accrual rule conflicts squarely with this Court's decisions in *Wallace v. Kato*, 549 U.S. 384 (2007), and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and with the Court's strict limitation on the application of *Heck v. Humphrey*, 512 U.S. 477 (1994). In fact, Manuel concedes that the Seventh Circuit read *Manuel I* to "limit[] the holding of *Wallace*," Opp. 13, notwithstanding that *Manuel I* cites *Wallace* with favor.

This case offers the ideal vehicle to reconcile the three competing accrual rules applicable to this

frequently recurring constitutional tort, and to bring the circuit court rules into line with this Court's long-established precedent. Indeed, the Court previously used this very case to summarize the three competing accrual rules described above and to invite the Seventh Circuit to choose among these rules on remand. And two members of the Court used this same case to articulate an accrual rule for Fourth Amendment claims like Manuel's. There is no more suitable vehicle than one this Court has already embraced as a means to answer the question presented.

Finally, Manuel agrees with the City that *McDonough v. Smith*, No. 18-485 (cert. granted Jan. 11, 2019), does not present the Fourth Amendment accrual question at issue here. Again, however, if the Court disagrees and determines to answer that question in *McDonough*, then the Court should hold this petition for a decision on the merits in that case.

## ARGUMENT

### I. Manuel Acknowledges But Unsuccessfully Downplays The Circuit Split, While Ignoring The Accrual Rule Adopted By The Only Members Of This Court To Reach The Issue In *Manuel I*.

Manuel calls the question presented "peculiar" because it does not urge the Court to adopt either of the rules currently dividing the courts of appeals, Opp. 2, a point he reiterates later when he contends that his claim is timely under either of those rules, Opp. 7-9. But this Court recognized *three* competing accrual rules in *Manuel I*. See Pet. App. 28a-30a. And critically, the only two members of the Court to reach

the merits of the accrual question embraced the City's rule, under which Manuel's claim is unquestionably time-barred. See Pet. App. 32a-33a, 42a-43a (Alito, J., joined by Thomas, J., dissenting).

In fact, Justices Alito and Thomas expressly rejected both the continuing-tort rule applied by the Seventh Circuit below and the favorable-termination rule adopted by other circuits, explaining why these rules are impossible to square with foundational Fourth Amendment principles.[1] See Pet. App. 32a-33a, 40a-43a; see also *Cordova v. City of Albuquerque*, 816 F.3d 645, 663 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) ("[I]t's just pretty hard to see how you might squeeze anything that looks quite like the common law tort of malicious prosecution into the Fourth Amendment.").

Yet absent this Court's intervention, those rules will continue to apply. The majority in *Manuel I* did not purport to choose among the three accrual principles it described, and circuits have therefore reaffirmed their pre-*Manuel I* accrual rules in the wake of that decision, see Pet. 13, 15, without considering the rule now adopted by two members of the Court.

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[1] Manuel invokes the unremarkable proposition that "dissenting opinions are * * * not a holding of the court and are non-precedential." Opp. 14. But the majority in *Manuel I* did not disagree with the dissenting Justices over the proper accrual rule. Rather, Justices Alito and Thomas dissented because they alone would have reached the accrual question.

At the same time, Manuel drastically understates the split between the Seventh Circuit's continuing-tort rule and the favorable-termination rule in place elsewhere. He describes the two rules as "slightly different" and at one point even claims that "[t]he circuit courts are not split," characterizing the two rules as a single accrual "theory." Opp. 6-7, 8.

But Manuel ignores the fact that the continuing-tort and favorable-termination rules not only set potentially different accrual dates (as in this case), but that the favorable-termination rule also *adds an element* to §1983 Fourth Amendment claims. Circuits following the favorable-termination rule deny §1983 relief to pretrial, post-process plaintiffs who do not ultimately prevail in their criminal proceedings, even if they were detained without probable cause in violation of the Fourth Amendment. Indeed, Justices Alito and Thomas observed precisely this disconnect between the rights the Fourth Amendment exists to protect and the need to prove favorable termination in these circuits. See Pet. App. 38a-39a ("The favorable-termination element is * * * irrelevant to claims like Manuel's," because "[t]he Fourth Amendment * * * prohibits all unreasonable seizures—regardless of whether a prosecution is ever brought or how a prosecution ends.").

In short, this Court outlined three potential, competing accrual rules for pretrial, post-process Fourth Amendment claims in *Manuel I*, and only this Court can put an end to the ongoing uncertainty by choosing among these three options now.

## II. The Decision Below Also Violates This Court's Long-Established Precedent.

Moreover, certiorari review is the only way to bring Seventh Circuit law into line with this Court's precedent. The petition showed that (1) the Seventh Circuit's new rule conflicts squarely with the holding in *Wallace*, 549 U.S. at 388, 390, that Fourth Amendment pretrial detention claims do not accrue upon a plaintiff's "release from custody" but rather when the wrongful act first causes the detention; (2) the decision below misapplied *Morgan*, which instead of authorizing application of the continuing-tort theory in this case squarely forecloses it; and (3) *Manuel II* violated this Court's strict limits on the bar to §1983 suits announced in *Heck*, which applies "only when there exists 'a conviction or sentence that has not been * * * invalidated,'" *Wallace*, 549 U.S. at 393 (emphasis omitted). See Pet. 17-22.

Manuel offers no meaningful response to any of these points. Rather (like the decision below), he assumes that *Manuel I* somehow "limited the holding of *Wallace*," even though *Manuel I* cited *Wallace* with favor and nowhere suggested that it was overturning any part of that decision. Opp. 13; see also Pet. App. 3a (*Manuel II* reasoning that "the line that the Justices drew in *Wallace* * * * did not survive *Manuel*"). Nor does Manuel offer any way to reconcile the Seventh Circuit's continuing-tort rule with *Morgan*.

And as for this Court's decisions limiting *Heck* to cases challenging criminal convictions or sentences, Manuel responds merely by citing *Edwards v. Balisok*, 520 U.S. 641 (1997). See Opp. 14. But as the

petition already explained—and Manuel does not dispute—*Edwards* applied *Heck* to a §1983 challenge to the loss of prison good-time credits only because that was in effect a challenge to the inmate's *criminal sentence*. See 520 U.S. at 643-44; see also *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (per curiam) (declining to apply *Heck/Edwards* rule to inmate's challenge to loss of good-time credit that "threaten[ed] *no consequence* for [the inmate's] conviction or the duration of his sentence") (emphasis added). Here, where Manuel was neither convicted nor sentenced, *Heck* does not apply, and the Seventh Circuit's contrary ruling therefore violates the until-now strict limitation on *Heck*'s use.

## III. This Case Presents An Ideal Vehicle To Resolve An Important And Recurring Issue.

Manuel does not dispute that §1983 plaintiffs and defendants must have a clear accrual rule. Nor does he contest that Fourth Amendment pretrial, post-process detention claims arise frequently, as further emphasized by the amicus brief submitted by leading municipal groups. See Br. for Int'l Mun. Lawyers Ass'n *et al.* as Amici Curiae Supporting Petitioners ("Amicus Br. of Int'l Mun. Lawyers Ass'n *et al.*") in Support of Certiorari in *City of Joliet v. Manuel*. Indeed, amici note that Chicago alone "reports 94 active claims similar to Manuel's" claim. *Id.* at 4. And for such a frequently recurring issue, "the confused state of the law is particularly intolerable." *Id.* at 7.

Manuel's only response appears in a footnote, arguing that the question presented is unimportant because sometimes there is little difference between the accrual date under the Seventh Circuit's rule and

the date set by the favorable-termination rule. Opp. 13 n.4. But this not only ignores the massive practical difference between those two rules—one of which adds a favorable-termination element that plaintiffs must prove to make out a claim, see *supra* p. 4; it also avoids the relevant comparison, between those accrual rules and the rule embraced by Justices Alito and Thomas in *Manuel I*, which properly starts the limitations clock when the §1983 plaintiff is unlawfully detained pursuant to legal process.

Manuel also argues that the "'unconstitutional'" nature of the misconduct he alleges "makes any concern over an extended statute of limitations irrelevant." Opp. 13 n.4. But that misses the point entirely. Time bars exist to increase reliability in assessing whether allegations like Manuel's are well-founded, see *Wilson v. Garcia*, 471 U.S. 261, 271 (1985); Amicus Br. of Int'l Mun. Lawyers Ass'n *et al.* at 13-14, so it is nonsensical to say that the limitations period is irrelevant *so long as* Manuel's claims are true.

Moreover, this case offers an excellent vehicle to resolve the question presented. The Court already saw fit to allow certiorari review in this case in *Manuel I*. The majority there recognized that it was a proper vehicle for the Seventh Circuit to address the accrual question on remand, Pet. App. 30a-31a, and two members of the Court used the case to enunciate an accrual rule for Manuel's claim, Pet. App. 32a-33a, 42a-43a.[2]

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[2] Manuel also contends that this case is a poor vehicle to resolve the question presented because two additional

Finally, Manuel's waiver theory is absurd. Although the timeliness of his claim has been the subject of two Seventh Circuit appeals, briefing and argument before this Court, and a second certiorari petition, he contends that the City somehow "waived [its] right to argue that Manuel's claim is untimely" during a single oral-argument exchange "[w]hen this case was first before the Seventh Circuit" in 2014. Opp. 9. And Manuel mischaracterizes the exchange in any event. He omits the key element—the court's question was not when any Fourth Amendment claim would accrue, but when "malicious * * * prosecution claims under the Fourth Amendment," as "recognized" in "other circuits," would accrue. *Manuel v. City of Joliet*, U.S. Ct. of App. for the Seventh Cir., No. 14-1581, Dkt. 47-2 at 67. As asked, of course counsel answered as he did, for under the malicious-prosecution claim recognized in other circuits Manuel's claim was timely. The parties' dispute is over *whether* that is the proper rule.

More importantly, Manuel advanced that waiver argument on remand in *Manuel II*—again, by quoting selectively from the prior oral exchange—and the

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splits in authority are not "dispositive" of his case. Opp. 10. But the City never claimed that those splits—over "whether incarceration is the litmus test for a Fourth Amendment seizure" and whether Fourth Amendment plaintiffs must prove malice as an element of their cause of action—were implicated in Manuel's case. Opp. 10-12. On the contrary, the City did not even mention the first of those splits in its petition, and it cited the latter merely as evidence of the depth of lower-court confusion in this area of law. See Pet. 12-13 n.3.

Seventh Circuit *rejected* that argument and reached the merits of the accrual question. Not surprisingly, the Seventh Circuit recognized that counsel for the City merely had acknowledged that "*if* the wrong is (as Manuel insisted) 'Fourth Amendment malicious prosecution,' *then* the accrual date" is the one Manuel proposed. Pet. App. 4a (emphasis added). The fact that the Seventh Circuit rejected Manuel's waiver theory on remand alone disposes of that theory. See Pet. App. 31a (noting that it was for the Seventh Circuit on remand to determine the merits of any waiver argument); see also *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991) (rejecting waiver argument because district court and court of appeals "decided the substantive issue presented").

Accordingly, the question presented is significant, and as this Court has already recognized, this case offers an ideal vehicle to resolve the entrenched split in authority.

## IV. Manuel Concedes That *McDonough v. Smith* Does Not Raise A Fourth Amendment Accrual Question, But If The Court Disagrees Then It Should Hold The Petition For A Decision In That Case.

Manuel agrees with the City that *McDonough* does not raise the accrual question this case presents. See Opp. 14-15 ("*McDonough* raises a due process claim, not a Fourth Amendment one."). Respondent in *McDonough* and its supporting amici make the same point. Respondent's Br. in *McDonough v. Smith*, No. 18-495, at 21 ("The Court in *Manuel* left open the question when that Fourth Amendment claim accrues. But that accrual issue is not before the Court

in this case."); Br. for Int'l Mun. Lawyers Ass'n *et al.* as Amici Curiae Supporting Respondent, *McDonough v. Smith*, No. 18-485, at 7 ("there is no Fourth Amendment accrual issue before the Court," and "[t]o the extent this Court wishes to address accrual in the post-process, pre-trial Fourth Amendment context, it should grant the pending petition for certiorari in *Manuel v. City of Joliet*"); Br. for Indiana *et al.* as Amici Curiae Supporting Respondent, *McDonough v. Smith*, No. 18-485, at 23 ("Throughout this litigation McDonough has chosen not to frame his 'fabrication of evidence' claim in Fourth Amendment terms"). Even as amicus for McDonough, the United States agrees that the Fourth Amendment accrual question at issue in this case is not presented in that one. See Br. for United States as Amicus Curiae Supporting Reversal, *McDonough v. Smith*, No. 18-485, at 15 ("As the courts below recognized, and petitioner implicitly acknowledges in his complaint, his claim * * * most naturally arises under the Due Process Clause," whereas "[t]he Fourth Amendment is an unlikely home for petitioner's asserted constitutional right").

But if this Court disagrees and determines to resolve the split over the pretrial, post-process Fourth Amendment accrual rule in *McDonough*, then the Court should hold this petition for a decision on the merits in that case. Contrary to Manuel's suggestion, see Opp. 15, if the Second Circuit's accrual rule in *McDonough* were applied to Fourth Amendment claims like Manuel's, then his claim would be untimely. Indeed, the Second Circuit's rule—defended by respondent in that case—is that McDonough's claim for fabrication of evidence accrues when the

plaintiff first had reason to know that defendants used false evidence against him. See *McDonough v. Smith*, 898 F.3d 259, 267 (2d Cir. 2018); Respondent's Br. in *McDonough v. Smith*, No. 18-485, at 5, 20-21, 24. Because Manuel allegedly knew that his pills were not illegal narcotics and therefore knew that the City was using false evidence to detain him at his initial court appearance on March 18, 2011, his claim accrued on that date under the Second Circuit's accrual rule, which in practice matches the City's proposed rule.[3]

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[3] Although the underlying constitutional claims are different, respondent in *McDonough* also argues, as the City does here, that the *Heck* bar on §1983 claims does not apply where there is no criminal conviction or sentence. See Respondent's Br. in *McDonough v. Smith*, No. 18-485, at 27-30; see also *supra* pp. 5-6. Respondent in *McDonough* thus specifically rejects the theory, on which the Seventh Circuit relied below, that any §1983 "suit that would have the effect of challenging the validity of *any* custody cannot be brought prior to the claimant's release from that custody—regardless of whether that custody stems from a conviction." Respondent's Br. in *McDonough v. Smith*, No. 18-485, at 30. And like the City here, respondent in *McDonough* also cites *Wallace* as grounds to reject any continuing-tort theory in that case. *Id.* at 32-33. In these additional respects, a decision from this Court favoring respondent's arguments in *McDonough* would undercut the basis for the Seventh Circuit's decision in *Manuel II*.

## CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held for a decision in *McDonough*.

Respectfully submitted,

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