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

MOTION FOR DIVIDED ARGUMENT AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Supreme Court Rules 28.4 and 28.7, the State of Indiana, on behalf of itself and Arkansas, Louisiana, Nebraska, Ohio, South Carolina, and Texas (collectively, *Amici* States), respectfully requests that the Court grant divided argument in order to allow *Amici* States ten minutes of argument time in support of Respondent.

The question presented in this case is when the statute of limitations began to run on the "fabrication of evidence" claim Petitioner Edward McDonough has brought under 42 U.S.C. § 1983 against Respondent Youel Smith, the prosecutor who led the criminal case against McDonough. The parties' briefs, as well as the brief in support

of McDonough filed by the United States, address this question while assuming that such a "fabrication of evidence" claim exists under *some* provision of the Constitution. *See* Pet. Br. 41–43 & n.13 (suggesting that the claim could be "textually housed" within the Fourth Amendment, Sixth Amendment, or Due Process Clause); U.S. Br. 13–17 (positing that the claim sounds in the procedural principles of the Due Process Clause); Resp't Br. 24 (arguing that, if the claim exists at all, it is premised on "a substantive due process violation").

As explained in *Amici* States' brief, however, the question presented—and by extension the statute-of-limitations arguments in the parties' briefs—"jump[s] the gun." *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 n.10. The Court reiterated just two terms ago that "the threshold inquiry in a § 1983 suit . . . requires courts to '*identify the specific constitutional right' at issue*." *Id.* at 920 (emphasis added) (quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion)). Only "*[a]fter* pinpointing that right," should courts "determine the elements of, and rules associated with, an action seeking damages for its violation." *Id.* (emphasis added). Because McDonough has continually refused to specify the constitutional right underlying his "fabrication of evidence" claim, it is impossible to determine when the hypothetical claim's limitations clock began ticking. "When the parties cannot be bothered to identify the source of their supposedly constitutional complaint," there is no reason to "enter[] a fight over an element of a putative constitutional cause of action that may not exist." *Cordova v. City of Albuquerque*, 816 F.3d 645, 666 (10th

Cir. 2016) (Gorsuch, J., concurring). The Court therefore should either dismiss the writ as improvidently granted or affirm the dismissal of McDonough's claim on the ground that McDonough has failed to state a claim at all.

Amici States have a compelling interest in this case because they have a substantial stake in preserving the clarity of the law governing 1983 claims. As this case shows, lower courts' decisions and litigants' filings frequently display profound confusion over the nature of the 1983 claims at issue, including such fundamental matters as which constitutional rights and which common-law analogies—if any—the claims implicate. Jumping to the statute-of-limitations question addressed by the parties would reintroduce "conflict, confusion, and uncertainty" into the caselaw interpreting and applying section 1983, *Wilson v. Garcia*, 471 U.S. 261, 266 (1985).

In addition, *Amici* States have a strong interest in ensuring that courts do not expand the set of claims cognizable under section 1983 to include theories unsupported by the Constitution. McDonough's "fabrication of evidence" claim is unmoored from any particular constitutional provision, and if the Court were to assume the existence of this claim on its way to deciding the question presented, it could lead lower courts to recognize 1983 claims that the Constitution does not authorize.

The Court has frequently granted argument time to States as amici curiae when cases implicate core state interests or when States can add a valuable perspective not fully articulated by the parties. *See*, *e.g.*, *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, No. 18-96 (2018) (Illinois); *Gamble v. United States*, No.

17-646 (2018) (Texas); *Sturgeon v. Frost*, No. 17-949 (2018) (Alaska); *ONEOK, Inc. v. Learjet, Inc.*, No. 13-271 (Kansas); *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, No. 06-480 (New York); *Halbert v. Michigan*, No. 03-10198 (Louisiana); *Clingman v. Beaver*, No. 04-37 (South Dakota); *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672 (Alabama); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, No. 02-1609 (Ohio).

Here, both of these factors weigh in favor of permitting *Amici* States to participate at oral argument. As frequent defendants in 1983 cases, *Amici* States will be the first to suffer from a muddled or erroneously expanded 1983 doctrine. And because *Amici* States have addressed the "initial inquiry" of "any § 1983 action," *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), they can offer the Court a unique and valuable perspective. The amici States accordingly request that their request for divided argument and for ten minutes of argument time be granted.

Respectfully submitted,

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