No. 19–1360

In the Supreme Court of the United States

WILLIAM CANNON, SR., *et al.*,
Petitioners,
v.
JOHNNIE LEE SAVORY,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case concerns the wrongful conviction of an innocent person named Johnnie Lee Savory. Sitting en banc, the Seventh Circuit ruled 9-1 that Savory's constitutional claims challenging his criminal conviction under 42 U.S.C. §1983 were timely filed because they accrued when his criminal conviction was set aside rather than with his earlier release from custody. That decision represents a straightforward application of *Heck v. Humphrey*, 512 U.S. 477 (1994), and *McDonough v. Smith*, 139 S. Ct. 2149 (2019). In light of these circumstances, the questions presented are:

1. Whether the Seventh Circuit's faithful application of this Court's decisions in *McDonough* and *Heck* warrants review just a year after *McDonough* resolved a circuit split and reaffirmed the favorable-termination requirement for section 1983 claims that necessarily impugn a state criminal prosecution or resulting conviction.

2. Whether this Court should create an exception to *McDonough* and *Heck*'s favorable-termination requirement for state convicts to challenge their convictions using section 1983 upon release from custody when the lower courts agree unanimously that such a claim should not be brought until the conviction has been set aside.

3. Whether this case presents a viable vehicle for creating petitioners' proposed exception to *McDonough* and *Heck*'s favorable-termination requirement, considering that (a) petitioners did not raise one of the questions they present to this

Court below, (b) petitioners took contrary positions on claim accrual in the Seventh Circuit, and (c) Savory is not the type of plaintiff who might need an exception to *McDonough* and *Heck*'s favorable-termination requirement to avail himself of federal remedies.

4. Whether this Court should rescind *McDonough* and *Heck*'s favorable-termination requirement for state prisoners released from custody so that all state prisoners who complete a sentence could challenge their state criminal convictions using section 1983, given that such a rule would dramatically undermine interests in respecting the finality of state criminal judgments, encouraging comity, promoting efficiency, and ensuring that individuals wrongly prosecuted or convicted can pursue constitutional claims.

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INTRODUCTION

When Johnnie Lee Savory was fourteen years old, petitioners framed him for a vicious double-murder and rape he did not commit. Because there was no evidence to connect Savory to the crime, petitioners fabricated witness statements and other evidence and subjected Savory to a brutal, days-long interrogation, coercing a false confession from him. Savory was twice convicted of murder based on fabricated and false evidence.

For four decades, Savory fought to have his conviction set aside, availing himself of every state and federal post-conviction procedure imaginable. Savory completed his sentence and was released from custody. Ultimately, he was able to secure DNA testing of physical evidence left by the killer at the crime scene, which conclusively proved his innocence. Savory then petitioned the Governor of Illinois for clemency. In 2015, as a result of the exonerating DNA evidence, Savory was pardoned, and his wrongful conviction was finally set aside.

Within two years of his pardon, Savory sued petitioners, who are the police officers who framed him. He asserted constitutional claims, principally under the Fifth and Fourteenth Amendments, for petitioners' coercion of a false confession and fabrication of other evidence. 42 U.S.C. § 1983. All of Savory's claims challenged the validity of his conviction.

Petitioners moved to dismiss, arguing that Savory's claims challenging his conviction accrued not when his conviction was set aside, but instead

with his earlier release from custody, and therefore were not filed within the two-year statute of limitations. The district court erroneously accepted petitioners' argument and dismissed the case. *Savory v. Cannon*, 338 F. Supp. 3d 860 (N.D. Ill. 2017). A panel of the Seventh Circuit reversed, correctly holding that *Heck v. Humphrey*, 512 U.S. 477 (1994), requires a conviction to be set aside before a section 1983 claim impugning that conviction can be brought, even if the plaintiff is no longer in custody. *Savory v. Cannon*, 912 F.3d 1030, 1034-35 (7th Cir. 2019) (citing *Heck*, 512 U.S. at 486-87, 490 n.10). After this Court granted certiorari in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), the Seventh Circuit granted rehearing en banc in Savory's case, waited until *McDonough* was decided, ordered supplemental briefing, and then reaffirmed the panel's conclusion in a 9-1 decision, taking the opportunity to overrule prior circuit decisions that were in tension with *Heck* and *McDonough*. *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020). This Court had held in *McDonough* that "[o]nly once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, . . . will the statute of limitations begin to run," 139 S. Ct. at 2158, and the en banc Seventh Circuit unsurprisingly concluded that this meant Savory's conviction had to be invalidated before he could sue, *Savory*, 947 F.3d at 430-31.

Petitioners ask this Court to grant certiorari and create an exception to *McDonough* and *Heck* that would permit state prisoners released from

custody to challenge their extant convictions using section 1983. Such an exception, petitioners' reason, would make Savory's civil wrongful conviction claims untimely, given that Savory was released before he was pardoned. This Court should deny the petition for at least four reasons.

First, this Court reaffirmed *Heck*'s favorable-termination requirement in *McDonough* just last year, and petitioners provide no good reason for revisiting *McDonough* so shortly after it was decided. Second, contrary to petitioners' assertion, the courts of appeals agree unanimously that section 1983 claims challenging state convictions must wait until the conviction has been set aside.

Third, petitioners' case presents a remarkably poor vehicle for considering the exception to *Heck* and *McDonough* that they advance. Not only did petitioners fail to raise below one of the questions presented, but they took contrary positions on claim accrual during argument in the Seventh Circuit. Moreover, they propose an exception to the normal accrual rules that they say is justified by the fact that some litigants do not have recourse to federal habeas corpus, but they ignore that such an exception has no relevance to Savory, who had comprehensive access to federal avenues for challenging his wrongful conviction.

Finally, petitioners' proposed exception to *Heck* and *McDonough*'s favorable-termination requirement would permit every state prisoner released from custody to challenge their extant criminal conviction using section 1983. As this Court has recognized, such a regime would

undermine the finality of state judgments, upset federal-state comity, and result in conflicting resolutions of cases in federal and state court. *McDonough*, 139 S. Ct. at 2156-57. Just as problematically—and contrary to petitioners' contention that they are advancing civil rights—petitioners' proposed exception to *Heck* and *McDonough* would actually forever bar meritorious wrongful conviction claims like Savory's. The Seventh Circuit's en banc decision avoids these problems and faithfully applies this Court's precedents.

STATEMENT

I. FACTUAL BACKGROUND

A. The Murders of Connie Cooper and James Robinson

In 1977, 19-year-old Connie Cooper, and 14-year-old James Robinson were killed in their family home in Peoria, Illinois, while their parents were at work. R.1 ¶¶20-21. Connie had been raped and suffered a number of defensive wounds, both had been stabbed multiple times, and their bodies were left on the floor of a bedroom. *Id.* The brutality of the crime shocked the community, and it drew widespread media attention in Peoria and beyond. *Id.* ¶21.

Various individuals emerged as likely perpetrators: Connie's secret lover, whose nightstick was found at the crime scene; Connie's physically abusive ex-boyfriend; the father of Connie's young child; and Connie's step-father, who had previously made sexual advances toward

Connie and who had welts under his eye on the day of the murder. *Id.* ¶24. None of these likely perpetrators was apprehended. *Id.* ¶25.

B. Petitioners Frame Johnnie Lee Savory

Johnnie Lee Savory was a 14-year-old child attending junior high school at the time of his arrest. *Id.* ¶27. He lived in Peoria with his father, sister, and grandmother, and he had been close friends with James Robinson. *Id.*

On the day that Connie and James were killed, Savory had a verifiable alibi for each moment of the day, meaning it was impossible for him to have committed the bloody double-murder. *Id.* ¶28. Nor did Savory have any motive to commit the crime. *Id.* In addition, despite the fact that petitioners collected substantial forensic evidence from the crime scene, there was absolutely no physical evidence connecting Savory to Connie's rape or to the deaths of Connie and James. *Id.* ¶29.

Ignoring Savory's solid alibi, the lack of physical evidence connecting him to the crime, and the existence of more likely perpetrators, petitioners suddenly and inexplicably began to focus on him as a suspect just a week after the crime occurred. *Id.* ¶¶27-29. Petitioners removed Savory from his middle school and brought him to the police station, where they interrogated Savory for approximately 31 hours over two days. *Id.* ¶¶31-32. Petitioners knew, but ignored, that Savory's youth rendered him particularly vulnerable to coercive interrogation techniques. *Id.* ¶¶33-34.

At no point during the 31-hour interrogation did petitioners provide Savory with an attorney or a youth officer. *Id.* ¶¶39-40. Further, Savory never had a parent or any other adult present to advocate on his behalf. *Id. Id.* ¶40. Petitioners even failed to give Savory complete *Miranda* warnings. *Id.* ¶46. Nevertheless, Savory repeatedly invoked his right to remain silent, and repeatedly asked petitioners to stop their questioning and false accusations. His requests were ignored. *Id.* ¶47.

Petitioners employed myriad abusive techniques during the interrogation. *Id.* ¶¶34-45. They stripped Savory out of his clothes and plucked hairs from all over his body. *Id.* ¶44. Petitioners screamed at and threatened Savory. *Id.* ¶42. They polygraphed Savory and falsely told him that the results implicated him in the crime. *Id.* ¶38. Petitioners made Savory false promises of leniency if he confessed. *Id.* ¶45. They fed him facts and showed him crime scene photos that had not been disclosed to the public. *Id.* ¶43.

To exacerbate the effects of their coercive techniques, petitioners also deprived Savory of sleep and food throughout his 31-hour interrogation. *Id.* ¶¶35-36. It was not until more than a day after petitioners had removed Savory from school and had begun their relentless interrogation of him that petitioners fed him, a child, anything other than candy and soda pop. *Id.* ¶36. In addition to the extreme physical and psychological conditions petitioners created, the exhausting and disorienting interrogation also took place in multiple locations at different facilities,

and petitioners employed a substantial roster of interrogators, who aggressively interrogated Savory in tag teams. *Id.* ¶¶35-37. When Savory broke down crying, petitioners callously ignored the child's distress and continued the interrogation. *Id.* ¶48.

In the face of such extreme physical and psychological abuse and coercion, Savory steadfastly maintained his innocence for more than a day. *Id.* ¶50. Savory told petitioners over and over that he had no connection to the murders of Connie and James. *Id.* But petitioners ignored Savory and disregarded evidence that corroborated his protestations of innocence. *Id.* They continued to accuse him, and after 31 hours of intense pressure, Savory succumbed and adopted petitioners' account of the crime. Petitioners wrote reports memorializing his false incriminating statements, which they then used to file criminal charges against him. *Id.* ¶51.

Knowing that there was no evidence to tie Savory to the killings other than his false confession, petitioners fabricated additional evidence, feeding the facts of the murders to three siblings who were Savory's friends—Frank Ivy, Tina Ivy, and Ella Ivy—and pressuring them to give false statements implicating Savory in the crime. *Id.* ¶58. Petitioners did not leave the details up to the Ivys, but rather fabricated a story for the Ivy siblings to present at trial in which Savory confessed to the trio that he had committed the murders. *Id. Id.* ¶¶ 58-59. To make framing their friend enticing, petitioners indicated to one of the

Ivy siblings that they would make him a deal in another case if he testified against Savory. *Id.* ¶59. Since Savory's criminal trials, the Ivys have admitted that petitioners fabricated and fed them the narrative implicating Savory and that they testified because of pressure from petitioners. *Id.* ¶59.

In addition to fabricating witness statements, petitioners fabricated physical evidence purportedly connecting Savory to the murders. This physical evidence included a pair of pants that petitioners alleged belonged to Savory and that they said were stained with Connie Cooper's blood. In fact, the pants neither belonged to Savory nor were stained with Connie's blood. Knowing this, petitioners destroyed the pants following Savory's conviction so that they could not be tested during appeal and post-conviction proceedings.

C. Savory's Conviction and Fight to Prove His Innocence

Based on Savory's involuntary statements and the other fabricated evidence, Savory was charged, tried, and twice wrongly convicted of murdering Robinson and Cooper.[1] Savory spent 30 years in

[1] Savory was first convicted in 1977, but the Illinois appellate court reversed and remanded for a new trial, concluding Savory's incriminating statements had been extracted in violation of his Fifth Amendment rights. *People v. Savory*, 403 N.E.2d 118, 122-24 (Ill. App. Ct. 1980). In 1981, when Savory was tried again, his incriminating

prison. While incarcerated, Savory continually fought to prove his innocence and to have his conviction set aside, exhausting his avenues for appeal and post-conviction relief in both state and federal court. See *People v. Savory*, 435 N.E.2d 226 (Ill. App. Ct. 1982); *People v. Savory*, 638 N.E.2d 1225 (Ill. App. Ct. 1991); *U.S. ex rel. Savory v. Lane*, No. 84 C 8112, 1983 WL 2108 (N.D. Ill. July 25, 1985); *U.S. ex rel. Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987); *U.S. ex rel. Savory v. Peters*, No. 94 C 2224, 1995 WL 9242 (N.D. Ill. Jan. 9, 1995). He also repeatedly pursued DNA testing, *People v. Savory*, 722 N.E.2d 220 (Ill. App. Ct. 1999); *People v. Savory*, 756 N.E.2d 804 (Ill. 2001); *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006), and he petitioned repeatedly for executive clemency.

In December 2006, Savory was released from prison on parole with his conviction still intact. Five years later, in December 2011, Savory's parole was terminated. Despite his release from custody and the eventual termination of his parole, Savory never gave up his mission to clear his name and secure relief from his conviction. Ultimately,

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statements were again used at trial, and he was again convicted. This time the conviction was affirmed on direct appeal, when the court concluded that the admission of Savory's statements was harmless error given the new testimony from the Ivys, *People v. Savory*, 435 N.E.2d 226, 228-32 (Ill. App. Ct. 1982), which has since been revealed as fabricated.

Savory won the right to test physical evidence found at the scene of the crime. Testing of the vaginal swabs taken from Connie Cooper revealed the presence of seminal fluid and a DNA profile that definitively excludes Savory. Similarly, testing of blood left on the bathroom light switch of the victims' home revealed the presence of James Robinson's DNA mixed with the DNA profile of an unidentified person who is not Savory. R.1 ¶75. With this exonerating DNA evidence in hand, Savory again petitioned for clemency.

On January 12, 2015, the Governor of Illinois pardoned Savory, setting aside his wrongful conviction and terminating the criminal proceeding in his favor. *Id.* ¶86. At the time the pardon was issued, Savory had spent three quarters of his life fighting the false charges against him. *Id.*

II. PROCEEDINGS BELOW

A. The District Court Misapplies Heck and Dismisses the Lawsuit

Savory filed suit on January 11, 2017, less than two years after his conviction was first set aside by the pardon. *Savory*, 947 F.3d at 413-14 (explaining that the statute of limitations for section 1983 claims is two years in Illinois). Among other claims, Savory alleged that his convictions were secured in violation of his Fifth and Fourteenth Amendment right to be free of compelled, involuntary self-incrimination, and that petitioners fabricated and suppressed evidence, in violation of his right to due process. *Id.* at 412-413. Each and every one of

Savory's claims challenged the validity of his state criminal proceedings and resulting convictions.

Petitioners moved to dismiss, arguing that Savory's claims accrued not when his conviction was set aside but instead when he was released from custody, a position explicitly foreclosed by *Heck v. Humphrey*, 512 U.S. 477, 487-90 & n.10 (1994), which holds that a section 1983 claim is not cognizable if it would necessarily impugn an extant conviction, regardless of whether the plaintiff has been released from custody. The district court erroneously accepted petitioners' argument, declaring in a short opinion that Seventh Circuit precedents dictated that whenever a person like Savory is convicted of a state crime and lacks recourse in federal habeas corpus, he may challenge his conviction using section 1983. *Savory v. Cannon*, 338 F. Supp.3d 860, 864-65 (N.D. Ill. 2017) ("When habeas is not available, § 1983 is[.]"). Applying this novel rule unmoored from this Court's precedents, the district court concluded Savory should have sued within two years of his release from custody, despite that his conviction was then still intact, and it dismissed his suit as untimely.

B. The Seventh Circuit Reverses the District Court's Erroneous Decision

Savory appealed to the Seventh Circuit, which reversed in a unanimous panel opinion, holding that *Heck* plainly foreclosed petitioners' novel accrual argument. *Savory v. Cannon*, 912 F.3d 1030, 1033-38 (7th Cir. 2019) (Rover, Hamilton, Barrett, JJ.). The panel explained that *Heck*

requires, in no uncertain terms, that a section 1983 suit challenging the validity of a state criminal conviction cannot be brought until the conviction has been invalidated. *Id.*

Days after the panel opinion was issued, this Court granted the petition for writ of certiorari in *McDonough v. Smith*, which presented the question whether a section 1983 due process claim accrued upon favorable termination of criminal proceedings or, alternatively, at some earlier point in time. 139 S. Ct. 915 (Jan. 11, 2019). Soon after, the Seventh Circuit granted rehearing en banc in Savory's case, deferring argument until this Court had decided *McDonough*.

McDonough reaffirmed the rule of *Heck* and extended its reach, holding that "[o]nly once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, see 512 U.S. at 486-87, will the statute of limitations begin to run." 139 S. Ct. at 2158 (citing the passage of *Heck* that requires a plaintiff to show that a conviction "has been reversed on direct appeal, *expunged by executive order*, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus" before challenging their state criminal conviction using section 1983) (emphasis added).

The en banc Seventh Circuit ordered supplemental briefing on *McDonough*, heard oral argument, and issued a 9-1 decision agreeing with the original panel's conclusion that Savory's claims

accrued only upon his pardon. *Savory v. Cannon*, 947 F.3d 409, 419-22 (7th Cir. 2020) (en banc). Faithfully applying *McDonough* and *Heck*, the full court held that the statute of limitations for section 1983 claims like Savory's, which necessarily impugn the validity of a criminal conviction, cannot begin to run until the conviction is set aside. *Id.* Because Savory's conviction had been intact until his pardon, the court correctly concluded that Savory's claims accrued with his pardon and thus were timely filed. *Id.* The court took the opportunity to overrule and clarify circuit precedents that were inconsistent with *Heck* and *McDonough*. *Id.* at 422-27.

ARGUMENT

I. THE SEVENTH CIRCUIT FAITHFULLY APPLIED LONG-STANDING PRECEDENTS, WHICH THIS COURT REAFFIRMED JUST LAST YEAR

Petitioners ask this Court to intervene in this case to clarify the accrual rules for section 1983 claims that challenge the validity of a state criminal conviction, despite that this Court did just that last year in *McDonough v. Smith*. In *McDonough,* the Court held that the statute of limitations for such a claim begins to run "[o]nly once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*." 139 S. Ct. 2149, 2158 (2019). And in *Heck* the Court long ago established a deferred-accrual rule for

section 1983 claims that necessarily impugn an outstanding conviction, concluding that such claims do not accrue until the conviction has been set aside. *Heck*, 512 U.S. 477, 486-87 (1994).

McDonough's holding and its reaffirmance of *Heck* directly contradicts petitioners' contention that Savory's claims accrued upon his release from custody, rather than upon the vacatur of his criminal conviction. In fact, petitioners are asking this Court to revisit its holding in *McDonough* and to overturn its reaffirmance of *Heck*'s longstanding accrual rule after just one year. Notably, petitioners do not articulate any reason that this Court should overrule *McDonough* or *Heck*. The fact that this Court reiterated accrual rules for claims like Savory's just last year is reason enough on its own to deny certiorari.

Moreover, this Court has repeatedly considered challenges to the *Heck* rule over the last two decades, and on every occasion this Court has declined to limit or otherwise create exceptions to *Heck*'s favorable-termination requirement. Instead, this Court has without exception maintained that section 1983 claims that challenge state criminal proceedings or their resulting judgments accrue, and the statute of limitations begins to run, only with the final and favorable termination of a criminal case. *McDonough*, 139 S. Ct. at 2158; *Skinner v. Switzer*, 562 U.S. 521, 533 (2011); *Wallace v. Kato*, 549 U.S. 384, 392-94 (2007); *Nelson v. Campbell*, 541 U.S. 637, 647-48 (2004); *Muhammad v. Close*, 540 U.S. 749, 751 (2004); *Edwards v. Balisok*, 520 U.S. 641, 646-49 (1997);

Heck, 512 U.S. at 486-87; *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Unless this Court wishes to revise these well-reasoned and recently reaffirmed accrual rules, there is no reason to grant the petition.

II. THERE IS NO CIRCUIT SPLIT ABOUT THE ACCRUAL OF SECTION 1983 CLAIMS THAT CHALLENGE STATE CRIMINAL CONVICTIONS

A. Petitioners' Alleged Circuit Split Is Based On A Misreading of Case Law

1. Contrary to petitioners' assertion, there is no split among the circuits on the question relevant to this case: whether a section 1983 claim challenging an extant state criminal conviction can be brought after release from custody but before the conviction has been set aside. All seven courts of appeals that have squarely addressed that question in a holding have answered it in the negative, as the en banc Seventh Circuit did below. See *Figueroa v. Rivera*, 147 F.3d 77, 80-81 (1st Cir. 1998) ("[A]ppellants do not allege that an authorized tribunal or executive body overturned or otherwise invalidated Ríos's conviction. Consequently, *Heck* bars the unconstitutional conviction and imprisonment claims."); *Gilles v. Davis*, 427 F.3d 197, 209-12 (3d Cir. 2005) ("Because the holding of *Heck* applies, [the plaintiff] cannot maintain a § 1983 claim unless successful completion of the ARD program constitutes a termination of the prior criminal proceeding in favor of the accused.") (internal quotations omitted); *Morris v. McAllester*, 702 F.3d

187, 192 (5th Cir. 2012) ("The fact that Morris is no longer a prisoner 'in custody' for his offense and thus may not seek habeas relief does not excuse him from the 'favorable termination' rule of *Heck*, which instead relies on the dismissal of the indictment."); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) ("Because [the plaintiff] is seeking damages pursuant to § 1983 for unconstitutional imprisonment and has not satisfied the favorable termination requirement of *Heck*, he is barred from any recovery and fails to state a claim upon which relief may be granted."); *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) ("Applying *Heck*, we agree with the district court that the favorable-termination rule bars [the plaintiff's] suit. If [the plaintiff's] challenge to the State's decision on sentence-reduction credits were to succeed, it would necessarily imply the invalidity of his conviction or sentence. . . . Therefore, the claim may be pursued only in an action for habeas corpus relief.") (internal quotations omitted); *Lyall v. Los Angeles*, 807 F.3d 1178, 1192 (9th Cir. 2015) (holding that a plaintiff released from custody cannot challenge an extant conviction, and citing *Guerrero v. Gates*, 442 F.3d 697, 704-05 (9th Cir. 2006), for the proposition that "[t]he fact that [the plaintiff] is no longer in custody and thus cannot overturn his prior convictions by means of habeas corpus does not lift *Heck*'s bar"); *Martin v. City of Boise*, 920 F.3d 584, 613 (9th Cir. 2019); *Domotor v. Wennet*, 356 F. App'x 316, 316 (11th Cir. 2009) ("As the district court properly explained in its . . . order

of dismissal, so long as those convictions remain undisturbed, *Heck v. Humphrey* bars appellant's claims."); but see *Topa v. Melendez*, 739 F. App'x 516, 519 n.2 (11th Cir. 2018) (saying "[t]his circuit has not definitively answered the question").

2. No court of appeals holds that a state prisoner released from custody can proceed with a section 1983 suit challenging an extant conviction. The only reported decision that had approved of such a suit was the split panel decision in *Poventud v. New York*, 715 F.3d 57, 58 (2d Cir. 2013); see *id.* at 66 (Jacobs, C.J., dissenting), which was vacated by the en banc Second Circuit and decided on other grounds, while assuming *Heck* would apply to bar the suit, *Poventud v. New York*, 750 F.3d 121, 125 n.1, 127 & n.6 (2d Cir. 2014) (en banc); see also *Teichmann v. New York*, 769 F.3d 821 (2d Cir. 2014).[2]

3. Meanwhile, none of the other cases cited in the petition hold that an ex-prisoner may challenge a conviction using section 1983 upon release from custody. Petitioners point to the Fourth Circuit's

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[2] Petitioners also point to the earlier Second Circuit decision in *Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001), which authorized a suit after release from custody where the plaintiff's child had been held in custody too long. But the panel there stressed that the suit was allowed because it was "aimed at the duration of [the plaintiff's] confinement," and "[did] not challenge the validity of [the plaintiff's] conviction." *Id.* at 75.

decisions in *Wilson v. Johnson*, 535 F.3d 262, 267 (4th Cir. 2008), and *Covey v. Assessor of Ohio Cty.*, 777 F.3d 186 (4th Cir. 2015), but *Griffin v. Baltimore Police Department*, 804 F.3d 692, 696-97 (4th Cir. 2015), subsequently held that the *Heck* bar applies to a person released from custody who challenges an extant conviction. Moreover, the Fourth Circuit in *Wilson* permitted a plaintiff's claim challenging a sentence extension precisely because "success on that claim [would] not impugn his underlying conviction or sentence," 535 F.3d at 263-68; and in *Covey* it left it to the district court on remand to decide whether a lack of access to habeas meant the plaintiff's claims of false imprisonment were not barred by *Heck*, 777 F.3d at 197-98, but the issue was dropped on remand, *Covey v. United States*, No. 5:11CV147, 2016 WL 297717, at *3 (N.D. W.Va. Jan. 22, 2016). The Sixth Circuit's decision in *Powers v. Hamilton County*, 501 F.3d 592, 599-604 (6th Cir. 2007), concerned a class-action lawsuit challenging the local public defender's procedures governing indigency hearings and was not a challenge to a conviction at all. *Id.* Moreover, that court has since criticized *Powers* on the ground that "[i]t seems clear that Justice Souter's ruminations in his concurring opinion in *Spencer* were *dicta*." *Harrison v. Michigan*, 722 F.3d 768, 773 n.1 (6th Cir. 2013). Finally, while the Tenth Circuit's decision in *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010), contains the dicta cited in the petition, that case was brought by a plaintiff in immigration detention who challenged his denial

of access to courts, not a criminal conviction. *Id.* 1312-17.

Although some of these cases discussed a split in authority about whether and how to apply concurring and dissenting opinions from *Spencer v. Kemna*, 523 U.S. 1, 21-24 (1998), for plaintiffs who never had access to federal habeas, there is in fact no difference of opinion about whether state prisoners released from custody can use section 1983 to challenge their convictions. No court of appeals permits such a suit to proceed.

B. Even If There Had Been A Circuit Split Before *McDonough*, It Does Not And Cannot Persist After *McDonough*

Even assuming for the sake of argument that the circuit court cases petitioners rely upon resulted from some pre-*McDonough* difference of opinion about the favorable-termination requirement, courts of appeals since *McDonough* have rightly viewed favorable termination as a requirement in all cases. *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1208 (9th Cir. 2020) ("Since *Heck*, the Court has reaffirmed the requirement that a plaintiff bringing a § 1983 malicious prosecution action must establish termination of the prior conviction in his favor."); *Jordan v. Town of Waldoboro*, 943 F.3d 532, 545 (1st Cir. 2019) ("It was recently a live question in our circuit whether . . . Supreme Court precedent rendered the favorable termination element 'an anachronism.' . . . But the Supreme Court arguably resolved this question when it reiterated that a plaintiff cannot bring a section 1983 fabricated-

evidence claim that is analogous to the common-law tort of malicious prosecution 'prior to favorable termination of [the] prosecution.'") (internal citations omitted); *Nash v. Kenney*, 784 F. App'x 54, 57 (3d Cir. 2019), cert. denied, 140 S. Ct. 2523 (2020) ("Because Nash has not shown that his conviction has been set aside, he cannot bring these claims at this time."); see also *Fusilier v. Zaunbrecher*, 806 Fed. App'x 280 (5th Cir. 2020); *Coley v. Ventura County*, No. CV 18-10385, 2019 WL 7905740 (C.D. Ca. Sept. 24, 2019). These courts, like the Seventh Circuit below, are in the process of overruling and clarifying precedents that are in tension with *McDonough*, and there is little doubt that other courts will do the same when appropriate cases come before them. Reconsidering the favorable-termination requirement before any potential division among the lower courts has had an opportunity to develop would be a waste of this Court's resources. See *California v. Carney*, 471 U.S. 386, 398-99 & n.8, 400 & n.11) (1985) (Stevens, J., dissenting) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, had the benefit of the experience of those lower courts.") (internal quotation omitted); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state

and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). Regardless, there was no relevant division of authority before *McDonough*, and the great unlikelihood of one developing in the wake of *McDonough* is another reason to deny the petition.

III. THIS CASE PRESENTS AN EXCEPTIONALLY POOR VEHICLE FOR CONSIDERING THE QUESTIONS PRESENTED IN THE PETITION

A. One of Petitioners' Questions Presented Was Never Raised Below

Petitioners' second question presented asks whether applying the favorable-termination rule of *Heck* and *McDonough* to ex-prisoners' claims violates the rule that exhaustion of state remedies is not a prerequisite to an action under section 1983. Pet. at (i) & 13 (citing *Patsy v. Board of Regents* 457 U.S. 496 (1982), and *Knick v. Township of Scott, Pa.*, S. Ct. 2162, 2167 (2019)). But petitioners failed to raise this argument at all in the lower courts, and this Court deliberately limits its review to only those questions that have already been decided by the district and appellate courts. *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443, 455 (2007); see also *United States v. Jones*, 565 U.S. 400, 413 (2012). The Court diverges from this rule "'only in exceptional cases.'" *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989)). The circumstances here are not

exceptional, and petitioners have not made any arguments that they are. This Court should not take a case that presents a question that was not preserved below. *United States v. Jones*, 565 U.S. 400, 413 (2012) ("We have no occasion to consider this argument. The government did not raise it below, and the D.C. Circuit therefore did not address it. We consider the argument forfeited.") (citation omitted).

In any event, petitioners are wrong on the merits of their unpreserved argument. As this Court explained explicitly in *Heck*, imposing a favorable-termination requirement for section 1983 claims challenging state criminal proceedings is not an exhaustion requirement. Instead, it is a recognition that a section 1983 claim attacking an extant state conviction is simply "not cognizable." *Heck*, 512 U.S. at 487. "We do not engraft an exhaustion requirement upon § 1983," the Court said, "but rather deny the existence of a cause of action." *Id.* at 489. "Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Id.* Thus, whether a state criminal defendant has exhausted all available state remedies or none is irrelevant to whether the defendant's section 1983 challenge to a state conviction can proceed. In either scenario, no federal cause of action arises until the criminal proceedings terminate in the defendant's favor. *Id.* Petitioners' assertion that this Court's accrual rule imposes an exhaustion

requirement ignores that this Court rejected precisely this argument in *Heck*, and petitioners offer no argument at all for overruling this aspect of *Heck*. That the second question presented by petitioners is forfeited and lacks merit is another good reason to deny certiorari.

B. Petitioners Took Contradictory Positions on Claim Accrual in the Seventh Circuit

This case is a bad vehicle for considering arguments about claim accrual for the additional reason that petitioners took inconsistent positions in the proceedings below about when (or whether) Savory's section 1983 claims had accrued. While they now urge this Court to adopt a new rule that state prisoners like Savory can file section 1983 suits challenging their extant convictions upon release from custody, they took a different position before the en banc Seventh Circuit. At argument, petitioners asserted—contrary to the early accrual rule outlined in their petition—that Savory's claims actually might not have accrued yet. Oral Argument at 48:40-56:24, *Savory v. Cannon*, 947 F.3d 409 (2020), https://bit.ly/2DffBJD. Not only is this argument contrary to the questions petitioners present to this Court, but it also diverged from the position that they had taken in the district court. Though the Seventh Circuit rightly rejected petitioners' contradictory argument, *Savory*, 947 F.3d at 429, petitioners' past embrace of it nonetheless undermines their contention that this case is an ideal vehicle for consideration of the

questions they present, which is yet another reason that the petition should be denied.

C. Savory's Case Does Not Lend Itself To Recognizing An Exception to the Favorable-Termination Requirement

This case is also a poor vehicle for considering whether there should be an exception to *Heck* and *McDonough*'s favorable-termination requirement for plaintiffs who never had the opportunity to seek relief from their convictions. Savory is no such plaintiff. To the contrary, Savory availed himself of every possible federal remedy in seeking to have his conviction set aside, and eventually he succeeded in securing vacatur of his conviction. Adopting an exception to *Heck* and *McDonough* in a case where such an exception is not needed would make little sense.

Petitioners argue that the favorable-termination requirement is unfair to those plaintiffs who have no opportunity or are unable to obtain relief from their convictions despite the merit of their claims. Their position is based on concurring opinions in *Spencer*, which raised concerns about plaintiffs who were never incarcerated or were incarcerated for such a short duration that they were unable to challenge their convictions through federal habeas corpus. Those individuals, the concurrences noted, would be wholly deprived of any federal avenue to seek relief from their wrongful convictions in the face of *Heck*'s favorable-termination requirement. To address this concern, the concurrences suggested that an individual who never had meaningful access to habeas relief might be

permitted to seek relief through section 1983 notwithstanding the continued validity of his or her conviction. *Spencer*, 523 U.S. at 18-22.

But Savory's case does not raise this concern at all, which means that it would be an exceptionally poor vehicle for this Court to revisit the concerns undergirding the *Spencer* concurrences. Unlike the type of plaintiff with whom the Justices concurring in *Spencer* were concerned, Savory was convicted and imprisoned for thirty years, and in that time repeatedly availed himself of federal and state procedures to seek relief from his conviction. *People v. Savory*, 435 N.E.2d 226 (Ill. App. Ct. 1982); *People v. Savory*, 638 N.E.2d 1225 (Ill. App. Ct. 1991); *U.S. ex rel. Savory v. Lane*, No. 84 C 8112, 1983 WL 2108 (N.D. Ill. July 25, 1985); *U.S. ex rel. Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987); *U.S. ex rel. Savory v. Peters*, No. 94 C 2224, 1995 WL 9242 (N.D. Ill. Jan. 9, 1995); *People v. Savory*, 722 N.E.2d 220 (Ill. App. Ct. 1999); *People v. Savory*, 756 N.E.2d 804 (Ill. 2001); *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006). Even after his release, Savory had state post-conviction remedies available to him. *Nance v. Vieregge*, 147 F.3d 589, 591 (7th Cir. 1998) (applying *Heck* because other relief was available—"[l]ike other states, Illinois allows a governor to pardon a released prisoner"); *Mack v. Chicago*, 723 Fed. App'x 374, 376-77 (7th Cir. 2016) (*Heck*'s favorable-termination requirement applied because the plaintiff could always file a successive postconviction petition in Illinois). In fact, Savory did secure relief from his conviction using these remedies when he obtained DNA testing and a

pardon. Thus, even if this Court wished to revisit concerns about access to relief for section 1983 plaintiffs who have had no other meaningful opportunity to challenge their convictions, the facts of this case make it a poor vehicle for revisiting those concerns.

IV. PETITIONERS' PROPOSED CLAIM ACCRUAL RULE IS WRONG

Petitioners' contention that Savory's section 1983 claims challenging his criminal conviction accrued upon his release from prison contradicts the express holdings of *Heck* and *McDonough*, ignores the logic of those decisions, and undermines the policy rationales that give rise to the favorable-termination requirement. In addition, that position would result in forever barring meritorious civil wrongful conviction claims like Savory's.

A. Petitioners' Proposed Rule Contradicts the Express Holdings of *Heck* and *McDonough*

This Court could not have been clearer when it held in *McDonough* that "[o]nly once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run." 139 S. Ct. at 2158 (internal citation omitted). Faced with this clarity, petitioners' arguments depend on purported limitations of the *Heck-McDonough* accrual rule that are found nowhere in the Court's opinions. For example, petitioners focus on the fact that Savory was released from custody, whereas the plaintiff in

McDonough was never convicted, and on the fact the plaintiff in *Heck* was still behind bars when he sued. But such differences were irrelevant to the Court's analysis in these cases, which hinged entirely on whether the section 1983 plaintiff's claims impugned an ongoing criminal proceeding or its resulting judgment. According to *McDonough*, for a section 1983 claim to be cognizable, the state criminal case *must* have resolved in the defendant's favor, and *only* at that moment does the statute of limitations begin to run. *Id*. The Court's focus in these cases is on the status of a potential section 1983 plaintiff's criminal case or conviction, not on their custodial status, which is just not a relevant factor.

Not only is custodial status irrelevant to the conclusions of *McDonough* or *Heck*, but petitioners' insistence that concurring and dissenting opinions in *Spencer* and *Heck* should be followed is misplaced. Most obviously, these separate opinions do not carry the force of law. On the contrary, the majority in *Heck* explicitly rejected the suggestion that its rule should be inapplicable after a plaintiff's release from custody. 512 U.S. at 490 n.10. Second, the separate opinions on which petitioners rely have lost any potential to be a guiding force given that *Heck*'s favorable-termination requirement has been reaffirmed repeatedly in subsequent cases, including *Wallace*, 549 U.S. at 387-92, *Manuel v. Joliet,* 137 S. Ct. 911, 921 (2017), and *McDonough*. Compare *Spencer*, 523 U.S. at 20 (J. Souter, concurring) (expressing skepticism that "the favorable-termination

requirement was necessarily an element of the § 1983 cause of action for unconstitutional conviction or custody"), with *McDonough*, 139 S. Ct. at 2160 ("*Heck* explains why favorable termination is both relevant and required for a claim analogous to malicious prosecution that would impugn a conviction."). This Court's majority opinions are binding and resolve the accrual issue in this case, and petitioners' proposed alternative approach, which has been soundly rejected, does not merit new consideration just because it would further petitioners' quest to evade liability for their unconstitutional treatment of Savory.

B. Petitioners' Proposed Rule Contradicts the Interpretive Method By Which This Court Determines Accrual Rules

Petitioners' proposed accrual rule also ignores the method by which this Court has fashioned accrual rules in section 1983 cases. *McDonough* reiterated that the rule that a plaintiff's claim accrues only upon favorable termination of his criminal proceedings "follows . . . from the rule of the most natural common-law analogy," which instructs that accrual rules for section 1983 claims should be determined by considering "common-law principles governing analogous torts." 139 S. Ct. at 2155-56 (citing *Wallace*, 549 U.S. at 388); see also *Manuel*, 137 S. Ct. at 920-21. *McDonough* and *Heck* found that claims challenging state criminal proceedings and their resulting judgments were analogous to common-law malicious prosecution. *McDonough*, 139 S. Ct. at 2156; *Heck*, 512 U.S. at

484. By contrast, the claims of false arrest at issue in *Wallace* were most analogous to common-law false imprisonment. 549 U.S. at 388-89. Accordingly, whereas section 1983 claims challenging criminal proceedings or their resulting judgments accrue with favorable termination like malicious prosecution claims, *McDonough*, 139 S. Ct. 2156, the statute of limitations begins to run on section 1983 false arrest claims when the false imprisonment ends, just as it does for common law false imprisonment claims. *Wallace*, 549 U.S. at 389. Savory's claims challenging his conviction are plainly analogous to malicious prosecution—they challenge violations of his rights after legal process and resulted in his wrongful conviction—and not false imprisonment, meaning they accrued with favorable termination, when his conviction was set aside. Petitioners' argument to the contrary gets the analogy backward and advocates for exactly the wrong accrual rule.

C. Petitioners' Proposed Rule Contradicts Deeply Rooted Comity Principles

Younger v. Harris emphasized Congress's longstanding "desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. 37, 43 (1971). Building on that principle, this Court in *Heck* noted it "has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack [on criminal convictions]." 512 U.S. at 484-85. Last year in *McDonough*, this Court reaffirmed the importance

of comity, noting that section 1983 cases should not serve as a mechanism to collaterally attack state criminal judgments or state criminal proceedings. 139 S. Ct. at 2155-59.

But if section 1983 claims challenging extant state criminal convictions accrued upon the state prisoner's release from custody, as petitioners' urge, then every state prisoner in the country would be permitted to challenge the validity of their state convictions in federal court as soon as they had completed their sentences. Such a regime would replace the carefully limited regime of federal habeas corpus—with its exhaustion requirements, exacting standards of proof, and deference to state-court proceedings—with plenary federal review. 28 U.S.C. §2254. *Preiser*, 411 U.S. at 489 (holding that habeas corpus "must be understood to be the exclusive remedy available" to mount a federal challenge to a state conviction). It would threaten parallel state and federal proceedings and result in different and conflicting state and federal judgments. *McDonough*, 139 S. Ct. at 2160. In sum, petitioners' rule would amount to a substantial breakdown in federal-state comity.

D. Petitioners' Proposed Rule Would Forever Bar Meritorious Civil Rights Claims

Finally, petitioners attempt to tug at the heartstrings by arguing that, Savory aside, their rule will actually allow more section 1983 plaintiffs to bring their wrongful conviction claims by permitting suits to be filed upon release from custody. Not so. In fact, petitioners' rule would

create a situation where wrongly convicted plaintiffs like Savory would have to file suit upon their release from custody to preserve their claims, but any section 1983 claim would be precluded by the extant state criminal conviction. See *Allen v. McCurry*, 449 U.S. 90 (1980). For the vast majority of ex-prisoners, their convictions would forever remain intact and thus forever precluded. District courts would be inundated with claims, most of which would be adjudicated on preclusion grounds and tossed anyway. But among that flood of claims would be those like Savory's, which represent some of the most serious federal civil rights claims that can be brought. Alternatively, suppose that plaintiffs like Savory sought to avoid preclusion and waited until the state convictions were set aside after their release from custody. That wait would in most cases mean that the section 1983 suits would be filed too late under petitioners' rule, given the short statutes of limitations that govern section 1983 claims in most states.

This, of course, is the regime that petitioners hope for—one where meritorious wrongful conviction claims like Savory's are either precluded or untimely, so that there is no federal recourse for the wrongly convicted. In that light, it becomes clear that petitioners' proposed rule does not benefit section 1983 plaintiffs at all but instead favors section 1983 defendants like petitioners.

Petitioners also argue that their rule is the only one that can provide section 1983 defendants with a sense of finality, urging that this Court adopt a rule minimizing the amount of time in the future

that defendants might be subject to suit. But the argument has two major flaws. First, the difference between an accrual rule determined by release date and one determined by vacatur of the conviction is not measurably different when the plaintiff has spent decades in prison as a result of alleged police misconduct. And, second, it is petitioners' proposed rule that will actually result in a lack of finality. Under *McDonough* and *Heck*'s favorable-termination rule, many state court cases never turn into section 1983 cases—for without favorable termination or vacatur of a conviction, the section 1983 cases is never cognizable. But petitioners' release-from-custody accrual rule would create a flood of suits of uncertain merit from released prisoners, undermining the finality that petitioners say they want. See *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007) (noting that a scheme requiring "conscientious defense attorneys" to file unripe suits "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any"). In the end, petitioners' principal justification for their proposed rule would in fact be undermined by that rule.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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