No. 21-700

IN THE

Supreme Court of the United States

KEITH SMITH,
Petitioner,

v.

CITY OF CHICAGO AND CHICAGO POLICE OFFICERS RANITA MITCHELL AND HERMAN OTERO,
Respondents.

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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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Do Fourth Amendment claims for unreasonable pretrial seizure pursuant to process accrue when the pretrial seizure ends; or, instead, are plaintiffs foreclosed from bringing such claims unless (and until) their criminal proceedings terminate in their favor?

2. Is a person being seized under the Fourth Amendment when he is not in custody, but is instead free on bail conditioned on his appearing monthly in his criminal case and obtaining court permission to travel outside the State?

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STATEMENT

Petitioner Keith Smith's operative complaint alleged that on September 10, 2013, respondents Chicago Police Officers Ranita Mitchell and Herman Otero stopped and searched the car in which petitioner was an occupant and "agreed to frame" him, so they falsely claimed he had "ma[d]e a furtive movement" and that they "found a bullet inside the vehicle." 2d Amend. Compl. 1-2, *Smith v. City of Chicago*, No. 18-cv-04918 (N.D. Ill. May 27, 2019), ECF No. 45. That complaint also alleged that the officers included those two falsehoods in their reports and communicated them to prosecutors. *Id.* at 2.

Petitioner now concedes, for the first time in this case, that the officers "found a firearm in the car." Pet. 3. Petitioner, who was a convicted felon and the registered owner of the car, was charged with unlawful possession of a weapon by a felon, in violation of section 24-1.1(a) of the Illinois Criminal Code, 720 ILCS 5/24-1.1(a) ("It is unlawful for a person to knowingly possess on or about his person . . . any firearm . . . if the person has been convicted of a felony under the laws of this State or any other jurisdiction.").[1] He was held in custody at the Cook

[1] Matters of public record, including proceedings in other courts, are judicially noticeable. *Wells v. United States*, 318 U.S. 257, 260 (1943); *see also Telltabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions, in particular, documents incorporated into the complaint by

County Jail for seven months before being released on bail "on or around March 29, 2014." 2d Amend. Compl. 2. On July 21, 2016, "he was found not guilty." *Id.* at 3.

On July 18, 2018, he filed this section 1983 action against the City and the officers, contending that he had been held in custody based on evidence fabricated by the officers, in violation of the Fourth Amendment, Pet. 3a – the type of claim this Court recognized in *Manuel v. City of Joliet*, 137 S. Ct. 911, 918-19 (2017) ("*Manuel I*"), Pet. 4a-5a. The district court dismissed the case as time barred. Pet. 3a. The court observed that the applicable statute of limitations was two years, and, relying on the Seventh Circuit's rule in *Manuel v. City of Joliet*, 903 F.3d 667, 669 (7th Cir. 2018) ("*Manuel II*"), *cert. denied*, 139 S. Ct. 2777 (2019), that a detainee's Fourth Amendment claim for unreasonable pretrial seizure pursuant to process accrues when his pretrial seizure ends, concluded that petitioner's claim accrued the day he was released on bail, March 29, 2014. Pet. 3a. Thus, he filed this action more than two years after the statute of limitations expired.

Petitioner moved for reconsideration, contending that the conditions of his bail amounted to a Fourth Amendment seizure that lasted until the conclusion of his criminal trial, and asking for leave to file an amended complaint describing the bail conditions.

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reference, and matters of which a court may take judicial notice.") (citation omitted).

Pet. 29a. The court gave him leave to file an amended complaint, Pet. 33a-34a; and his "Second Amended Complaint," Pet. 19a n.1, alleged that his bail had been conditioned on his appearing in court when requested, approximately once each month, and his seeking court permission before leaving the State, 2d Amend. Compl. 2-3. The court concluded that those conditions were not sufficiently onerous to constitute a seizure, and again dismissed the action as untimely. Pet. 3a.

On appeal, petitioner asked the Seventh Circuit to overrule *Manuel II*'s accrual rule based on *McDonough v. Smith*, 139 S. Ct. 2149 (2019), and hold that a Fourth Amendment claim for unreasonable pretrial seizure pursuant to process does not accrue when the pretrial seizure ends, but instead when (and if) the plaintiff's criminal proceedings terminate in his favor. Pet. 4a. Alternatively, petitioner contended that his bail conditions constituted a seizure that lasted until his criminal trial. Pet. 2a, 4a.

The Seventh Circuit rejected both alternatives, and affirmed the dismissal of petitioner's Fourth Amendment claim as time barred. First, the court concluded that *Manuel II*'s accrual rule for Fourth Amendment claims alleging unreasonable pretrial seizure pursuant to process is compatible with *McDonough*. Pet. 1a-2a, 4a-13a. The court observed that in *McDonough*, this Court "assume[d], without deciding," that the claim there, which alleged evidence fabrication, Pet. 6a, but "involved no detention," Pet. 10a, had been brought under the Due

Process Clause, Pet. 6a (citing 139 S. Ct. at 2155). The Seventh Circuit further observed that this Court then concluded in *McDonough* that the common-law analogue to a due process claim is malicious prosecution, Pet. 6a (citing 139 S. Ct. at 2156), and that, like a malicious prosecution claim, a due process claim accrues upon favorable termination of the plaintiff's criminal proceedings, Pet. 6a (citing 139 S. Ct. at 2153).[2] The Seventh Circuit observed as well that because claims for pretrial seizure, including petitioner's, stem from the Fourth Amendment, not the Due Process Clause, Pet. 6a-7a, "*McDonough*'s analogy to the tort of malicious prosecution as a rationale for the favorable-termination rule is distinguishable," Pet. 7a, and that despite some similarities, McDonough's assumed due process claim and petitioner's Fourth Amendment claim "are

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[2] The Seventh Circuit also observed that this Court concluded not only that McDonough's assumed due process claim accrued upon favorable termination of his criminal proceedings, but also that because his "'clai[m] challenge[d] the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* [*v. Humphrey*, 512 U.S. 477 (1994),] challenged the validity of his conviction,'" he was foreclosed from bringing the claim until such favorable termination. Pet. 7a-8a (quoting *McDonough*, 139 S. Ct. at 2158). A favorable termination accrual rule for Fourth Amendment claims alleging unreasonable pretrial seizure would preclude such claims by plaintiffs who are convicted and whose convictions are never overturned, even when their claims would not impugn their convictions (because, for example, their pretrial seizures were allegedly based on fabricated evidence that was not presented at their criminal trials).

dissimilar enough to warrant different treatment," Pet. 11a.[3] And, after observing that this Court, in *Wallace v. Kato*, 549 U.S. 384 (2007), likened the Fourth Amendment false-arrest claim in that case to the common-law tort of false imprisonment and held that it accrued when the plaintiff's pre-process seizure ended, Pet. 8a (citing 549 U.S. at 390), the Seventh Circuit concluded that petitioner's claim "is more like the claim in *Wallace* than the claim in *McDonough*," and accrued when his pretrial seizure pursuant to process ended, Pet. 12a.[4]

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[3] Petitioner asserts that in this case, the Seventh Circuit "did not reconcile" its "reading [of] *McDonough* as limited to claims proceeding under the Due Process Clause" with its pre-*McDonough* decision in *Lewis v. City of Chicago*, 914 F.3d 472 (7th Cir. 2019), which, according to petitioner, "reject[ed] any [due process] remedy for a prosecution based on fabricated evidence that does not result in a criminal conviction." Pet. 8-9 (citing *Lewis*, 914 F.3d at 479). Petitioner misreads *Lewis*, which did not address whether the Due Process Clause provides a remedy for prosecutions based on fabricated evidence that do not result in convictions, such as prosecutions that result in pretrial deprivations of liberty other than custody, including "restrictions on [the] ability to travel" like those on which this Court based the assumed due process claim in *McDonough*, 139 S. Ct. at 2156 n.4, and on which petitioner alleges his bail was conditioned, Pet. 2d Amend. Compl. 2-3.

[4] The Seventh Circuit also emphasized *Wallace*'s treatment of the "concern about federal courts interfering with ongoing prosecutions," Pet. 13a (citing *Wallace*, 549 U.S. at 393-94) – that "[i]f a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it

Second, the Seventh Circuit concluded that petitioner's bail conditions "do not fit within the historical and judicially recognized framework of what constitutes a seizure." Pet. 16a. The court stated that petitioner's bail condition that he appear in court when requested "is a future obligation to do something," and thus "lacks the immediacy of a Fourth Amendment seizure," and that "if a duty to attend a court hearing is a seizure, then large swaths of compulsory conduct – like jury duty and traffic hearings – would fall within the amendment's scope." Pet 16a. And the court stated that petitioner's other bail condition – that he request permission to leave the State – is a "precursor to a possible seizure but not a seizure itself," since "[t]here is no restriction on the defendant's freedom of movement unless he is denied permission to leave." Pet. 16a.

Petitioner filed a petition for rehearing and rehearing en banc on both issues. *Smith v. City of Chicago*, No. 19-2725 (7th Cir. July 26, 2021), ECF No. 65. That petition was denied. Pet. 52a.

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is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended," 549 U.S. at 393-94 (citing *Heck*, 512 U.S. at 487-88 n.8). Petitioner ignores this in asserting that the Seventh Circuit's accrual rule will require "criminal defendants released before trial [to] face the untenable choice [of] either let[ting] the claim expire or litigat[ing] simultaneously in two forums." Pet. 14.

REASONS TO DENY THE PETITION

I. PETITIONER'S CLAIM FAILS ON A GROUND UNRELATED TO EITHER OF THE QUESTIONS PRESENTED.

As this Court has explained, certiorari is inappropriate when "it is not clear that [this Court's] resolution of the constitutional question will make any difference even to these litigants." *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 122 (1994). That principle applies here. Both questions presented in the petition pertain to when a Fourth Amendment claim for unreasonable seizure pursuant to process accrues. But petitioner's claim fails on an additional ground unrelated to when it accrued; namely, that there was probable cause for his detention pursuant to legal process.

Petitioner asserted that there was no probable cause to detain him pursuant to legal process because the officers fabricated evidence that they saw him make a furtive movement and found a bullet in the car; and the officers dispute that they fabricated any evidence. But there is an independent basis for probable cause that is indisputable. Petitioner was detained on a charge of possession of a weapon by a felon. His admission that the officers found a gun in the car, Pet. 3, together with his being a convicted felon and the car's registered owner, establish as a matter of law that there was probable cause to detain him on that charge. *See*, *e.g.*, *United States v.*

Lindsey, 482 F.3d 1285, 1292 n.4 (11th Cir. 2007) (police had probable cause to arrest defendant for being a felon in possession of a firearm where defendant was a felon and officers reasonably believed his vehicle contained a firearm).[5] The undeniable existence of probable cause defeats petitioner's Fourth Amendment claim.

Because petitioner's claim fails on an independent ground, this case is a poor vehicle for addressing either of the questions presented.

II. ADDITIONAL REASONS THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE "ACCRUAL" QUESTION.

Petitioner first asks the Court to decide whether a Fourth Amendment claim for unreasonable pretrial seizure pursuant to process accrues when the pretrial seizure ends, or instead when the plaintiff's

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[5] The allegedly fabricated statements in the officers' reports do not undermine the legality of petitioner's pretrial seizure on the charge of possession of a weapon by a felon. That is because a person's Fourth Amendment claim for unreasonable pretrial seizure fails where there was probable cause for that seizure, even if the evidence establishing probable cause was the fruit of an illegal search. *Martin v. Marinez*, 934 F.3d 594, 598-99 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 1115 (2020); *see also Pagan-Gonzalez v. Moreno*, 919 F.3d 582, 601 (1st Cir. 2019) (referring to "[t]he widespread view that probable cause to arrest or prosecute may be established in civil proceedings with unlawfully seized evidence").

criminal proceedings terminate in his favor.[6] This Court has made clear that in deciding accrual rules, courts must consider what common-law tort is most analogous to the constitutional claim presented. Yet petitioner has failed to present that issue in his petition. He has therefore forfeited any such argument. And the Seventh Circuit did not reach the issue. This Court generally does not decide issues that were neither presented by the petitioner nor decided below. *See*, e.g. *United States v. United Foods, Inc.*, 553 U.S. 405, 417 (2001); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

In addition, and independently, this case is a poor vehicle to address accrual because the Court

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[6] Limitations periods are crucial to the fairness of a legal proceeding because they "promote justice" by "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). And any delay in the plaintiff's bringing a claim like the one at issue here works almost entirely to his benefit and the officers' prejudice, since the plaintiff can be expected to remember the circumstances of his own arrest much better than the officers will remember one of perhaps hundreds of arrests they have made. This also prejudices a public employer, who may be required to indemnify the officer. Public employers are also prejudiced in the additional respect that they "have a strong interest in timely notice of alleged misconduct by their agents," *Wallace*, 549 U.S. at 397 (quotation marks omitted), so they can act to prevent future misconduct, whether through disciplinary measures or additional training.

would benefit from further percolation of the accrual issue in the wake of *Manuel I*.

A. Petitioner has forfeited the issue of what common-law tort is most analogous to his claim.

Manuel I instructed that the "threshold inquiry in a § 1983 suit . . . requires courts to identify the specific constitutional right at issue," and that "[a]fter pinpointing that right, courts must . . . determine the elements of, and rules associated with, an action seeking damages for its violation." 137 S. Ct. at 920. "In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts," *id.*, which entails identifying "the common law principles governing analogous torts," *McDonough*, 139 S. Ct. at 2156. "Sometimes, that review of the common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." *Manuel I*, 137 S. Ct. at 920.

Manuel I enumerated those principles in framing the issue of when a Fourth Amendment claim for unreasonable pretrial seizure pursuant to process accrues. 137 S. Ct. at 920-22. The Court observed that Manuel analogized that claim to the tort of malicious prosecution, an element of which is termination of the criminal proceeding in favor of the accused, while the defendants analogized the claim to the tort of false arrest, which does not have a

favorable termination element. *Id.* at 921. But the Court did not decide what common-law tort is most analogous to the claim or when it accrues, expressly leaving that for the Seventh Circuit to decide on remand. *Id.* at 922.[7]

On remand, the Seventh Circuit opined that *Manuel I* "deprecated the analogy to malicious prosecution":

> After *Manuel* [*I*], "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim – the absence of probable cause that would justify the detention. 137 S. Ct. at 917-20. The problem is the wrongful custody. "[T]here is no such thing as a constitutional right not to be prosecuted without probable cause." *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013). But there *is* a constitutional right not to be held in custody without probable cause.

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[7] Although the Court compared descriptions of those two common-law torts in *Heck*, 512 U.S. at 484, and *Wallace*, 549 U.S. at 389-90, the comparison in *Heck* is inapplicable here because it concerned Heck's challenge to the constitutionality of his conviction, not his pretrial detention, 512 U.S. at 478, and the comparison in *Wallace* is dicta because it did not concern the claim the Court decided – Wallace's challenge to his *pre*-process arrest, 549 U.S. at 387 & n.1.

Manuel II, 903 F.3d at 669-70 (Easterbrook, J.). Those were among the reasons the Seventh Circuit concluded that Manuel's Fourth Amendment claim for unreasonable pretrial seizure pursuant to process accrued when his detention ended, not when his criminal charges were dismissed. *Id.* at 669, 670; *accord Savory v. Cannon*, 947 F.3d 409, 413 n.2 (7th Cir. 2020) (en banc).

While *Manuel II* concluded that the common-law tort of malicious prosecution is not analogous to such a Fourth Amendment claim, 903 F.3d at 669-70, it did not identify what common-law tort *is* most analogous. Nor has the Seventh Circuit done so in any subsequent decision.

Petitioner asserts that such a claim accrues upon favorable termination of criminal proceedings, rather than when the detention ends; but, in his petition, he makes no argument, and presents no analysis, concerning the critical question of the most analogous common-law tort, forfeiting any such argument. Indeed, while he asserted below that the common-law tort of malicious prosecution is analogous to his claim, that assertion was conclusory – he did not address the historical underpinnings of that, or any other, common-law tort, much less explain why he believes the underpinnings of malicious prosecution make it the tort most analogous to his claim. Nor did he even respond to our discussion below of the historical underpinnings of the common-law torts of false imprisonment and malicious prosecution and why false imprisonment is the most analogous tort, Brief

of Defendants-Appellees 17-31, *Smith v. City of Chicago*, No. 19-2725 (7th Cir. September 3, 2020), ECF No. 40 – a discussion we recently reiterated in an amicus brief to this Court, Brief of Chicago[, *et al.*] As Amici Curiae Supporting Respondent 10-21, *Thompson v. Clark*, cert. granted 141 S. Ct. 1513 & 141 S. Ct. 1683 (2021)). The Seventh Circuit did not decide the issue. Pet. 7a n.3.

Because this Court has made clear that the issue of what common-law tort is most analogous to any constitutional claim must be considered in determining when the claim accrues, *McDonough*, 139 S. Ct. at 2156; *Manuel I*, 137 S. Ct. at 920-21 – yet petitioner has forfeited any argument on that issue and the Seventh Circuit did not decide it – this case is a poor vehicle for addressing accrual.

B. This Court should allow the accrual issue, including the issue of the most analogous common-law tort, to percolate.

Petitioner asserts that "in *Manuel* [*I*], this Court counted eight circuits that follow the accrual on favorable termination rule for" Fourth Amendment claims alleging unreasonable pretrial seizure pursuant to process. Pet. 9; *see Manuel I*, 137 S. Ct. at 917 & n.4, 921 & n.9. And, petitioner says, "[n]one of those circuits have altered their position since *Manuel* [*I*]." Pet. 10. That statement is grossly misleading.

As we have explained, *Manuel I* did not decide what common-law tort is most analogous to a Fourth Amendment claim for unreasonable pretrial seizure pursuant to process, or what accrual rule applies to such a claim. The dissenting Justices would have decided those questions, and indicated that malicious prosecution was not a good fit. 137 S. Ct. at 123 (Alito, J., and Thomas, J., dissenting); *see also id.* ("If a malicious prosecution claim may be brought under the Constitution, it must find some other home, presumably the Due Process Clause."). In particular, the dissent concluded that "malicious prosecution is a strikingly inapt 'tort analog[y] . . . for Fourth Amendment violations," *id.* at 926 (citation omitted), and, moreover, that

> malicious prosecution's favorable-termination element makes no sense when the claim is that a seizure violated the Fourth Amendment. The Fourth Amendment, after all, prohibits *all* unreasonable seizures, regardless of whether a prosecution is ever brought or how a prosecution ends.

Id.; *see also id.* at 925 ("A malicious prosecution claim cannot be based on the Fourth Amendment."); *id.* ("There is a severe mismatch between th[e] elements [of a common-law claim for malicious prosecution] and the Fourth Amendment."); *id.* ("[W]hile subjective bad faith, *i.e.*, malice, is the core element of a malicious prosecution claim, it is firmly established that the Fourth Amendment standard of reasonableness is

fundamentally objective.") (citation omitted); *Cordova v. City of Albuquerque*, 816 F.3d 645, 663 (10th Cir. 2016) (Gorsuch, J., concurring) ("hard to see how you might squeeze anything that looks quite like the common law tort of malicious prosecution into the Fourth Amendment"). The *Manuel I* majority expressed no disagreement with the dissent's rejection of malicious prosecution as the common-law tort most analogous to such a claim.

In the short time since *Manuel I*, the circuits have hardly engaged at all with the question of what common-law tort is most analogous to a Fourth Amendment claim for unlawful pretrial detention pursuant to legal process. All of the circuits, including the eight that, prior to *Manuel I*, had adopted malicious prosecution as the appropriate analogy and applied the favorable-termination element, should have the opportunity to consider the issue in the wake of *Manuel I* and the clear statement by two Justices that malicious prosecution is a poor choice. Only three of the eight circuits petitioner references have done so thus far. *Jordan v. Town of Waldoboro*, 943 F.3d 532, 545 (1st Cir. 2019); *id.* at 550-51 (Barron, J., concurring); *Pagan-Gonzalez v. Moreno*, 919 F.3d 582, 601 (1st Cir. 2019); *id.* at 608-09 (Barron, J., concurring); *Jones v. Clark County, Kentucky*, 959 F.3d 748, 777 (6th Cir. 2020) (Murphy, J., concurring in part and dissenting in part); *Howse*

v. Hodous, 953 F.3d 402, 408 n.2 (6th Cir. 2020); *Mglej v. Gardner*, 974 F.3d 1151, 1171 n.14 (10th Cir. 2020).[8]

In light of this, the Court should await further percolation in the lower courts before weighing in. With time, these issues may resolve themselves; courts that, prior to *Manuel I*, adopted the malicious-prosecution analogy and applied the favorable-termination element may well be persuaded by the dissent in *Manuel I* to overrule their prior decisions. At a minimum, any future review by this Court would

[8] In contending that none of the eight circuits that adopted the favorable-termination element prior to *Manuel I* has altered its position since that case was decided, petitioner cites cases from only three circuits. Pet. 9 (citing *Ashley v. City of New York*, 992 F.3d 128 (2d Cir. 2021); *Laskar v. Hurd*, 972 F.3d 1278 (11th Cir. 2020), *pet. for cert. filed*, No. 20-1351; *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018); *Fusilier v. Zaunbrecher*, 806 Fed. Appx. 280 (5th Cir.2020)). Only one of those cases mentions Justice Alito's dissent in *Manuel I*. That reference appears in Judge Moore's dissent in *Laskar*, which refers as well to "[t]he unlikely interplay between the elements of malicious prosecution and Fourth Amendment considerations," *id.*, and explains that the issue whether Fourth Amendment claims are properly based on the tort of malicious prosecution was not revisited in that case because "[n]o one ha[d] asked the [c]ourt to do so," *id.* at 1306. Moreover, the only issue concerning favorable termination in *Laskar* was "whether a termination must contain evidence of a plaintiff's innocence to be favorable," *id.* at 1285; *see also id.* at 1285-95 – an issue that is not presented in this case. And that was likewise the only issue concerning favorable termination in *Ashley*. 992 F.3d at 140-42.

benefit from allowing the courts of appeals to continue grappling with this issue.[9]

III. ADDITIONAL REASONS THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE "ORDINARY BAIL CONDITIONS" QUESTION.

Petitioner's second question concerns "ordinary bail conditions." Petitioner contends that "[i]f the Court adopts the Seventh Circuit's rule of accrual, it should resolve the conflict between the circuits about whether 'ordinary conditions of bail' constitute a seizure." Pet. 14 (heading); *see also id.* at 16. Petitioner does not ask the Court to resolve that conflict if it denies review of his first question – the "accrual" question. For the reasons we have explained, review of that question should be denied because this case is a poor vehicle to resolve the issue. Review of the "ordinary bail conditions" question should thus be denied as well.

Regardless, this question does not merit review. According to petitioner's operative complaint, his bail

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[9] According to petitioner, "[i]t is unlikely that any circuit will reconsider its view of accrual after the Court applied the favorable termination rule in *McDonough*." Pet. 10. But petitioner overlooks *Jones* and *Jordan*, both of which cite *McDonough,* yet address, and express no disagreement with, the *Manuel I* dissent's rejection of the favorable-termination rule. *Jones*, 559 F.3d at 777 (Murphy, J., concurring in part and dissenting in part); *Jordan*, 943 F.3d at 545; *id.* at 550 n.8 (Barron, J., concurring); *id.* at 550-51.

was subject to two conditions – that he appear in court when requested, approximately once each month, and that he seek court permission before leaving the State. 2d Amend. Compl. 2-3. With respect to those conditions, the circuit split is not what petitioner portrays it to be.

First, he omits the Ninth Circuit's governing decision – *Karam v. City of Burbank*, 352 F.3d 1188 (9th Cir. 2003) – which, in conformity with the Seventh Circuit's decision in this case and the First, Tenth, and Eleventh Circuit cases he cites, Pet. 14, held that a criminal defendant who is subject only to the same pretrial deprivations of liberty to which petitioner was subject is not seized under the Fourth Amendment, *Karam*, 352 F.3d at 1193-94.

Second, while petitioner describes the Fifth Circuit's decision in *Evans v. Ball*, 168 F.3d 856 (5th Cir. 1999), *abrogated on other grounds* by *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003), as "holding that 'ordinary conditions of bail' are a seizure," Pet. 14-15, the pretrial liberty deprivations on which the Fifth Circuit based its ruling that Evans was seized were different from, and indeed far more substantial than, petitioner's. *Evans*, 168 F.3d at 861 (in addition to "appear[ing] in court" and "obtain[ing] permission before leaving the state," Evans had to "report regularly to pretrial services, sign a personal recognizance bond, and provide federal officers with financial and identifying information"). Thus, *Evans* would not consider petitioner seized while he was free on bail, just as the Seventh Circuit's decision below

does not. The actual circuit split is therefore not four-to-three, as petitioner contends. Pet. 14-15. It is instead five-to-two, with the Seventh Circuit's decision in this case in the clear majority.

Petitioner also refers to Justice Ginsburg's description, in her concurrence in *Albright v. Oliver*, 510 U.S. 266 (1994), of criminal defendants who are not in custody pending their trials, including that they are required to appear in court and often must seek the court's permission to leave the state. Pet. 15 (citing *Albright*, 510 U.S. at 578). And petitioner also refers to the statement in that concurrence that such a defendant "'is scarcely at liberty; he remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is bound to appear in court and answer the state's charges.'" Pet. 16 (quoting *Albright*, 510 U.S. at 279). That reasoning, petitioner contends, "is consistent with the Court's decision in *McDonough* . . . , where it accepted the parties' agreement that there is a deprivation of liberty where a criminal defendant is subject to restrictions on his ability to travel and other restraints not shared by the public generally." *Id.* (citing *McDonough*, 139 S. Ct. at 2156 n.4).

This does not help petitioner, and indeed, is irrelevant here. Pretrial custody, when effectuated unreasonably, is remedied under the Fourth Amendment; and that is the claim petitioner presses. But, when *non-custodial* pretrial deprivations of liberty – like petitioner's and those that Justice Ginsburg described in her *Albright* concurrence – are

wrongful, they fall instead under the Due Process Clause, as in *McDonough*, where the Court "assume[d] without deciding" that the plaintiff's claim, which sought damages for non-custodial liberty deprivations, including "restrictions on his ability to travel," *id.* at 2156 & n.4, "ar[o]s[e] under the Due Process Clause," *id.* at 2155.

IV. PETITIONER'S CONDITIONAL GVR REQUEST IS FAULTY.

Petitioner observes that "[t]he question before the Court in *Thompson v. Clark*, cert. granted, 141 S. Ct. 1513 & 141 S. Ct. 1683 (2021), assumes that favorable termination is an element of a claim under § 1983 arising from an unreasonable seizure pursuant to legal process," and that the respondent in that case has urged the Court to reject that assumption, Pet. 16-17 (citing Brief of Respondent 16, 23, *Thompson v. Clark*, No. 20-659 (U.S. August 16, 2021)), as have we, *id.* at 17 (citing Brief of Chicago[, *et al.*] As Amici Curiae Supporting Respondent 10-21, *Thompson v. Clark*, No. 20-659 (U.S. August 23, 2021) (arguing that favorable termination plays no role in such claims)). And petitioner contends that if the Court nonetheless "hold[s]" in *Thompson* that favorable termination is an element of such a claim, then it should grant the petition in this case, vacate the judgment below, and remand for further proceedings. *Id.* We have no quarrel with that contention.

But petitioner further contends that the Court should do the same even if in *Thompson* it "merely

assumes," without deciding, "that favorable termination is an element of [such a] claim and rules on the type of favorable termination that is required." Pet. 17. That contention should be rejected. The effect of such an assumption might well be to require courts in circuits whose governing decisions hold that favorable termination is an element of such claims to apply whatever type of favorable termination this Court might specify. But, as a "mer[e] assum[ption]," not a holding, it should not have the effect of summarily overturning any circuit's governing decisions holding that favorable termination is not an element of such claims. Because the posited assumption would be inconsistent with the holdings of the Seventh Circuit's governing decisions, it should not be the basis for a GVR here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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