No. 18-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

PARTIES TO THE PROCEEDING

Edward G. McDonough, petitioner on review, was the plaintiff-appellant below.

Youel Smith, individually and as Special District Attorney for the County of Rensselaer, New York, AKA Trey Smith, respondent on review, was the defendant-appellee below.

John J. Ogden, Richard McNally Jr., Kevin McGrath, Alan Robillard, County of Rensselaer, John F. Brown, William A. McInerney, Kevin F. O'Malley, Daniel B. Brown, and Anthony J. Renna were defendants below, but are not parties to this petition.

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Edward G. McDonough respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion is reported at 898 F.3d 259. Pet. App. 1a-19a. The District Court's opinions are not reported. *Id.* at 20a-84a, 85a-135a. The Second Circuit's order denying rehearing en banc is not reported. *Id.* at 136a-137a.

JURISDICTION

The Second Circuit entered judgment on August 3, 2018. Petitioner filed a timely petition for rehearing en banc, which was denied on September 12, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

The Due Process Clause of the Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

> favor, and to have the Assistance of Counsel for his defence.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Section 1983 of Title 42 of the U.S. Code provides:

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

INTRODUCTION

Petitioner Edward McDonough twice stood trial—and was ultimately acquitted—on dozens of criminal charges based on fabricated evidence. Much of the evidence was fabricated by Respondent Youel Smith, the prosecutor in McDonough's case, who forged witness affidavits in a pre-trial investigation and falsified other evidence used in grand jury proceedings and at trial. A Federal Bureau of Investigation inquiry uncovered Smith's malfeasance, and McDonough was finally cleared of all charges after a

years-long ordeal. McDonough subsequently filed this Section 1983 suit against Smith and other defendants. McDonough's suit was filed within three years of his acquittal, but more than three years from when (according to the Second Circuit) he would have first found out that fabricated evidence was being used against him. The issue in this case—which has divided seven circuits—is whether McDonough's suit is timely.

The majority rule, adopted by five courts of appeals, is that the statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run when the criminal proceedings terminate in the defendant's favor. *See Floyd* v. *Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano* v. *Fragozo*, 352 F.3d 939, 959-960 (5th Cir. 2003) (en banc); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King* v. *Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008).

The Third, Fifth, Sixth, Ninth, and Tenth Circuits reached that conclusion by applying this Court's precedents in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and *Wallace* v. *Kato*, 549 U.S. 384 (2007). In those cases, the Court explained that for Section 1983 claims analogous to the common law tort of malicious prosecution—as McDonough's fabrication of evidence claims are here—the statute of limitations does not begin to run until criminal proceedings terminate in the defendant's favor. *See Heck*, 512 U.S. at 483-487; *see also Wallace*, 549 U.S. at 388-390. In addition, the Seventh Circuit has held that when a criminal defendant's constitutional rights are

violated, the statute of limitations does not begin to run until the constitutional violation ends. *See Manuel* v. *City of Joliet*, 903 F.3d 667, 669-670 (7th Cir. 2018) ("*Manuel II*"). In McDonough's case, that did not occur until his acquittal. If McDonough had filed this Section 1983 suit in any of these six circuits, it would have been timely.

Not so in the Second Circuit. Breaking with the majority of courts, the Second Circuit in its decision below adopted a new rule. The court acknowledged that other circuits have held that the "fabrication cause of action accrues only after criminal proceedings have terminated." Pet. App. 12a. The court stated, however, that it "disagree[d] with those decisions." *Id.* at 13a. According to the court, the "injury for this constitutional violation occurs at the time the evidence is used against the defendant," and the statute of limitations begins to run when the criminal defendant first "becomes aware of [the] tainted evidence and its improper use." *Id.* Applying that new rule in McDonough's case, the Second Circuit held that McDonough should have known of the fabricated evidence by the end of his first trial, and that McDonough's Section 1983 suit was thus untimely. *See id.*

This Court's intervention is urgently needed. As it currently stands, nothing more than geography dictates when the statute of limitations begins to run for a Section 1983 claim alleging that a public official willfully fabricated evidence in a criminal proceeding. Worse still, the Second Circuit's position requires criminal defendants to file a civil complaint explaining why the evidence against them in an *ongoing criminal trial* is fabricated—potentially

subjecting any criminal defendant who takes the stand to cross-examination. It creates a similar problem for police officers and prosecutors, who may be forced to produce documents and submit to depositions regarding a criminal proceeding that has not yet concluded. The potential for conflicting civil and criminal judgments, moreover, poses a difficulty for courts.

The Second Circuit's ruling in this case represents a clear, acknowledged departure from six other circuits. Because the Second Circuit denied rehearing en banc, the division between the courts of appeals will persist if certiorari is not granted. This Court should accordingly grant the petition and reverse.

STATEMENT

A. Factual Background

McDonough is the former Democratic Commissioner of the Rensselaer County Board of Elections. Pet. App. 24a.[1] In 2009, an investigation uncovered that in a primary election in Troy, New York, several dozen applications for absentee ballots, as well as the absentee ballots themselves, had been falsely completed or forged. *Id.* at 24a-28a. A number of suspects were identified, including William McInerney, the Troy City Clerk who actively recruited voters for the Democratic Party in Rensselaer County, and John Brown, a Democratic member of the city coun-

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[1] The facts are drawn from McDonough's complaint and the opinions below. On a motion to dismiss, the Court must "accept as true all the factual allegations in his complaint." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 915 & n.1 (2017) ("*Manuel I*").

cil. *Id.* Because McInerney had worked on the district attorney's election campaign, a county judge appointed Smith as special prosecutor to investigate and prosecute the allegations. *Id.* at 28a.

Smith's investigation was biased. Shortly after his appointment, Smith informed McInerney and Brown that they would not be prosecuted for the ballot forgery. *Id.* at 29a. When speaking with witnesses whose absentee ballots had been falsely completed or forged, Smith showed them a photo of McInerney that was 20 years old and did not reflect his current appearance, and did not show them a photo of Brown. *Id.* at 31a. Smith also failed to interview several key witnesses with knowledge of McInerney and Brown's role in the forgery. *Id.* Smith likewise declined to investigate allegations of witness tampering. *Id.* at 32a-33a. After multiple witnesses implicated McInerney and Brown in the forgery scheme, *id.* at 100a, Smith still declined to prosecute them.

Smith took a different approach with McDonough. Smith leaked to the press that McDonough was the primary target of the investigation—even though Smith lacked probable cause to prosecute McDonough for the forgery. *Id.* at 29a, 105a. Smith interviewed McDonough repeatedly, urging him to plead guilty. *Id.* at 32a-35a. On one occasion, Smith professed animosity for McDonough's father, the Democratic Party Chair, who had "turned his back" on Smith's ambitions to run for district attorney. *Id.* at 34a (internal quotation marks omitted). When it became clear that McDonough would not plead guilty, Smith fabricated evidence implicating McDonough in the forgery.

As part of the pre-trial investigation, Smith collected affidavits from witnesses whose ballots or ballot applications had been forged. Two of those affidavits were fabricated by Smith, who presented them to the grand jury. *Id.* at 36a-37a. The witnesses whose affidavits had been fabricated later testified at trial that the signatures on their purported affidavits were not genuine. *Id.* at 37a. As the trial court stated on the record, "the first witness out of the box says there's a forged instrument that the People presented." Compl., ¶ 822, 2015 WL 9435166 (Dec. 18, 2015); *see id.* ¶¶ 816-830.

Smith also aided multiple witnesses in preparing written statements that falsely implicated McDonough in the ballot forgery. For example, six months before the grand jury was empaneled, Smith pressured Kevin McGrath, another suspect in the case, into "falsely incriminat[ing]" McDonough in a sworn statement. *Id.* ¶¶ 617-620; *see* Pet. App. 34a. Prior to trial, Smith also assisted McInerney in preparing a false statement implicating McDonough, which served as a basis upon which other witnesses fabricated their testimony. Pet. App. 65a-67a (finding that McInerney's statement was intended to influence the testimony of other witnesses and was accordingly not entitled to absolute immunity); *see also* Compl., ¶ 333.

In 2010, Smith commenced grand jury proceedings against McDonough and another defendant. Pet. App. 34a. Smith offered cooperation agreements to witnesses, who in turn falsely incriminated McDonough before the grand jury. *See id.* at 34a-36a. A police investigator working with Smith testified before the grand jury that he had reviewed

the handwriting on the forged absentee ballot applications and concluded that the handwriting came from the same person. *Id.* at 35a. The investigator later admitted at trial that his testimony before the grand jury "was not correct and a mistake." *Id.* at 35a-36a (internal quotation marks omitted).

Before the grand jury, witness Kevin O'Malley initially testified that he had been involved in the forgery, but he did not implicate McDonough. *Id.* at 36a. Smith then e-mailed O'Malley's lawyer, threatening to prosecute O'Malley and "warning that it made no sense for [O'Malley] to protect" McDonough. *Id.* (internal quotation marks omitted). O'Malley then returned to the grand jury and testified, falsely, that McDonough had told him to complete certain absentee ballot applications. *Id.* O'Malley later admitted at trial that Smith had called him at his home the night before O'Malley changed his testimony. *Id.*

McDonough was indicted by the grand jury and charged with 38 counts of felony forgery and 36 counts of felony criminal possession of a forged instrument. *Id.* McDonough moved to disqualify Smith as special prosecutor, but his motion was unsuccessful. *Id.* at 37a. In 2011, McDonough contacted the U.S. attorney's office and requested an FBI investigation of his prosecution. *Id.* at 38a. The FBI agent assigned to the case gathered sufficient evidence to implicate McInerney in the forgery scheme. *Id.* The agent also found that Smith had been untruthful when he informed police that McInerney and Brown could not be prosecuted due to insufficient evidence. *Id.* McInerney was subsequently arrested and charged with forgery. *Id.* at

39a. Smith, however, offered McInerney a cooperation agreement, and McInerney pled guilty to one felony count and was sentenced to a 90-day work order. *Id.* In exchange for his cooperation, Brown similarly pled guilty to one felony count. *Id.*

McDonough, in contrast, was tried before two juries. *Id.* at 40a-41a. At trial, several witnesses—many of whom had been given cooperation agreements by Smith—gave false testimony against McDonough. *Id.* at 40a. At McDonough's second trial, the court ordered the testimony of one of those witnesses, Anthony Renna, stricken in its entirety due to the testimony's apparent falsity. *Id.* The judge instructed Renna to immediately leave the courthouse. *Id.* McDonough's first trial ended in a mistrial. *Id.* at 5a-6a. At the end of his second trial, the jury acquitted McDonough. *Id.* at 41a.

B. Procedural History

McDonough was acquitted on December 21, 2012. *Id.* He filed this Section 1983 suit in the U.S. District Court for the Northern District of New York on December 18, 2015, less than three years later. *Id.* at 23a. The suit raises two claims. First, McDonough alleges that Smith (and others, including McInerney) violated his constitutional rights by fabricating evidence used in the criminal proceedings. *Id.* at 47a. McDonough claims that his rights were violated under the Fourth, Fifth, Sixth, and Fourteenth Amendments. *See id.* at 49a; *see also* Compl., ¶¶ 1210-1213.[2] Second, McDonough alleges

[2] This Court has not determined whether a Section 1983 claim based on fabrication of evidence arises under the Fourth, Fifth, Sixth, or Fourteenth Amendments, nor is there agree-

that Smith and others engaged in malicious prosecution. Pet. App. 47a.

The district court dismissed as untimely McDonough's Section 1983 claim based on fabrication of evidence. *Id.* at 48a-53a; *see id.* at 94a. According to the district court, the statute of limitations on that claim began to run when McDonough learned, or should have learned, of the fabricated evidence, which the district court concluded occurred well before McDonough's acquittal. Pet. App. 52a-53a. The district court permitted McDonough's malicious prosecution claim to proceed against McInerney, citing the written statement in which McInerney fabricated evidence at Smith's direction that implicated McDonough. *Id.* at 64a-69a.

The district court dismissed McDonough's malicious prosecution claim against Smith, holding that "prosecutors generally have absolute immunity from malicious prosecution claims." *Id.* at 109a. The district court noted that Smith may *not* have absolute immunity from McDonough's fabrication of evidence claim, but it did not reach that issue. *Id.* at

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ment on that issue among the courts of appeals. *See, e.g.*, *Morse* v. *Fusto*, 804 F.3d 538, 547 n.7 (2d Cir. 2015) ("[T]his Circuit has been inconsistent as to whether fabrication of evidence claims arise under the Sixth Amendment right to a fair and speedy trial, or under the due process clauses of the Fifth and Fourteenth Amendments." (alterations and internal quotation marks omitted)); *Mondragón*, 519 F.3d at 1083 ("The Supreme Court has not yet explicitly decided whether such a claim exists in these circumstances under the Fourth Amendment or the procedural component of the Due Process Clause."). McDonough accordingly raised and preserved claims under each of those constitutional provisions.

112a ("The Court acknowledges that [McDonough] has sufficiently alleged that some of Defendant Smith's actions were taken in an investigative role * * *."); *id.* at 113a-114a ("If Plaintiff's fabrication of evidence claim was timely, * * * then the distinction between investigative and prosecutorial acts would be relevant."); *see also Castellano*, 352 F.3d at 958 (Courts have "held that non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity.").

The district court entered judgment with respect to Smith under Federal Rule of Civil Procedure 54(b), certifying the dismissal of McDonough's claims against Smith for appeal. Pet. App. 4a. McDonough's claims against other parties, including McInerney, remain pending in the district court.

The Second Circuit affirmed. It "acknowledge[d]" that in other circuits, a "fabrication cause of action accrues only after criminal proceedings have terminated." *Id.* at 12a. It nevertheless "disagree[d] with those decisions." *Id.* at 13a. According to the Second Circuit, "[b]ecause the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted," the statute of limitations begins to run "when he becomes aware of [the] tainted evidence and its improper use" and "his liberty has been deprived in some way." *Id.* at 10a, 13a. The court concluded that McDonough learned of the fabricated evidence "at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented," and that "there is no dispute in this case that McDonough suffered a liberty deprivation." *Id.*

at 10a, 13a-14a.[3] The Second Circuit accordingly affirmed the district court's dismissal of McDonough's fabrication of evidence claim as untimely. *Id.* at 19a.[4]

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP AND ACKNOWLEDGED CIRCUIT SPLIT OVER WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN ON A SECTION 1983 FABRICATION OF EVIDENCE CLAIM.

The Second Circuit's decision creates a clear split with six other courts of appeals, as well as numerous district courts. In its opinion below, the Second Circuit held that the statute of limitations for a Section 1983 claim alleging fabrication of evidence begins to run when a criminal defendant "becomes aware of [t]he tainted evidence and its improper use." *Id.* at 13a. In stark contrast, five other courts of appeals have held that the statute of limitations begins to run only once criminal proceedings have terminated in the defendant's favor. *See Floyd*, 722 F. App'x at 114; *Castellano*, 352 F.3d at 959-960; *Mills*, 869 F.3d at 484; *Bradford*, 803 F.3d at 387-389; *Mondragón*, 519 F.3d at 1083. The Second

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[3] The district court held that McDonough suffered a liberty deprivation when he was required to appear at trial and comply with other restrictions imposed by New York law. *See* Pet. App. 57a.

[4] The Second Circuit also affirmed the dismissal of McDonough's malicious prosecution claim against Smith. *See* Pet. App. 17a-19a. That ruling is not at issue in this petition.

Circuit's decision is also contrary to the position of the Seventh Circuit, which holds that the statute of limitations begins to run on a fabrication of evidence claim when the constitutional violation ends—not when the criminal defendant notices the fabrication. *See Manuel II*, 903 F.3d at 669-670. That division of authority is outcome-determinative in this case: In every other circuit to have examined the issue, McDonough's Section 1983 claim would be timely. Given this clear split, the Court's intervention is warranted.

A. The Circuits Are Divided Over When The Statute Of Limitations Begins To Run.

1. In its decision below, the Second Circuit deliberately departed from the majority rule applied by five other circuits. The court acknowledged that "the alleged creation or use of [fabricated] evidence by both investigating officers and the prosecutor[ ] works an unacceptable corruption of the truth-seeking function of the trial process." Pet. App. 10a (internal quotation marks omitted). It held, however, that this constitutional harm occurs when the fabricated evidence is *first* used. *See id.* at 13a. Based on that reasoning, the Second Circuit concluded that the statute of limitations for a fabrication of evidence claim begins to run as soon as the criminal defendant becomes *aware* that fabricated evidence has been used against him (and his liberty has been deprived). *Id.* "For McDonough," the Second Circuit opined, "this was, at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented," making McDonough's Section 1983 claim untimely. *Id.* at 13a-14a.

The Second Circuit "acknowledge[d]" that in multiple other circuits, the statute of limitations for a fabrication of evidence claim begins to run "only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are analogous to claims of malicious prosecution, which require termination of the criminal proceeding in the defendant's favor before suit may be brought." *Id.* at 12a-13a (citing *Floyd*, 722 F. App'x at 114, *Bradford*, 803 F.3d at 388-389, and *Mondragón*, 519 F.3d at 1083). The Second Circuit nevertheless chose to depart from those decisions. *Id.* at 13a. McDonough sought en banc review of the panel decision, emphasizing that the court's ruling was contrary to the position adopted by numerous other circuits. The Second Circuit nevertheless denied McDonough's petition for rehearing en banc, cementing the court's departure from the majority rule. *See id.* at 136a-137a.

The Second Circuit's position has been followed by several federal district courts. In a decision predating *Manuel II*, the U.S. District Court for the Northern District of Illinois stated that the statute of limitations on a fabrication of evidence claim begins to run "at the moment [government officials] used the fabricated evidence to deprive [the criminal defendant] of his liberty," rather than at the termination of criminal proceedings. *Lewis* v. *City of Chicago*, No. 16-CV-7592, 2017 WL 698682, at *3 (N.D. Ill. Feb. 22, 2017). Other district courts have likewise adopted the Second Circuit's position. *See, e.g.*, *Rehberg* v. *Paulk*, No. 1:07-CV-22 (WLS), 2009 WL 7772286, at *4 (M.D. Ga. Mar. 31, 2009); *Smith* v. *King*, No. 07-0268-CG-B, 2009 WL 1635757, at *5 (S.D. Ala. June 9, 2009).

2. In stark contrast with the Second Circuit, the Ninth Circuit holds that the statute of limitations for a Section 1983 claim based on fabrication of evidence does not begin to run until criminal proceedings terminate in the defendant's favor. *See Bradford*, 803 F.3d at 387-389. The Ninth Circuit based its conclusion on this Court's opinion in *Wallace*. There, the Court evaluated when the statute of limitations begins to run on a Section 1983 claim seeking damages for false arrest. *See Wallace*, 549 U.S. at 386-387. To answer that question, the Court looked to the treatment at common law of the analogous torts of false arrest and false imprisonment. *See id.* at 387-388. This Court reasoned that because the statute of limitations for those torts does not begin to run until the false imprisonment ends, the statute of limitations for an analogous Section 1983 claim similarly does not begin to run until the false imprisonment ends. *See id.* at 388-389.

Drawing on the principles enunciated in *Wallace*, the Ninth Circuit in *Bradford* held that "a court evaluates the proper accrual date for a claim by identifying the common law analogue for the § 1983 claim and applying any 'distinctive' accrual rules associated with that common law analogue." 803 F.3d at 388. In a Section 1983 suit based on fabrication of evidence, the Ninth Circuit identified the constitutional right at issue as "the right to be free from criminal charges based on a claim of deliberately fabricated evidence." *Id.* (alterations and internal quotation marks omitted). The court concluded that this right "is similar to the tort of malicious prosecution, which involves the right to be free from the use of legal process that is motivated by malice and unsupported by probable cause." *Id.*

At common law, the statute of limitations for the tort of malicious prosecution does not begin to run "until the proceedings against the plaintiff have terminated in such a manner that they cannot be revived." *Id.* (alterations and internal quotation marks omitted). The Ninth Circuit accordingly applied that same statute of limitations rule to the claim at issue in *Bradford*. The court concluded that the statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run only once the charges against the criminal defendant are "fully and finally resolved." *Id.* at 389.

The Ninth Circuit explained that its position is both legally correct and makes practical sense. As the Ninth Circuit emphasized, if a criminal defendant were required to file a Section 1983 suit *prior* to the conclusion of criminal proceedings, the public official named in the suit would almost certainly move to stay the civil proceedings while the criminal proceedings were ongoing. *See id.* at 388. In such a scenario, the public official "would not only not be prejudiced by a delay in reaching the merits, he might well have benefitted from it." *Id.*

Four other courts of appeals have adopted the rule espoused by the Ninth Circuit. In *Floyd*, the Third Circuit stated that "fabrication of evidence claims do not accrue until the criminal proceedings have terminated in [the defendant's] favor." 722 F. App'x at 114. In reaching that conclusion, the Third Circuit cited the Ninth Circuit's decision in *Bradford* for the proposition that a "claim alleging fabrication of evidence" should be treated "in the same way as [a] claim of malicious prosecution." *Id.*

The Fifth Circuit reached a similar conclusion in *Castellano*, this time relying on the Court's opinion in *Heck*. *See Castellano*, 352 F.3d at 959-960. In *Heck*, the Court emphasized that civil claims that implicate the validity of a conviction or sentence should be brought *after* criminal proceedings conclude. *See* 512 U.S. at 484-487. Citing *Heck*, the Fifth Circuit explained in *Castellano* that it had "no occasion * * * to consider afresh the federal common law footing of our insistence that a state criminal proceeding terminate in favor of a federal plaintiff complaining of constitutional deprivations suffered in a state court prosecution, a rule reflecting powerful governmental interests in finality of judgments." 352 F.3d at 959. The Fifth Circuit emphasized that "[t]he heart of [the defendant's] claim is that the prosecution obtained his arrest and conviction by use of manufactured evidence and perjured testimony." *Id.* at 959-960. Because the criminal defendant's "proof directly implicated the validity of his conviction," the Fifth Circuit concluded that the statute of limitations did not begin to run "until the case was dismissed for insufficient evidence by the state trial court." *Id.* at 360. The Fifth Circuit recently reaffirmed its position in *Winfrey* v. *Rogers*, 901 F.3d 483, 492-493 (5th Cir. 2018).

The Sixth Circuit followed suit in *Mills*, explaining that "[t]he basis of a fabrication-of-evidence claim under § 1983 is an allegation that a defendant knowingly fabricated evidence against a plaintiff, and that there is a reasonable likelihood that the false evidence could have affected the judgment of the jury." 869 F.3d at 484 (alterations and internal quotation marks omitted). For such a claim, the Sixth Circuit held that the statute of limitations "does not begin to

run while a criminal indictment on the same charges is outstanding." *Id.* The court cited its earlier decision in *King*, which explained that "[b]ecause an element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused, the statute of limitations in such an action does not begin to run until the plaintiff knows or has reason to know of such favorable termination." 852 F.3d at 578 (internal quotation marks and citation omitted). "Were it not so," the Sixth Circuit stated in *King*, "the plaintiff would be compelled to sue during the pendency of the allegedly malicious prosecution, risking the possibility of the plaintiff's succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id.* (internal quotation marks omitted). The court concluded that this result would be "in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* (quoting *Heck*, 512 U.S. at 484).

In *Mondragón*, the Tenth Circuit also adopted the majority rule. *See* 519 F.3d at 1083. There, the court looked to this Court's opinion in *Wallace* to determine when a Section 1983 claim based on fabrication of evidence is timely. *See id.* at 1082-1083. The Tenth Circuit read *Wallace* as distinguishing between claims based on constitutional violations that occur *prior* to the institution of legal process, and claims based on constitutional violations that occur *after* the institution of legal process. *See id.* The court concluded that "[a]fter the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim," and the statute of limitations begins to run for such a

claim "at the earliest, when favorable termination occurs." *Id.* at 1083.

A number of federal district courts in circuits that have not addressed the question presented have similarly applied *Heck* and *Wallace* to determine when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence. Those courts have analyzed when a conviction was vacated or overturned, rather than when the criminal defendant learned of the fabrication, to determine the limitations period. *See, e.g.*, *Echavarria* v. *Roach*, No. 16-cv-11118, 2017 WL 3928270, at *6 (D. Mass. Sept. 7, 2017) (holding that statute of limitations on fabrication of evidence claim began to run when plaintiff's motion for a new trial was granted); *Gates* v. *District of Columbia*, 66 F. Supp. 3d 1, 27 (D.D.C. 2014) (holding that statute of limitations for fabrication of evidence claim did not begin to run "until the court vacated [the defendant's] conviction"); *Taylor* v. *Deaver*, No. 5:11-CV-341-H, 2012 WL 12905868, at *6 (E.D.N.C. Sept. 28, 2012) (similar).

The Third, Fifth, Sixth, Ninth, and Tenth Circuits thus all reach the same conclusion: The statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run only once criminal proceedings have terminated in the defendant's favor. The Second Circuit, in contrast, holds that the statute of limitations begins to run once the defendant finds out (or should have found out) about the fabrication. The district courts are likewise divided. This Court should grant certiorari to resolve the clear, acknowledged split. *See, e.g.*, *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 917 (2017) ("*Manuel I*") (grant-

ing certiorari to correct "outlier" position of Seventh Circuit in Section 1983 case).

4. In addition to creating a clear split with five other circuits, the Second Circuit's decision also departs from the statute of limitations rule applied by *eleven* circuits in Section 1983 cases alleging a constitutional violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). In a *Brady* case, the issue is whether a public official has withheld exculpatory evidence, a claim akin to the fabrication of evidence claim at issue in this case. Although the courts of appeals are divided over the precise statute of limitations rule to apply in *Brady* cases, *none* of those courts has held that the statute of limitations begins to run as soon as the criminal defendant discovers that exculpatory evidence has been withheld. *See* Pet. at 6-7, *Carpenter* v. *Jordan*, No. 18-73 (July 11, 2018) (response requested on Sept. 7, 2018) (describing different approaches).

In crafting a new statute of limitations rule in this case, the Second Circuit accordingly departed not only from the rule applied by a majority of circuits in fabrication of evidence cases, but also from the rule applied by courts in *Brady* cases. The fundamental constitutional rights at stake in both situations—including the right to a fair trial and due process of law—are similar. *See Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."). For this reason as well, the Court should grant certiorari to address when the statute of limitations begins to run in a fabrication of evidence suit.

B. The Circuits Are Divided Over Whether The Statute Of Limitations Begins To Run Afresh Each Day A Criminal Defendant's Rights Are Violated.

This case also presents one other split. In *Manuel I*, this Court evaluated a Section 1983 claim brought by a criminal defendant who had been arrested and detained prior to trial based on fabricated evidence. *See* 137 S. Ct. at 914-916. After concluding that the defendant's claims were cognizable under the Fourth Amendment, this Court left open whether the statute of limitations began to run afresh each day that the defendant's constitutional rights were violated. *See id.* at 921-922 (citing *Albright* v. *Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J., concurring) ("The time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges * * *.")).

On remand in *Manuel II*, the Seventh Circuit addressed that issue. It held that "[w]hen a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends." 903 F.3d at 669. Thus, the court concluded that "[t]he wrong of detention without probable cause continues for the duration of the detention," and that the statute of limitations accordingly begins to run "when the detention ends." *Id.* at 670. The Seventh Circuit allowed the criminal defendant's Section 1983 suit based on fabrication of evidence to go forward on that basis. *See id.*

The Second Circuit adopted the opposite approach in this case. McDonough argued below that his fabrication of evidence claim was "timely because his wrongful prosecution constituted a continuing viola-

tion, that only ceased on his acquittal." Pet. App. 16a (alterations and quotation marks omitted). The Second Circuit disagreed, holding that McDonough was instead injured each time the fabricated evidence was used, including when "Smith allegedly fabricated evidence, then presented that evidence to a grand jury, and later used it at McDonough's trials." *Id.* at 17a. Finding no continuing violation, the Second Circuit concluded that the statute of limitations began to run when McDonough *first* "became aware of the fabricated evidence, which was, at the latest, during the first trial." *Id.*

The disagreement between the Second Circuit and the Seventh Circuit is clear. In the Second Circuit, where a criminal defendant asserts that his constitutional rights (including his Fourth Amendment rights) have been violated based on fabricated evidence, the statute of limitations begins to run as soon as the defendant becomes aware that fabricated evidence has been used against him. In the Seventh Circuit, in contrast, the statute of limitations begins to run only once the constitutional violation ends. This straightforward division of authority is worthy of the Court's attention, and the Court should grant certiorari to resolve it.

II. THE DECISION BELOW IS WRONG.

The Court should also grant certiorari because the position adopted by the Second Circuit, on a grave constitutional matter, is wrong. In *Heck* and *Wallace*, this Court set forth the proper procedure for determining when the statute of limitations begins to run in a Section 1983 case. Under those precedents, a court must first identify the right at issue, and then compare that right to the most analogous tort at

common law. The statute of limitations rule governing that analogous tort then determines the statute of limitations for the Section 1983 claim. *See Heck*, 512 U.S. at 483-487; *Wallace*, 549 U.S. at 388-390. The Second Circuit never performed that crucial analysis, and it accordingly reached the wrong result in this case. Even if the Second Circuit were correct to conduct a free-floating inquiry into the constitutional rights at issue to determine when the statute of limitations begins to run, however, the Second Circuit failed to properly identify those rights. This Court has made clear that when a criminal defendant's constitutional rights are violated by the wrongful initiation and continuation of judicial process, the statute of limitations does not begin to run until the criminal proceedings end. For that reason too, McDonough's suit is timely, and this Court should reverse.

1. Applying the straightforward approach set out by this Court in *Heck* and *Wallace*, McDonough's Section 1983 suit is timely. As the Court explained in *Wallace*, a Section 1983 claim seeking damages for the violation of constitutional rights *prior* to the institution of legal process is analogous to the common law tort of false arrest or false imprisonment. *See* 549 U.S. at 389-390. "That tort provides the proper analogy" because "[t]he sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*." *Id.* at 389. At common law, the statute of limitations for the tort of false imprisonment begins to run once the false imprisonment ends. *See id.* A Section 1983 claim premised on a constitutional injury analogous to the tort of false imprisonment accordingly begins to run

when a criminal defendant's false imprisonment ends and legal process begins. *See id.*

A Section 1983 claim seeking damages for the violation of constitutional rights *after* the institution of legal process, in contrast, is analogous to the tort of malicious prosecution. *See id.* at 390. As this Court has explained, that tort "remedies detention accompanied, not by the absence of legal process, but by *wrongful institution* of legal process." *Id.* (emphasis added); *see also Heck*, 512 U.S. at 483-484. After legal process has been initiated, "any damages recoverable must be based on a malicious prosecution claim and on the *wrongful use* of judicial process rather than detention itself." *Wallace*, 549 U.S. at 390 (emphasis added and internal quotation marks omitted); *see also* Restatement (Second) of Torts § 655 (1977) (tort of malicious prosecution includes wrongfully "continuing or procuring the continuation of criminal proceedings"). At common law, the statute of limitations for the tort of malicious prosecution does not begin to run until "termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. A Section 1983 claim premised on a constitutional injury analogous to the tort of malicious prosecution accordingly begins to run only once the criminal proceedings have terminated in the defendant's favor. *See id.* at 484-487.

McDonough's Section 1983 suit does not seek damages for unlawful arrest or detention prior to the institution of legal process. It instead seeks damages for the deprivation of McDonough's Fourth, Fifth, Sixth, and Fourteenth Amendment rights *after* legal process was instituted. Whether characterized as a seizure without probable cause, a violation of due

process, or the absence of a fair trial, McDonough's claim centers on Smith's initiation and maintenance of criminal proceedings against him based on evidence that Smith *knew* to be fabricated. Because McDonough seeks damages for the period following the institution of legal process, under *Heck* and *Wallace*, his Section 1983 claim is analogous to the tort of malicious prosecution. *See, e.g.*, *Mondragón*, 519 F.3d at 1083 ("After the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim."). The statute of limitations for McDonough's Section 1983 claim accordingly did not begin to run until his acquittal, when criminal proceedings indisputably terminated in his favor. *See Manuel I*, 137 S. Ct. at 920 (courts may "adopt wholesale the rules that would apply in a suit involving the most analogous tort"). McDonough filed suit within three years of that date, making his suit timely.

The Second Circuit did not identify the common law tort analogous to McDonough's fabrication of evidence claim, nor did it apply the statute of limitations rule associated with that tort. The Second Circuit accordingly erred in dismissing McDonough's Section 1983 suit as untimely.

2. Instead of applying the straightforward approach set out by this Court in *Heck* and *Wallace*, the Second Circuit stated—without citation—that "the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted." Pet. App. 13a. Working from that faulty premise, the court concluded that the statute of limitations begins to

run when the criminal defendant "becomes aware of [the] tainted evidence and its improper use." *Id.* The Second Circuit was wrong on both counts.

First, the Second Circuit erred in its characterization of the constitutional violation at issue. In *Wallace*, this Court explained that for a Section 1983 claim analogous to the tort of malicious prosecution, the constitutional injury is the "*wrongful institution* of legal process." 549 U.S. at 390. After the institution of such process, this Court explained, "any damages recoverable must be based on a malicious prosecution claim and on the *wrongful use* of judicial process." *Id.* (emphasis added and internal quotation marks omitted). This Court made a similar statement in *Heck*, where it suggested that the "gravamen" of the tort of malicious prosecution (as opposed to a complaint about abuse of process) is the "wrongfulness of the prosecution," which persists through the "lawful conclusion" of the criminal proceedings. 512 U.S. at 486 n.5.

Here, McDonough's complaint is not that Smith used fabricated evidence against him at one point in the criminal proceedings. It is that Smith wrongfully *instituted and maintained* criminal proceedings against him based on fabricated evidence, depriving McDonough of due process, a fair trial, and his liberty throughout those proceedings. That is precisely the constitutional injury identified in *Heck* and *Wallace*. As the Ninth Circuit explained in *Bradford*, a Section 1983 suit based on fabrication of evidence seeks to vindicate the "right to be free from criminal charges based on a claim of deliberately fabricated evidence," not the right to be free from a single use of such evidence. 803 F.3d at 388 (altera-

tions and internal quotation marks omitted). Because the Second Circuit misidentified the constitutional right at issue, it failed to apply the correct statute of limitations rule. *See Manuel I*, 137 S. Ct. at 921 ("[C]ourts must closely attend to the values and purposes of the constitutional right at issue."). This Court explained in *Heck* and *Wallace* that where a criminal defendant seeks to vindicate a constitutional injury analogous to the tort of malicious prosecution—as McDonough plainly does here—the statute of limitations does not begin to run until criminal proceedings terminate in the defendant's favor. *See supra* pp. 24-26.

Second, even if the Second Circuit were correct about the kind of constitutional harm at stake, it nevertheless erred in determining when the statute of limitations began to run. In its decision below, the Second Circuit relied on an earlier circuit precedent, *Veal* v. *Geraci*, 23 F.3d 722 (2d Cir. 1994), which held that the statute of limitations for a Section 1983 claim begins to run when the criminal defendant learns that his constitutional rights have been violated. *See* Pet. App. 10a-11a (citing *Veal*, 23 F.3d at 724). *Veal* in turn cited an even earlier circuit decision, *Woods v. Candela*, 13 F.3d 574 (2d Cir. 1994), which had adopted that position. *See id.* at 575-576. There is only one problem: *Woods* was granted, vacated, and remanded by this Court following its decision in *Heck*—presumably because it applied the wrong approach to calculating the statute of limitations in a Section 1983 suit. *See* 115 S. Ct. 44 (1994) (mem.).

The precedent relied on by the Second Circuit in this case is thus directly contrary to this Court's

rulings, as this Court has already concluded. *See id.* In *Heck*, this Court held that the statute of limitations for a Section 1983 claim based on the withholding of exculpatory evidence and the use of illegal trial procedures begins to run when the criminal proceedings *terminate* in the defendant's favor. *See* 512 U.S. at 486-487. Similarly, in *Wallace*, this Court held that the statute of limitations for a Section 1983 claim based on false imprisonment begins to run when the false imprisonment *ends*. *See* 549 U.S. at 389. Neither of those cases supports the Second Circuit's rule here, which pegs the statute of limitations to the criminal defendant's subjective knowledge of the violation of his constitutional rights.

3. The Second Circuit also erred when it rejected McDonough's argument that "the use of fabricated evidence against him constituted a continuing violation that renders his claim timely." Pet. App. 8a. According to the Second Circuit, "[t]he continuation of the prosecution does not, by itself, constitute a continuing violation that would postpone the running of the statute of limitations until his acquittal." *Id.* at 17a. As noted, however, this Court has expressly held that for a Section 1983 claim analogous to the tort of malicious prosecution, the constitutional injury is the "wrongful institution of legal process" and the "wrongful use of judicial process"—not the first use of fabricated evidence in a criminal proceeding. *Wallace*, 549 U.S. at 390 (emphasis and internal quotation marks omitted). In proceedings before the New York state court, McDonough was indicted and prosecuted through *two separate trials* based on evidence willfully fabricated by his prosecutor. That constitutional harm did not end the first time fabri-

cated evidence was used against him, but instead persisted throughout the criminal proceedings.

This conclusion is supported by the Seventh Circuit's decision on remand in *Manuel II*, where the court evaluated when the statute of limitations begins to run on a Section 1983 claim based on fabrication of evidence. *See* 903 F.3d at 669-670. Contrary to the approach adopted by the Second Circuit, the Seventh Circuit held that the constitutional violation in that case—the criminal defendant's detention based on a fabricated report concluding that the defendant possessed illegal drugs, when he in fact possessed vitamins—was "ongoing rather than discrete." *Id.* at 669. Because the defendant's harm was ongoing, the Seventh Circuit concluded that the statute of limitations began to run when the constitutional violation *ended*, not when the defendant found out about it. *See id.* at 669-670. Under that rule, McDonough's Section 1983 claim is plainly timely, warranting reversal.

4. Two courts of appeals—the Fifth Circuit and the Sixth Circuit—have looked to the principles enunciated in this Court's opinion in *Heck* to set the statute of limitations rule for a fabrication of evidence claim. *See Castellano*, 352 F.3d at 959-960; *Mills*, 869 F.3d at 484 (citing *King*, 852 F.3d at 579). This Court held in *Heck* that where a criminal defendant has been convicted, he cannot bring a Section 1983 claim analogous to malicious prosecution until his conviction is invalidated. *See* 512 U.S. at 486-487. The Court explained that "concerns for finality and consistency" undergirded its ruling, which was designed to "avoid[ ] parallel litigation over the issues of probable cause and guilt," and to "pre-

clude[ ] the possibility" of a criminal defendant "succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id.* 484-485 (internal quotation marks omitted).

In *Castellano*, the Fifth Circuit relied on those principles to hold that the statute of limitations does not begin to run on a fabrication of evidence claim until criminal proceedings have terminated in the defendant's favor. *See* 352 F.3d at 959. The Fifth Circuit cited "powerful governmental interests in finality of judgments" to support its position. *Id.* In *Mills*, the Sixth Circuit likewise relied on circuit precedent emphasizing that criminal proceedings should conclude before civil suits begin in order to prevent the possibility of conflicting judgments in criminal and civil cases. *See* 869 F.3d at 484 (citing *King*, 852 F.3d at 579).

The Fifth and Sixth Circuit's opinions in *Castellano* and *Mills* demonstrate the important legal principles behind the majority rule that the statute of limitations does not begin to run on a fabrication of evidence claim until criminal proceedings terminate in the defendant's favor. The Second Circuit's position, in contrast, violates those principles. Under the Second Circuit's rule, McDonough was required to file a civil suit against Smith before the criminal proceedings terminated, raising the possibility of conflicting judgments in the civil and criminal proceedings. For that reason as well, the Second Circuit's judgment should be reversed.

III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is critically important. It is undisputed that the Constitution protects criminal

defendants from the willful fabrication of evidence by public officials. In order to vindicate their constitutional rights, however, criminal defendants need to know when to file suit. Public officials similarly need to understand the scope of their liability, and courts need a clear rule to determine when a suit is timely, and when it is not. This case is an ideal vehicle to address those crucial issues.

Although the Court has said that the use of fabricated evidence is a practice that the Constitution "cannot tolerate," *Miller* v. *Pate*, 386 U.S. 1, 7 (1967), fabrication remains a "disturbingly common cause of wrongful convictions." Br. of Amici Curiae the American Civil Liberties Union, Bronx Defenders, Brooklyn Defender Services, Center for Appellate Litigation, Connecticut Innocence Project, The Innocence Project, The Legal Aid Society, National Association of Criminal Defense Lawyers, Neighborhood Defender Service of Harlem, New York County Defender Services, New York State Association of Criminal Defense Lawyers, Office of the Appellate Defender, and Vermont Office of the Defender General at 1, *McDonough*, 898 F.3d 259 (No. 17-0296-cv), 2018 WL 4191173, at *1. Section 1983 suits provide a federal avenue for holding those who violate the rights of criminal defendants accountable. *See Manuel I*, 137 S. Ct. at 916; *see also City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."). That is particularly important here, where Smith's actions cannot be characterized as an oversight or a mistake. Smith deliberately fabricated evidence, including witness affidavits, used in criminal proceedings against

McDonough. The statute of limitations rule adopted by this Court will determine the extent to which public officials will be held accountable for such actions.

The question presented is also of great practical importance. If this Court allows the decision below to stand, criminal defendants in the Second Circuit will in many cases be forced to file a Section 1983 suit *before* criminal proceedings have terminated. Many will be unwilling to do so, fearing that filing a civil suit will provoke prosecutors to seek greater penalties in ongoing criminal proceedings. Others will likely be counseled against filing a civil suit by their attorneys: Few lawyers would advise their client to make public statements about the evidence against them in a criminal proceeding, particularly if the client is considering testifying on their own behalf at a criminal trial. As a practical matter, the Second Circuit's statute of limitations rule is likely to deter criminal defendants from filing meritorious fabrication of evidence suits. Police officers and prosecutors may face a similar dilemma; they too could be forced in a civil suit to perform document discovery and provide depositions regarding the evidence presented in an ongoing criminal proceeding.

The rule adopted by the Second Circuit, moreover, will engender both significant uncertainty and protracted litigation. As Justice Scalia wrote, "any period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring in part and concurring in the judgment). Under the Second Circuit's rule, it is

unclear when the statute of limitations begins to run in any particular case. The exact point at which the criminal defendant knew, or should have known, that fabricated evidence was being used against him is a question of fact that could be litigated for years before a court reaches the merits of a Section 1983 claim. That is a problem not only for criminal defendants, but also for public officials, who will be unable to calculate with certainty when their Section 1983 liability draws to a close. *See Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14 (2014) (limitations periods "embody a policy of repose, designed to protect defendants" and foster certainty about a defendant's liability (internal quotation marks omitted)); *see also Missouri* v. *McNeely*, 569 U.S. 141, 166 (2013) (Roberts, C.J., concurring in part and dissenting in part) (advocating in favor of straightforward rules to guide public officials).

Without clear guidance, courts will similarly struggle to determine the boundaries of the limitations period. Those courts that follow the Second Circuit's approach will be forced to engage in a fact-intensive inquiry to determine when the statute of limitations started to run in each case. *Cf. Novella* v. *Westchester Cty.*, 661 F.3d 128, 148 (2d Cir. 2011) (remanding for a "fact-dependent inquiry into" when each plaintiff knew or should have known of the fact triggering the statute of limitations). In some cases, this inquiry may need to be conducted as criminal proceedings continue in state court—an outcome the Court disfavors. *See Heck*, 512 U.S. at 484 (opting for an approach that "avoids parallel litigation" in federal and state court (internal quotation marks omitted)). Meanwhile, district courts will continue to reach their own, often contradictory, conclusions in light of

the circuit divide. *Compare Taylor* v. *City of Chicago*, No. 17-cv-03642, 2018 WL 4075402, at *5-6 (N.D. Ill. Aug. 27, 2018) (following Ninth Circuit's approach), *with Lewis*, 2017 WL 698682, at *3 (employing same approach as Second Circuit).

McDonough's case presents an ideal vehicle for the Court to resolve this important issue. He raised and preserved the question presented in the district court and court of appeals. *See* Pet. App. 8a, 47a-48a. Because the circuit split arose in McDonough's case, this case provides an opportunity to correct the Second Circuit's misstep before confusion deepens. *See* SUP. CT. R. 10(a). Moreover, in the decades since this Court's decisions in *Heck* and *Wallace*, a large majority of circuits have weighed in on the issue, making further percolation unwarranted.

In sum, this case presents the right vehicle for the Court to resolve the circuits' acknowledged, intractable, and consequential dispute over when the statute of limitations begins to run in a Section 1983 suit based on fabrication of evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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