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

BRIEF *AMICI CURIAE* OF THE INTERGOVERNMENTAL RISK MANAGEMENT AGENCY, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Intergovernmental Risk Management Agency ("IRMA") is a non-profit, member-owned, self-governed public risk pool serving Illinois municipalities. Founded in 1979, IRMA was the first municipal risk pool in Illinois and consists of 71 local municipalities and special service districts in northeastern Illinois, which have joined together to manage and fund their claims and lawsuits. All members also participate in a comprehensive risk management program. IRMA works to fulfill its members' goals of stabilizing future annual contribution rates and improving the quality of risk management services.

The International Municipal Lawyers Association ("IMLA") is a non-profit, non-partisan, professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The National Association of Police Organizations ("NAPO") is a coalition of police units and associations from across the United States. It was organized for the purpose of advancing the interests of America's law enforcement officers. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, and over 241,000 sworn law enforcement officers who share a common dedication to fair and effective law enforcement. NAPO often appears as *amicus curiae* in cases of special importance.

Amici have a strong interest in this case because they believe in responsible governance at all levels and are heavily invested in the fair and efficient resolution of civil rights lawsuits. *Amici* and their members are among those greatly impacted by the unfairness and uncertainty of the lower court's decision to apply the *Heck* bar to claims brought after a plaintiff is released from custody. In *amici*'s experience, the lower court's ruling prevents deserving plaintiffs from pursuing their claims and deprives putative defendants of any ability to predict when the risk of potential litigation will pass.

INTRODUCTION AND SUMMARY OF ARGUMENT

When the Court "confront[ed] the consequences of Congress' failure to provide a specific statute of limitations to govern § 1983 actions," *Owens v. Okure*, 488 U.S. 235, 239 (1989), it undertook "a practical inquiry" to "provide courts with a rule . . . that can be applied with *ease and predictability* in all 50 states," *id.* at 242–43 (emphasis added). Yet footnote 10 of the Court's seminal decision in *Heck v. Humphrey*, 512 U.S. 477, 490 n.10 (1994), has given rise to an acknowledged circuit split, making it entirely unpredictable as to when a claim under § 1983 may arise under certain circumstances. *See Newmy v. Johnson*, 758 F.3d 1008, 1010 (8th Cir. 2014); *see also* Petition, p. 23-30.

One line of cases, adopted by the lower court, provides that a cause of action under § 1983 accrues only upon "favorable termination of [a] conviction" after an individual is released from prison." *Savory v. Cannon*, 947 F.3d 409, 428 (7th Cir. 2020), *petition for cert. docketed*, No. 19-1360 (June 11, 2020); *see, e.g.*, *Lyall v. L.A.*, 807 F.3d 1178 (9th Cir. 2015); *Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998); *Deemer v. Beard*, 557 F. App'x 162, 166 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 50 (2014); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); *Domotor v. Wennet*, 356 F. App'x 316 (11th Cir. 2009). Under this rule, a § 1983 claim may arise at literally any time—conceivably even decades after an individual's term of incarceration has ended—subject only to the whims of a state's political pardon process. The result is "[a]

federal cause of action [that may be] 'brought at any distance of time,'" something that is "'utterly repugnant to the genius of our laws.'" *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805)). There is no justification for an accrual rule that admits of such unpredictable results.

Heck was built on the need to reasonably reconcile "the two most fertile sources of federal-court prisoner litigation—the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254." 512 U.S. at 480. But once an individual is released from incarceration, the need to account for the latter by delaying accrual of an action under the former disappears entirely. The Second Circuit splits from the approach outlined above and has adopted a pragmatic approach to determining accrual—namely, holding § 1983 claims accrue upon release from custody. *Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001). Further muddying the waters, a third line of cases adds the additional requirement that release from custody eliminates the *Heck* bar, but only where the plaintiff lacked access to federal habeas relief while in custody. *Griffin v. Baltimore Police Dep't*, 804 F.3d 692 (4th Cir. 2015); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592 (6th Cir. 2007); *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010).

This circuit split carries serious real-world consequences that warrant resolution by the Court. Under the Seventh Circuit's formulation, the availability of a § 1983 action turns on each state's unpredictable pardon process. This vests state

governors with the final say in whether a plaintiff may bring a lawsuit under a bedrock federal statute, invites perpetual petitions for pardons as gubernatorial administrations change, and leaves retired public officials and the estates of deceased public officials subject to ever changing political winds and unable to ascertain with any "confidence when their delicts lie in repose." *Wilson*, 471 U.S. at 275 n.34. These results are unfair to both plaintiffs and defendants, and the unfairness reverberates beyond the immediate parties to the myriad community interests at play in § 1983 litigation. Indeed, municipalities and their insurers lack any means to even hazard a guess when or whether a § 1983 lawsuit may accrue.

In striving to outline the appropriate procedure for identifying the applicable statute of limitations under 42 U.S.C. § 1988, the Court succinctly explained that "the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for *scarce resources must be dissipated by useless litigation on collateral matters*." *Id.* at 275 (emphasis added). When a claim does accrue, perhaps years or decades after incarceration, municipalities and their residents are stuck with a significant portion of the bill in ancillary litigation just to determine who should bear responsibility for defending against, and potentially paying any judgment from, a § 1983 lawsuit. With a re-entrenched circuit split and a pure issue of law, this case provides the perfect opportunity for course correction.

ARGUMENT

I. Because the Statutes Do Not Mandate Otherwise, Accrual Should Be Determined by "Practical Inquiry."

The important habeas considerations that motivated *Heck* play no role after incarceration, so the same pragmatic guideposts that underlie the Court's § 1983 statute of limitations jurisprudence should guide here.

Heck sought to reconcile two "overlap[ping]" provisions of federal law that serve different purposes and impose different procedural requirements." 512 U.S. at 481. Section 2254, the federal habeas corpus statute, provides "the exclusive remedy for a state prisoner who challenges the fact or duration of [their] confinement and seeks immediate or speedier release." *Id.* (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). Critically, while "exhaustion of state remedies 'is *not* a prerequisite to an action under § 1983,'" *id.* (citing *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501 (1982)), a writ of habeas corpus may not issue unless "the applicant has exhausted the remedies available in the courts of the State," 28 U.S.C. § 2254(b)(1)(A). *Heck* held that the exclusivity of the latter could not be circumvented by a suit for damages under the former, and thus "[e]ven 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." 512 U.S. at 489.

Neither *Heck* (which dealt with an incarcerated individual's action for damages) nor any other decision of this Court has squarely addressed the issue presented here: whether *after* an individual is released from incarceration, their conviction must nevertheless be invalidated to trigger accrual of a § 1983 action. As evidenced by the deep and entrenched circuit split, this is a recurring issue.

Certainly nothing in § 2254 or § 1983 requires such a result. Indeed, "[t]he federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are '*in custody* in violation of the Constitution or laws or treaties of the United States.'" *Maleng v. Cook*, 490 U.S. 488, 490 (1989) (quoting 28 U.S.C. § 2241(c)(3)) (citing § 2254(a)). Once an individual is no longer in custody, not only does a remedy under § 2254 become unavailable, but also the need to reconcile habeas procedure with § 1983 drops out. And there's no basis to otherwise graft additional "exhaustion" or favorable termination requirements on accrual of a § 1983 claim where Congress has declined to impose any and where § 2254 is not implicated.[2] *See, e.g.*, *Savory*, 947 F.3d at 434

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[2] To the extent rectifying unfairness of the favorable termination accrual rule requires any deviation from common-law "prerequisites" for malicious prosecution suits, *Heck* contemplated that such common-law rules would "provide the appropriate *starting point*"—*not* the definitive ending point—"for the inquiry under § 1983." *Heck*, 512 U.S. at 483 (quoting *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978)); *see Wilson*, 471 U.S. at 272 ("Because the § 1983 remedy is one that can override certain

(Easterbrook, J., dissenting) ("Congress could create by legislation a rule foreclosing damages until a plaintiff, although no longer in prison, has been vindicated by a pardon or certificate of innocence, but such a rule cannot be found in any enacted statute.").

The Court has repeatedly recognized that, in the absence of a statutory mandate, the task of sculpting the contours of § 1983 requires "essentially a practical inquiry." *Owens*, 488 U.S. at 242 (citing *Wilson*, 471 U.S. at 272); *see Heck*, 512 U.S. at 483 (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986) (explaining that § 1983 "creates a species of tort liability")). The Court's § 1983 jurisprudence recognizes the need to "take into account practicalities that are involved in litigating federal civil rights claims." *Burnett v. Grattan*, 468 U.S. 42, 50 (1984), *holding modified by Wilson*, 471 U.S. 261; *Wilson*, 471 U.S. at 275. And as the Court recognized, even the "borrowing process" of § 1988 must account for "'the predominance of the federal interest.'" *Wilson*, 471 U.S. at 269 (quoting *Burnett*, 468 U.S. at 48). "Even when principles of state law are borrowed to assist in the enforcement of this federal remedy, the state rule is adopted as 'a federal rule responsive to the need whenever a federal right is impaired.'" *Id.*

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kinds of state laws, . . . it can have no precise counterpart in state law. . . . [I]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." (internal quotations omitted) (internal citations omitted)).

(quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969)).

These same prudential considerations should guide in identifying the appropriate rule of accrual. Indeed, a key consequence of the Seventh Circuit's rule, echoed by several other circuits, is to give state authorities final say over the accrual of the bedrock federal civil rights action. The potential parties to § 1983 litigation, both plaintiffs and defendants, deserve a clear accrual rule, such as that adopted by the Second, Fourth, Sixth, and Tenth Circuits, that is not wholly dependent upon the political pardon process. Furthermore, as a statute designed to remedy abuses of public authority, § 1983 litigation affects whole communities, beyond the individual parties, that need means to discern when the threat of litigation has passed. The unpredictability and unfairness of the Seventh Circuit's rule eviscerates the "simple approach" the Court has sought in borrowing a reasonable statute of limitations. *Id.* at 275.

Most importantly, the circuit split engenders the same needless "conflict, confusion and uncertainty" that led the Court to revisit the statute of limitations issue and take corrective action in *Owens*, doing away with the requirement that courts seek "state-law analogies for particular § 1983 claims." 488 U.S. at 240 (quoting *Wilson*, 471 U.S. at 266) ("The practice of seeking state-law analogies for particular § 1983 claims bred confusion and inconsistency in the lower courts . . . ."). Tasked with ensuring the effective operation of § 1983, the Court should stop the accrual rule from introducing the same disparity and

uncertainty that previously beset the task of identifying the applicable statute of limitations.

II. Accrual Upon Release from Incarceration Would Best Serve All Interests by Providing Predictability and Fairness.

A potential § 1983 claim is never dead under the Seventh Circuit's formulation. Rather, any number of years later, a governor may decide to breathe life into a claim that may have previously undergone numerous cycles of state and federal judicial review. Just as nothing in § 1983 supports a favorable termination accrual rule, it is absurd to suggest that Congress would provide state authorities the final say in whether and when a plaintiff may file a lawsuit under the "most important, and ubiquitous, [federal] civil rights statute." *Wilson*, 471 U.S. at 266.

Tying accrual under § 1983 to a pardon is inefficient and unfair to both plaintiffs and defendants. While a plaintiff seeking to pursue a § 1983 claim following release but with a conviction intact may face preclusion obstacles, those are properly "a matter of state law under [28 U.S.C.] § 1738 and," as Congress has directed, "should be dealt with in the same way as any other invocation of issue or claim preclusion." *Savory*, 947 F.3d at 434 (Easterbrook, J., dissenting). But a formerly-incarcerated plaintiff with a potentially viable § 1983 claim and a potential exception to preclusion, *see, e.g.*, Wright & Miller, Claim Preclusion—Exceptions to Claim Preclusion Rules, 18 Fed. Prac. & Proc. Juris. § 4415 (3d ed.), should not have the door to the courthouse closed simply because a particular gubernatorial administration refuses to exercise its

discretion to grant a pardon, *see Savory*, 947 F.3d at 434 (Easterbrook, J., dissenting) ("Savory's victory today comes at a terrible price—the extinguishment of many substantively valid constitutional claims.").

Pardons are inherently unpredictable and may (and perhaps often do) issue for reasons wholly disconnected from fairness or justice. *See, e.g.*, Chad Flanders, *Pardons and the Theory of the "Second-Best"*, 65 FLA. L. REV. 1559 (2013) ("Pardons can all too often reflect patterns of racial bias, favoritism, and sheer randomness . . . ."); Katie R. Van Camp, Comment, *The Pardoning Power: Where Does Tradition End and Legal Regulation Begin?*, 83 MISS. L.J. 1271, 1284 (2014) ("Another problem with the pardon power is that, in some states, exercise of the power is not insulated from politics; that is, there is no protection from the political process when it comes to the pardon process."); *cf., e.g.*, Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1132–33 (2010) ("In the three administrations that preceded Obama's, applicants with political connections and/or high-priced, well-connected lawyers bypassed the Department of Justice, disregarded its regulations, and obtained clemency on grounds not available to others."). Yet *Savory* allows such unpalatable motives to be determinative of accrual under § 1983, and it incentivizes formerly incarcerated individuals to continuously petition for a pardon in the hopes of favorable political winds. This incentive is reason enough to divorce pardons from the availability of a § 1983 claim.

"On a human level, uncertainty is costly to all parties." *Wilson*, 471 U.S. at 275 n.34. The uncertainty is unfair to defendants who lack any reasonable means to "calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." *Id.* Putative § 1983 defendants—including long-retired public officials the estates of deceased officials—should (as any putative defendant) be able to reliably calculate when the risk of litigation will finally pass.

The consequences and uncertainty embodied by the lower court's ruling reverberate far beyond the immediate parties to a § 1983 claim. Municipalities and insurers must be able to ascertain when they may close the books on each year. Tying accrual to a pardon as opposed to the end of incarceration prevents *any* basis for making critical decisions about when the risk of a *Monell* action or an indemnification action brought by an official may finally pass. And risk pools cannot be expected to hold funds perpetually available for a fiscal year without some basis for believing that a potential suit may be forthcoming. The uncertainty and surprise of litigation occurring many years or decades following incarceration unnecessarily produces and prolongs ancillary litigation among these stakeholders over who should pay for the defense and results of § 1983 lawsuits.

In the end, taxpayers bear at least part of the burden of the inability to predict when or whether a § 1983 suit may someday arise—and for a reason (a pardon) that is disconnected from the fundamental remedial purpose of § 1983. Even plaintiffs suffer when monies that could otherwise go to deserving

claimants must instead be squandered in litigating questions posed by lawsuits arising at random, years after an individual is released from custody. *Cf., e.g.*, *Wilson*, 471 U.S. at 275 ("[T]he legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for *scarce resources must be dissipated by useless litigation on collateral matters*." (emphasis added)). Meanwhile, a straightforward accrual rule based upon the end of incarceration would ensure fairness for plaintiffs, fairness for defendants, and predictability for the myriad important systemic interests involved in a § 1983 lawsuit.

These consequences are precisely the sort of systemic issues that warrant clarifying the confusion engendered by footnote 10 of *Heck*. The Court aimed to implement the statute of limitations borrowing process of § 1988 with a "rule . . . that can be applied with ease and predictability in all 50 States." *Owens*, 488 U.S. at 243. The disparity among circuits—deepened by the disparity among states in their pardoning processes[3]—demonstrates that this enterprise has failed with respect to identifying a clear accrual rule, with disastrous consequences for a matter of great federal importance. Rather than allow the confusion to persist for what should be a straightforward issue of determining when a § 1983 claim accrues, the Court should grant the petition for

[3] *See 50-State Comparison: Pardon Policy & Practice*, Restoration of Rights Project (May 2020), https://tinyurl.com/pardpol50.

certiorari and clarify that a § 1983 claim accrues upon a plaintiff's release from incarceration.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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