No. 17-652

In The
Supreme Court of the United States

MARIE HENRY, as guardian parent, next of kin, and for and on behalf of M.E. Henry-Robinson, a minor,

Petitioner,

v.

CITY OF MT. DORA, FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

This case presents an issue of considerable practical and constitutional importance, and *amicus curiae* National Association for Public Defense ("NAPD"), is particularly well-suited to provide additional insight into the broad implications of the decision below. NAPD timely notified counsel of record for both parties that it intended to submit the attached brief more than 10 days prior to filing. Counsel for petitioner consented to the filing of this brief, and that letter of consent has been lodged with the Clerk of this Court. Counsel for respondent declined to grant such consent. Therefore, pursuant to Supreme Court Rule 37.2(b), NAPD respectfully moves this Court for leave to file the accompanying brief of *amicus curiae* in support of petitioner.

NAPD is a nation-wide association which joins together more than 15,000 practitioner-members dedicated to bringing fairness to the criminal justice system. NAPD members include many different types of professionals who specialize in the defense of constitutional rights, particularly for the poor. NAPD members represent state, county and local systems through full-time, contract, and assigned counsel delivery mechanisms. Thus, the NAPD is dedicated to ensuring fairness in America's criminal courts. Further, NAPD strives to ensure that the rights of those placed in diversionary programs in lieu of a formal adjudication have a mechanism to challenge violations of their constitutional rights. NAPD's brief provides arguments

and perspectives not addressed by the parties, and that will assist the Court in resolving the issues in this matter.

There is a significant conflict among the federal circuit courts regarding the proper application of *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Spencer v. Kemna*, 523 U.S. 1 (1998) regarding the issue of whether a defendant, particularly one in a diversionary program, has a right to bring a 28 U.S.C. § 1983 action in federal court to redress constitutional violations. *Amicus* NAPD urges this Court to reconsider its rulings in *Heck* and *Spencer* and repair the split among the circuit courts.

Access to the federal courts by way of a 28 U.S.C. § 1983 action to redress violations of fundamental constitutional rights is particularly important for juveniles and others placed in diversionary programs, such as "drug courts", where the underlying charge's resolution does not amount to a criminal conviction. *Heck* would categorically prohibit such individuals from challenging conduct that infringes on basic constitutional protections. Put simply, applying *Heck* to the facts of this case would leave juveniles – and others in diversionary programs – with rights but no remedies.

Finally, it is critical to have unity among the circuits to ensure that the constitutional rights of all classes of persons in all circuits are protected by ensuring that they have appropriate access to federal courts to redress constitutional violations. NAPD's experiences not only underscore the practical and

constitutional implications of the Eleventh Circuit's decision, but also demonstrate that NAPD is exceptionally well-positioned to elaborate on these implications for the Court's benefit. NAPD therefore seeks leave to file the attached brief of *amicus curiae* urging the Court to grant the petition.

Respectfully submitted,

December 4, 2017

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QUESTIONS PRESENTED

1. Whether participants in diversionary programs, such as juveniles and those involved in "drug courts", should have equal access to 42 U.S.C. § 1983 remedies when they have no access to *habeas corpus* relief and when their case was resolved without a final favorable termination?

2. Whether the Court's decision in *Heck v. Humphrey* bars actions under 42 U.S.C. § 1983 when the writ of *habeas corpus* was not available, as the majority of circuits have held, or whether *Heck* bars actions under 42 U.S.C. § 1983 regardless of *habeas corpus* availability, as the Eleventh Circuit held here, and four other circuits have held.

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BRIEF OF *AMICUS CURIAE*

Amicus curiae, National Association for Public Defense ("NAPD"), respectfully submits this brief in support of Petitioner, Marie Henry, requesting that this Court grant review in Petition No. 17-652.

INTEREST OF *AMICUS*[1]

NAPD is a nation-wide association which joins together more than 15,000 practitioner-members dedicated to bringing fairness to the criminal justice system. It engages public-defense professionals in a clear and focused voice to address the constitutional rights of defendants, and to collaborate with diverse partners for judicial reform, including solutions that ensure meaningful access to justice for poor people. NAPD members include many different types of professionals including lawyers, social workers, case managers, investigators, sentencing advocates, paralegals, civil legal aid providers, education advocates, experts, information technology gurus, teachers and trainers, financial professionals, researchers, legislative

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Counsel for Petitioner has consented to the filing of this *amicus curiae* brief. Counsel for Respondent, the City of Mt. Dora does not consent.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

advocates and communications personnel. NAPD members represent state, county and local systems through full-time, contract, and assigned counsel delivery mechanisms. Thus, the NAPD is dedicated to ensuring fairness in America's criminal courts. Further, NAPD strives to ensure that the rights of those placed in diversionary programs in lieu of a formal adjudication have a mechanism to challenge violations of their constitutional rights. NAPD's brief provides arguments and perspectives not addressed by the parties, and that will assist the Court in resolving the issues in this matter.

In light of a significant conflict among the federal circuit courts, *Amicus* NAPD urges this Court to reconsider its rulings in *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Spencer v. Kemna*, 523 U.S. 1 (1998). Access to the federal courts by way of a 28 U.S.C. § 1983 action to redress violations of fundamental constitutional rights is particularly important for juveniles and others placed in diversionary programs, such as "drug courts", where the underlying charge's resolution does not amount to a criminal conviction and thus, under *Heck* would categorically prohibit such individuals from challenging conduct that infringes on basic constitutional protections. Put simply, applying *Heck* to the facts of this case would leave juveniles – and others in diversionary programs – with rights, but no remedies. Finally, it is critical to have unity among the circuits to ensure that the constitutional rights of all classes of persons in all circuits are protected by

ensuring that they have appropriate access to Federal Courts to redress constitutional violations.

SUMMARY OF ARGUMENT

At issue here is the interpretation of this Court's prior rulings regarding whether a 28 U.S.C. § 1983 civil rights claim may be brought by a juvenile offender when habeas corpus is not available relief and when the termination of the juvenile proceeding was a "withheld adjudication". More specifically, the question is whether a juvenile's § 1983 action is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Spencer v. Kemna*, 523 U.S. 1 (1998). The Court's reasoning in *Heck* and *Spencer* strongly suggests that this question should be answered in the negative. *Amicus curiae* requests this Court grant a writ of certiorari on this important matter of federal law and constitutional rights, since there is a significant split among the federal courts of appeals, and because the Court's application of *Heck* and *Spencer*, as interpreted by a minority of circuits, would deprive thousands of juveniles across the country from accessing the federal courts to redress violations of basic constitutional protections.

42 U.S.C. § 1983 provides a method of redress for persons whose "rights, privileges or immunities secured to them by the Constitution" are impinged. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Section 1983 "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions

under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation". *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

By its terms, § 1983 applies to "every person". Nothing limits its application to particular individuals or defendants. Furthermore, nothing in § 1983, or this Court's precedent, limits access by juveniles, or others involved in criminal or quasi-criminal proceedings such as drug courts or diversionary programs, to § 1983 relief. The statute applies to all, and for good reason. In many cases, § 1983 is the primary (often only) and indispensable mechanism by which individuals can redress violations of fundamental constitutional protections.

The availability of § 1983 relief is critically important in cases involving juveniles and others who, in lieu of a formal adjudication, are placed in diversionary programs, such as "drug courts". In these situations, juveniles and others may – and often are – subjected to procedures and safeguards that offer less protection than those provided by the general criminal statutory scheme. Thus, violations of constitutional rights in juvenile and diversionary programs may, on the one hand, be more common and, on the other, be subject to fewer remedies. That is exactly the dilemma posed by the factual scenario presenting in the instant case: Based on the Eleventh Circuit's ruling below in this matter, juveniles, and by analogy, anyone in a diversionary program, cannot redress constitutional violations in the juvenile or diversionary program, because he or she could not satisfy *Heck*'s "favorable

termination" requirement. The reasoning underling *Heck*, the purposes underlying § 1983, and basic principles of fairness and justice, do not countenance a rule that categorically prohibits juveniles and others in diversionary programs from enforcing the constitutional rights to which they are entitled.

To be sure, the legislative history of § 1983 shows that it was intended to create "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution" *Carey v. Piphus*, 435 U.S. 247, 253 (1978). If *Heck* and *Spencer* were interpreted to prohibit access by a juvenile to federal courts for redress of constitutional violations, it would defeat the very purpose of § 1983. There is an irreconcilable split among the federal circuit courts on this issue, with the circuits applying this Court's rulings in *Heck* and *Spencer v. Kemna*, 523 U.S. 1 (1998) differently. These inconsistent rulings must be reconciled to ensure that constitutional rights are equally available to people in all federal circuits.

For these reasons, this Court should grant certiorari to resolve conflicted rulings that directly affect juveniles', and others', ability to access the federal courts to redress constitutional violations. In so doing, *Heck* should be limited to cases in which habeas relief is available. Such relief was not available in this case, and applying *Heck* to bar a § 1983 action would ensure that, for thousands of juveniles and others across the

country, no relief for violations of constitutional rights will ever be available.

ARGUMENT

I. PARTICIPANTS IN DIVERSIONARY PROGRAMS, INCLUDING JUVENILES, SHOULD HAVE EQUAL ACCESS TO 42 U.S.C. § 1983 REMEDIES

The instant case revisits what this Court has previously called the "intersection of 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". *Heck*, 512 U.S. at 480. The issue here, however, is not the applicability of § 1983 to a person in custody, or even to a federal defendant. Rather, it involves an alleged wrongful stop and arrest of a juvenile whose case was adjudicated in a juvenile system that is separate and distinct from the adult criminal system. Fla. Stat. § 985.35(6) (2017).

There are significant differences between a juvenile adjudication and a criminal conviction. For example, a juvenile adjudication, unlike a criminal conviction, does not constitute a finding of guilt. *See State v. Menuto*, 912 So.2d 603, 607 (Fla. 2005). For years, particularly since the publication of President's Commission on Law Enforcement and Administration of Justice, society in general, and the courts in particular, have struggled with how to deal with juveniles in

the correction system. *See Task force report: Juvenile delinquency and youth crime.* Washington, DC: Government Printing Office (1967). Now it is generally acknowledged that juvenile proceedings are designed to rehabilitate, rather than to punish. *P.W.G. v. State*, 702 So.2d 488, 491 (Fla. 1997). *See also State v. Menuto*, 912 So.2d 603, 607 (Fla. 2005). As this Court noted in *Application of Gault*, 387 U.S. 1 (1967):

> From the inception of the juvenile court system, wide differences have been tolerated – indeed insisted upon – between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. . . . it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury.

387 U.S. at 14 (1967) (footnotes omitted).

Thus, juveniles enjoy fewer constitutional protections than defendants have in state criminal trials. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971); *Kent v. United States*, 383 U.S. 541, 562 (1966). Although juveniles have a right to "appropriate notice, to counsel, to confrontation and to cross-examination, and the privilege against self-incrimination," *id*. they have no right to bail or to a jury trial, and can be detained before trial on a mere "serious risk" standard. *See Schall v. Martin*, 467 U.S. 253, 256-257 (1984); *McKeiver*, 403 U.S. at 545; and *In re Daniel C.*, 15 Misc. 3d 543, 546, 830 (2007). This Court has approved of the

limitations on constitutional rights for juveniles based on the rehabilitative purpose of juvenile proceedings, and based on a fear that providing full-blown constitutional protections would turn the juvenile proceeding into an adversarial proceeding, which is not thought beneficial to juveniles. *See Gault*, 387 U.S. at 14 (1967); *McKeiver*, 403 U.S. at 545.

When juveniles and others are placed in diversionary programs, such programs often differ in the degree to which they provide civil rights protections or fair procedures. Of course, part and parcel of the juvenile system is a desire to avoid the stigma of a criminal conviction, and diversionary programs encourage a resolution of a charge by something other than a final judicial resolution. Notwithstanding, it cannot be gainsaid that, in such programs, juveniles are not afforded the same constitutional or civil rights protections as those convicted in state criminal court. As the Office of Juvenile Justice and Delinquency Prevention at the Department of Justice has acknowledged, there is a difference. *See* www.ojjdp.gov/ojstatbb/structure_process/qa04205.asp?qaDate=2012 (accessed November 19, 2017). These clear differences in states' juvenile justice systems, particularly regarding diversionary programs, mean that not all states apply the same procedures or rights, and, further, means that juveniles are not afforded the full panoply of basic constitutional protections as are adults. *See* https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2015 (accessed November 19, 2017). Thus, since such justice is applied differently, this difference alone makes it important

that juveniles have access to federal courts to redress wrongs occurring in the various state systems.[2] It is antithetical to the desire to rehabilitate to allow state actors to violate a juvenile's rights with impunity as part of a rehabilitation effort. Surely, this Court's reasoning in *Heck* did not explicitly or implicitly countenance such a result, and the purposes of § 1983 would certainly be undermined if this Court held that juveniles could not avail themselves of remedies that would right constitutional wrongs.

II. *HECK* DID NOT HOLD THAT A PERSON TO WHOM HABEAS WAS NOT AVAILABLE WAS BARRED FROM A § 1983 ACTION.

It has long been recognized that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (*quoting Ex parte Virginia*, 100 U.S. 339 (1880)). There is nothing in the legislative history of § 1983, or in interpretations by this Court, that alter this basic tenet. *See Tower v. Glover*, 467 U.S. 914 (1967). The statute's purpose would be defeated, however, if persons not in custody, particularly juveniles and others such as those in diversionary programs, were barred from using federal

[2] The same could, of course be said of any diversionary program.

court to remedy state violations of constitutional rights.

In *Heck*, this Court (analogizing to the tort of malicious prosecution) held that for a plaintiff to have a viable claim under § 1983 for an unconstitutional conviction or imprisonment, the plaintiff must first prove that his conviction or sentence was reversed on appeal, expunged, declared invalid by a state tribunal or called into question by a federal writ of habeas corpus. *Heck* specifically noted, and did not change, the long-held rule that exhaustion of state remedies was *not* a prerequisite to bringing a § 1983 action. 512 U.S. at 480-481 (*citing Patsy v. Bd of Regents of State of Fla*, 457 U.S. 496, 500 (1982)) ("we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies"). While the language this Court used has been applied broadly and generally by some circuit courts, it is important to note that in *Heck* the petitioner was in custody. And, immediately after setting forth the general requirement of the so-called "favorable termination" requirement, this Court *applied* its pronouncement only to in-custody plaintiffs, such as Heck himself:

> Thus, when a *state prisoner* seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff

> can demonstrate that the conviction or sentence has already been invalidated.

(Emphasis added, footnotes omitted). 512 U.S. at 486-487.

In a concurring opinion in *Heck*, Justice Souter agreed with the majority's favorable-termination rule, but wrote that it only applied to individuals in state custody, reasoning that those prisoners had access to federal habeas relief under 28 U.S.C. § 2254. *Id.* at 498-500 (Souter, J., concurring). Justice Souter specifically warned that imposing a categorical favorable-termination requirement denied a federal forum to claimants not in state custody who could not invoke habeas. *Id.* at 500. Four years later, in *Spencer v. Kemna*, 523 U.S. 1 (1998), five justices adopted the reasoning of Justice Souter's concurrence in *Heck*. 512 U.S. at 19-21. Since there was no authoritative majority opinion, however, the issue remains unsettled.

Since *Spencer*, courts have grappled with application of the favorable termination requirement for those without access to habeas relief. Courts have essentially split into two camps: those who apply *Heck* as controlling, largely due to this Court's requirement that lower courts must follow Supreme Court pronouncements, and those who follow Justice Souter's logic in *Spencer*. The First, Third, Fifth and Eighth, and now the Eleventh Circuits have declined to follow the concurring and dissenting opinions in *Spencer* and have interpreted *Heck* to impose a universal favorable-termination requirement on all § 1983 plaintiffs who attack

the validity of their conviction or sentence. *See Henry v. City of Mt. Dora*, 688 Fed. Appx. 842 (11th Cir. 2017) (per curiam); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); *Williams v. Consovoy*, 453 F.3d 173, 177-178 (3d Cir. 2006); *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000) (per curiam); and *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998). Of those circuits adopting the minority view, many have done so based on a strict reading of, and in deference to, *Heck*. For example, in *Figueroa* the court stated:

> We are mindful that dicta from concurring and dissenting opinions in . . . *Spencer v. Kemna,* . . . may cast doubt upon the universality of *Heck*'s "favorable termination" requirement. . . . The Court, however, has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court "the prerogative of overruling its own decisions."

147 F.3d at 81 (1st Cir. 1998); *see also Entzi v. Redmann*, 485 F.3d 998, 1003 ("Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck*, however, we decline to depart from that rule"); *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005); and *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2005).

Heck did *not* hold that a person to whom habeas was not available was barred from a § 1983 action. And

Justice Souter's concurrence in *Spencer* properly sets forth the standard that should govern:

> The better view . . . is that a former prisoner, no longer "in custody" may bring a Section 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy the favorable termination requirement that it would be impossible as a matter of law for him to satisfy.
>
> 523 U.S. at 19-21.

The majority of circuits follow Justice Souter's logic in *Spencer*. The Second, Fourth, Sixth, Seventh, Ninth and Tenth Circuits hold that *Heck* does not apply if there is no available access to habeas. These are the better-reasoned opinions because they recognize that *Heck* did not affirmatively decide the issue, and, therefore, that a person who does not have access to habeas relief may still bring an action under § 1983. These Circuits generally accept Justice Souter's *Spencer* interpretation and agree that *Heck* stands *solely* for the proposition that a favorable-termination requirement applies only to persons who had the remedy of habeas corpus available to them. The majority of circuits thus interpret *Heck* as mere dicta on the issue of applicability to those not in custody, since the non-custodial issue was not before the Court. The reasoning in the majority circuits is, thus, that *Spencer* merely clarified the logic underlying *Heck*, but did not undermine its holding. *See, e.g.*, *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008); *Powers v. Hamilton County*

Public Defender Commission, 501 F.3d 592 (6th Cir. 2007); *Huang v. Johnson* 225 F.3d 6 (2d Cir. 2001).

To apply *Heck* beyond its facts is to raise dicta to the level of a holding. Here, Petitioner, a juvenile, did not have access to habeas relief. Thus, she should be permitted to pursue a § 1983 claim. This Court should grant certiorari to reconcile the split among the federal circuit courts.

CONCLUSION

The irreconcilable split among the federal circuit courts regarding the availability of § 1983 relief when habeas is not available should be resolved. Juveniles and others in diversionary programs who cannot satisfy a favorable termination requirement should not have to surrender their constitutional rights. Further, it is fundamentally wrong that a person's ability to access federal courts to redress a violation of constitutional rights should depend on the circuit in which they find themselves. No person's access to federal court to protect his or her constitutional rights should be different from that of any other person, and especially should not differ based purely on the circuit in which he or she brings a claim. *Amicus curiae* National Association for Public Defense respectfully requests

that this Court grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

December 4, 2017

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