No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Heck v. Humphrey, 512 U.S. 477 (1994), held that, to prevent circumvention of habeas corpus's statutory exhaustion of state remedies requirement, a prisoner cannot bring a claim under 42 U.S.C. §1983 that necessarily implicates his criminal conviction, unless and until that conviction is "favorably terminated." Since *Heck*, the circuits have hopelessly split, and this Court has been internally divided, on whether this favorable termination rule continues to bar accrual of §1983 claims *after* a prisoner has been released from custody and habeas is no longer available. *See Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004) (acknowledging it is unsettled whether release from custody "dispense[s] with the *Heck* requirement").

The questions presented are:

1. Does the limitations period for a §1983 claim that necessarily implicates a criminal conviction accrue when a prisoner is released from custody, as four circuits hold, or when the ex-prisoner persuades either a governor to pardon him or a state court to overturn his conviction, as seven circuits, including the lower court, hold?

2. Does extending *Heck*'s favorable termination rule to ex-prisoners who lack access to a federal remedy violate the rule of *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496 (1982), which prohibits a judicially imposed exhaustion of state remedies requirement for §1983 claims?

3. When extended to ex-prisoners, does *Heck*'s favorable termination rule, which is satisfied by

a gubernatorial pardon that can be perpetually pursued, imprudently eliminate the finality otherwise afforded §1983 defendants by statutes of limitations and preclusion doctrines?

PARTIES TO THE PROCEEDING

Petitioners, Defendants-Appellants below, are William Cannon, Sr. (*special representative for Charles Cannon*), Beth Bell (*special representative for Russell Buck, Peter Gerontes, and John Timmes*), John Fiers, Charles Edward Bowers, John Stenson, George Pinkney, Ed Haynes, Walter Jatkowski, Glen Perkins, Allen Andrews, Harold Marteness, Mary Ann Dunlavey, Carl Tiarks, Marcella Brown Teplitz, and the City of Peoria, Illinois.

Respondent, Johnnie Lee Savory, is Plaintiff-Appellee below.

RELATED CASES

- *Savory v. Cannon, et al.*, No. 17-cv-00204, App. 79–89, U.S. District Court for the Northern District of Illinois, Eastern Division. Judgment entered December 1, 2017.
- *Savory v. Cannon, et al.*, No. 17-3543, Rehearing *En Banc*, App. 1–54, U.S. Court of Appeals for the Seventh Circuit. Judgment entered on January 7, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's *en banc* opinion is reported at 947 F.3d 409. (App. 1–54.) The Seventh Circuit's panel opinion is reported at 912 F.3d 1030. (App. 59–76.) The district court's opinion is reported at 338 F. Supp. 3d 860. (App. 79–89.)

JURISDICTION

On January 7, 2019, a panel of the Seventh Circuit reversed the district court's dismissal of this case on the pleadings. On March 6, 2019, Petitioners' petition for rehearing *en banc* was granted. The Seventh Circuit issued its *en banc* opinion and entered judgment on January 7, 2020. On March 19, 2020, this Court extended the time to file this petition to June 5, 2020. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of 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[.]

28 U.S.C. §2254 provides, in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

INTRODUCTION

When federalism is squarely threatened and the circuits are intractably fragmented to the detriment of future plaintiffs and defendants alike, this Court's intervention is needed. The lower court's extension of *Heck*'s favorable termination rule to ex-prisoners

allows them to revive long dormant suits against police officers by obtaining any kind of gubernatorial pardon in contravention of the finality otherwise afforded by statutes of limitations and preclusion doctrines. At the same time, the lower court's rule will unconstitutionally require ex-prisoners—who lack access to habeas and discover new evidence of unconstitutional convictions after their release—to first obtain a favorable termination of those convictions at the state level, in subversion of 42 U.S.C. §1983's intended purpose as an avenue of first resort.

Imposing the identical catch-22 condemned by this Court just last year, seven circuits, including the lower court, shut this distinct class of ex-prisoners out of federal court, absent the receipt of a favorable termination from a governor or state court. *See Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019) (a plaintiff "cannot go to federal court without going to state court first; but if he goes to state court and loses, his [§1983] claim will be barred in federal court."). Additionally, those circuits leave putative police defendants in perpetual limbo with no hope of finality from civil exposure, thus eviscerating the protections of statutes of limitations. This is so because extending *Heck*'s favorable termination rule to ex-prisoners allows them to successively petition state governors with *no* endpoint, until they obtain a pardon, the receipt of which revives long dormant civil claims. Worse yet, the pardon automatically renders those claims impervious to traditional preclusion doctrines.

By contrast, under the better view of four circuits, as well as several justices, *Heck*'s favorable termination

rule falls away upon release from custody. *See Spencer v. Kemna*, 523 U.S. 1, 18-22, 25 n.8 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, J.J., concurring; Stevens, J., dissenting). Dropping the *Heck* bar starts the limitations clock on any §1983 claims and allows putative police officer defendants to rely on the finality provided by statutes of limitations and traditional preclusion defenses to promptly defeat civil suits targeting often decades-old police investigations. That is, of course, unless a deserving ex-prisoner discovers new evidence which triggers equitable exceptions to limitations periods and preclusion doctrines; exceptions that have always permitted federal consideration of otherwise barred claims without prior resort to state remedies. Such consideration is not only consistent with, but is required by, this Court's long-standing prohibition against a judicially imposed exhaustion of state remedies requirement. *See Patsy*, 457 U.S. 496.

Granting this petition is necessary to restore the balance carefully set forth in this Court's past decisions, including *Patsy* and *Knick*, as well as *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."), and *McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 672 (1963) (observing it would defeat the purpose of §1983 "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"). The question brought to this Court—whether the *Heck* bar still applies after release from custody—is clean, direct and dispositive. It is also

undoubtedly ripe for this Court's review because it has percolated within the circuits for a quarter-century, with no sign of an emerging consensus.

STATEMENT OF THE CASE

A. Factual Background

In 1977, in Peoria, Illinois, Plaintiff Johnnie Lee Savory was arrested, prosecuted and convicted for the murders of Connie Cooper and James Robinson. *See People v. Savory*, 403 N.E.2d 118, 120 (Ill. App. Ct. 1980). In 1980, the Illinois Appellate Court reversed and remanded for retrial upon finding Savory's confession was obtained by Peoria police officers in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966). *Id*. at 124. Savory was retried without his confession in 1981, again convicted, and sentenced to 40 to 80 years in prison. *See People v. Savory*, 435 N.E.2d 226, 233 (Ill. App. Ct. 1982); *United States ex rel. Johnnie Lee Savory,* No. 94 C 2224, 1995 WL 9242, at *4 (N.D. Ill. Jan. 9, 1995). This conviction was affirmed. *See Savory,* 435 N.E.2d at 234.

While serving his sentence, Savory exercised every available option for collateral relief, including post-conviction state court remedies, state and federal requests for new DNA testing, and two federal habeas corpus petitions.[1] Savory also repeatedly petitioned

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[1] *See People v. Savory*, 403 N.E.2d 118 (Ill. App. Ct. 1980), *cert. denied*, 449 U.S. 1101 (1981), *reh'g denied*, 450 U.S. 989 (1981); *People v. Savory*, 435 N.E.2d 226 (Ill. App. Ct. 1982); *People v. Savory*, No. 77 CF 565, 1983 WL 820529 (Ill. Cir. Ct. Dec. 6, 1983); *United States ex rel. Johnnie Lee Savory*, No. 84 C 8112, 1985 WL 2108 (N.D. Ill. July 25, 1985), *aff'd*, 832 F.2d 1011 (7th Cir. 1987);

Illinois governors for clemency. (App. 4.) All of those efforts were unsuccessful. (App.3–4.)

Savory was paroled in December 2006. (App. 4.) Five years later, on December 6, 2011, Illinois Governor Patrick Quinn commuted Savory's remaining parole, which terminated his custody but left his conviction intact. (App. 4.) Three years after granting the commutation, Governor Quinn, on January 12, 2015, his last day in office, granted Savory a general pardon which "acquitted and discharged" him of further imprisonment and restored many of his rights of citizenship, though not the right "to ship, transport, receive or possess firearms, which were forfeited by his earlier conviction." (App. 93–94.) Savory's general pardon was not a declaration of his innocence, but rather an expression of the State's 'forgiveness' of his crime.[2] (*Id.*) Governor Quinn could have but did not

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United States ex rel. Johnnie Lee Savory, No. 94 C 2224, 1995 WL 9242 (N.D. Ill. Jan. 9, 1995); *People v. Savory*, No. 77 CF 565, 1998 WL 35257175 (Ill. Cir. Ct. July 7, 1998), *aff'd*, 722 N.E.2d 220 (Ill. App. Ct. 1999), *aff'd*, 756 N.E.2d 804 (Ill. 2001); *Savory v. Lyons*, No. 05-2082, 2005 WL 8163719 (C.D. Ill. Oct. 5, 2005), *report and recommendation adopted*, 2005 WL 8163684 (C.D. Ill. Nov. 7, 2005) and 2005 WL 3543833 (C.D. Ill. Dec. 28, 2005), *aff'd*, 469 F.3d 667 (7th Cir. 2006), *cert. denied*, 550 U.S. 960 (2007); *People v. Savory*, No. 77 CF 565, 2004 WL 5540566 (Ill. Cir. Ct. June 29, 2004); *see also* App. 3–4 .

[2] Illinois recognizes two forms of pardons, one based upon innocence and the other without reference to innocence. *See Walden v. City of Chicago*, 391 F. Supp. 2d 660, 671 (N.D. Ill. 2005) (citing *People v. Chiappa,* 368 N.E.2d 925, 926-27 (1977)). "[G]uilt … is absolved … only where the [pardon] states that it is based upon …innocence…. [A] general pardon ... does not absolve the defendant from guilt but forgives him for having committed the offense.'" *Id.*

award Savory a pardon based on innocence, and he provided no explanation for his decision. (*Id*.)

B. Procedural Background

1. The District Court Dismisses the Lawsuit.

On January 11, 2017, more than five years after his release from custody and two years after receiving his pardon, Savory sued Petitioners under §1983 for: coerced confession, deprivation of liberty without probable cause, deprivation of a fair trial, and failure to intervene. (App. 4–5.)

Petitioners moved to dismiss on several grounds, including that Savory's §1983 suit was time-barred because it was not filed within two years of its accrual on December 6, 2011[3]—the day his custody formally terminated upon the commutation of his remaining parole.[4] (App. 4.) In support, Petitioners cited several Seventh Circuit precedents holding that *Heck* no longer applies after an individual is released from custody and lacks access to habeas relief.[5] (App. 25.)

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[3] The statute of limitations for §1983 claims brought in Illinois federal courts is two years. *See Devbrow v. Kalu*, 705 F.3d 765, 767 (7th Cir. 2013).

[4] Savory also brought state law claims, which were dismissed after he conceded they were untimely under the one-year limitations period proscribed by the Illinois Tort Immunity Act, 735 Ill. Comp. Stat. § 10/8-101(a) (2020); *see also* App. 6.

[5] *See DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000); *Simpson v. Nickle*, 450 F.3d 303 (7th Cir. 2006); *Burd v. Sessler*, 702 F.3d 429 (7th Cir. 2012).

On December 1, 2017, the district court dismissed Savory's suit with prejudice on the basis that *Heck* tolled his claims through his imprisonment but not after his release from custody. (App. 79–89.) The court explained that *Heck* barred the use of §1983 to circumvent habeas corpus's statutory exhaustion requirement, so that "[w]hen habeas is not available, §1983 is[.]" (App. 85.)

2. The Seventh Circuit Panel Decision Reverses and Remands.

On January 7, 2019, a panel of the Seventh Circuit reversed, finding that, notwithstanding Savory's release from custody, *Heck* still tolled accrual of his suit until Illinois' governor favorably terminated his criminal case by granting him a general pardon. (App. 76.) The panel downplayed *Heck*'s stated concern for the potential collision between §1983 and habeas, and found that a former prisoner cannot *ever* challenge the legality of his conviction under §1983, unless and until he receives a "favorable termination" of his criminal case from a governor or state court. (App. 59–76.)

3. Petition for Rehearing *En Banc* Is Granted.

Petitioners requested rehearing *en banc,* contending that the panel decision conflicted with six Seventh Circuit decisions, was contrary to the pronouncement of five justices in *Spencer v. Kemna*, and incorrectly conditioned Savory's access to §1983 on his ability to obtain prior approval of the governor. (App. 98–99.) On March 6, 2019, the Seventh Circuit granted the petition. (App. 92.)

On July 1, 2019, the Seventh Circuit ordered supplemental briefing on this Court's June 20, 2019 decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), which applied *Heck* to bar a §1983 fabrication of evidence claim from accruing during the pendency of a criminal prosecution. (App. 57–58.) Petitioners argued that, in postponing accrual of a fabrication claim within the purview of habeas upon conviction, *McDonough* did not consider, and had no bearing on, whether *Heck* applied to ex-prisoners who lack access to habeas. (App. 142–152.) Savory countered that, after *McDonough*, *Heck* requires a favorable termination of a criminal proceeding before *any* §1983 claim implicating the conviction's legality can *ever* be filed. (App. 122–123.)

4. The *En Banc* Decision Reverses and Remands.

On January 7, 2020, the *en banc* Seventh Circuit, over one dissent, confirmed the panel decision reversing the district court. The court held that, notwithstanding Savory's release and the unavailability of habeas, "he had no complete cause of action until he received a favorable termination of his conviction, which occurred when the governor issued a pardon for the subject conviction." (App. 17.) In so holding, the court overturned, disavowed, and explained away several of its precedents, but noted that this Court may "revisit the need for the favorable termination rule in cases where habeas relief is unavailable." (App. 45–46.) The court did not address Defendants' concern that indefinitely postponing accrual on ex-prisoners' claims effectively eliminates

any finality to statutes of limitations already dramatically extended under *Heck*. Judge Easterbrook dissented, opining the appeals court should adopt Justice Souter's *Heck* concurrence and the views of five justices in *Spencer*, wherein "the end of custody marks the end of deferral[,]" because conditioning an ex-prisoner's access to a federal remedy on his ability to persuade a governor to grant a pardon "comes at a terrible price – the extinguishment of many substantively valid constitutional claims." (App. 47, 54.) Furthermore, "[i]t may take decades for official misconduct to come to light. Under the majority's rule this delay means that a §1983 claim will *never* accrue unless the former prisoner can obtain a pardon or certificate of innocence. On my view, by contrast, the claim accrues no later than release from prison." (*Id.* at 53 (emphasis in original).)

REASONS FOR GRANTING THE PETITION

I. Extending *Heck* to Ex-Prisoners Eviscerates the Finality Provided by Limitations Periods and Preclusion Doctrines and Impermissibly Requires Exhaustion of State Remedies.

A. *Heck*'s Favorable Termination Rule.

In *Heck*, the Court addressed an incarcerated prisoner's §1983 suit, which challenged the validity of his criminal conviction, thus placing it "at the intersection" of the federal habeas statute's exhaustion of state remedies requirement and §1983's exemption from any judicially imposed exhaustion requirement. 512 U.S. at 480 (citing 28 U.S.C. §2254 and *Patsy*, 457 U.S. at 501). To prevent the statutory collision, the

Court borrowed the favorable termination element of the most analogous common-law tort of malicious prosecution in holding that, "in order to recover damages for allegedly unconstitutional conviction or imprisonment[,] a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." *Heck,* 512 U.S. at 486-87. *Heck*'s adoption of malicious prosecution's favorable termination rule was prudent because it protected the exclusivity of statutory habeas, which implements principles of federalism by mandating exhaustion of state remedies in order to manage prisoners' collateral attacks on extant convictions.

But as Justice Souter explained in concurrence, once a prisoner is released from custody, the threat that §1983 can be used to circumvent habeas evaporates, as do the pragmatic concerns that spawned use of the favorable termination rule. *See Heck*, 512 U.S. at 500-02 (Souter, J., joined by Blackmun, Stevens, O'Connor, J.J., concurring). As a result, applying a *Heck* bar to ex-prisoners would "narrow the 'broad language' of § 1983" and "place at risk the rights of those outside the intersection of §1983 and the habeas statute, individuals not 'in custody' for habeas purposes[.]"

Because the *Heck* majority could not envision "real-life examples […] involving former state prisoners who, because they are no longer in custody, cannot bring

postconviction challenges[,]" it disagreed with Justice Souter's approach to treating an ex-prisoner differently. *Heck*, 512 U.S. at 490 n.10. In framing the issue as one of creation of a claim rather than exhaustion, the Court did not consider the implications to future plaintiffs and defendants alike of forestalling an otherwise viable §1983 claim until the plaintiff first pursued and prevailed on state law "postconviction challenges[,]" where a federal habeas remedy was unavailable. *See Heck*, 512 U.S. at 483. Specifically, the Court did not foresee how extending the favorable termination rule to ex-prisoners would harm civil defendants, such as those in the instant case, by subverting principles of finality embodied in statutes of limitations and preclusion doctrines, while simultaneously preventing deserving plaintiffs from advancing §1983 challenges to convictions based on new evidence for which no other federal remedy was available.

Four years after *Heck,* Justice Souter's concurrence garnered the approval of five justices in *Spencer v. Kemna,* 523 U.S. 1, 18-22, 25 n.8 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, J.J., concurring; Stevens, J., dissenting), based on the notion that the breadth of §1983 required an ex-prisoner to have access to *some* federal remedy where habeas was unavailable. Twenty-two years later, the issue is still unsettled. *See Muhammad*, 540 U.S. at 752 n.2.

B. Only Congress Can Require an Ex-Prisoner to Exhaust State Remedies Prior to Filing a §1983 Lawsuit.

Requiring favorable termination before an ex-prisoner can challenge a criminal conviction under §1983 cannot be squared with this Court's prohibition on exhaustion of state remedies. The Court has unequivocally announced it is not its "province to alter the balance struck by Congress in establishing the procedural framework for bringing actions under §1983." *Patsy*, 457 U.S. at 512. In reaffirming several decisions which rejected calls for exhaustion, *Patsy* confirmed 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," (*Id.* at 503 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880))), and that "Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of the state courts." *Patsy*, 457 U.S. at 506. In language particularly important here, *Patsy* emphasized that any judicially imposed exhaustion requirement was inconsistent with Congress's decision "to carve out only a narrow exception to [the no exhaustion] rule" in the case of adult prisoners. *Id.* at 508.

Just last year, in reliance on *Patsy*, and in an analogous context, the Court overruled *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)—which had required takings plaintiffs to win in state court before proceeding under §1983—as being in contravention of the "settled rule" that exhaustion of state remedies "'is *not* a prerequisite

to an action under [42 U.S.C.] §1983'." *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019) (quoting *Patsy*, 457 U.S. at 501). As a result, requiring takings plaintiffs to first seek compensation in state court violated the "guarantee[e of] a federal forum for claims of unconstitutional treatment at the hands of state officials[.]" *Id.* In reaching this decision, the Court explained that "[t]he 'general rule' is that plaintiffs may bring constitutional claims under §1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available." *Id.* at 2172-73 (citation omitted). "This is as true for takings claims as for any other claim grounded in the Bill of Rights."[6] *Id.* at 2173. The *Knick* Court recognized that "[t]he takings plaintiff finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his [§ 1983] claim will be barred in federal court." *Id.* at 2167. The 'catch-22' identified in *Knick* is identical to the quandary created by the lower court's extension of *Heck* to former prisoners: an ex-prisoner who discovers evidence of official misconduct after his release cannot go to federal court without going to a state court or executive first; but if he goes to either and loses, his §1983 claim will be barred in federal court.

[6] The *Knick* Court's analogizing of takings claims to other "claim[s] grounded in the bill of rights" defeats any contention that *Knick* was intended to be limited to the specific context of a takings claim.

C. Forcing *Heck* Onto Ex-Prisoners Is Detrimental to Plaintiffs by Requiring Exhaustion and to Defendants by Eliminating Finality.

As the *Heck* concurrence explained, further postponing accrual on claims by ex-prisoners would have closed the federal courthouse doors to a former slave who learned after his release that he was framed by Ku Klux Klan-controlled police, unless he "first managed to convince the state court that his conviction was unlawful."[7] *Heck*, 512 U.S. at 502; *see also Savory v. Cannon,* 947 F.3d 409, 434 (7th Cir. 2020) (Easterbrook, J., dissenting) (explaining that a §1983 claim by an ex-prisoner who learns decades after his release that he was framed by police "will *never* accrue unless [he] can obtain a pardon or certificate of innocence") (emphasis in original).

Moreover, the lower court's denial of a remedy to ex-prisoners who unsuccessfully pursue state remedies accords the states a level of deference which dwarfs that which is provided even under habeas's statutory scheme. Specifically, habeas requires exhaustion only where a federal court determines that state remedies are both available *and* adequate in safeguarding a

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[7] The *Heck* majority acknowledged such a claim might be barred, but added that, even without *Heck,* judicial immunity would have barred a claim against a "corrupt state judge in league with the Ku Klux Klan." *Heck*, 512 U.S. at 490 n.10 (citing *Pierson v. Ray*, 386 U.S. 547 (1967)). But there is a wide chasm between recognizing a common-law immunity which existed when §1983 passed (*see Pierson*, 386 U.S. at 554-55), and abrogating an entire class of claims based on broad deference to the states, which contravenes the purposes of the statute.

prisoner's constitutional rights. *See* 28 U.S.C. § 2254(b). By stark contrast, extending *Heck* to an ex-prisoner's §1983 claim requires no consideration of the adequacy of state remedies. To the contrary, the only way such a plaintiff can access federal court is by demonstrating that his criminal case was favorably terminated through *any* state-provided process, regardless of its adequacy.

Equally as damaging as the prejudice to potential plaintiffs is the significant harm to putative civil defendants created by the lower court's decision. By embracing a gubernatorial pardon as a favorable termination in this case, the lower court sanctioned a scenario that destroys the finality underlying statutes of limitations. "Predictability, a primary goal of statutes of limitations[,]" was presumably achieved when this Court mandated that a state's general personal injury statute of limitations governed §1983 claims. *Owens v. Okure*, 488 U.S. 235, 240-41 (1989). This enabled both plaintiffs and defendants to "readily ascertain, with little risk of confusion or unpredictability, the applicable limitations period." *Id.* at 248*; see also United States v. Kubrick*, 444 U.S. 111, 117 (1979) (explaining that statutes of limitations "protec[t] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise").

To be sure, limitations periods on §1983 claims challenging criminal convictions are already dramatically postponed by *Heck*, often for decades,

until a prisoner's conviction is overturned, expunged, or he is released. However, and as illustrated by the facts of this case, indefinitely postponing accrual, even after release, while the ex-prisoner repeatedly pursues a pardon, eliminates all predictability and clarity, frustrates the purposes and protections of the limitations period, and undermines a civil defendant's ability to properly defend stale claims. Already significantly delayed by 30 years of incarceration and a plethora of unsuccessful direct and collateral challenges to his conviction, by the time Savory sued in 2017, it had been more than five years since his release from custody and 40 years since the alleged constitutional violations occurred, in contravention of every policy underlying statutes of limitations. *See, e.g., 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).

D. A Governor's Unbridled Pardon Power Illustrates the Inequity of Applying *Heck* to Ex-Prisoners.

The inequity to defendants, attributable to the extension of *Heck*'s favorable termination rule to ex-prisoners, is exacerbated by the lack of any meaningful restrictions on the pardon process in most states. Here, Savory obtained a favorable termination even though his pardon was not premised on his innocence, but rather, on some other unstated premise which merely 'forgave' his offense.[8] (App. 41–42.) As a result,

[8] The lower court held, alternatively, that Petitioners waived the claim that the general nature of the pardon distinguished it from

Petitioners were at the mercy of a political prayer as the determinative factor on whether they could be sued under §1983 for alleged conduct which occurred 40 years earlier.[9] Indeed, as with most states, an Illinois governor's pardon power is not constrained by any standard of review or quantum of required evidence from the petitioner. *See* 730 Ill. Comp. Stat. § 5/3-3-13(a) and (e) (2020). The governor can grant, deny, or

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a pardon based on innocence for purposes of satisfying *Heck*'s favorable termination rule. (App. 43–45.) Petitioners did assert that position as an alternative basis for dismissal of the state law malicious prosecution claim (Id.), but did not press it on the §1983 claims because a dismissal on that limited basis would only have prolonged Petitioners' lack of finality, as Savory could forever pursue an innocence-based pardon. Petitioners emphasize the general nature of the pardon here, as they did below, as an additional illustration of why the *Heck* bar should drop away upon release from custody.

[9] Thirty-one states provide clemency processes where governors have few to no restrictions and are not bound by the recommendations of their clemency advisory boards. *See, e.g.,* Alaska Stat. § 33.20.080; Cal. Pen. Code §4800; COLO. CONST. art. IV, §7; HAW. CONST. art. V, §5; ILL. CONST. art. V, §12; IND. CONST. art. V, §17; IOWA CONST. art. IV, §16; KAN. CONST. art. I, §7; KY. CONST. §77; ME. CONST. art. V, §11; MD. CONST. art. II, §20; MICH. CONST. art. V, §14; MISS. CONST. art. V, §124; MO. CONST. art. 4, §7; MONT. CONST. art. VI, §12; N.H. CONST. pt. 2, art. 52; N.J. CONST. art. V, §2, ¶ 1; N.M. CONST. art. V, §6; N.Y. CONST. art. IV, §4; N.C. CONST. art. III, §5(6); N.D. CONST. art. V, §7; OHIO CONST. art. III, §11; OR. CONST. art. V, §14; S.D. CONST. art. IV, §3; TENN. CONST. art. III, §6; VT. CONST. ch. II, §20; VA. CONST. art. V, §12; WASH. CONST. art. III, §9; W. VA. CONST. art. VII, §11; WYO. CONST. art. IV, §5; *see also 50-State Comparison: Pardon Policy & Practice*, Restoration of Rights Project (May 2020) https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison characteristics-of-pardon-authorities-2/.

even ignore the petition at his discretion, without review.[10] *See* 730 Ill. Comp. Stat. § 5/3-3-13(e) (2020).

Further, the only consequence of the denial of a pardon in Illinois is a one-year waiting period before reapplication. *See* 730 Ill. Comp. Stat. § 5/3-3-13(a-5) (2020). Thus, when clemency is repeatedly denied, as it was here, the most that is required of the petitioner after each denial is to wait one year from the date of denial before reapplying.[11] *Id.* There is no endpoint to this process; it can continue on in perpetuity until a receptive gubernatorial ear is found. While these repeated entreaties are a citizen's right, the notion that a clandestine process—which grants unlimited bites at the apple and includes no measured standards for review—can subject police defendants to suit for decades-old conduct, eviscerates principles of finality embodied in limitations periods. *See McCleskey v. Zant*, 499 U.S. 467, 492 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.").

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[10] Nor is the governor's decision-making constrained by his hand-picked Prisoner Review Board, which serves at his pleasure. *See* 730 Ill. Comp. Stat. § 5/3-3-13(b) (2020).

[11] The one-year waiting period may be waived if the petitioner can provide new information previously unavailable at the time of his prior filing or demonstrate that he has a compelling change of circumstances that has arisen since the denial of his clemency petition. *See* 730 Ill. Comp. Stat. §5/3-3-13(a-5) (2020).

E. Traditional Preclusion Doctrines are Eviscerated when *Heck* is Applied to Ex-Prisoners.

The lower court reasoned that applying *Heck* to former prisoners was necessary to ensure that claims filed by plaintiffs like Savory, "who obtained a pardon several years after release from custody and who may have the most meritorious claims[,]" would not be barred by *res judicata* and collateral estoppel if filed before obtaining a favorable termination. (App. 18–19.) This reasoning reflects a fundamental misunderstanding of the interaction between traditional preclusion doctrines, *Heck*, and §1983. Critically, *Heck* was intended to prevent premature §1983 challenges to extant convictions (*see Heck,* 512 U.S. at 499), not as an affirmative tool for plaintiffs to circumvent *res judicata*, collateral estoppel, or *Rooker-Feldman*.[12]

In that respect, the lower court was correct when it emphasized that, without a *Heck* bar, *res judicata* would render claims like Savory's "dead on arrival" if filed within two years of release. (App. 17.) But that is precisely as it should have been, because, as the lower court recognized, the wholesale rejection of all of Savory's prior state and federal challenges to his conviction entitled those final judgments to the same full faith and credit in federal court as they would have

[12] The *Rooker-Feldman* doctrine essentially prohibits lower federal court review of adverse state court judgments. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983); *see also Skinner v. Switzer*, 131 S. Ct. 1289, 1291-92 (2011).

been accorded in state court. (App. 17 (citing *Allen v. McCurry*, 449 U.S. 90, 96 (1980)); *see also supra,* note 1. Indeed, principles of finality underlying preclusion doctrines are "essential to the operation of our criminal justice system," and should not be lightly tossed aside. *Foster v. Chatman*, 136 S. Ct. 1737, 1759 (2016) (Alito, J., concurring) (quotation omitted).

Unquestionably, the lower court construed *Heck* as a sword to circumvent traditional comity-based preclusion doctrines, but that was never *Heck*'s intent. Where a plaintiff has unsuccessfully litigated multiple rounds of post-conviction and habeas proceedings over 30 years, putative defendants should have solace that §1983 claims based on the same contentions will fail under traditional preclusion defenses which, like limitations periods, are intended to provide finality. However, by applying *Heck*'s favorable termination rule to ex-prisoners, the decision below eliminates finality and allows ex-prisoners to repeatedly petition governors for relief in order to trigger a §1983 claim that will be impervious to those preclusion doctrines. *Cf.* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452-53 (1963) ("There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.").

On the other hand, the lower court's suggestion that traditional preclusion doctrines are impenetrable and will bar even well-founded claims in the absence of a *Heck* bar is simply wrong. (App. 17–19.) The lower court critically overlooked specific equitable exceptions

which are common to *res judicata* and collateral estoppel–yet ironically unavailable in a *Heck* analysis–which ensure that deserving plaintiffs are not unfairly denied a federal forum. Specifically, "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen*, 449 U.S. at 95 (citation omitted). Similarly, "the [r]edetermination of issues [overcomes *res judicata*] if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481 (1982) (citation omitted). Accordingly, as in Justice Souter's Ku Klux Klan example, a plaintiff who discovers new evidence that he had been framed by police—after his release and through no fault of his own—would not be precluded from suing if he had not had a "full and fair opportunity" to previously litigate the issue.

But *Heck*, by contrast, is not an equitable doctrine, and its bar to the creation of a cause of action in the absence of a favorable termination, speaks of no equitable exceptions. As a result, under the lower court's decision, an ex-prisoner who learns of new evidence of his innocence is forever barred from federal court unless he first persuades a governor or state court to approve his claim, whereas even a current prisoner can invoke equitable exceptions in appropriate cases to allow second or subsequent habeas petitions that would otherwise be procedurally barred. *See Schlup v. Delo*, 513 U.S. 298, 319, 324 (1995) (explaining that the "equitable nature of *habeas corpus*" overcomes procedural bars to prevent a

"fundamental miscarriage of justice" when a prisoner possesses "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial"). To be sure, by "[e]xplicitly tying the miscarriage of justice exception to innocence," this Court sought to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in extraordinary cases." *Schlup*, 513 U.S. at 322, 324. This balance is lost when rigidly applying *Heck* to all ex-prisoners.

II. The Circuits Need a Clear Rule to Resolve the Deep Inter-Circuit Conflict.

The lower court's decision in the instant case amplifies the deep division among the circuits as to whether *Heck* drops away upon release, retains its full effect, or operates as a hybrid to bar some §1983 claims but not others. All of the circuits, as well as this Court, have acknowledged the issue is unsettled. *See, e.g., Muhammad*, 540 U.S. at 752 n.2 (stating "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement[.] This case is no occasion to settle the issue.") (internal citations omitted); *Savory*, 947 F.3d at 421 (acknowledging the "Supreme Court may eventually adopt Justice Souter's view, but it has not yet done so and we are bound by *Heck*['s footnote 10].").

As explained below, the lower court and several circuits extend *Heck* to ex-prisoners based on their view that *Heck*'s footnote 10 is binding, while downplaying

the significance of both *Muhammad*'s recognition in footnote 2 that the issue is unsettled, and the opinions of the five justices in *Spencer*. By contrast, other circuits embrace *Spencer* while concluding that *Muhammad*'s footnote 2 demonstrates that *Heck*'s footnote 10 was mere dicta. That said, even those circuits which follow *Spencer* disagree whether it requires that the *Heck* bar always be dropped upon release, or only for certain claims. Ultimately, the only area of circuit unanimity is the desire for this Court's guidance.

A. Four Circuits Follow *Spencer* and Drop *Heck* upon Release from Custody.

Initially, the Second Circuit held, in reliance on *Spencer* and in the context of an ex-prisoner's challenge to the duration of his confinement, that "because [plaintiff] has no habeas remedy because he has long since been released from [ ] custody[,]" his §1983 claims "must be allowed to proceed." *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001).[13] More recently, the Second Circuit applied *Huang* to a §1983 challenge to a conviction in *Poventud v. City of New York*, 715 F.3d 57 (2d Cir. 2013), *rev'd en banc on other grounds,* 750 F.3d 121, 125 n.1, 127 & n. 6 (2d Cir. 2014). But not all Second Circuit judges adhere to this view. *See Poventud,* 715 F.3d at 66-75 (Jacobs, J., dissenting); *Teichmann v. New York*, 769 F.3d 821, 828

[13] *See also Jenkins v. Haubert,* 179 F.3d 19 (2d Cir. 1999) (applying *Spencer* to challenge to validity of prison disciplinary hearings) and *Leather v. Eyck,* 180 F.3d 420 (2d Cir. 1999) (*Spencer*, not *Heck*, governs §1983 challenge to conviction which resulted in fine rather than imprisonment).

(2d Cir. 2014) (Livingston, J., concurring in part) (stating there is "much to recommend the view that *Heck* permits *no* exceptions") (emphasis in original).

The Fourth Circuit also holds that release from custody eliminates the *Heck* bar for all claims including challenges to criminal convictions, but only if the plaintiff can demonstrate that "he lacked access to federal *habeas corpus* while in custody." *Griffin v. Baltimore Police Dep't*, 804 F.3d 692, 697 (4th Cir. 2015). The Fourth Circuit has recognized that the *Heck* majority and *Spencer* have imparted mere dicta on this issue, providing "grist for circuits on both sides of this dilemma" and leaving the courts "with no directly applicable precedent upon which to rely." *Wilson v. Johnson*, 535 F.3d 262, 267 (4th Cir. 2008)*; see also Covey v. Assessor of Ohio Cty.*, 777 F.3d 186 (4th Cir. 2015) (§1983 challenge to a conviction, which resulted in home confinement, was not *Heck* barred where the plaintiff lacked access to habeas).

Similarly, the Sixth Circuit interprets *Spencer* as requiring the elimination of the *Heck* bar upon release, but only if the plaintiff "was precluded 'as a matter of law' from seeking habeas redress[.]" *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 601-03 (6th Cir. 2007). The Sixth Circuit more recently reaffirmed that position in the context of a sentencing challenge, stating it follows "Justice Souter's 'holding' as law," even though "in the 15 years since *Spencer*, the Supreme Court has never recognized such an exception[.]" *Harrison v. Michigan*, 722 F.3d 768, 774 (6th Cir. 2013), *cert. denied,* 571 U.S. 1174 (2014). The *Harrison* court lamented, "[i]n the wake of *Spencer*, a

circuit split has developed concerning the significance of Justice Souter's concurring opinion, with several circuits convinced it must be *dictum* because it was unnecessary to the holding of the case (*i.e.*, that Spencer's habeas claim was moot), and other circuits, including our own, equally convinced that because a majority of the court endorsed it, the concurring opinion created an exception to *Heck*'s favorable termination requirement." *Id.* at 773-4 (citing *Powers*, 501 F.3d at 601); *see Sumpter v. Atkins*, 2013 WL 8178399 (E.D. Mich. Dec. 6, 2013) (holding *Spencer* and *Powers* govern in context of ex-prisoner's §1983 challenge to legality of conviction).

Lastly, in *Cohen v. Longshore*, the Tenth Circuit held, in reliance on *Spencer*, that an ex-prisoner who "has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a §1983 claim." 621 F.3d 1311, 1317 (10th Cir. 2010). The court also referenced *Muhammad*'s footnote 2 in recognizing that absent further guidance from this Court "this issue [is] an unsettled one." *Id.* at 1316*; see also Klen v. City of Loveland, Colo.,* 661 F.3d 498, 515-16 (10th Cir. 2011) (holding challenge to extant conviction is not barred by *Heck* where the plaintiff lacked access to habeas).

B. Seven Circuits Reject *Spencer* as *Dicta* in Favor of *Heck*'s Footnote 10.

Before this case, the Seventh Circuit had faithfully followed *Spencer* in proclaiming it would not apply *Heck* in a way that would "contravene the pronouncement of five [then] sitting Justices…[who] hold the view that a §1983 action must be available to

challenge constitutional wrongs where federal habeas is not available." *DeWalt v. Carter*, 224 F.3d 607, 616-17 (7th Cir. 2000).[14] But in this case, the lower court reversed that position and declared "the dicta of five Justices in *Spencer* did not overrule the holding and reasoning of *Heck*." (App. 33.) In doing so, the lower court concluded it had ventured too far in following *Spencer* and repudiated all language "suggesting that a section 1983 remedy must be available when habeas relief is unavailable is in conflict with footnote 10 of *Heck*[.]" (App. 28.) The lower court bolstered the Seventh Circuit's retreat from *Spencer* with an expansive view of *McDonough*, which did not involve an ex-prisoner, but concerned only whether a fabrication of evidence claim accrued during the pendency of a criminal prosecution.

The Ninth Circuit has similarly evolved since first holding that "[i]nformed as we are by the opinions in *Spencer*, we conclude that *Heck* does not preclude" a §1983 action where plaintiff has no habeas remedy. *Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002). More recently, the Ninth Circuit opted to confine *Spencer* to "former prisoners challenging loss of good-time credits, revocation of parole or similar matters, not challenges to an underlying conviction" and not to

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[14] *See also, e.g., Simpson*, 450 F.3d at 307 (applying *Spencer* to conditions of confinement claim); *Burd*, 702 F.3d at 429 (paving way to claim based on interference with prisoner's ability to withdraw guilty plea); *Whitfield v. Howard*, 852 F.3d 656, 664 (7th Cir. 2017) (retaliatory revocation of good time credits); *Hoeft v. Joanis*, 727 F. App'x 881, 883 (7th Cir. 2018) (claim that plaintiff was framed and wrongfully convicted); and *Sanchez v. City of Chicago*, 880 F.3d 349, 356 (7th Cir. 2018) (same).

persons who could have, but did not seek, "direct appeal or post-conviction relief." *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 & n.12 (9th Cir. 2015) (internal quotations omitted); *see also Taylor v. County of Pima*, 913 F.3d 930 (9th Cir. 2019) (*Heck* barred ex-prisoner's §1983 challenge to criminal conviction based on absence of a favorable termination), *cert. denied*, 2020 WL 1325851 (Mar. 23, 2020).

Similarly, the First, Third, Fifth, and Eighth Circuits have consistently held that *Spencer* notwithstanding, *Heck*'s footnote 10 requires that the favorable termination rule be applied universally to all §1983 claims alleging unconstitutional conviction. *See, e.g., 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). But even these circuits trumpet the unrelenting uncertainty and need for unification.

For instance, the First Circuit is "mindful that [five Justices]…in *Spencer v. Kemna*, may cast doubt upon the universality of *Heck*'s 'favorable termination' requirement." *Figueroa*, 147 F.3d at 81 n.3. The Third Circuit acknowledges that since *Spencer,* "it has remained an unsettled issue before the Supreme Court whether the 'unavailability of habeas [may] dispense with the *Heck* requirement." *Deemer*, 557 F. App'x at 165 (citing *Muhammad*, 540 U.S. at 752 n.2). The Fifth Circuit is "mindful" that five Justices sought to "relax *Heck's* universal favorable termination requirement" but opined it must follow *Heck* "even if that precedent

appears weakened[.]" *Randell*, 227 F.3d at 301; *accord Black v. Hathaway*, 616 F. App'x 650, 652-4 (5th Cir. 2015) (explaining that *Muhammad*'s footnote 2 suggests this Court views *Heck*'s footnote 10 as mere dicta). And as the Eighth Circuit sees it, "[a] landscape consisting of *Heck* and the collection of opinions in *Spencer* has resulted in a conflict in the circuits about the scope of *Heck*'s favorable termination rule." *Newmy v. Johnson*, 758 F.3d 1008, 1010 (8th Cir. 2014); *see also id*. at 1012 (Kelly, J., concurring) (stating that *Spencer* has "cast doubt on [the] broad reading of *Heck*").

Finally, the Eleventh Circuit initially followed *Spencer* in concluding that *Heck* would not apply where habeas was unavailable because "five justices hold the view that, where federal *habeas corpus* is not available to address constitutional wrongs, §1983 must be." *Harden v. Pataki*, 320 F.3d 1289, 1298 (11th Cir. 2003) (quotation omitted). But since *Pataki*, the Eleventh Circuit has retreated and now holds that notwithstanding the unavailability of habeas, *Heck* still bars claims by ex-prisoners unless and until they obtain a favorable termination of their convictions through state court post-conviction proceedings. *See Domotor v. Wennet*, 356 F. App'x 316 (11th Cir. 2009) (affirming the district court analysis in *Domotor v. Wennet*, 630 F. Supp. 2d 1368, 1378-81 (S.D. Fla. 2009)). In so holding, the Eleventh Circuit makes explicit what is implicit in the position taken by all those federal circuits which apply a favorable termination rule to claims brought by ex-prisoners: that they must exhaust and indeed prevail through state remedies before they can file suit under §1983.

III. Contrary to the Seventh Circuit's Holding, *McDonough v. Smith* Did Not Decide or Inform the Questions Presented Here.

This petition asks whether applying *Heck* to ex-prisoners:

- improperly deprives putative defendants of the finality embodied in statutes of limitations;
- impermissibly allows undeserving plaintiffs to use the *Heck* bar as a sword to circumvent limitations periods and traditional preclusion doctrines; and
- unconstitutionally imposes an exhaustion of state remedies requirement that blocks deserving plaintiffs' access to federal court.

Contrary to the lower court's analysis, the Court's decision in *McDonough v. Smith*, addressed none of these concerns, nor did it help fuse the circuit split, described above. On the contrary, *McDonough* examined a wholly separate and narrow issue: whether a fabrication of evidence claim accrued and thus could be filed during the pendency of a criminal prosecution in which the disputed evidence was introduced. 139 S. Ct. at 2154-55. Throughout that opinion, the Court emphasized that it was not addressing any accrual rules for claims that were not before the Court. *See id.* at 2155 n.2, 2160 n.10.

Erroneously, the lower court concluded that *McDonough*, which sensibly applied *Heck* to bar accrual of a fabrication claim in the midst of a criminal prosecution, also bars released prisoners from utilizing

§1983 unless and until their convictions are favorably terminated. (App. 1–46.) Yet, *McDonough* said nothing about the application of *Heck* when habeas is not implicated, and to the contrary emphasized that "the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus[.]" 139 S. Ct. at 2158. Nor did *McDonough* mention the long-standing conflict between *Heck*'s footnote 10 and *Spencer*, neither of which were even cited, or any other decision which has considered whether extending *Heck* beyond the realm of habeas deprives both deserving plaintiffs of *any* federal remedy and putative civil defendants of *any* finality. To be sure, the claims in both *Heck* and *McDonough* undeniably threatened to circumvent habeas's exclusivity requirement; *McDonough* concerned the prospect of §1983 being used to derail a pending prosecution, and *Heck* involved circumvention of habeas exclusivity by a prisoner under sentence. Both cases involved the potential collision between §1983 and habeas which spawned *Heck*; whereas claims by ex-prisoners trigger no such concern.

At bottom, the essence of *McDonough* was an overriding concern that parallel litigation created by concurrent §1983 civil suits and criminal trials "would run counter to core principles of federalism, comity, consistency, and judicial economy;" principles intended to minimize federal interference in state criminal proceedings and avoid circumvention of habeas exclusivity. 139 S. Ct. at 2158; *see also Heck*, 512 U.S. at 485-87. Yet, *Heck* was never intended—and as explained above, is not at all needed—to curtail §1983 cases brought by released prisoners for which the full

array of comity-based preclusion doctrines, including *res judicata*, collateral estoppel, and *Rooker-Feldman* are readily available. (*See supra* note 12.) Unlike limited discretionary abstention, which was "poorly suited" to reduce "two-track" litigation concerns in *McDonough*, these doctrines vigilantly safeguard federalism concerns by ensuring that suits from ex-prisoners, who have unsuccessfully litigated constitutional claims through direct appeal, post-conviction, and/or habeas, will meet a prompt end to what could otherwise be endless litigation. 139 S. Ct. at 2158–59.

IV. This Case Is an Excellent Vehicle to Resolve the Critical Questions Presented.

The questions presented here are critical to §1983 plaintiffs and defendants, and to the courts and society. They strike at the heart of the underlying purposes of §1983, particularly whether the federal courts can engraft an exhaustion of state remedies requirement onto a specific class of §1983 plaintiffs. While *Heck* promotes federalism by preventing the circumvention of statutory habeas, extending it to ex-prisoners impermissibly allows the states to be the gatekeepers of §1983: granting or denying an ex-prisoner's access to federal court, irrespective of whether he discovered new evidence demonstrating he was wrongly convicted. On the flip side, applying the *Heck* bar to ex-prisoners punishes putative police defendants by providing plaintiffs with a tool to revive long dormant claims at the whim of state officials. Once revived, the pardon unjustly renders the civil claims impervious to

traditional preclusion doctrines, including *res judicata* and collateral estoppel.

The conflicting views on this important and divisive issue can be neatly addressed under the straightforward fact pattern presented here and, as a result, this case presents a perfect vehicle for its resolution. It is unencumbered by the kinds of complications which forced a narrow decision in *McDonough* that failed to provide useful guidance beyond the confined claim presented. *See* 139 S. Ct. at 2155 n.2, 2160 n.10. It is not at all fact-specific and presents a clean question the Court has never addressed concerning whether the federal courts can (given prohibitions against judicially imposed exhaustion) and should (given the demonstrated inequities) apply *Heck* beyond the context of claims within the purview of habeas. Furthermore, the question is undoubtedly ripe, having divided the lower courts for a quarter-century, resulting in a disturbing lack of uniformity on a fundamental question concerning the scope of the Civil Rights Act.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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