No. 19-47

In the Supreme Court of the United States

JERYME MORGAN, PETITIONER,
v.
MINH SCHOTT, TIM VEATH, AND HUDSON MAYNARD, RESPONDENTS.

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

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Whether a prisoner may circumvent the *Heck* bar by not seeking damages for the part of a disciplinary decision affecting the duration of his sentence where his claim, if successful, would still imply the invalidity of the punishment as a whole.

RELATED CASES

- *Morgan v. Maynard, et al.*, No. 3:13-cv-00881-SCW, U.S. District Court for the Southern District of Illinois. Judgment entered May 16, 2016.
- *Morgan v. Schott, et al.*, No. 16-2384, U.S. Court of Appeals for the Seventh Circuit. Judgment entered February 5, 2019.

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BRIEF IN OPPOSITION

In *Heck v. Humphrey*, 512 U.S. 477 (1994), and subsequent cases, this Court drew a line between claims that are cognizable under the federal habeas corpus statute and claims that are cognizable under 42 U.S.C. § 1983. Challenges to the validity of a prisoner's confinement or its duration are governed by habeas corpus, while challenges to the conditions of confinement may be brought under Section 1983. *Hill v. McDonough*, 547 U.S. 573, 579 (2006). Prisoners are therefore barred from bringing Section 1983 actions if judgment in their favor would necessarily imply the invalidity of their confinement or its length unless they first obtain a favorable termination of the conviction, sentence, or discipline through habeas or available state remedies. *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005).

Petitioner's due process claim challenged the validity of a prison disciplinary decision revoking good conduct credits and imposing other penalties. Because this challenge pertained to the duration of his confinement, it is among those claims that must proceed under habeas. The Seventh Circuit correctly affirmed the dismissal of the claim because petitioner instead chose to bring it under Section 1983.

Petitioner, however, contends that he should have had the option to proceed under Section 1983 because he offered to waive damages for the part of the sanction revoking good conduct credits, as the Second Circuit permitted in *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006). He argues that the Second Circuit's approach aligns more closely with this Court's prece-

dent and that certiorari is required to resolve this circuit split.

But this Court's review is unnecessary because no other circuit has adopted *Peralta*, while most have yet to have an opportunity to weigh in. And it is unlikely that any other circuit will join the Second because *Peralta* is incompatible with this Court's precedent. In addition, the question presented by this petition is of limited importance because there is no risk that prisoners will be prevented from pursuing their constitutional claims under either approach; the dispute centers only on the appropriate forum for raising these claims. Finally, even if this Court were inclined to decide the question presented, this case is a poor vehicle for doing so because resolution of the question in petitioner's favor is unlikely to bring him relief.

STATEMENT

1. Petitioner Jeryme Morgan, an inmate in the custody of the Illinois Department of Corrections ("Department"), was charged with multiple prison rule violations for participating in the beating and stabbing of two inmates. Dist. Ct. Doc. 100-1 at 15-17. Specifically, petitioner was charged with conspiring with fellow gang members to attack the victims, joining in the attack, possessing dangerous contraband, causing a dangerous disturbance, interfering with the investigation into the attack, and participating in gang activity. *Ibid.*

Petitioner received a disciplinary report detailing the charges and allegations against him and advising him of his right to respond and present evidence at a hearing conducted by the prison Adjustment Commit-

tee ("Committee"). *Id.* at 15. The report included a detachable form that petitioner could use to request witnesses to testify at the hearing. *Ibid.* Petitioner filled in parts of the form, writing "James Lewis" in the space reserved for the requested witness's name and the words "James Lewis" and "where abouts" in the space for a summary of the witness's anticipated testimony. *Ibid.*

Respondents Minh Schott and Tim Veath served on the Committee, which, following a hearing, found petitioner guilty of all charges. *Id.* at 22-23. The Committee recommended revoking three months of good conduct credits, placing petitioner in segregation and on reduced status for one year, and restricting his access to the commissary (one year) and the yard (three months), as well as his visitations (six months). *Id.* at 23. Those recommendations were adopted by the prison's Chief Administrative Officer. *Ibid.*

Petitioner filed a grievance asserting that the Committee violated his right to due process by not calling Lewis to testify at the hearing. *Id.* at 86-87. A grievance officer denied the grievance, finding no due process violation, and the Chief Administrative Officer concurred. *Id.* at 89. Petitioner appealed to the prison's Administrative Review Board, *ibid.*, which generally denied the grievance but reversed the guilty findings on the interference and dangerous contraband charges, *id.* at 91-92. The Department Director upheld that decision, *id.* at 92, and approved a reduction in the revocation of good conduct credits from three months to one, *id.* at 96.

2. Petitioner brought an action for damages under Section 1983, asserting various constitutional claims

against multiple prison officials. Dist. Ct. Doc. 2 at 1-6. Relevant here, petitioner alleged that Schott and Veath violated his right to due process by not calling Lewis as a witness at the disciplinary hearing. *Id.* at 5; Dist. Ct. Doc. 50.[1]

Schott and Veath moved for summary judgment, contending that petitioner's claim was barred under *Heck* because a judgment in his favor—that the Committee's hearing did not comport with due process—would necessarily imply that the ensuing disciplinary decision and sanction, including the loss of good conduct credits, were invalid. Dist. Ct. Doc. 77 at 4-5. Schott and Veath also argued that they were entitled to judgment on the merits because due process does not require a prison official to call a witness whom an inmate has not properly requested, and petitioner, who only partially completed the witness-request form, failed to include enough information to show why Lewis's testimony would have been relevant. *Id.* at 5-7. In the alternative, respondents argued that they were entitled to qualified immunity because petitioner had no clearly established right to the participation of a witness whom he failed to properly request. *Id.* at 7-9.

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[1] Petitioner also alleged a retaliation claim against Schott, Veath, and Respondent Hudson Maynard. Dist. Ct. Doc. 2 at 5. That claim and the due process claim were severed from unrelated claims against other defendants and proceeded as a separate case, *id.* at 4; Dist. Ct. Doc. 50; petitioner did not challenge the resolution of the retaliation claim or other unrelated claims on appeal or in his certiorari petition.

Petitioner, who was now represented by counsel, responded that his action was not subject to *Heck*'s favorable-termination requirement, arguing for the first time that he was not challenging the part of the sanction that revoked good conduct credits. Dist. Ct. Doc. 96 at 5-9. To that end, he attached an affidavit in which he stated that his due process claim challenged only the part of the sanction affecting his segregation, status, and privileges, but confirmed that his claim was still based on the allegation that respondents failed to call a witness. Pet. App. 23a-26a. He also purported to waive any claims regarding the loss of good conduct credits. *Id.* at 25a-26a.

The district court granted summary judgment to respondents, holding that petitioner's due process claim was barred by *Heck*. Pet. App. 18a-20a. The court reasoned that petitioner's challenge to the disciplinary hearing's procedures necessarily implied the invalidity of the disciplinary decision. *Id.* at 19a. Petitioner's waiver of any claim for damages based on the revocation of good conduct credits did not alter the analysis. *Id.* at 18a.

3. The Seventh Circuit affirmed, holding that a judgment in petitioner's favor on his due process claim "would necessarily imply the invalidity of his prison discipline." *Id.* at 2a-3a. A favorable judgment, it explained, "would amount to a judicial determination that prison officials infringed [petitioner's] constitutional rights by failing to call a witness in his defense, rendering the proceeding unfair." *Id.* at 11a. In reaching this conclusion, the court rejected petitioner's "strategic waiver" of certain damages as "incompatible with the *Heck* line of cases" and foreclosed by circuit precedent. *Id.* at 2a-3a. It pointed

out that the court had already rejected *Peralta* in *Haywood v. Hathaway*, 842 F.3d 1026 (7th Cir. 2016), and "[saw] no reason to change course." Pet. App. at 8a-9a. To that end, the court reasoned that *Heck*'s favorable-termination rule—which it likened to a version of issue preclusion under which "a disciplinary sanction, as long as it stands, blocks any inconsistent civil judgment"—was grounded in substantive concerns about allowing conflicting judgments that *Peralta* failed to consider. *Ibid.* (internal quotations omitted). The notion that the existence of a Section 1983 claim could turn on the specific relief that a prisoner requested also ran afoul of *Heck*'s holding that the claim does not accrue until the conviction, sentence, or discipline has been invalidated. *Id.* at 9a.

The Seventh Circuit, "in the interest of completeness," also addressed petitioner's new argument that his claim was not barred as a threshold matter under *Wilkinson v. Dotson*, 544 U.S. 74 (2005), and *Skinner v. Switzer*, 562 U.S. 521 (2011). *Id.* at 10a-12a. It concluded that petitioner's challenge to the hearing that generated the sanction was "entirely backward looking," defeating his attempt to analogize this case to *Wilkinson* and *Skinner*, which recognized that certain forward-looking claims were cognizable under Section 1983. *Ibid.* Unlike the claims in *Wilkinson* and *Skinner*, a judicial determination that petitioner's hearing violated due process "would straightforwardly imply the invalidity of his punishment, triggering *Heck*'s favorable-termination rule." *Id.* at 11a.

Finally, the Seventh Circuit noted that petitioner at one time had, and may still have, remedies available in state court to challenge the disciplinary decision and, after exhausting state review, could seek relief

under the federal habeas corpus statute. *Id.* at 12a-13a. Thus, the court modified the district court's judgment to reflect that petitioner's due process claim was dismissed without prejudice. *Id.* at 13a.

REASONS FOR DENYING THE PETITION

Petitioner's request for certiorari flows from his argument that the circuits are deeply split over whether a prisoner challenging a disciplinary decision may avoid the *Heck* bar simply by limiting his request for relief to damages associated with the non-durational aspect of his punishment. But petitioner overstates the extent of the conflict. Only the Second Circuit has permitted prisoners challenging their disciplinary decision to evade *Heck* by disclaiming damages for the portion of a sanction that revoked good conduct credits. The other decisions cited in the petition do not involve challenges to disciplinary decisions and instead simply reflect the uncontroversial proposition that prisoners may bring a separate claim challenging their conditions of confinement under Section 1983.

Moreover, it is unlikely that any other circuit would join the Second because *Peralta* is incompatible with this Court's precedent. Unlike the *Heck* line of cases, which examines the claim's allegations to determine if success on the merits would imply the invalidity of a disciplinary decision and associated punishment, *Peralta* looked to the scope of the requested relief. By shifting the focus from the nature of the claim to the relief requested, the Second Circuit departed from this Court's precedent. Indeed, the single circuit other than the Seventh that has had an opportunity to address the question presented (albeit

in a slightly different context) rejected *Peralta*'s approach. See *Skinner v. U.S. Dep't of Justice & Bureau of Prisons*, 584 F.3d 1093, 1099-1100 (D.C. Cir. 2009), cert. denied, 562 U.S. 946 (2010).

The shallow split between the Second Circuit, on the one hand, and the Seventh and District of Columbia Circuits, on the other, does not warrant this Court's attention. Neither analysis prevents prisoners from litigating their constitutional claims because any challenges barred by *Heck* could have been raised through habeas; thus, the issue goes only to the correct vehicle for raising these claims. And even if the question presented warranted this Court's review, this case is a poor vehicle for answering it. Because petitioner waived his challenge to the revocation of good conduct credits, he may not be able to establish the deprivation of a liberty interest necessary for a due process claim. And, even if he could, respondents would be entitled to qualified immunity because petitioner had no clearly established right to have a witness called whom he had not properly requested. The certiorari petition should be denied.

I. *Peralta* Has Not Been Followed By Any Other Circuit.

In *Peralta*, a prisoner brought a Section 1983 action challenging the sufficiency of a disciplinary proceeding that resulted in a sanction affecting both the duration and the conditions of his confinement. 467 F.3d at 101. The Second Circuit recognized that *Heck* would normally bar his claims because the asserted procedural defect, "if established, would necessarily imply the invalidity of that punishment." *Id.* at 103. Yet the court held that the prisoner could

pursue his claims under Section 1983 if he waived any challenge to the part of the sanction affecting the duration of his confinement. *Id.* at 104. Without explaining how a claim attacking the procedure that led to the entire sanction could challenge only the part affecting the conditions of confinement, the court remanded to allow the prisoner to waive any claims implicating the length of his incarceration and proceed on those affecting its conditions. *Id.* at 105-106.

No other circuit has followed *Peralta*'s approach. None of the circuit decisions identified in the petition, all of which are unpublished and were decided after *Peralta*, see Pet. 11-13, adopted its reasoning or even cited it. Those decisions, moreover, stand for the uncontroversial proposition that *Heck* imposes no barrier to a Section 1983 claim challenging only the conditions of confinement.

In *Slack v. Jones*, 348 F. App'x 361 (10th Cir. 2009), for example, a prisoner claimed that a disciplinary proceeding, which resulted in a lengthier sentence and placement in segregated housing, violated due process and also that the conditions in segregation violated the Eighth Amendment. *Id.* at 362. The Tenth Circuit held that although the due process claim was barred because a favorable judgment would imply the invalidity of the disciplinary charges and sanction imposed, the Eighth Amendment claim could proceed because it implicated only the conditions of segregation. *Id.* at 364.

Similarly, in *Brownlee v. Murphy*, 231 F. App'x 642 (9th Cir. 2007), the Ninth Circuit remanded a prisoner's Section 1983 action to the district court to determine whether the prisoner had pled "a separate due

process challenge to the manner of his confinement." *Id.* at 644. The court explained that "[t]o the extent the § 1983 claim challenges only the manner of confinement, rather than its duration, *Heck* would not bar it from proceeding." *Ibid.* The dissenting judge disagreed with the majority's characterization of the complaint, finding that the prisoner sought to overturn the decision that revoked good conduct credits and concluding that it was "precisely the type of § 1983 action barred by *Heck*." *Id.* at 645 (Bybee, J., dissenting). In any event, because the court remanded for the district court to determine the nature of the prisoner's claim so it could decide if the action was barred, it did not confront the question whether a prisoner may evade *Heck* by challenging a disciplinary decision yet seeking damages for only the non-durational portion of the punishment.

Petitioner notes that a single district court within the Ninth Circuit relied on *Brownlee* and *Peralta* to permit the strategic waiver he proposes. Pet. 12 (citing *Brown v. Marshall*, No. CIV S-07-0956 MCE DAD P., 2009 WL 2905779 (E.D. Cal. 2009)). But he fails to mention that another, more recent decision from that same district rejected *Peralta*, opting to follow the Seventh Circuit's reasoning in *Haywood* instead. See *Galicia v. Marsh*, No. 1:16-cv-00011-DAD-SAB (PC), 2017 WL 1837074, at *5-6 (E.D. Cal. 2017). Thus, contrary to petitioner's suggestion, Pet. 11-12, neither the Ninth Circuit nor district courts within that circuit follow *Peralta*.

Petitioner's suggestion that the Eleventh Circuit "would agree with" *Peralta*, Pet. 12, is likewise incorrect. In *Smith v. Villapando*, 286 F. App'x 682 (11th Cir. 2008), a prisoner was found guilty of two rule

violations and, while one resulted in the loss of good conduct credits, the other did not. *Id.* at 684. The prisoner challenged only the violation that did not result in lost credits, and his allegations were aimed at the procedure by which that distinct finding was made. *Id.* at 684-685. As a result, the Eleventh Circuit was not asked to, and did not, decide how *Heck*'s favorable-termination requirement applies where, as here, a prisoner attacks a single disciplinary decision that provides for both durational and non-durational sanctions.

Thus, none of the circuit decisions in the petition adopted *Peralta*, cited it, or followed its reasoning. And while petitioner argues that three district court decisions outside the Second Circuit have adopted *Peralta*, see Pet. 12-13, none of these unpublished decisions provides a basis for the Court to grant certiorari. The first, as explained, preceded another decision from the same district that rejected *Peralta*. See *Brown*, 2009 WL 2905779, at *1 (following *Peralta*); *Galicia*, 2017 WL 1837074, at *5-6 (following *Haywood*). The second, which was decided before *Haywood*, followed *Peralta*, but without any reasoning. *Pollard v. Romero*, No. 07-cv-00399-EWN-KLM, 2008 WL 1826187, at *6 (D. Colo. 2008). And the third did not embrace *Peralta*, but instead applied it only to the extent that the prisoner alleged a conditions-of-confinement claim. *Gardner v. Lanigan*, No. 13-7064 (BRM) (DEA), 2018 WL 4144689, at *3 n.4 (D.N.J. 2018). Respondents have discovered no other decisions outside of the Second Circuit that allow

Peralta's strategic waiver.[2] Given that only two district court decisions have adopted *Peralta*'s reasoning in the 13 years since it was issued, petitioner is wrong to suggest that that "lower courts are intractably divided" over the question presented. Pet. 8.

Moreover, the Seventh Circuit is the only court of appeals to have examined *Peralta*'s reasoning, now twice rejecting it as inconsistent with this Court's precedent. See Pet. App. 8a-10a; *Haywood*, 842 F.3d at 1028-30. And only one other circuit has passed upon the issue (albeit in a slightly different context), and it took the same approach. In *Skinner v. U.S. Dep't of Justice & Bureau of Prisons*, 584 F.3d 1093 (D.C. Cir. 2009), the District of Columbia Circuit held that a federal prisoner's action under the Privacy Act, 5 U.S.C. § 552a, challenging a disciplinary decision

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[2] The additional district court decisions cited by the amicus do not reflect a "wide divergence" among district courts, NACDL Amicus Br. 6, because they cite *Peralta* only for its discussion of *Heck*, and not for its endorsement of the strategic waiver practice at issue here. See *Hughes v. Parker*, No. 1:17-cv-00009, 2018 WL 1138536, at *1 (M.D. Tenn. 2018) (citing *Peralta* for proposition that procedural challenges to disciplinary decisions are subject to *Heck*); *Paladin v. Rivas*, No. 05-cv-079-SM, 2007 WL 2907263, at *9 (D.N.H. 2007) (same, for proposition that *Heck* does not apply to claims that do not affect the length of confinement); *Petties v. Caruso*, No. 5:06-cv-72, 2007 WL 1032375, at *10 n.17 (W.D. Mich. 2007) (stating that favorable-termination rule confers "practical benefit of providing a district court reviewing a subsequent section 1983 claim with a well-developed record regarding the administration of the prisoner's sentence," and citing *Peralta*).

revoking good conduct credits and imposing non-durational sanctions was *Heck* barred. *Id.* at 1099-1100. The prisoner argued that his claims for damages associated with the non-durational sanctions should survive even if he could not seek damages for the loss of good conduct credits. *Id.* at 1099. But the court concluded that recovery on the non-durational claims "depends on overturning the adverse determination that also led to his loss of good-time credits," meaning that if he succeeded on those claims, "he would necessarily have demonstrated the invalidity of the latter." *Id.* at 1100.[3]

In short, at best the question presented implicates a split between *Peralta* and two other circuits. This shallow split does not warrant certiorari, particularly because, as now explained, the Seventh Circuit's decision below was correct, the question presented is not of great importance, and, even if it were, this case is a poor vehicle to decide it.

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[3] The Eighth Circuit reached a similar conclusion in *Portley-El v. Brill*, 288 F.3d 1063 (8th Cir. 2002), see Pet. 14-15, holding that a Section 1983 claim challenging a disciplinary ruling that revoked good conduct credits and imposed segregation was *Heck*-barred. The court did not decide the strategic waiver question, however, because the prisoner continued to seek damages for the revoked good conduct credits even after he abandoned his claim for an injunction to restore them. *Id.* at 1066-1067; see also *Darby v. Schuetzle*, Nos. 1:09-cv-004, 1:09-cv-005, 2009 WL 700631, at *5 n.2 (D.N.D. 2009) (stating the Eighth Circuit has not ruled on whether to adopt *Peralta*); *Moore v. Hoeven*, No. 1:08-cv-028, 2008 WL 1902451, at *7 n.7 (D.N.D. 2008) (same).

II. The Seventh Circuit's Decision Follows This Court's Precedent.

This Court resolved the potential overlap between the federal habeas corpus statute and Section 1983 in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), by holding that a prisoner's claim for an injunction to restore good conduct credits is cognizable only under the habeas statute, which is more specific than Section 1983, because "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement." *Id.* at 489-490.

In *Heck*, this Court built upon *Preiser*'s foundation and developed the favorable-termination rule, which instructs courts to distinguish between claims that may be brought under Section 1983 and those that are governed by habeas by focusing on the allegedly unlawful conduct rather than the remedy. 512 U.S. at 486-487. Specifically, the Court held that a Section 1983 claim that necessarily requires a prisoner to establish the invalidity of his conviction or sentence is not cognizable until the prisoner has obtained the favorable termination of that conviction or sentence through habeas or similar state remedies. *Ibid.* Then, in *Edwards. v. Balisok*, 520 U.S. 641 (1997), the Court clarified that the favorable-termination rule applies equally to claims that challenge the procedure by which a decision is made and those that challenge the result, and also reaches claims implicating prison disciplinary decisions affecting the duration of confinement. *Id.* at 645-646.

This Court has also recognized the limits of the *Heck* doctrine. In *Muhammad v. Close*, 540 U.S. 749

(2004) (per curiam), it concluded that the doctrine applies only to those claims seeking a judgment that is "at odds" with the fact or duration of a prisoner's confinement. *Id.* at 754-755. In that case, the prisoner alleged a retaliation claim challenging his placement in prehearing detention, but not the ensuing disciplinary decision or sanction. *Id.* at 752-753. This Court held that the prisoner's claim could proceed under Section 1983 because it did not implicate the fact or duration of his confinement, given that "no good-time credits were eliminated by the prehearing action [he] called into question," and he therefore could not have obtained habeas relief. *Id.* at 754-755. In sum, under the *Heck* line, "a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 81-82 (emphasis in original).

The Seventh Circuit faithfully applied these precedents when it held that petitioner's due process challenge to the disciplinary decision was barred because a judgment in his favor "would straightforwardly imply the invalidity of his punishment." Pet. App. 11a. As the court recognized, a favorable judgment "would amount to a judicial determination that prison officials infringed [petitioner's] constitutional rights by failing to call a witness in his defense, rendering the proceeding unfair." *Ibid.* Petitioner's purported waiver of claims regarding the loss of good conduct credits was of no consequence because any

judgment in his favor would imply the invalidity of the entire sanction regardless of whether petitioner sought damages for only a part of it. *Id.* at 9a-10a.

Petitioner's characterization of his claim as directed at "only on the non-durational component of the sanction," Pet. 18, is therefore inaccurate. His single claim rests on the allegation that respondents violated his right to due process by failing to call his requested witness at the disciplinary hearing. Dist. Ct. Doc. 2 at 5; Pet. App. 25a. Thus, petitioner's purported waiver of all challenges to the part of the sanction revoking good conduct credits is ineffective because he continues to assert, in the very same document, a challenge to the procedure by which the entirety of the disciplinary decision was made. See Pet. App. 25a-26a.

In addition, as the Seventh Circuit recognized, petitioner's argument is irreconcilable with *Heck*'s holding that a Section 1983 claim does not accrue until the underlying conviction, sentence, or discipline has been invalidated. See Pet. App. 9a. A prisoner's election to forego damages for part of a punishment cannot avoid the *Heck* bar because courts examine the effect of a judgment on the merits to determine if the claim has accrued, not the remedy that the prisoner has chosen to pursue. See *Edwards*, 520 U.S. at 646 (holding prisoner's claim was barred because alleged procedural defect "would, if established, necessarily imply the invalidity of the deprivation of his good-time credit"); see also *Haywood*, 842 F.3d at 1028 ("If the claim has not yet accrued, it cannot matter what relief a prisoner seeks."). And while petitioner suggests that prisoners should control when a Section 1983 claim accrues through the decision to waive damages for the

durational part of a sanction, Pet. 18, that concept bears little resemblance to the standard rule that accrual occurs "when the plaintiff has a complete and present cause of action," *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

Allowing a prisoner to bring a claim to life by waiving damages would also create tremendous uncertainty about when the statute of limitations began to run, which *Heck* often bears upon. See, *e.g.*, *McDonough v. Smith*, 139 S. Ct. 2149 (2019); *Wallace*, 549 U.S. 384. If a prisoner can bring a Section 1983 claim prior to the favorable termination of the discipline, then the claim must have accrued sometime earlier, such as when the discipline was imposed. If that is the case, then prisoners who waited to bring their claims until they satisfied the favorable-termination requirement will have waited too long. See *Haywood*, 842 F.3d at 1028-1029. At the very least, following petitioner's approach would generate more uncertainty in this area, frustrating his stated goal of clarifying the law. See Pet. 20.

Nevertheless, petitioner argues that *Heck* does not apply because he "does not 'seek to invalidate' the duration of his confinement." *Id.* at 16. But that is not the test. The proper inquiry asks whether a judgment in petitioner's favor would "necessarily imply the invalidity of the punishment proposed." *Edwards*, 520 U.S. at 648; see also *Heck*, 512 U.S. at 487 ("the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence"). As the Seventh Circuit noted, "[i]mply is not synonymous with invalidate." Pet. App. 11a (internal quotations omitted). Petitioner's singular focus on whether

a favorable judgment would actually result in a speedier release, Pet. 17, is thus at odds with *Heck*.

Petitioner also complains that the Seventh Circuit incorrectly "rejected [his] § 1983 claim on the ground that *Heck*'s favorable-termination rule is a 'version of issue preclusion.'" Pet. 17. To the contrary, the court merely—and properly—analogized the effect of *Heck*'s rule to the effect of that doctrine. Pet. App. 8a-9a. As the Seventh Circuit recognized, both *Heck* and issue preclusion are "grounded in substantive concerns about allowing conflicting judgments." Pet. App. 8a.

Petitioner's warnings about "undesirable incentives" and "perverse results" that purportedly will flow from the decision below, Pet. 18-19, are similarly misplaced. He identifies no evidence that prison officials are intentionally revoking good conduct credits to prevent prisoners from filing suit under Section 1983. And he cannot argue that the revocation of his own credits was an unreasonable response to findings that he participated in a violent attack on two inmates. See Dist. Ct. Doc. 100-1 at 22. Regardless, *Heck* bars only those claims that could have been raised through habeas or other means, see *Wilkinson*, 544 U.S. at 80 (stating habeas is proper vehicle for claims barred by *Heck*), and leaves these other options open, see Pet. App. 12a-13a (listing state-court and federal habeas alternatives to Section 1983).

Finally, petitioner's argument that two prisoners who allege the same due process violation should not be treated differently if one received a durational sanction and the other did not, Pet. 19, demonstrates that his real complaint is with *Heck*. Yet petitioner does not ask this Court to overrule that decision.

Indeed, *Heck* resolved the potential conflict between the federal habeas statute and Section 1983 in a way that respects the statutes' text and history. See *Wilkinson*, 544 U.S. at 79 (explaining favorable-termination rule is based on "considerations of linguistic specificity, history, and comity"). Petitioner provides no reason for this Court to retreat from that approach.

III. The Question Presented Is Not Of Great Importance And This Case Is A Poor Vehicle For Answering It.

The question presented lacks significance because neither the Seventh Circuit's approach nor *Peralta* prevents prisoners from litigating their constitutional claims. The difference between the two merely relates to the proper vehicle and forum for pursuing them. As stated, the favorable-termination rule only reaches those claims that could have been pursued through habeas. See *Heck*, 512 U.S. at 481 ("certain claims by state prisoners are not *cognizable* under [Section 1983], and must be brought in habeas corpus proceedings") (emphasis in original). Here, petitioner could have raised a due process challenge to the failure to call his witness through state certiorari or mandamus proceedings and then, if necessary, federal habeas. Pet. App. 11a-12a.

In addition, contrary to petitioner's assertion that this issue frequently recurs, see Pet. 20, only three circuits have addressed it, see *supra* pp. 8-13. In fact, the Seventh Circuit had already rejected the strategic waiver approach years before the Second adopted it. See *McCurdy v. Sheriff of Madison Cty.*, 128 F.3d 1144, 1145 (7th Cir. 1997) (holding prisoner may not

avoid *Heck* by conceding validity of conviction); see also *Haywood*, 842 F.3d at 1030 (*Peralta* "created a conflict among the circuits"). Thus, the same 2-1 split has existed since the District of Columbia Circuit decided *Skinner* and this Court denied certiorari. See *Skinner*, 562 U.S. 946 (2010). And if, notwithstanding indications otherwise, this issue does arise as often as petitioner suggests, then the Court will have plenty of opportunities to decide the matter after more than three circuits have weighed in.

This case is also a poor vehicle for deciding the question presented because there exists a serious question as to whether petitioner can allege that he suffered a deprivation of a liberty interest protected by due process given his decision to limit his challenge to the non-durational aspects of his punishment. See *Wilkinson v. Austin*, 545 U.S. 209, 221-222 (2005) (recognizing necessity of protected liberty interest for due process claim). A prisoner who is placed in disciplinary confinement and/or has privileges revoked but does not lose good conduct credits suffers an injury to a protected liberty interest only if the discipline "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Here, petitioner was placed in segregation for one year and denied certain privileges for varying periods of time. Dist. Ct. Doc. 100-1 at 23. Because a one-year placement in segregation may or may not constitute an atypical and significant hardship depending on the accompanying conditions, see *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697-698 (7th Cir. 2009), petitioner's due process challenge to the non-durational aspects of his punishment could be subject

to dismissal for failure to state a claim even if this Court were to grant certiorari and find that the claim is not barred by *Heck*.

Thus, the very challenge that petitioner purports to waive to avoid *Heck* may be necessary to assert a due process claim in the first place. Indeed, at least one prisoner's attempt at strategic waiver was thwarted because his placement in restrictive housing, absent the durational sanction, did not implicate a liberty interest. *Mclellan v. Chapdelaine*, No. 3:16-cv-2032 (VAB), 2017 WL 388804, at *3-4 (D. Conn. 2017).

Moreover, even if petitioner's due process challenge were not *Heck* barred, respondents would be entitled to qualified immunity. Qualified immunity shields officials from liability under Section 1983 "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). While prisoners have a due process right to present witnesses at a disciplinary hearing (if it implicates a protected liberty interest), prison officials maintain the discretion to impose reasonable limits on their ability to do so. See *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974); see also *Scruggs v. Jordan*, 485 F.3d 934, 939-940 (7th Cir. 2007) ("officials need not permit the presentation of irrelevant or repetitive evidence in order to afford prisoners due process in disciplinary proceedings").

The Department's witness-request procedure reasonably ensures that a prisoner's witnesses will provide relevant testimony. See 20 Ill. Admin. Code § 504.80(f)(2) ("request shall be made in writing on

the space provided in the disciplinary report and shall include an explanation of what the witness would state"). Due process does not require a prison official to call a witness that an inmate has not properly requested, see *Hamilton v. O'Leary*, 976 F.2d 341, 346-347 (7th Cir. 1992), and petitioner failed to identify any existing precedent clearly establishing that the Committee was required to call his witness after he only partially completed the form. He instead relied on cases supporting the basic proposition that prisoners are entitled to present witnesses at a disciplinary hearing. See Dist. Ct. Doc. 96 at 12-13; 7th Cir. Doc. 60 at 9-10. But this Court has repeatedly held that an asserted right cannot be defined at such a high level of generality in the context of qualified immunity. See, *e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500, 503-504 (2019).

For these reasons, petitioner likely would be unable to obtain relief even if this Court were to conclude that *Heck* does not bar his Section 1983 claim, making this a poor vehicle to decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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