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

REPLY BRIEF IN SUPPORT OF CERTIORARI

MICHAEL A. SCODRO
Counsel of Record
JOSHUA D. YOUNT
JED W. GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
mscodro@mayerbrown.com
312-782-0600

Counsel for Petitioner

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INTRODUCTION

Courts in multiple circuits have adopted conflicting rules over whether, and under what circumstances, prison inmates may use 42 U.S.C. § 1983 to bring claims related to the imposition of mixed disciplinary sanctions. Respondents concede that this case implicates (at a minimum) a 2-1 split on the issue; as explained in the petition and discussed below, moreover, the split is deeper still. The Court should grant certiorari to resolve this entrenched conflict over the meaning of federal law.

ARGUMENT

I. This Court's Guidance Is Required.

Respondents argue that the Court should deny certiorari because no other circuit has expressly followed *Peralta* v. *Vasquez*, 467 F.3d 98 (2d Cir. 2006), and only the Seventh and D.C. Circuits have "rejected *Peralta*'s approach." Opp. 8-14. Respondents are wrong for two reasons.

First, even under Respondents' view of the circuit split, this case involves a persistent disagreement over the meaning of federal law.[1] Accord *Morrison* v. *Rochlin*, 778 F. App'x 151, 154 n.4 (3d Cir. 2019) (observing that other circuits "have come to different conclusions" in mixed-sanction cases). Respondents offer no reason to think that the Second, Seventh, or D.C. Circuits will reconsider their long-held positions. Nor do Respondents offer any reason why additional

[1] This Court frequently grants certiorari on the basis of a two-to-one split. See, *e.g.*, *Leidos, Inc.* v. *Ind. Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017); *Taylor* v. *United States*, 136 S. Ct. 2074 (2016); *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581 (2016); *Integrity Staffing Sols., Inc.* v. *Busk*, 135 S. Ct. 513 (2014); Stephen M. Shapiro et al., Supreme Court Practice 242 (10th ed. 2013).

percolation would help to frame this issue for the Court.

Second, Respondents' view fails to acknowledge the breadth of the confusion in the lower courts. Whether or not courts outside the Second, Seventh, and D.C. Circuits are citing *Peralta* or expressly invoking its estoppel underpinnings, it is undeniable that the circuits are reaching diametrically opposed *results* concerning an inmate's ability to use § 1983 to challenge mixed sanctions. In particular, both the Ninth and Tenth Circuits have issued opinions permitting inmates in Morgan's position to bring claims challenging the non-durational components of a mixed disciplinary sanction. See Pet. 11-12.

Respondents contend that *Brownlee* v. *Murphy*, 231 F. App'x 642 (9th Cir. 2007), and *Slack* v. *Jones*, 348 F. App'x 361 (10th Cir. 2009), stand solely for the "uncontroversial proposition" that *Heck* v. *Humphrey*, 512 U.S. 477 (1994), does not bar a § 1983 claim challenging only the conditions of confinement. Opp. 9. But both cases involved challenges to mixed sanctions, meaning both would have come out the other way in many other circuits. The Seventh Circuit, for example, has squarely rejected the supposedly "uncontroversial proposition" that "challenges to the *conditions* of a prisoner's confinement—as opposed to the *duration* of that confinement—do not implicate *Heck*, so a prisoner should be permitted to challenge a disciplinary proceeding via § 1983 if he waives all challenges to duration-of-confinement sanctions." App. 8a.

In *Brownlee*, the inmate brought a due process claim challenging disciplinary proceedings resulting in a mixed durational and non-durational sanction. The court held that the inmate's complaint "may be

read to challenge the revocation of good-time credits on procedural grounds" but "may also be read to challenge Brownlee's 'confinement in segregation' on due process grounds," and that *Heck* did not apply "[*t*]*o the extent* the § 1983 claim challenges only the manner of confinement, rather than its duration." 231 F. App'x at 644 (emphasis added). Similarly, in *Slack*, the Tenth Circuit held that *Heck* did not apply "to the extent" that the inmate "challenged the conditions of his confinement and loss of privileges" rather than a loss of "good time credits." 348 F. App'x at 364.

Both decisions thus held—consistent with *Peralta* and contrary to the law in other circuits (including the Seventh)—that *Heck* permits § 1983 suits to the extent inmates challenge *only* the non-durational components of a mixed sanction. Indeed, as Respondents note (Opp. 10), one member of the *Brownlee* panel dissented on the ground that the inmate's due process claim "would, if established, necessarily imply the invalidity of the deprivation of his good-time credits." 231 F. App'x at 645 (Bybee, J.). That dissent, embracing the rule the Seventh Circuit applied in this case, would have made no sense if the panel majority had simply endorsed the "uncontroversial proposition" (Opp. 9) that *Heck* does not bar conditions-of-confinement claims.

Meanwhile, *Smith* v. *Villapando*, 286 F. App'x 682 (11th Cir. 2008), appears to put the Eleventh Circuit in line with the Second, Ninth, and Tenth. And while Respondents note that *Smith* did not involve a "single disciplinary decision" (Opp. 11), this only confirms how untenable the situation in the lower courts has become. To treat the distinction between "single" and "multiple" disciplinary violations as controlling would be formalism of the highest order.

As discussed in Morgan's petition, *Smith* involved two disciplinary violations arising from the *same* incident and assessed in the *same* proceeding on the *same* day. Pet. 11-12. Noting that the durational sanction was assessed for only one of the two violations, the Eleventh Circuit concluded that the inmate could bring a due process claim under § 1983 because his "complaint and supporting memorandum stated that he was challenging only" the violation for which he was assessed a purely non-durational sanction. 286 F. App'x at 686. Morgan's case also involves multiple disciplinary violations, and he also was assessed durational and non-durational sanctions and sought to limit his due process claim to his non-durational sanctions. *Heck*'s application should not turn on the mere happenstance of whether prison officials chose to allocate durational sanctions to particular disciplinary violations.

Respondents' discussion of the law in the Eighth Circuit further highlights the disarray among lower courts. In step with the Seventh and D.C. Circuits, that court held that a § 1983 plaintiff's attempt at "*abandoning his claim* for the restoration of good time credits" to avoid the *Heck* bar was "unavailing." *Portley-El* v. *Brill*, 288 F.3d 1063, 1066-1067 (8th Cir. 2002) (emphasis added). Respondents contend that the Eighth Circuit somehow is not at odds with *Peralta*. Opp. 13 n.3. Yet both the United States and the State of New York have acknowledged this very conflict. See Brief for the United States in Opposition, *Skinner* v. *U.S. Dep't of Justice*, No. 09-1188, at 12 (July 21, 2010); Petition for Writ of Certiorari, *Jones*

v. *Peralta*, No. 06-1307, 2007 WL 934237, at *8 (Mar. 27, 2007).[2]

II. The Question Presented Is Important.

Just as Respondents try (unsuccessfully) to downplay the divided state of the law, they offer the unavailing argument that the question presented is unimportant because it "merely relates to the proper vehicle and forum" for bringing constitutional claims. Opp. 19. This Court has emphatically declared otherwise.

In *Preiser* v. *Rodriguez*, the Court stated that whether inmates may seek relief under 42 U.S.C. § 1983 or instead must use the federal habeas corpus statute is a question of "considerable practical importance." 411 U.S. 475, 476-477 (1973). In *Heck*, the Court stressed that the scope of § 1983 is an issue that lies "at the intersection of the two most fertile sources of federal-court prisoner litigation." 512 U.S. at 480. And after *Heck*, the Court has repeatedly granted review to address the intersection between the two statutes. See, *e.g.*, *Muhammad* v. *Close*, 540 U.S. 749 (2004); *Edwards* v. *Balisok*, 520 U.S. 641 (1997). This is not surprising, for habeas corpus—with its exhaustion requirements and deferential standards of review—is fundamentally different from § 1983. *Heck*, 512 U.S. at 480-481.

Nor is there anything to Respondents' claim that the question presented rarely arises. Opp. 19-21. Because so much prison litigation is *pro se* and disposed of through summary orders or reports and

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[2] To the extent district courts continue to struggle with the application of *Heck*'s principles to the mixed-sanctions context, moreover (see Opp. 10-11 & 13 n.3), that only confirms the need for this Court's review.

recommendations, and because many inmates will not bother to pursue § 1983 mixed-sanction claims in circuits that do not allow them, much of the impact of the Seventh Circuit's rule will be subterranean. Nevertheless, there is every reason to think that mixed-sanction claims arise with considerable frequency. As explained in the petition (at 20), the New York State Department of Correctional Services issued roughly 7,000 mixed sanctions (out of 17,000 total prison disciplinary determinations) in a single year. Indeed, just a few weeks after Morgan filed his certiorari petition, an inmate in the Second Circuit submitted a *Peralta* waiver and, unlike Morgan, was then allowed to proceed with his § 1983 claim.[3]

III. This Case Is An Ideal Vehicle To Answer The Question Presented.

Morgan's petition cleanly presents the mixed-sanctions issue, which raises a pure question of law and was the only basis for the lower court's decision. See Pet. 19-20. Respondents conjure two supposed vehicle problems, but neither withstands scrutiny.

Respondents first argue that Morgan's non-durational sanctions "may or may not" constitute an atypical and significant hardship, and thus his due process claim "could be" subject to dismissal if *Heck* does not apply. Opp. 20-21. But the merits of the underlying constitutional claim have nothing to do with this Court's ability to decide the *Heck* question over which the lower courts are divided. In any event, the case Respondents cite (Opp. 20) demonstrates that their due process argument is far from ironclad. See

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[3] See *Randolph* v. *Prieur*, Case No. 9:19-cv-00639, Dkt. 9 (N.D.N.Y. July 23, 2019) (*Peralta* waiver); *id.*, Dkt. 10 (N.D.N.Y. Aug. 22, 2019) (order).

Marion v. *Columbia Corr. Inst.*, 559 F.3d 693, 698 (7th Cir. 2009) (citing decisions that "recognized the need for additional factual development" in cases involving one year of segregation, and holding that "it is clear" that even a 240-day term of segregation "requires scrutiny of the actual conditions of segregation"). Because Morgan was assessed one year of segregation and loss of other privileges (App. 4a), deciding whether Morgan suffered an injury to a protected liberty interest demands a fact-bound inquiry that the district court will have the opportunity to undertake on remand.

Respondents' qualified immunity defense is equally irrelevant to this Court's review. Opp. 21. Qualified immunity is "frequently asserted as a defense to § 1983 personal-capacity claims for damages." Martin A. Schwartz, Section 1983 Litigation 143 (Kris Markarian ed., Fed. Jud. Ctr., 3d ed. 2014), https://tinyurl.com/yx2kxqra. And the Seventh Circuit said nothing about the merits of this defense. App. 5a. If the presence of an unexamined qualified immunity defense were enough to immunize a § 1983 case from certiorari review, this Court would rarely hear such cases.

In short, Respondents will be free on remand to argue that Morgan has not adduced evidence to support a due process claim or demonstrated that Respondents violated clearly established law. Respondents are incorrect on both fronts, but more importantly, these arguments do nothing to impede this Court's review of the question presented.[4]

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[4] This Court's decision to grant certiorari in *Muhammad* v. *Close* shows that the fact that an inmate "may or may not" prevail on the merits of a civil rights claim (Opp. 20) is not a reason to deny

IV. The Decision Below Is Wrong.

This Court has made clear that *Heck* is limited to claims that can be "construed as seeking a judgment at odds with * * * the State's calculation of time to be served in accordance with the underlying sentence." *Muhammad*, 540 U.S. at 754-755. As explained in Morgan's petition, his claims cannot be so construed. By expressly limiting those claims through a binding *Peralta* waiver, Morgan has ensured that a successful lawsuit will not result in the restoration of any good-time credits. Pet. 16-19.

Respondents contend that Morgan's waiver is insufficient to lift the *Heck* bar because Morgan "continues to assert * * * a challenge to the procedure by which the entirety of the disciplinary decision was made." Opp. 16. But Respondents do not dispute that Morgan has explicitly waived any present or future challenge to his loss of good-time credits and agreed to forgo any consequences from his § 1983 claim for the durational component of his sanction; that the doctrine of judicial estoppel would bind him to his waiver; or that a judgment in Morgan's favor would not reduce his sentence by a single day. For these reasons, Morgan's challenge "threatens no consequence" for his conviction or the duration of his sentence and there is thus "no need to preserve the habeas exhaustion rule." *Muhammad*, 540 U.S. at 751-752.

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review on a threshold *Heck* question. On remand from this Court's ruling allowing the inmate to bring his § 1983 claim, the district court granted summary judgment to the defendants, concluding that the inmate had not proffered evidence sufficient to support a First Amendment retaliation claim. *Muhammad* v. *Close*, 2008 WL 2605216 (E.D. Mich. June 27, 2008).

Respondents also argue that Morgan's position is inconsistent with § 1983 accrual rules and would create "tremendous uncertainty" about when the statute of limitations begins to run. Opp. 16-17. But inmates have been bringing claims like Morgan's in the Second Circuit for over a decade, and Respondents fail to identify any uncertainty over accrual and limitations principles in that circuit. Nor do Respondents address the similar claims-processing rule that applies to federal habeas claims (Pet. 18 n.8), much less show that an inmate's ability to delete unexhausted habeas claims has resulted in a rash of uncertainty or unmanageable litigation.[5]

Respondents further argue that Morgan has not identified evidence of officials "intentionally revoking good conduct credits" to prevent suits under § 1983. Opp. 18. Setting aside the fact that such evidence would be virtually impossible for someone in Morgan's position to assemble, Respondents do not dispute that the Seventh Circuit's rule creates that perverse incentive. *Peralta*, 467 F.2d at 106 n.8.

Finally, Respondents do not dispute that the Seventh Circuit's rule treats similarly situated inmates differently. Instead, Respondents argue that Morgan's "real complaint" is with *Heck*. Opp. 18. But

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[5] The consequences of this supposed "uncertainty" are also exceedingly remote. It is dubious that there is a large class of inmates "wait[ing] to bring their [mixed-sanction] claims until they satisfied the favorable-termination requirement." Opp. 17. Yet even assuming that there were, such inmates would not have executed a *Peralta* waiver and therefore would be subject to traditional *Heck* accrual principles. Going forward, moreover, the inmates that Respondents hypothesize would no longer have to "wait[] to bring their" mixed-sanction claims, provided they are willing to execute a *Peralta* waiver.

that is a mischaracterization. Morgan's complaint is that inmates who disavow any consequence of their civil rights challenge for the duration of their prison sentence through an enforceable waiver should be allowed to bring claims under § 1983. As Morgan has already explained, his position is intended to "*abide by*, not avoid," *Heck* and its progeny. Pet. 18.

At the end of the day, the fact remains that the two sides of this split cannot both be right. This Court should answer the question conclusively so that future courts and litigants can apply a clear, uniform rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL A. SCODRO
Counsel of Record
JOSHUA D. YOUNT
JED W. GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
mscodro@mayerbrown.com
312-782-0600

Counsel for Petitioner

NOVEMBER 2019