No. 19-756

IN THE

Supreme Court of the United States

LOUIS TAYLOR,
Petitioner,
v.

PIMA COUNTY, ARIZONA, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONER

JOSEPH V. SCHAEFFER
Counsel of Record
SPILMAN THOMAS & BATTLE PLLC
48 Donley St., Suite 800
Morgantown, WV 26501
Telephone: 304-291-7952
Facsimile: 304-291-7979
jschaeffer@spilmanlaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

The National Bar Association is the United States' oldest and largest voluntary bar association of predominantly African-American attorneys, judges, educators, and law students.[1] It was incorporated in 1925 after several of its founding members were denied membership to the American Bar Association, and it has been dedicated to the protection and advancement of civil rights ever since.

Since its enactment during Reconstruction, Section 1983 has been essential for the protection and advancement of civil rights. The National Bar Association and its members have relied on Section 1983 to fight for equal voting rights, education, and public accommodations, as well as to address police misconduct and wrongful convictions. The National Bar Association thus has an interest in cases like this that define Section 1983's scope.

In this *amicus curiae* brief, the National Bar Association urges this Court to grant Louis Taylor's petition for writ of *certiorari* to resolve a deep circuit split over whether *Heck v. Humphrey*, 512 U.S. 477 (1994), bars Section 1983 claims by former convicts

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission. The parties filed blanket consents to the filing of *amicus curiae* briefs with the Clerk and were timely notified of the National Bar Association's intention to file this brief.

Neither the fact of submission nor the substance of this brief should be viewed as reflecting the views of the National Bar Association's judicial members or its Judicial Council.

who lack access to *habeas* relief. Because Congress enacted Section 1983 for the express purpose of creating a federal forum for federal civil rights claims, the National Bar Association further urges this Court to reverse the Ninth Circuit's decision and hold that *Heck* does not apply to *habeas*-ineligible Section 1983 plaintiffs like Taylor.

SUMMARY OF ARGUMENT

The federal civil rights statute, Section 1983, and the federal *habeas* statute, Section 2254, are the twin pillars of statutory protection for federal civil rights. 42 U.S.C. § 1983 (2018) & 28 U.S.C. § 2254 (2018). Although this Court held in *Heck* that Section 1983 claims are barred if they imply the invalidity of convictions that have not been reversed, expunged, vacated, or called into question by a federal writ of *habeas corpus*, five of the Justices who decided that case would not have applied its holding to plaintiffs who are ineligible for federal *habeas* relief. *Heck*, 512 U.S. at 491 (Souter, J., concurring); *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (Souter, J., concurring).

Whether the *Heck* bar applies to *habeas*-ineligible Section 1983 plaintiffs has immense practical importance: thousands of people will never have access to federal *habeas* relief because their sentences were non-custodial or expired before they could meet Section 2254's exhaustion requirement. If the *Heck* bar applies to their Section 1983 claims, this *habeas*-ineligible class will be denied access to a federal forum for the vindication of their federal civil rights.

Reading *Heck* in this manner is deeply inconsistent with the history and purpose of Section 1983. Adopted as part of the Ku Klux Act of 1871 in response

to state indifference to Reconstruction-era violence, Section 1983's express purpose was to provide plaintiffs with access to a federal forum for their federal civil rights claims. This Court thus should not foreclose access to a federal forum under Section 1983 when federal *habeas* relief under Section 2254 is not available.

Reading *Heck* in this manner also does not serve the public policies that this Court cited in *Heck* as disfavoring collateral attacks. *Habeas*-ineligible plaintiffs cannot bring parallel proceedings under Section 1983 and Section 2254 and are limited, instead, to their remedies under Section 1983. Nor can they use those remedies to secure their release or impose inconsistent obligations on state officials. *Habeas*-ineligible plaintiffs can at most obtain redress for past violations.

The circuit courts are nonetheless deeply split on whether *Heck* bars claims by *habeas*-ineligible Section 1983 plaintiffs. This split affects every regional circuit and appears to be deepening, with the Second, Seventh, Ninth, and Eleventh Circuits all questioning or departing from prior holdings.

Taylor's petition for writ of *certiorari* presents the Court with an excellent opportunity to resolve this circuit split. There is no question that Taylor was ineligible for federal *habeas* relief from his sentence to time served on a 2013 no-contest plea, and the majority opinion in the Ninth Circuit rested entirely on the conclusion that Taylor's Section 1983 claims implied the invalidity of that sentence. And without the *Heck* bar, Taylor presents a compelling claim for constitutional violations that led him to serve more than 40 years in prison for a crime that likely never was.

The National Bar Association thus urges this Court to grant Taylor's petition for writ of *certiorari* and hold that *Heck* does not bar Section 1983 claims by plaintiffs who are ineligible for federal *habeas* relief.

ARGUMENT

I. THE SCOPE OF THE *HECK* BAR IS AN ISSUE OF IMMENSE PRACTICAL IMPORTANCE ON WHICH THE REGIONAL CIRCUITS ARE DEEPLY SPLIT.

In *Heck*, this Court held that a current inmate's Section 1983 action was barred because it would imply the invalidity of a conviction that had not previously 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." 512 U.S. at 486-87. *Heck* thus introduced a favorable-termination requirement into Section 1983 jurisprudence. *See id.* at 484.

In a concurrence joined by Justices Blackmun, Stevens, and O'Connor, Justice Souter read *Heck*'s favorable-termination requirement as applying only to individuals in custody: that is, those eligible for federal *habeas* relief. *Id.* at 500 (Souter, J., concurring). Extending *Heck* to *habeas*-ineligible plaintiffs would "deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling." *Id.* Writing for the majority in reply, however, Justice Scalia suggested in *dicta* that "the principle barring collateral attacks … is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 490 n.10. Justice Ginsburg, who had joined the majority in

Heck, later wrote in concurrence in *Spencer*, 523 U.S. at 21-22, that she had come to agree with Justice Souter: *Heck*'s favorable-termination requirement does not extend to *habeas*-ineligible Section 1983 plaintiffs. After *Spencer*, five of the Justices who decided *Heck* thus would hold that it does not apply to Section 1983 plaintiffs who are ineligible for federal *habeas* relief.

Although the Court has revisited *Heck* in *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam), again in *Wallace v. Kato*, 549 U.S. 384 (2007), and just two terms ago in *McDonough v. Smith*, --- U.S. ---, 139 S. Ct. 2149 (2019), it has not resolved the tension between Justice Scalia's *dicta* in *Heck* and Justice Souter's concurrence in *Spencer*. The result has been confusion over the application of *Heck* to *habeas*-ineligible Section 1983 plaintiffs that now extends to every regional circuit and has deepened over time.

* * *

Three circuits—the Fourth, Sixth, and Tenth—have adopted and consistently applied *Spencer* to hold that *Heck*'s favorable termination requirement does not apply to *habeas*-ineligible Section 1983 plaintiffs. *See Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008); *Griffin v. Baltimore Police Dep't*, 804 F.3d 692 (4th Cir. 2015); *Powers v. Hamilton Cty. Pub. Defender Comm'n*, 501 F.3d 592 (6th Cir. 2007); *Harrison v. Michigan*, 722 F.3d 768 (6th Cir. 2013); *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010).

Four circuits—the First, Third, Fifth, and Eighth—have adopted and consistently applied Justice Scalia's *dicta* from *Heck* to hold that the favorable-termination requirement applies even in the case

of *habeas*-ineligible Section 1983 plaintiffs. *See Figuero v. Rivera*, 147 F.3d 77 (1st Cir. 1998); *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Deember v. Beard*, 557 F. App'x 162 (3d Cir. 2014); *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000) (per curiam); *Black v. Hathaway*, 616 F. App'x 650 (5th Cir. 2015) (per curiam); *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007).

Four circuits—the Second, Seventh, Ninth, and Eleventh—are internally divided or have reversed course on *Heck*'s scope. The Second Circuit assumed, without deciding, that *Heck* would apply to habeas-ineligible plaintiffs in *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014) (en banc), only 12 years after deciding it would not in *Huang v. Johnson*, 251 F.3d 65 (2d. Cir. 2001). The Seventh Circuit has granted rehearing en banc in *Savory v. Cannon*, 912 F.3d 103 (7th Cir. 2019) after that panel rejected a twenty-year-line of circuit precedent from *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999), by holding that *Heck* bars claims by *habeas*-ineligible plaintiffs. The Ninth Circuit in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015) whittled down a seemingly once-broad exception for *habeas*-ineligible plaintiffs from *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), to cover only the narrowest cases. And though the Eleventh Circuit signaled in *Harden v. Pataki*, 320 F.3d 1289 (11th Cir. 2003), that it had adopted *Spencer*, it later held in *Christy v. Sheriff of Palm Beach County*, 288 F. App'x 658, at *8 (11th Cir. 2008) (per curiam), that it has "expressly declined to consider that issue [of whether a *habeas*-ineligible plaintiff may bring claims] in an opinion where the § 1983 action is otherwise barred under *Heck*."

This split not only extends to every regional circuit, it appears to be deepening over time with the Second, Seventh, Ninth, and Eleventh Circuits all questioning or departing from prior holdings adopting an exception to *Heck* for *habeas*-ineligible plaintiffs. The result is that about 83 million Americans live in a circuit where *habeas*-ineligible plaintiffs are excluded from the *Heck* bar, about 161 million Americans live in a circuit where they are not, and about 86 million Americans live under uncertainty. *See Population estimates, July 1, 2019*, U.S. CENSUS BUREAU, *available at* http://bit.ly/2SULUD7 (last visited Jan. 5, 2020).

Taylor is thus as much a victim of time and geography as he is of unjust prosecution and imprisonment. If his case had not overlapped with the Ninth Circuit's decision in *Lyall*, or if he had been convicted in New Mexico, just one state over in the Tenth Circuit, then Taylor's Section 1983 claims likely could have proceeded.

* * *

This split has immense practical consequences.

Of the approximately 2,157,800 people incarcerated at the end of 2016, only 188,300 were held in federal facilities, with the remaining 1,969,500 being held in state or local facilities. *See* DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, 12 (2018), *available at* http://bit.ly/2tz0Eni (last visited Jan. 5, 2020). People released from state prisons that same year served an average of 2.6 years, but a median of only 1.3 years. *See* DANIELLE KAEBLE, U.S. DEP'T OF JUST., BUREAU

OF JUST. STAT., TIME SERVED IN STATE PRISON, 2016 1 (2018), *available at* http://bit.ly/2Qqm2NH (last visited Jan. 5, 2020). If those state prisoners had taken an appeal before their release, it likely would have taken nearly 300 days to resolve. *See* NICOLE L. WATERS, PH.D ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., CRIMINAL APPEALS IN STATE COURTS 7 (2015), *available at* http://bit.ly/2tynTXM (last visited Jan. 5, 2020). Additional appeals and state *habeas* proceedings undoubtedly took longer.

Using these 2016-era prisoners as representative, and accounting further for the thousands of people whose state convictions result in non-custodial sentences, there are substantial numbers of people who will never have access to federal *habeas* relief because they will not be under state control long enough to meet Section 2254's exhaustion requirement. 28 U.S.C § 2254(b). For those living in circuits that deny an exception to the *Heck* bar for *habeas*-ineligible plaintiffs, the result is that they will never have access to a federal forum for the vindication of their federal civil rights.

In his *Heck* concurrence, Justice Souter saw plainly how cutting off access to a federal forum could deny protections for federal civil rights. He considered the Reconstruction-era example of an African-American framed for raping a white woman by Ku-Klux-Klan-controlled state law enforcement and subsequently convicted by a Klan-controlled state court. 512 U.S. at 501. If the unjustly arrested and convicted African-American only discovered proof of unconstitutionality after his release from custody, he would lack recourse to the federal courts not only through federal

habeas relief but also through Section 1983. *Id.* at 501-02.

Notwithstanding Justice Souter's choice of example, the importance of a federal forum to civil rights enforcement is no mere anachronism. Before federal prosecutors charged them with federal crimes in 2009, two state court judges in Luzerne County, Pennsylvania, denied 1,800 juvenile defendants their constitutional rights as part of a kickback scheme yielding $2.8 million in illegal payments. INTERBRANCH COMM'N ON JUV. JUST., REP. 8-9 (2010), *available at* http://bit.ly/35rEn1n (last visited Jan. 6, 2020). And in the early 2010s, members of the Maricopa County, Arizona, judiciary and Board of Supervisors sought relief in federal court—in part under Section 1983—from politically-motivated prosecutions and investigations brought as part of a conspiracy between the county sheriff and county attorney. *See Donahoe v. Arpaio*, 869 F. Supp. 2d 1020 (D. Ariz. 2012).

Everyone suffers when *Heck* is read to foreclose a federal forum by barring Section 1983 claims for *habeas*-ineligible plaintiffs. But African-Americans suffer disproportionately. African-Americans make up only 13% of the United States population but account for nearly half of the 1,900 exonerations tracked by the National Registry of Exonerations through October 2016 and the majority of the 1,800 additional "group exonerations" for police misconduct. SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES ii (2017), *available at* http://bit.ly/39JBn3A (last visited Jan. 7, 2020).

And though Section 1983 cannot erase all consequences of a wrongful conviction, it can provide justice

where it would otherwise be denied. Interpreting *Heck* to foreclose Section 1983 claims for habeas-*ineligible* plaintiffs would foreclose this entire class from accessing a federal forum when state or local governments will not act due to prejudice, indifference, or fear.

II. THIS CASE IS THE APPROPRIATE VEHICLE FOR THIS COURT TO REVISIT AND LIMIT ITS HOLDING IN *HECK*.

Taylor's case offers this Court an excellent vehicle to consider whether *Heck* extends to Section 1983 plaintiffs who are ineligible for federal *habeas* relief.

First, Taylor indisputably could not have sought federal *habeas* relief from his 2013 no-contest plea because he was sentenced to time served and released from prison. *Taylor v. Cty. of Pima*, 913 F.3d 930, 932 (9th Cir. 2019).

Second, the majority below held that the 2013 no-contest plea was the sole legal cause of Taylor's incarceration, and so any Section 1983 claim challenging its constitutionality "would necessarily imply the invalidity of his [2013] conviction or sentence" under *Heck*. *Id.* at 935 (quoting *Heck*, 512 U.S. at 487) (alteration in original).

Third, this Court may dispose of the issues before it by holding that *Heck* does not apply to *habeas*-ineligible Section 1983 plaintiffs.

And *fourth*, Taylor has a compelling claim of actual innocence. His trial was tainted by withheld evidence, racial bias, and a prosecution witness's suggestion that Taylor was guilty because "black boys" like to set fires. *Id.* at 939. Newly-uncovered evidence indicates that the fire for which Taylor was convicted

was likely not arson at all. *Id.* at 940. And county prosecutors offered no substantive defense of the original conviction. *Id.* at 939. This is precisely the type of case involving clear civil rights violations that Section 1983 was intended to address.

III. THIS COURT SHOULD EXCLUDE *HABEAS*-INELIGIBLE SECTION 1983 PLAINTIFFS FROM THE *HECK* BAR.

When *federal* habeas relief is not available, five of the Justices who decided *Heck* recognized that a Section 1983 claim must be permitted in order to provide access to a federal forum for the vindication of federal civil rights. Those Justices' conclusion is supported by Congressional intent for the adoption of Section 1983 and is reconcilable with this Court's concerns regarding collateral attacks. This Court accordingly should formally adopt their conclusion that the *Heck* bar does not apply to Section 1983 plaintiffs who are ineligible for federal *habeas* relief.

A. Congress expressly intended for Section 1983 to provide access to a federal forum for the vindication of federal civil rights.

The years immediately preceding Congress's enactment of the predecessor to Section 1983, Section 1 of the Ku Klux Act of 1871, were marked by Ku-Klux-Klan-led terrorism against African-Americans. An aide to South Carolina Governor Robert Scott informed President Ulysses S. Grant in late 1870 that "murder and other acts of violence are constantly occurring, and that the offenders go unpunished in consequence of the inertness or want of power of the civil authorities." Letter from Unknown Correspondent to Pres. Ulysses S. Grant (Nov. 7, 1870) *in* ULYSSES S. GRANT, THE PAPERS OF ULYSSES S. GRANT, VOLUME 21:

NOVEMBER 1, 1870-MAY 31, 1871 259 (John Y. Simon ed., 1998). And in February 1871, Governor Scott took the extraordinary step of asking President Grant to send federal troops to South Carolina to preserve public order. Telegraph from Gov. Robert K. Scott to Pres. Ulysses S. Grant (Feb. 14, 1871), *in* ULYSSES S. GRANT, supra at 259.

Against this backdrop, President Grant wrote James G. Blaine, the Speaker of the House of Representatives, on March 9, 1871, to emphasize the "deplorable state of affairs existing in some portions of the South" and request that Congress "provid[e] means for the protection of life and property in those Sections of the Country where the present civil authority fails to secure that end." Letter from Pres. Ulysses S. Grant to Hon. James G. Blaine (Mar. 9, 1871), *in id.* at 218-19. On March 23, 1871, President Grant addressed Congress directly to again report "[a] condition of affairs now exist[ing] in some of the States of the Union, rendering life and property insecure, and the carrying of the mails, and the collection of the revenue dangerous." Letter from Pres. Ulysses S. Grant to Congress (Mar. 23, 1871), *in id.* at 246. Because "the power to correct these evils is beyond the control of the State authorities," President Grant urged Congress to pass legislation that would "effectually secure life liberty and property, and the enforcement of law, in all parts of the United States." *Id.*

Although the Ku Klux Act of 1871 had been introduced in draft form in the latter days of the 41st Congress, President Grant's March 23rd message spurred the newly-seated 42nd Congress into action. David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of*

"Under Color of" Law, 1999 UTAH L. REV. 1, 7-9 & 44-46. With President Grant's urging, Congress adopted the Ku Klux Act of 1871 on April 20, 1871, and included in Section 1 what is now codified, as amended, as Section 1983:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage, of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States …"

Ku Klux Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

Both supporters and opponents of the Ku Klux Act of 1871 understood that its primary purpose was to establish a federal bulwark against the deprivation of federal civil rights. Congressman Aaron F. Perry of Ohio described the problem of state and local indifference:

> "Where these gangs of assassins show themselves, the rest of the people look on, if not with sympathy, at least with forbearance. … Sheriffs, having

> eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection."

Hon. Aaron F. Perry, Remarks on the Floor of the House of Representatives (Mar. 31, 1871), *in Cong. Globe*, 42d Cong., 1st Sess. app. 78 (1871). These injustices fell mostly upon "blacks and against white people who by any means attract attention as earnest friends of the blacks." *Id.*

Congressman David Perley Lowe of Kansas expressed similar concerns on the floor of the House of Representatives:

> "Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress. If there is no remedy for this, if the rights of citizenship may be denied without redress, if the Constitution may not be enforced, if life and liberty may not be effectively protected, then, indeed, is our civil Government a failure, and instead of enjoying liberty regulated by law, its subjects may live only by the sufferance of lawless and exasperated conspirators."

Hon. David Perley Lowe, Remarks on the Floor of the House of Representatives (Mar. 31, 1871), *in Cong. Globe*, 42d Cong., 1st Sess. 374.

And Congressman John Beatty of Ohio succinctly summarized the problem Congress sought to address when he argued that "[t]he State, from lack of power or inclination, practically denied the equal protection of the law …" Hon. John Beatty, Remarks on the Floor of the House of Representatives (Apr. 3, 1871), *in Cong. Globe*, 42d Cong., 1st Sess. 428.

Opponents of the Ku Klux Act of 1871 criticized the legislation precisely because it would address discrimination and violence through the creation of a federal remedy. Referring to Section 1983's precursor, Congressman Michael Kerr of Indiana complained:

> It "gives to any person who may have been injured in any of his rights, privileges or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts. … It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States."

Hon. Michael Kerr, Remarks on the Floor of the House of Representatives (Mar. 28, 1871), *in Cong. Globe*, 42d Cong., 1st Sess., app. 50.

Considering these and other remarks from the 42nd Congress, this Court has held:

> "It is abundantly clear that one reason the [Ku Klux Act of 1871] was passed was to afford a federal right in federal

> courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."

Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). A "powerful impulse behind the creation of [Section 1983] was the purpose that it be available in, and shaped through, original federal tribunals." *Id.* at 252 (Frankfurter, J., dissenting).

The fact that Section 1983 opened access to the federal courts for federal civil rights claims was significant. "In a suit to enforce fundamental constitutional rights, the plaintiff's choice of a federal forum has singular urgency." *Preiser v. Rodriguez*, 411 U.S. 475, 515 (1973) (Brennan, J., dissenting). Indeed, as this Court held in *Patsy v. Board of Regents*:

> "A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the [Ku Klux Act of 1871] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated those rights. … This 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."

457 U.S. 496, 505-06 (1982).

Section 1983 is directly traceable to this clear Congressional intent to provide plaintiffs, and particularly African-Americans, access to a federal forum for the protection of federal civil rights.

B. The reasons *Heck* gave for disfavoring collateral attacks do not apply to *habeas*-ineligible plaintiffs.

Heck limited Section 1983 claims out of an aversion to collateral attacks that might result in parallel proceedings and potentially conflicting judgments. 512 U.S. at 484-86. As this Court explained in *Muhammad*, "conditioning the right to bring a § 1983 action on a favorable result in state litigation or federal habeas served the practical objective of preserving limitations on the availability of habeas remedies." 540 U.S. at 751. In the absence of a favorable-termination requirement, this Court feared that Section 1983 actions would swallow federal *habeas* actions because of the lack of exhaustion requirements and the generally smoother path to the courts. *Id.* at 751-52.

Where *habeas* relief is unavailable, however, the circumstances are very different. *First*, rather than replacing one of the twin pillars for the protection of federal civil rights, Section 1983 stands alone as the sole means of access to the federal courts. *Second*, because the individual is not in custody, the practical effect of collateral attacks is less significant.

If an individual is in custody, a favorable Section 1983 decision calling the underlying conviction into question might be used in post-conviction proceedings to secure his release. At a minimum, however, the favorable Section 1983 decision creates a Catch-22 for

the state official charged with the individual's incarceration: his custody has been held unlawful by a federal court but remains required pursuant to the state conviction. Actions directed toward either release or continued confinement place the state official at risk.

By contrast, if the individual is not in custody, a favorable Section 1983 decision calling the underlying conviction into question cannot be used to attack his incarceration or place a state official at risk of inconsistent obligations. The individual's sentence either will have been non-custodial or completed.

The remaining consideration is the respect for state court judgments under a federal system of government. Yet, a Section 1983 action does not invalidate the underlying conviction, and the principle of comity is not absolute. Congress can disregard it, as when Congress enacted Section 1983 and the federal *habeas* statute to provide federal recourse for state violations of federal constitutional rights. Moreover, this Court has held that "[i]n appropriate cases those principles [of comity and finality] must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982). As this Court stated in the context of *habeas* relief:

> It "always has been a *collateral remedy* … The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in

> readjudicating convictions according to all legal standards in effect …"

Teague v. Lane, 489 U.S. 288, 306 (1989) (emphasis in original). "The State court cannot have the last say when it … may have misconceived a federal constitutional right." *Daniels v. Allen*, 344 U.S. 443, 508 (1953), *overruled in part on other grounds by Townsend v. Sain*, 372 U.S. 293 (1963).

* * *

Five of the Justices who decided *Heck* concluded it would run counter to the history and purpose of Section 1983 to exclude claims by plaintiffs who are ineligible for federal *habeas* relief. *Heck*, 512 U.S. at 501 (Souter, Blackmun, Stevens, O'Connor, JJ., concurring); *Spencer*, 523 U.S. at 18 (Souter, O'Connor, Ginsburg, Breyer, JJ., concurring). Theirs is the correct view. Section 1983 and the federal *habeas* statute, Section 2254, are twin pillars for the protection of federal constitutional rights. *Muhammad*, 540 U.S. at 750. "It is futile to contend that the [Ku Klux] Act of 1871 [enacting Section 1983] has less importance in our constitutional scheme than does the Great Writ [of *habeas corpus*]." *Wolff v. McDonnell*, 18 U.S. 539, 579 (1974). If a person lacks access to the federal courts because *habeas* relief is unavailable, it is not grounds for barring a Section 1983 action as well, but rather an argument for its very necessity. This Court accordingly should grant Taylor's petition to resolve the circuit split on this issue and hold that the *Heck* bar does not apply to Section 1983 plaintiffs who are ineligible for federal *habeas* relief.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted and the Ninth Circuit reversed.

* * *

Respectfully submitted,

JOSEPH V. SCHAEFFER
Counsel of Record
SPILMAN THOMAS & BATTLE PLLC
48 Donley St., Suite 800
Morgantown, WV 26501
Telephone: 304-291-7952
Facsimile: 304-291-7979
jschaeffer@spilmanlaw.com

Counsel for Amicus Curiae
The National Bar Association