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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case hits a rare trifecta for cert petitions. It involves an undeniable 6-4 circuit split, which even respondent barely contests. *See* Opp. 17-18. That split has deepened during the pendency of this petition, with the en banc Seventh Circuit issuing a decision on the issue last month over a vigorous dissent by Judge Easterbrook. *Savory* v. *Cannon*, 947 F.3d 409 (7th Cir. 2020) (en banc); *see id.* at 431-434 (Easterbrook, J., dissenting). And an array of amici have explained that the case is "critical to the integrity of our prosecutorial system," Amicus Br. of American Bar Association (ABA Amicus Br.) 15-16, and of "great importance * * * to the protection of the wrongfully convicted," Amicus Br. of Criminal Justice Organizations 6; *see* Amicus Br. of National Bar Association 2.

Pima County's reasons for opposing review of this "exceptional[ly] importan[t]" case cannot withstand scrutiny. ABA Amicus Br. 15. Taylor preserved his arguments in the lower courts. The questions presented recur with alarming frequency. And no purpose would be served by delay; if anything, the lower courts' divisions have already persisted for too long, giving rise to a practice that has resulted in an intolerable denial of justice for Louis Taylor and too many others like him.

The Court should not delay review of these urgent issues any longer. The writ should be granted, and the Ninth Circuit's judgment should be reversed.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE AN INTRACTABLE SPLIT ON THE APPLICABILITY OF *HECK* TO FORMER PRISONERS.

The Ninth Circuit's decision deepens a widely acknowledged, deeply entrenched 6-4 circuit split over whether *Heck* v. *Humphrey*, 512 U.S. 477 (1994), applies to former prisoners who lacked an opportunity to raise their claims through federal habeas while incarcerated. *See* Pet. 14-20. Pima County barely contests that split, and offers no viable reason for denying review.

1. Pima County claims that Taylor failed to argue below that "the *Spencer* exception" applies here. Opp. 14-17. That is false; Taylor raised this precise argument at every stage of the proceedings below. In the District Court, Taylor argued that *Heck* is inapplicable to his claims by virtue of the "exception to

Heck" recognized by Justice Souter in *Spencer* v. *Kemna*, 523 U.S. 1 (1998), and the District Court twice ruled on that very argument. Pet. App. 91a-93a; *see id.* at 68a-72a. In the Ninth Circuit, Taylor argued that "[t]he district court * * * *correctly* declined to *Heck* bar any of Taylor's claims, finding a possible 'exception' to *Heck* under *Spencer* v. *Kemna.*" Taylor CA9 Supp. Br. 4 (emphasis added). And in his petition for rehearing, Taylor again argued that "*Heck* has no application to a former prisoner, like Taylor, who could not challenge his conviction or sentence while incarcerated." Taylor CA9 Rehearing Pet. 1, 5-10. Pima County responded to that argument on the merits, without once suggesting that it had been forfeited. *See* Pima County CA9 Opp. to Rehearing Pet. 11-14.

Pima County now claims that Taylor's panel-stage brief did not press this argument at sufficient length. Opp. 15 & n.2. But a litigant need not argue a point extensively in order to preserve it. And extensive argument on this question at the panel stage would have been pointless, given that all agree the Ninth Circuit's decision in *Lyall* v. *City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), foreclosed it.

In any event, Pima County slices the preservation question much too fine. "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks omitted). Taylor indisputably argued below that *Heck* does not bar his claim. He therefore remains free to press any argument in support of that claim, including the argument that

Heck does not apply by virtue of the *Spencer* exception.

2. Pima County also claims the circuit split is "overstate[d]." Opp. 17. But Pima County does not deny that six circuits have expressly rejected the *Spencer* concurrence. *Id.* at 18. Four circuits have clearly taken a contrary view: The Tenth Circuit has adhered to Justice Souter's *Spencer* concurrence for a decade, and Pima County does not argue otherwise. Pet. 15-16. Far from "qualif[ying]" its position (Opp. 17), the Fourth Circuit reaffirmed in *Griffin* v. *Baltimore Police Department* that a plaintiff is exempt from *Heck* if the plaintiff "'could not, as a practical matter [have sought] habeas relief' while in custody." 804 F.3d 692, 696 (4th Cir. 2015) (quoting *Wilson* v. *Johnson*, 535 F.3d 262, 268 (4th Cir. 2008)). The Eleventh Circuit has followed the same rule in each of its published opinions. *See Topa* v. *Melendez*, 739 F. App'x 516, 519 n.2 (11th Cir. 2018) (per curiam). And although the Sixth Circuit has debated whether the operative portion of Justice Souter's concurrence is dicta or a holding, it has said it is "convinced" that that concurrence states the law. *Harrison* v. *Michigan*, 722 F.3d 768, 773-774 & n.1 (6th Cir. 2013).

Pima County speculates that all of these circuits might revisit their positions. Opp. 18-19. But that would require *four separate circuits* to grant rehearing en banc and overturn their settled precedents. If that remote prospect were sufficient to defeat a circuit split, this Court's certiorari docket would be slim indeed. And the prospect that the split will "dissipate" (Opp. 19) is especially fanciful given that these circuits have adhered to their positions in the face of a well-established circuit split, and the Sec-

ond Circuit hopelessly splintered last time it attempted to resolve the question en banc. *See Poventud* v. *City of New York*, 750 F.3d 121 (2d Cir. 2014) (en banc).

Pima County points out that the Seventh Circuit recently issued an en banc decision on this question. But unlike the Fourth, Sixth, Tenth, and Eleventh Circuits, the Seventh Circuit's decisions were internally inconsistent on this question, which is why rehearing en banc was necessary. *See Savory*, 947 F.3d at 422-427. And that decision still drew a searing dissent from Judge Easterbrook, only confirming the question's importance and the pervasive division as to its answer. *Id.* at 431 & n.1, 434.

3. Pima County also claims that the circuit split is not implicated here. Opp. 19-20. That too is demonstrably incorrect. The District Court found that Taylor was entitled to relief when it applied the *Spencer* concurrence, *see* Pet. App. 91a-93a, and then barred Taylor from recovery after the Ninth Circuit repudiated the *Spencer* concurrence in *Lyall*, *id.* at 68a-72a. It is hard to think of a clearer illustration that a circuit split is outcome-determinative.

Pima County nonetheless contends that the *Spencer* exception would not apply to Taylor because Taylor had an opportunity to challenge his *1972 conviction* through habeas. Opp. 19. But that is irrelevant; the only operative conviction at this point is the *2013 conviction*, and there is no question Taylor lacked an opportunity to challenge that conviction through habeas, since he was released the very same day it was entered. *See* Pet. App. 8a-10a. Pima County notes that Taylor argues his claims would not call into question the validity of his 2013

conviction. Opp. 19-20. But that is an argument in the alternative *if the Court concludes that* Heck *applies*. *See* Pet. 29-30. It in no way obviates the relevance of the critical threshold question whether *Heck* shields his 2013 conviction in the first place.

4. Given the depth and clarity of this split, review would be warranted regardless of the merits. But Pima County is conspicuously unable to offer a plausible defense of the Ninth Circuit's position.

Pima County's principal argument is that *Heck* resolved the first question presented when, in a footnote, it suggested the *Heck* bar would still apply "in those cases (of which no real-life example comes to mind) involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges." 512 U.S. at 490 n.10. "[A] clearer example of dicta is hard to imagine": the Court was addressing a hypothetical situation, unbriefed by the parties, which the majority incorrectly believed would almost never arise. *Savory*, 947 F.3d at 432 (Easterbrook, J., dissenting). And the Court subsequently made clear that it had not yet had "occasion to settle the issue." *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam).

Nor is there any principled reason why *Heck* would apply where a plaintiff never had an opportunity to challenge the pertinent conviction through habeas. Pima County claims that *Heck* did not rest on the rationale that the specific habeas statute takes precedence over the general § 1983 cause of action, but no less an authority than Justice Scalia—*Heck*'s author—said that it did. *See Wallace* v. *Kato*, 549 U.S. 384, 392 (2007). Far from supporting Pima County's position, this Court's decision in

McDonough v. *Smith* held that the considerations underlying *Heck* apply "to civil suits *within the domain of habeas corpus*." 139 S. Ct. 2149, 2158 (2019) (emphasis added). A plaintiff who never had an opportunity to bring a habeas claim plainly falls outside that domain.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AS TO WHETHER *HECK* APPLIES TO PRISONERS WHO PLEAD NO CONTEST TO TIME SERVED.

The Court should also grant certiorari to resolve a second critically important split: whether, even if *Heck* applies to former prisoners, it bars recovery by persons who were released from prison pursuant to a plea of "no contest" to time served. Pet. i. This question has divided the lower courts, which have encountered that precise fact pattern with alarming—and accelerating—frequency. *Id.* at 21-26. And Pima County cannot offer any reason why the Court should wait to resolve this urgent issue.

1. Pima County again offers a strained procedural objection, claiming that even though this issue was "pressed in and passed on by the Ninth Circuit," briefing was not quite ample enough to warrant review. Opp. 25. Nonsense. The Ninth Circuit *invited* briefing on this question, and both parties filed 15-page briefs devoted to the issue. CA9 Supp. Briefing Order (Sept. 21, 2018). The Ninth Circuit then issued a published opinion, over a vigorous dissent, in which it aligned itself with other circuits that have reached identical conclusions. That is more than sufficient to tee up the question for this Court's consideration.

2. Pima County also offers no credible grounds for disputing the split. As it acknowledges, four circuits have held that *Heck* bars recovery for persons similarly situated to Taylor. Opp. 26. Two circuits, in contrast—the Third and the Seventh—have adopted rules that permit recovery. Pet. 23-26.

Pima County observes that the Third and Seventh Circuits announced their rules in cases factually different than this one. Opp. 26-28. But that misses the point: What matters is that those courts adopted *rules* that squarely conflict with the positions taken by the First, Second, Fifth, and Ninth Circuits. The Third Circuit adopted a flexible understanding of "favorable termination" that turns on whether a judgment "indicates the innocence of the accused" rather than on the label. *Geness* v. *Cox*, 902 F.3d 344, 356 (3d Cir. 2018) (internal quotation marks omitted); *see Bronowicz* v. *Allegheny County*, 804 F.3d 338, 346 (3d Cir. 2015) (applying this rule in the context of *Heck*). And the Seventh Circuit held, contrary to the decision below, that a judgment retroactively authorizing a prisoner's detention does not immunize that detention from § 1983 liability. *See Lopez* v. *City of Chicago*, 464 F.3d 711, 722 (7th Cir. 2006); *cf.* Pet. App. 10a.

Pima County does not dispute that those different legal rules have led to different results on the ground in cases just like Taylor's. *See* Pet. 23-25. Pima County dismisses those decisions because they were issued by district courts. Opp. 28-29. But the fact that different legal rules lead to different results in district courts is a standard way of showing that a circuit split has bite—particularly where, as here, the relevant legal question (the availability of dam-

ages) is rarely immediately appealable, and cases presenting that question often settle by the time trial concludes.

3. Given the split, review would again be warranted regardless of the merits. But Pima County's defense of the decision below is singularly underwhelming.

First, Pima County offers no reason why awarding damages for a term of imprisonment would call into question the validity of a subsequent sentence to time served. Pima County simply asserts that a time-served sentence is "backwards-looking." Opp. 30. But that unreasoned assertion does not address, let alone rebut, the serious flaws Taylor identified in the Ninth Circuit's reasoning. *See* Pet. 29-30.

Second, Pima County cannot explain why Taylor did not achieve "favorable termination," given that his no-contest plea ended his term of imprisonment and reflected the prosecution's determination that it could not prove his guilt beyond a reasonable doubt. Pet. 30. Pima County instead responds with a non-sequitur: It says that allowing Taylor to obtain damages for his term of imprisonment would "undermin[e]" his plea. Opp. 31, 34-35 (internal quotation marks omitted). But nothing in Taylor's plea agreement says that it bars § 1983 relief, *see* ER 127-135; if anything, it is Pima County that would obtain a windfall by effectively amending the plea agreement to add a limitation on relief that is nowhere found in its text.[*]

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[*] Pima County says it did not retry Taylor because of the "passage of time," rather than because it agreed he was inno-

Third, Pima County fails to reconcile the decision below with *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987). Taylor's plea was deeply "coerci[ve]," because the prosecution refused to release him from life imprisonment unless he signed it. *Id.* at 394. And Pima County cannot identify a single "legitimate prosecutorial and public interest[]" served by this plea. *Id.* at 397. Pima County's suggestion (at 32-33) that the plea is insulated from scrutiny merely because Taylor was counseled and a judge approved it finds no footing in this Court's precedents, ignores the realities of plea bargaining, and would render *Rumery* a dead letter for any plaintiff in Taylor's position. *See* Amicus Br. of Lucian E. Dervan 1-3.

III. THE QUESTIONS PRESENTED ARE OF ENORMOUS IMPORTANCE AND THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THEM.

The questions presented are of profound importance. Contrary to Pima County's suggestion (at 24), resolution of either question would determine whether individuals who are released pursuant to a no-contest plea can obtain recovery for their wrong-

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cent. Opp. 33 n.6. But the relevant question is whether Pima County believed it could sustain Taylor's conviction, and it plainly did not. Further, the County has not identified any evidence credibly suggesting that Taylor was guilty or that arson was committed. The only scraps of "evidence" it points to—that Taylor, as a 16-year old smoker, gave confused answers during his all-night interrogation and had matchbooks in his pocket, *id.* at 3-4—could not possibly support a conviction for 28 counts of murder. And Pima County does not even attempt to rebut the evidence of severe misconduct by the prosecutor, the police, and the fire investigator. *See* Pet. 6-8.

ful terms of imprisonment. That issue is both frequently recurring and highly important: As the ABA explains, local governments have, with disturbing frequency, turned to no-contest pleas as a means of insulating themselves from claims by the wrongfully incarcerated. ABA Amicus Br. 20-23; *see* Richard A. Webster, *A 42-year inmate's choice: Exoneration fight or 'deal with the devil' for freedom*, Wash. Post (Feb. 21, 2020), https://tinyurl.com/weaatey (giving additional examples). Indeed, the ABA issued guidance specifically disapproving of such pleas in light of evidence that they have become a "very real problem." ABA Amicus Br. at 16-18, 22-26.

The first question presented is also significant for an array of other individuals. Cases frequently arise in which former prisoners lacked a viable habeas remedy while incarcerated—for instance, because they were sentenced to probation, or their terms were too short to seek habeas relief. *See* Pet. 15-19. Deeming *Heck* applicable to such persons exacts a "terrible price," by depriving them of any opportunity to obtain redress for severe constitutional violations. *Savory*, 947 F.3d at 434 (Easterbrook, J., dissenting). Yet this Court never previously had a viable opportunity to resolve this important question. Pima County identifies only two petitions raising the issue, and both suffered from obvious vehicle problems. *See* Br. in Opposition 8, *Newmy* v. *Johnson*, 574 U.S. 1047 (2014) (No. 14-91), 2014 WL 5489481 (petitioner forwent available postconviction remedies, rendering the *Spencer* exception inapplicable); Br. in Opposition 12-13, *Gause* v. *Haile*, 574 U.S. 824 (2014) (No. 13-1518), 2014 WL 4059772 (same).

Pima County identifies no impediment that would prevent the Court from at last resolving the circuit splits in this case. The County claims that it may be entitled to Eleventh Amendment immunity, Opp. 20-21, but it is black-letter law that counties are not protected by the Eleventh Amendment, *N. Ins. Co. of N.Y.* v. *Chatham County*, 547 U.S. 189, 193 (2006). And Pima County waived any claim of immunity by removing the case to federal court. *See Lapides* v. *Bd. of Regents of Univ. Sys.*, 535 U.S. 613, 624 (2002).

Nor is it relevant that this case arises on a § 1292(b) appeal. *See, e.g.*, *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 485 (2015) (reviewing decision appealed under § 1292(b)); *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 22 (2004) (same). The Ninth Circuit granted immediate review precisely because the questions presented would not be clarified by requiring Taylor to undergo trial. Pet. App. 7a-8a. On the contrary, compelling Taylor to try the case without the opportunity to present evidence of damages from his 42 years of imprisonment would entail a waste of resources, and only further delay justice for an individual who has suffered for more than four decades as a result of his government's inexcusable misconduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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