No. 20-___

IN THE

Supreme Court of the United States

CITY OF FAIRBANKS, JAMES GEIER, CLIFFORD AARON RING, CHRIS NOLAN AND DAVE KENDRICK,

Petitioners,

v.

MARVIN ROBERTS, GEORGE FRESE, KEVIN PEASE AND EUGENE VENT,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that a plaintiff cannot bring a claim under 42 U.S.C. § 1983 for allegedly unconstitutional conviction or imprisonment unless they can prove that the underlying criminal proceedings terminated in their favor. *Heck* identified four possible ways that a § 1983 plaintiff could overcome this bar—namely, a plaintiff "must prove that the conviction or sentence has been [1] reversed on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87 (numbering added).

Respondents were convicted and imprisoned for a 1997 murder in Fairbanks, Alaska. During the pendency of state post-conviction proceedings, an Alaska trial court vacated Respondents' convictions based on a settlement agreement and a stipulation with the state that "the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt[.]" In vacating the convictions, the Alaska court made no determination that the convictions were unlawfully obtained or constitutionally infirm. To the contrary, the Alaska court expressly stated that its review was limited to examining whether the state attorney general acted within his lawful authority to settle civil litigation and that the court was not opining on the merits of the underlying convictions or the terms of the settlement.

On review, the issue is whether vacatur of a conviction by settlement qualifies as a favorable termination under *Heck* when the vacatur was merely the ministerial recognition of a settlement agreement between Respondents and the state.

RELATED PROCEEDINGS

Roberts, et al. v. City of Fairbanks, et al., No. 18-35938, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 22, 2020, *reh'g denied* June 26, 2020.

Roberts v. City of Fairbanks, et al., No. 4:17-cv-0034-HRH, consolidated with *Vent, et al. v. City of Fairbanks, et al.*, No. 4:17-cv-0035-HRH, U.S. District Court for the District of Alaska. Judgment entered Oct. 24, 2018.

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PETITION FOR A WRIT OF CERTIORARI

The City of Fairbanks, Alaska, and Fairbanks Police Department (FPD) Officers Geier, Ring, Nolan and Kendrick respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-29a) and dissenting opinion of Judge Ikuta (Pet. App. 30a-49a), are reported at *Roberts v. City of Fairbanks*, 947 F.3d 1191 (9th Cir. 2020). The order of the Ninth Circuit denying rehearing en banc (Pet. App. 77a-78a) and the dissenting opinion of Judge VanDyke (Pet. App. 79a-98a) are reported at 962 F.3d 1165 (9th Cir. 2020). The decision and order of the United States District Court for the District of Alaska granting Petitioners' motion to dismiss (Pet. App. 50a-74a) is not reported but is available at 2018 WL 5259453.

JURISDICTION

The Court of Appeals entered judgment on January 22, 2020. Petitioners filed a timely petition for rehearing en banc, which was denied on June 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. Factual Background

Three different juries convicted Marvin Roberts, George Frese, Kevin Pease and Eugene Vent (collectively, "Respondents") of the 1997 murder of John Hartman in Fairbanks, Alaska. The Alaska Court of Appeals affirmed each of those convictions on direct appeal. In 2013, Respondents filed petitions for post-conviction relief in the Alaska superior court seeking to set aside their convictions based on newly discovered evidence—a jailhouse informant claiming that persons other than Respondents committed the murder. Pet. App. 4a. The superior court allowed Respondents to conduct discovery and afforded them an opportunity to prove their factual innocence at an evidentiary hearing. *Id.* The superior court did not issue a decision at the end of the hearing but took the matter under advisement. *Id.* at 6a. Respondents decided not to wait for the court's decision. Instead, they chose to resolve their post-conviction relief petitions through a settlement agreement with the State of Alaska. *Id.* As part of the settlement agreement, the state stipulated that the superior court could vacate Respondents' convictions. *Id.* The state then dismissed

Respondents' indictments without prejudice, reserving the right to file new charges upon the discovery of substantial new evidence of guilt. *Id.* at 53a. In exchange, Respondents agreed to release all claims against the State of Alaska, the City of Fairbanks, and their respective employees. *Id*. at 8a.

The settlement did not resolve the question of Respondents' guilt or innocence. Instead, the parties agreed they "ha[d] not reached agreement as to [Respondents'] actual guilt or innocence." *Id.* at 6a. The parties also stipulated that "the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt" (*Id*. at 7a) and that "[the] Court need not make findings of innocence" under Alaska's post-conviction relief statute. *Id.* at 56a.

Pursuant to the settlement agreement and stipulations, the superior court vacated Respondents' convictions and sentences. *Id.* at 7a-8a. In doing so, the superior court stated that its role was to "ministerially sign the orders necessary to [e]ffect the decision of the attorney general," and that, having determined the settlement was procedurally proper, it had "no authority to review or to criticize" the attorney general's settlement decision. *Id.* at 7a. The superior court reiterated that it had "no power of review or approval" over the settlement. *Id.* at 31a. The superior court therefore did not have occasion to declare that Respondents' original convictions or sentences were invalid, or to make a judicial determination that they had satisfied the requirements for post-conviction relief under Alaska law.

B. Procedural History

Despite the global release of all claims in the settlement agreement, Respondents subsequently filed a civil action in the United States District Court for the District of Alaska, asserting claims against the City of Fairbanks and its police officers for unconstitutional conviction and incarceration under 42 U.S.C. § 1983 and § 1985. *Id.* at 8a. The district court had jurisdiction over Respondents' federal statutory claims pursuant to 28 U.S.C. § 1331. The district court dismissed Respondents' claims pursuant to *Heck v. Humphrey*, concluding that the vacatur of Respondents' convictions pursuant to a settlement agreement did not satisfy *Heck's* favorable termination rule. Pet. App. 50a-74a.

A divided panel of the Ninth Circuit court reversed, holding that *Heck* did not apply because Respondents' convictions were no longer outstanding: "[W]here all convictions underlying § 1983 claims are vacated and no outstanding criminal judgments remain, *Heck* does not bar plaintiffs from seeking relief under § 1983." *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1193 (9th Cir. 2020) (*"Roberts I"*). "The absence of a criminal judgment here renders the *Heck* bar inapplicable; the plain language of the decision requires the existence of a conviction in order for a § 1983 suit to be barred." *Id.* at 1198. In other words, it did not matter to the Ninth Circuit how or why the convictions were vacated. The fact of vacatur, in and of itself, rendered *Heck's* favorable termination rule inapplicable.

Judge Ikuta dissented. She recognized that permitting § 1983 wrongful-conviction claims to proceed based on the fact of vacatur alone "squarely contradicts" *Heck's* unambiguous mandate that "plaintiffs 'must' show that their convictions were terminated in

one of four specific ways[.]" *Id*. at 1206, 1213–14 (Ikuta, J., dissenting). Judge Ikuta would have held that the Respondents could not satisfy their burden of proof under *Heck* because they "did not have their prior convictions 'declared invalid by a state tribunal authorized to make such determination,' but instead reached an agreement with the state to vacate their convictions." *Id*. at 1215.

The City of Fairbanks petitioned for rehearing en banc, but the Ninth Circuit denied the petition. *Roberts v. City of Fairbanks*, 962 F.3d 1165 (9th Cir. 2020) (*"Roberts II"*). Dissenting from that denial, Judge VanDyke noted that "[t]he split panel decision in this case created an additional exception to the *Heck* bar that, a far as [he could] tell, is unprecedented—not only in our circuit, but across the federal courts." *Id.* at 1166 (VanDyke, J., dissenting). He considered the panel majority's decision to be "irreconcilable with *Heck's* favorable termination rule." *Id*. at 1173. Judge VanDyke also had a "very serious concern" about the practical implications of the panel majority's "novel exception" to *Heck's* favorable termination rule. *Id.* at 1173, 1175. He explained the decision conflicted with decisions of other circuits, and could open a "Pandora's box" of new § 1983 claims based on convictions that were vacated without a judicial determination of invalidity, for example, statutory expungements. *Id*. at 1166-67.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that a § 1983 plaintiff seeking damages for an allegedly unconstitutional conviction can avoid the application of *Heck*'s favorable termination rule merely by proving that their conviction has been vacated. Under the Ninth Circuit's decision, any vacatur will do. This holding "squarely contradicts" *Heck's* unambiguous mandate that "plaintiffs 'must' show that their convictions were terminated in one of four specific ways." *Roberts I*, 947 F.3d at 1213-14 (Ikuta, J., dissenting). And it "create[s] an additional exception to the *Heck* bar that . . . is unprecedented . . . across the federal courts." *Roberts II*, 962 F.3d at 1166 (VanDyke, J., dissenting from denial of rehearing en banc).

By breaking with *Heck's* clear and unambiguous mandate, the Ninth Circuit has created new law with wide-ranging implications. It "casts into doubt the *Heck* bar's applicability" in "every situation where a criminal defendant's conviction is ministerially vacated without any judicial determination that the conviction was actually 'invalid.'" *Roberts II*, 962 F.3d at 1166 (VanDyke, J, dissenting). This includes the many situations in which convictions are automatically vacated pursuant to state law after an offender has served his sentence. *Id*. at 1173 (collecting statutes providing for automatic vacatur of sentences that were never declared invalid). Under the decision below, § 1983 plaintiffs can now collaterally attack the validity of prior convictions using the vehicle of a civil suit in the first instance, which is precisely what *Heck* sought to preclude.

In addition to breaking with controlling precedent from this Court, the holding below conflicts with decisions of three other circuits, and it deepens a well-

developed circuit split. Like the decision below, the Sixth, Tenth and Eleventh circuits all hold that *Heck* cannot apply in the absence of an "outstanding conviction." By contrast, the Second, Third, and Fifth circuits hold that a § 1983 plaintiff must prove "favorable termination" even if their convictions are not outstanding. This case presents an ideal opportunity for the Court to resolve this entrenched circuit split.

Heck's favorable termination rule is one of the most frequently litigated issues in the federal courts.[1] "[I]ts better-established exceptions already bedevil federal courts around the country[.]" *Roberts II*, 962 F.3d at 1166 (VanDyke, J., dissenting). And "confusion over how to interpret *Heck* runs rampant." Bonnie Gill, *Collateral Consequences of Pretrial Diversion Programs Under the Heck Doctrine*, 76 Wash. & Lee L. Rev. 1763, 1768 (2019). The decision below exemplifies and adds to this confusion, and this case presents an ideal opportunity for this Court to address important and frequently recurring issues related to the correct application of *Heck's* favorable termination rule. The Court should grant certiorari.

I. The Judgment of the Ninth Circuit is a Significant Departure from Controlling Supreme Court Precedent

The Ninth Circuit's decision is a sharp departure from this Court's established precedents.

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[1] *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 Vand. L. Rev. 333, 389 (2016) (appending a list of most frequently cited Supreme Court decisions, with *Heck* coming in at number 27). As of the date of printing this petition, Westlaw reflects that *Heck* has been cited in 31,206 written decisions, including 30,795 federal court decisions.

In *Heck v. Humphrey*, this Court held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, . . . a § 1983 plaintiff must prove that the conviction or sentence has been [1] reversed on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487-87 (numbering added). The Court made clear that this list is exclusive: "A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." *Id*. at 487 (emphasis in original). And it has recently affirmed that "invalidation" of a conviction has a particularized meaning for purposes of § 1983 claims, and that particularized meaning is defined by *Heck*: "Only once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated *within the meaning of Heck*, will the statute of limitations begin to run." *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019) (emphasis added). The *manner* in which a conviction is vacated is therefore critical to *Heck's* favorable termination analysis. Not just any vacatur will suffice. Instead, a § 1983 plaintiff "*must* prove" that their prior conviction ended in one of the ways that *Heck* recognized as a favorable termination.

The decision below ignores this mandate, holding that *Heck* does not apply so long as the § 1983 plaintiff's prior conviction has already been vacated, regardless of the manner of or reasons for the vacatur: "[W]here all convictions underlying § 1983 claims are vacated and no outstanding criminal judgments remain, *Heck* does not bar plaintiffs from seeking relief under § 1983." *Roberts I*, 947 F.3d at 1193. According to the Ninth Circuit, the "absence of a

criminal judgment . . . renders the *Heck* bar inapplicable[.]" *Id*. at 1198. But this analysis is "irreconcilable with *Heck's* favorable termination rule." *Roberts II*, 962 F.3d at 1173 (VanDyke, J., dissenting). Succinctly stated in Judge Ikuta's dissenting opinion:

> *Heck* precludes plaintiffs from bringing a § 1983 action unless they have shown that their conviction was invalidated by one of the four specific means. 512 U.S. at 486–87, 114 S.Ct. 2364. The majority, by contrast, allows plaintiffs to bring a § 1983 action if their conviction was discharged or satisfied by any means.

Roberts I, 947 F.3d at 1212–13 (Ikuta, J., dissenting). Because the "conclusion that a plaintiff can bring a § 1983 malicious prosecution action so long as the underlying criminal judgment was discharged by *any* means is contrary to *Heck*, the majority's interpretation must be rejected." *Id*. at 1213.

The decision below is also wrong because it "divorce[s] *Heck's* favorable termination requirement from its common law roots." *Roberts II*, 962 F.3d at 1170 (VanDyke, J., dissenting). *Heck's* "favorable termination" rule derives from the common law tort of malicious prosecution. At common law, "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. This requirement "avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two

conflicting resolutions arising out of the same or identical transaction." *Id*. (internal citations omitted).

In *Heck*, this Court expressly incorporated these common law principles into its § 1983 jurisprudence, holding that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." *Heck*, 512 U.S. at 486 (internal citations omitted). Thus, "[j]ust as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id*. at 489–90 (internal citations omitted). The common law favorable termination rule therefore animates and informs the analysis of *Heck's* favorable termination requirement.

Under the common law favorable termination rule, it is the *manner* in which a prosecution ends, not merely the fact that it ended, that matters. It is well settled, for example, that "[p]roceedings are 'terminated in favor of the accused' only when their final disposition is such as to indicate the accused is not guilty."[2] Thus, "termination of criminal proceedings in

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[2] *Bretz v. Brusett*, 899 F.2d 18 (9th Cir. 1990) (unpub.) (citing *Restatement (Second) of Torts* § 660, Comments a & b (1977)); *see also Uboh v. Reno*, 141 F.3d 1000, 1004–05 (11th Cir. 1998) ("Courts have further reasoned that 'only terminations that indicate that the accused is innocent ought to be considered favorable.'") (quoting *Hilfirty v. Shipman*, 91 F.3d 573, 580 (3d Cir. 1996)); *Restatement (Second) of Torts* § 660 cmt. a ("Proceedings

favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if . . . the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused . . . . "[3] This principle is widely recognized in federal and state courts around the country.[4]

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are 'terminated in favor of the accused' . . . only when their final disposition is such as to indicate the innocence of the accused.").

[3] *Hilfirty*, 91 F.3d at 580 (quoting *Restatement (Second) of Torts* § 660), *disapproved of on other grounds by Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782 (3d Cir. 2000).

[4] *See McCubbrey v. Veninga*, 39 F.3d 1054, 1055 (9th Cir. 1994) ("The district court correctly determined that, 'generally, a dismissal resulting from a settlement does not constitute a favorable determination . . . . '"); *Ohnemus v. Thompson*, 594 F. App'x 864, 867 (6th Cir. 2014) ("In order for a termination of proceedings to be favorable to the accused, the dismissal must be one-sided and not the result of any settlement or compromise."); *Poventud v. City of New York*, 750 F.3d 121, 131 (2d Cir. 2014) ("[I]t is hornbook law that where charges are withdrawn or the prosecution is terminated by reason of a compromise into which the accused has entered voluntarily, there is no sufficient termination in favor of the accused.") (internal quotations omitted); *Murphy v. Lynn*, 118 F.3d 938, 949 (2d Cir. 1997) ("The prevailing view is that if the abandonment [of criminal claims by the prosecution] was the result of a compromise to which the accused agreed . . . it is not a termination in favor of the accused for purposes of a malicious prosecution claim."); *Uboh v. Reno*, 141 F.3d 1000, 1004–05 (11th Cir. 1998) ("[C]ourts have found that withdrawal of criminal charges pursuant to a compromise or agreement does not constitute favorable termination and, thus, cannot support a claim for malicious prosecution.") (internal citations omitted); *Laster v. Star Rental, Inc.*, 353 S.E.2d 37, 38 (Ga. App. 1987) ("[W]here the termination of the prosecution has been brought about by compromise and agreement of the parties, an action for malicious prosecution cannot be maintained."); *Fuentes v. Berry*, 45 Cal. Rptr. 2d 848, 852–53 (Cal. App. 1995) ("[A] dismissal resulting from a *settlement* generally does not

In concluding that *any* vacatur is sufficient to render *Heck* inapplicable, including the vacatur of Respondents' convictions by settlement agreement, the Ninth Circuit not only departed from the clear mandate of *Heck*, but it also broke with the common law principles from which *Heck* derived. As Judge Ikuta put it, "vacatur by settlement is not—and never was—recognized as a favorable termination at common law, so the majority's attempt to recognize it as a fifth means of favorable termination under *Heck* squarely contradicts *Heck*'s reliance on the 'common law of torts.'" *Roberts I*, 947 F.3d at 1214–15 (Ikuta, J., dissenting).

By declaring *Heck* inapplicable to any § 1983 plaintiff whose conviction has been vacated (irrespective of the means of or reasons for the vacatur), the decision below guts *Heck's* core holding and ignores its common law pedigree. The Ninth Circuit justified this departure from *Heck's* common law underpinnings by insisting that *Heck's* favorable termination requirement is not coextensive with the common law favorable termination rule. *Roberts I*, 947 F.3d at 1202–03 n.13. And that may very well be true. But this Court has held *Heck* out as an example of an occasion when the "review of common law [led] a court to adopt *wholesale* the rules that would apply in a suit involving the most analogous tort." *Manuel v. City of Joliet, Illinois*, 137 S. Ct. 911, 920–21 (2017) (emphasis added). So even the Ninth Circuit's effort to distance *Heck* from the common law on which it is based is inconsistent with this Court's jurisprudence.

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constitute a favorable termination. 'In such a case the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant's guilt or innocence.'").

In the end, the decision below marks a decided departure from the law that this Court laid down in *Heck*. Intervention is necessary to ensure the faithful application of controlling precedent, particularly given the importance of this issue.

II. The Decision Below Opens the Floodgates to § 1983 Claims Challenging Convictions that Have Never Been Invalidated within the Meaning of *Heck*

The Alaska superior court in this case "ministerially" vacated Respondents' convictions based on a settlement agreement and a stipulation that "the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt[.]" There has never been a judicial determination that Respondents' convictions were unlawfully obtained or constitutionally infirm. In other words, Respondents' convictions were never "declared invalid by a state tribunal authorized to make such determination," as required by *Heck*. *See Roberts I*, 947 F.3d at 1210 (Ikuta, J., dissenting). By holding that the ministerial vacatur of Respondents' convictions is sufficient to bypass *Heck*, without any judicial determination that the convictions were invalid, the decision below opens the floodgates to a whole new class of § 1983 claims for incarceration-related damages.

Many states have expungement statutes under which convictions may be "vacated" based solely upon the passage of time, the completion of probation, or the convict's subsequent good behavior, with no showing that the underlying conviction was unlawful or constitutionally infirm. Washington law provides a good example. In Washington State, if a convict meets the statutory test for expungement, the state court is

directed to "clear the record of conviction by . . . setting aside the verdict of guilty . . . and dismissing the information or indictment against the offender." RCW 9.94A.640(1). In such cases, the law treats the offender as though he or she had never been convicted: "For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime." RCW 9.94A.640(3)(A). Washington is not alone. Many states have similar expungement statues.[5]

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[5] *See, e.g.*, Or. Rev. Stat. § 137.225 ("[A]t any time after the lapse of three years from the date of pronouncement of judgment, any defendant who has fully complied with and performed the sentence of the court . . . may apply to the court where the conviction was entered for entry of an order setting aside the conviction."); Cal. Penal Code § 1203.4 (requiring "vacation" of certain convictions after successful completion of probation); *id.* at § 1203.41 (providing for vacation of guilty pleas and verdicts without a finding of the conviction's invalidity); Ariz. Rev. Stat. § 13-909 (providing for vacation of convictions); *id.* at § 13-905 ("[E]very person convicted of a criminal offense, on fulfillment of the conditions of probation or sentence and discharge by the court, may apply to the court to have the judgment of guilt set aside."); Nev. Rev. Stat. § 179.247 (providing certain nonviolent offenders with the option of vacating their judgment and sealing their records of conviction); Haw. Rev. Stat. § 712-1209.6 (giving convicted prostitutes the ability to vacate their convictions); Wash. Rev. Code Ann. § 10.05.120 (instructing courts to dismiss charges after the defendant successfully completes a deferred prosecution program); Mont. Code. Ann. § 46-16-130 (requiring automatic dismissal of prosecution upon compliance with the terms of a pre-trial diversion program); Nev. Rev. Stat. § 174.033 (mandating the dismissal of charges following a defendant's completion of "the terms and conditions of a preprosecution diversion program"); Or. Rev. Stat. § 135.891 (confirming that criminal charges will be dismissed with prejudice when a defendant fulfills the requirements of a diversion agreement); Ariz. Rev. Stat. § 11-361 ("[T]he county attorney of a participating

Until now, courts have had little difficulty concluding that such vacaturs did not relieve plaintiffs of the *Heck* bar because their convictions were not "declared invalid" by a state tribunal. *See, e.g.*, *Campos v. City of Merced*, 709 F. Supp. 2d 944, 961 (E.D. Cal. 2010) (vacatur of conviction under California Penal Code § 1203.4 does not lift the *Heck* bar); *Lynch v. State*, 2018 WL 3120840, at *4 (Wash. Ct. App. 2018) (vacatur of conviction under Washington expungement statute does not lift the *Heck* bar because, under *Heck*, "a § 1983 action becomes cognizable only when the underlying conviction or sentence is determined to have been invalidated, *i.e.*, deemed unconstitutional or unlawful.").

After the decision below, however, there is no principled reason to hold that *Heck* bars a plaintiff whose conviction was vacated in such a manner from collaterally attacking their still-valid convictions through a § 1983 civil suit, which is precisely the result *Heck* sought to avoid. *See Roberts II*, 962 F.3d at 1175 ("Even though one purpose of the favorable-

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county may divert or defer, before a guilty plea or a trial, the prosecution of a person who is accused of committing a crime . . . ."); Haw. Rev. Stat. § 853-1 (deferring further proceedings when a defendant enters a guilty or nolo contendere plea to allow the defendant to participate in a deferred prosecution program that requires dismissal of the criminal charges upon completion of the program); Alaska Stat. § 12.55.078 (permitting deferred adjudication wherein a defendant serves a term of probation in exchange for the dismissal of the criminal proceedings); Mont. Code. Ann. § 46-18-1104 (describing the conditions for expungement of misdemeanors); Idaho Code § 19-2604 (authorizing courts to terminate a sentence, set aside a guilty plea or conviction, and dismiss the case if the court determines "there is no longer cause for continuing the period of [defendant's] probation").

termination rule is to avoid the risk that a criminal conviction could be deemed valid in the criminal context and invalid in the civil context, the *Roberts* exception now requires this Court to engage in judicial gymnastics to determine whether a § 1983 plaintiff may attack a conviction that has not actually been declared invalid by an authorized state tribunal.") (VanDyke, J., dissenting).

By holding that the application of *Heck's* favorable termination rule turns on the existence, or not, of an "outstanding conviction," the decision below throws open the door to collateral attacks on convictions and sentences that have never been invalidated in the criminal courts.

III. The Decision Below Adds to a Deepening Circuit Split

The decision below also adds to a deepening circuit split regarding the application of *Heck* to plaintiffs who have no outstanding conviction even though the criminal proceedings against them did not terminate in their favor. In this case, the Ninth Circuit concluded that the absence of an outstanding conviction means that *Heck's* favorable termination rule does not apply. As Judge VanDyke recognized dissenting from the denial of en banc review, this conclusion puts the Ninth Circuit in conflict with the Second and Third Circuits, both of which have held that a § 1983 plaintiff must prove favorable termination, even in the absence of an outstanding conviction. *Roberts II*, 962 F.3d at 1174-75. The Second and Third Circuits reached this conclusion in the context of pretrial diversion statutes, under which a criminal defendant avoids a "conviction" by agreeing to participate in a rehabilitative or other program. In these circuits, a criminal defendant who has voluntarily entered a pretrial diversion

program may not later contest the criminal proceedings through a § 1983 suit, despite the absence of a conviction, because participation in a pretrial diversion program is not a favorable termination. *See Roesch v. Otarola*, 980 F.2d 850, 853 (2d Cir. 1992) ("[W]e hold [that a] trial rehabilitation program is not a termination in favor of the accused for purposes of a civil rights suit."); *see Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005) ("[W]e hold the [pretrial diversion] program is not a favorable termination under *Heck*."). The Fifth Circuit is in accord. *See Taylor v. Gregg*, 36 F.3d 453, 455-56 (5th Cir. 1994) (holding that pretrial diversion programs are not favorable terminations).

The Sixth, Tenth, and Eleventh Circuits, however, have held that *Heck* does not bar a criminal defendant who successfully completes a pretrial diversion program from bringing a subsequent civil rights suit, specifically because there is no "outstanding conviction" in such cases. *See Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1096 (10th Cir. 2009) ("[W]e have determined that the Kansas pretrial diversion agreements are not outstanding convictions and therefore these § 1983 claims impugning their validity are not barred by *Heck*."); *McClish v. Nugent*, 483 F.3d 1231, 1252 (11th Cir. 2007) ("[We] reverse the district court's grant of summary judgment . . . on the grounds that Holmberg's § 1983 claim was *Heck*-barred."); *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 639 (6th Cir. 2008) ("We hold that *Heck* is inapplicable, and poses no bar to plaintiffs' claims.").

Accordingly, there is a well-developed circuit split regarding the application of *Heck* to plaintiffs who cannot prove favorable termination, but whose convictions are not "outstanding" due to a variety of state-court procedural devices employed to resolve criminal

proceedings. *See* Bonnie Gill, *Collateral Consequences of Pretrial Diversion Programs Under the Heck Doctrine*, 76 Wash. & Lee L. Rev. 1763, 1768 (2019) (examining circuit split). This case presents an ideal vehicle to resolve this split of circuit authority and bring clarity to an important area of law that has sown confusion within the federal courts.

CONCLUSION

The decision below was deeply flawed and flatly inconsistent with controlling decisions from this Court. It adds to the acknowledged confusion over the correct application of *Heck* and deepens a well-developed circuit split about the significance of an outstanding conviction for purposes of *Heck*. The Court should grant certiorari to correct the decision below and provide the lower courts with much needed guidance on the application of *Heck* to plaintiffs whose prior convictions are no longer outstanding.

Respectfully submitted,

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November 20, 2020

APPENDIX

APPENDIX A

947 F.3d 1191

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 18-35938

MARVIN ROBERTS; EUGENE VENT;
KEVIN PEASE; GEORGE FRESE,

Plaintiffs-Appellants,

v.

CITY OF FAIRBANKS; JAMES GEIER;
CLIFFORD AARON RING; CHRIS NOLAN;
DAVE KENDRICK,

Defendants-Appellees.

Argued and Submitted August 9, 2019
Fairbanks, Alaska
Filed January 22, 2020

Appeal from the United States District Court
for the District of Alaska,
H. Russel Holland, District Judge, Presiding,
D.C. Nos. 4:17-cv-00034-HRH, 4:17-cv-00035-HRH

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OPINION

Before: Richard C. Tallman, Sandra S. Ikuta, and N. Randy Smith, Circuit Judges.

Dissent by Judge Ikuta

TALLMAN, Circuit Judge:

This is an appeal from an order dismissing claims brought under 42 U.S.C. § 1983 and § 1985 on the ground that the claims were barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The primary question before us is whether § 1983 plaintiffs may recover damages if the convictions underlying their claims were vacated pursuant to a settlement agreement. The answer depends on whether such a vacatur serves to invalidate the convictions and thus renders the related § 1983 claims actionable notwithstanding *Heck*. We conclude that where all convictions underlying § 1983 claims are vacated and no outstanding criminal judgments remain, *Heck* does not bar plaintiffs from seeking relief under § 1983. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand for further proceedings.

I

The following facts are alleged in the operative pleading or are subject to judicial notice:

On October 11, 1997, several men beat and kicked to death 15-year-old John Hartman on the streets of Fairbanks, Alaska. Plaintiffs Marvin Roberts, George Frese, Kevin Pease, and Eugene Vent (collectively "Plaintiffs") were arrested by the Fairbanks Police Department, tried, and convicted of the murder and received prison sentences ranging from 30 to 77 years. The men—three Alaska Natives and one Native American—were between the ages of 17 and 20.

Several years after the convictions, an individual named William Holmes confessed to his involvement in the murder and named Jason Wallace and three other men as the actual perpetrators of the crime. Partly based on this confession, Plaintiffs filed post-conviction relief ("PCR") petitions in Alaska Superior Court in September 2013. The court ruled that the petitions stated a prima facie case of actual innocence, allowing Plaintiffs to proceed with discovery, which lasted two years.

On May 4, 2015, Jason Gazewood, counsel for Jason Wallace, wrote a letter to the post-conviction prosecutors,[1] expressing his concerns with the likely outcome of a PCR hearing. Gazewood, a former Fairbanks prosecutor, wrote that their convictions were likely to be vacated and that a retrial would be "virtually unwinnable." He noted that the lead investigator of the murder, Detective Clifford Aaron Ring, had "edit[ed] his recordings in such a way as to not record exculpatory information while using coercive techniques to obtain confessions," and that the Fairbanks Police Department ("FPD") was well aware of Detective Ring's "use of deceptive interviewing techniques." For these reasons, among others, Gazewood warned the prosecutors that Plaintiffs were likely to seek—and win—tens of millions of dollars in a civil-rights

[1] Gazewood's letter was addressed to Assistant Attorney General Adrienne Bachmann who had allegedly suppressed a memorandum documenting Holmes' 2011 confession to the Hartman murder from Plaintiffs and their counsel. Because we review de novo the district court's grant of a motion to dismiss under Rule 12(b)(6), "accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party," *Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018), we do not address whether Plaintiffs' allegations can be proven.

suit against those involved in procuring their wrongful convictions.

After discovery, the state court held a five-week evidentiary hearing from October through November of 2015. The following testimony was adduced:

- William Holmes testified that he, Jason Wallace, and three other men had murdered Hartman;
- Eleven witnesses corroborated Holmes' account;
- Four witnesses testified that Wallace had confessed to killing Hartman and provided consistent, interlocking accounts corroborating that fact;
- Arlo Olson, the sole witness who had identified Plaintiffs as assailants in an unrelated attack on Frank Dayton the night of the Hartman murder, testified that FPD officers coerced him into giving a false statement;
- Frank Dayton, the individual who had also been assaulted on the night of the murder, testified that his assailants had not been in Roberts' car, as had been asserted by the prosecution;
- An Alaska State Trooper testified that an investigation corroborated key elements of Holmes' confession and failed to find any evidence of Plaintiffs' guilt;
- Alibi witnesses provided accounts of the activities and whereabouts of Plaintiffs on the night of the murder, establishing that Plaintiffs were never together that night

and could not have murdered Hartman or assaulted Dayton; and

- Forensic experts testified that the prosecution improperly advanced "evidence" that Frese's boot print matched the injuries on Hartman's face, stating that there was no scientifically reliable way to make this determination.

At the end of the evidentiary hearing, the judge told the parties that he would not render a decision for another six to eight months. Plaintiffs allege that prosecutors publicly stated that they would appeal any decision favorable to Plaintiffs all the way to the Alaska Supreme Court, thereby extending the men's already lengthy incarceration for an indefinite period.

Several weeks after the hearing and just before Christmas 2015, the prosecutors offered Plaintiffs a deal: the prosecution would consent to vacating the convictions and dismissing the charges, but only if all four plaintiffs agreed to release the State of Alaska and the City of Fairbanks (and their employees) from any liability related to the convictions.[2] Plaintiffs agreed and entered into a settlement agreement with the State of Alaska and the City of Fairbanks (the "Settlement Agreement"). The Settlement Agreement was filed with the Alaska Superior Court, and the parties jointly stipulated that the court would be asked to vacate Plaintiffs' convictions. The Settlement Agreement also provided that "[t]he parties have not reached agreement as to [Plaintiffs'] actual guilt or innocence."

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[2] Roberts had already been released from prison and was on supervised parole, but the prosecution refused to release any of the other three plaintiffs from prison unless Roberts agreed to the same arrangement.

Nonetheless, Plaintiffs all signed the Settlement Agreement, which included the following key stipulations:

> - The petitioners stipulate and agree that the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt.
> - The parties stipulate and agree that there is sufficient new evidence of material facts that a new trial could be ordered under AS 12.72.010(4).[3]
> - The parties stipulate and agree that this Court may immediately enter Orders vacating the Judgments of Conviction . . . and awarding each Petitioner the relief of a new trial for each of the charges for which Petitioners were convicted.

On December 17, 2015, after a judicially supervised mediation, the Alaska Superior Court convened a settlement hearing with all parties present and heard from representatives of the victims and counsel for all parties. The court explained that its role was to "ministerially sign the orders necessary to [e]ffect the decision of the attorney general," and that, having determined that the settlement was procedurally proper, it "had no authority to . . . review or to criticize" the attorney general's decision. At the conclusion of the hearing, the court vacated Plaintiffs' convictions,

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[3] Under Alaska Statute § 12.72.010(4), a person convicted of a crime may institute a PCR proceeding if the person claims "that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice."

the prosecutors dismissed all indictments, and Vent, Frese, and Pease were released from prison. The parties inform us that no further prosecution of these men has ensued and no new trial was ever ordered following the 2015 hearing.

Despite a global release of all claims by Plaintiffs contained in the Settlement Agreement, this civil-rights lawsuit was later commenced. On May 14, 2018, Plaintiffs filed a Second Amended and Consolidated Complaint and Jury Demand seeking relief under § 1983 against the City of Fairbanks and the four named FPD officers: James Geier, Clifford Aaron Ring, Chris Nolan, and Dave Kendrick (collectively "Defendants"). Vent and Frese alleged Fifth Amendment violations, and all four plaintiffs asserted the following causes of action:

1. 42 U.S.C. § 1983 deprivation of liberty;
2. § 1983 malicious prosecution;
3. § 1983 *Brady* violations;
4. § 1983 supervisor liability;
5. § 1983 civil rights conspiracy;
6. § 1985(3) conspiracy;
7. § 1983 *Monell* claims against the City of Fairbanks;
8. § 1983 First Amendment right of access;
9. Spoliation of evidence;
10. Negligence; and
11. Intentional or reckless infliction of emotional distress. Plaintiffs requested a declaratory judgment that the Settlement Agreement is unenforceable, an award of

compensatory and punitive damages, and attorney's fees.

On June 4, 2018, Defendants moved to dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), or alternatively, for failure to join the State of Alaska as an indispensable party under Rule 12(b)(7).

The district court entered a final judgment and order dismissing Plaintiffs' negligence and negligent infliction of emotional distress[4] claims with prejudice,[5] and dismissing the other ten claims without prejudice, under Rule 12(b)(6).[6]

Roberts v. City of Fairbanks, No. 4:17-CV-0034-HRH, 2018 WL 5259453, at *10 (D. Alaska Oct. 22, 2018). But the court denied leave to amend "as amendment would be futile at th[at] time." *Id.* The district court dismissed the claims as barred by *Heck v. Humphrey*, holding that vacatur of convictions pursuant to a settlement agreement was insufficient to render the convictions invalid in specific reliance on the parties' stipulation that "the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt." *Id.* at *8 (internal quotation marks omitted). As the court explained, "[a]ll the Superior Court did was vacate

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[4] The court likely intended to refer to the intentional or reckless infliction of emotional distress claim, as Plaintiffs had not asserted a negligent infliction of emotional distress claim. The district court can clarify this matter on remand.

[5] The court noted that Plaintiffs did not oppose dismissal of these two claims.

[6] The court did not consider Defendants' alternative Rule 12(b)(7) argument. Defendants press that issue on appeal before us.

plaintiffs' convictions pursuant to the settlement agreements and the stipulation. The Superior Court did not declare their convictions invalid." *Id.* Plaintiffs timely appealed.

II

As previously noted, *see supra* n.1, we accept Plaintiffs' factual allegations as true and review de novo the Rule 12(b)(6) dismissal.

III

A

We agree with the district court that our analysis is guided by *Heck v. Humphrey*, the seminal case discussing whether a plaintiff may challenge the constitutionality of a conviction through a § 1983 suit for damages. 512 U.S. at 478, 114 S.Ct. 2364. Petitioner Roy Heck was serving a 15-year sentence for voluntary manslaughter in the killing of his wife. *Id.* While his appeal from the conviction was pending in state court, Heck filed § 1983 claims in federal district court alleging that defendants, including county prosecutors and a state police investigator, had engaged in "unlawful, unreasonable, and arbitrary investigation," "knowingly destroyed" exculpatory evidence, and caused an "unlawful voice identification procedure" to be used at his trial, while acting under color of state law. *Id.* at 479, 114 S.Ct. 2364. Heck sought compensatory and punitive damages but did not seek injunctive relief or release from custody. *Id.*

The district court dismissed Heck's suit because it implicated the legality of his conviction. *Id.* Heck appealed this ruling to the Seventh Circuit Court of Appeals. *Id.* While the federal appeal was pending, the state supreme court affirmed his conviction and

sentence. *Id.* The Seventh Circuit upheld the district court's dismissal of the claims, holding that

> [i]f regardless of the relief sought, the plaintiff [in a federal civil-rights action] is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so.

Id. at 479–80, 114 S.Ct. 2364 (footnote and citations omitted).

Upon review, the Supreme Court disagreed with the circuit court's conclusion regarding exhaustion and stated that "§ 1983 contains no exhaustion requirement beyond what Congress has provided." *Id.* at 483, 114 S.Ct. 2364. Instead, the Court stated, the question before it was "whether the claim is cognizable under § 1983 at all." *Id.* Recognizing that § 1983 "creates a species of tort liability," *id*. (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986)), the Court began its analysis by looking at the common law of torts, specifically, the cause of action for malicious prosecution, which it described as the most analogous to Heck's claims, *id.* at 483–84, 114 S.Ct. 2364. The Court emphasized that the favorable-termination[7] element of malicious prosecution

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[7] We have said that the favorable-termination rule in the context of malicious prosecution refers to the termination of proceedings "in such a manner as to indicate . . . innocence." *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004). As discussed below, we leave to the district court the question

> avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.

Id. at 484, 114 S.Ct. 2364 (alteration in original) (quoting 8 S. Speiser, C. Krause & A. Gans, American Law of Torts § 28:5, at 24 (1991)).

The *Heck* Court noted its similar longstanding concern "for finality and consistency" and general disinclination to "expand opportunities for collateral attack." *Id.* at 485–86, 114 S.Ct. 2364. Based on this laudatory concern and "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," *id.* at 486, 114 S.Ct. 2364, the Court adopted a version of the common law's favorable-termination rule for § 1983 damages claims that "call into question the lawfulness of conviction or confinement," *id.* at 483, 114 S.Ct. 2364. The Court articulated four ways in which a § 1983 plaintiff could satisfy this requirement:

> [T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [1] reversed

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whether Plaintiffs have alleged sufficient facts to state a claim for malicious prosecution.

> on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court's issuance of a writ of habeas corpus.

Id. at 486–87, 114 S.Ct. 2364 (footnote omitted).[8] Here, we need only consider whether Plaintiffs' convictions were "declared invalid by a state tribunal authorized to make such determination," *id.* at 487, 114 S.Ct. 2364, when the Alaska Superior Court vacated their convictions based on the Settlement Agreement.

The *Heck* Court was explicit: "If the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* (footnote omitted). Because all convictions here were vacated and underlying indictments ordered dismissed, there remains no outstanding criminal judgment nor any charges pending against Plaintiffs. The absence of a criminal judgment here renders the *Heck* bar inapplicable; the plain language of the decision requires the existence of a conviction in order for a § 1983 suit to be barred. *See id.*

Defendants argue, and the dissent agrees, that even though the convictions were vacated, they are still "valid" and so Plaintiffs' civil-rights claims are not cognizable. But the plain meaning of *Heck* and our precedents counsel otherwise. According to *Black's Law Dictionary*, the definition of "vacate" is "to

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[8] We have held that *Heck* applies equally to claims brought under § 1985. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1097 n.4 (9th Cir. 2004).

nullify or cancel; make void; *invalidate*." *Black's Law Dictionary* 1782 (10th ed. 2014) (emphasis added). Nevertheless, Defendants maintain that the state court did not declare the convictions "invalid," as required by *Heck*, despite vacatur, because Plaintiffs, pursuant to the Settlement Agreement, "confirm[ed] the validity of their original convictions and sentences." The district court agreed, concluding that vacating Plaintiffs' convictions and sentences "is not the same thing [as invalidating them] for purposes of *Heck*." *Roberts*, 2018 WL5259453, at *10. The dissent claims allowing a § 1983 action based on vacated convictions is novel and contrary to our precedents. *See post*, at 1210. We address each argument in turn.

B

The district court's ruling and the dissent's proposed disposition conflict with our decisions in *Rosales-Martinez v. Palmer*, 753 F.3d 890 (9th Cir. 2014), and *Taylor v. County of Pima*, 913 F.3d 930 (9th Cir. 2019). Unfortunately, the district court did not have the benefit of *Taylor*, our most recent decision in this area, when it dismissed the case. There, we considered the vacatur of multiple convictions pursuant to an agreement following a post-conviction relief petition based on newly discovered evidence calling the convictions into question—mirroring the circumstances here. 913 F.3d at 932. The appellant in *Taylor*—convicted of felony murder in 1972—entered into a plea agreement with the state in 2013 whereby his original 1972 conviction was vacated, he pleaded no contest to the same counts, was resentenced to time served, and was ultimately released from prison. *Id.*

Our opinion in *Taylor* was firmly rooted in the reasoning that vacatur of a conviction by a state court constitutes invalidation under *Heck*. Specifically, we

said that "under *Heck*, a plaintiff in a § 1983 action may not seek a judgment that would necessarily imply the invalidity of a state-court conviction or sentence unless, for example, *the conviction had been vacated by the state court*." *Id.* at 935 (emphasis added). We confirmed the district court's proper analysis of *Heck*: "*Heck* does not bar [Taylor] from raising claims premised on alleged constitutional violations that affect his 1972 convictions [which had been vacated pursuant to the settlement] but do not taint his 2013 convictions [to which he pleaded no contest]." *Id.* (internal quotation marks omitted). We concluded that "Taylor's 1972 jury conviction ha[d] been vacated by the state court, so *Heck pose[d] no bar to a challenge to that conviction* or the resulting sentence." *Id.* (emphasis added). We ultimately held that Taylor was barred from seeking incarceration-related damages because all the time he served was "supported by the valid 2013 state-court judgment," not the vacated 1972 convictions. *Id.*

Our dissenting colleague contends that *Taylor*'s conclusion that § 1983 suits based on vacated convictions are not barred by *Heck* is merely an "offhand comment" that was made "in passing" and is therefore not binding. *Post*, at 1211. We think that reading of *Taylor* is too narrow. We expressly held there that *Heck* did not bar Taylor from seeking damages related to the 1972 conviction—just that Taylor could not seek *incarceration-related* damages, because the valid 2013 conviction "[a]s a matter of law . . . caused the entire period of his incarceration." *Taylor*, 913 F.3d at 935. *Cf. Jackson v. Barnes*, 749 F.3d 755, 762 (9th Cir. 2014) (allowing a § 1983 suit for nominal and punitive damages—but not incarceration-related damages—where the plaintiff was convicted, his conviction was set aside on habeas for *Miranda* violations, and he

was subsequently reconvicted without the tainted evidence). Taylor specifically challenged "his 1972 prosecution, convictions, and sentence and [did] not challenge his 2013 'no contest' pleas," recognizing that *Heck* would bar only the non-vacated judgment. *Taylor*, 913 F.3d at 935 (internal quotation marks omitted). We agreed that the 2013 judgment was valid because it had not been vacated, unlike the 1972 conviction. *Id.*

Far from an "offhand comment" made "in passing," *Taylor*'s understanding that a vacated conviction was "declared invalid" under *Heck* was an integral element underpinning our holding. We held that only the 2013 conviction—not the vacated 1972 conviction—barred his claim for incarceration-related damages, and we called the fact that the 2013 conviction supported his entire period of incarceration "critical[ ]." *Id.* That is no idle comment made in passing. Unlike in *Taylor*, here there is no substitute outstanding conviction to bar Plaintiffs from their suit for damages as Taylor's 2013 conviction barred his.

In *Rosales-Martinez*, the state court vacated the plaintiff's convictions pursuant to a settlement agreement following his filing of a habeas corpus petition alleging *Brady* violations. *See* 753 F.3d at 893. In 2004, Rosales-Martinez was convicted of four drug-related counts and sentenced to a term of imprisonment of 10 to 25 years. *Id.* at 892. He filed a state habeas petition after learning that the sole witness to testify against him had a criminal history that was not disclosed by the state as ordered by the court. *Id.* Rosales-Martinez then entered into a stipulated agreement with the state in which he agreed to withdraw his habeas petition and to plead guilty to one of the counts for which he was charged in exchange for

the state's recommending vacatur of his other convictions "based on the cumulative errors" he alleged and recommending to the court that he be sentenced only to time served. *Id.* at 893.

The state court accepted the agreement, vacated three of the four counts, and imposed a punishment of time served, whereupon Rosales-Martinez was released from prison. *Id.* at 894. He then filed a § 1983 action in federal district court based on the state's alleged *Brady* violations. *Id.* at 892. The district court concluded that Rosales-Martinez's § 1983 claim was untimely because he failed to file it within the two-year statute of limitations. *Id.* at 895. The court based its decision on the rule that "[a] federal claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action."[9] *Id.* (internal quotation marks and citation omitted).

We reversed, pointing to the Supreme Court's holding in *Heck* that "a § 1983 action challenging a conviction or sentence does not 'exist[ ]' until the conviction or sentence is invalidated." *Id.* at 896 (alteration in original) (citation omitted). Applying this rule, we stated, "*Heck* therefore teaches that Rosales-Martinez's claims did not accrue until the Nevada court vacated those convictions on December 2, 2008." *Id.* We thus implicitly held that vacating a conviction pursuant to a settlement agreement serves to invalidate the conviction under *Heck*. Specifically, we stated that "Rosales-Martinez pleaded guilty to one of the four

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[9] The court applied a statute of limitations of two years as provided by Nevada state law. "Nevada law provides the statute of limitations because, in the absence of a federal provision for § 1983 actions, the analogous state statute of limitations for personal injury claims applies." *Rosales-Martinez*, 753 F.3d at 895.

counts of his original conviction, *with the other three being held invalid*." *Id.* at 899 (emphasis added).

We went on to remand the case so the district court could determine how Rosales-Martinez's guilty plea to one count under the release-dismissal agreement should be addressed:

> The fact that Rosales-Martinez was reconvicted following the vacation of his initial convictions, means that he still has an outstanding conviction. This outstanding conviction raises the question whether Rosales-Martinez's § 1983 action is barred by *Heck*'s holding that "[a] claim for damages [based] on a conviction or sentence that has not been so invalidated is not cognizable."

Id. at 897 (quoting *Heck*, 512 U.S. at 487, 114 S.Ct. 2364) (alterations in original). Indeed, our decision reversing the lower court was contingent upon the finding that *Heck* does not bar a suit for damages based on convictions that were vacated pursuant to a settlement agreement.

The dissent's attempt to distinguish *Rosales-Martinez* is unconvincing. The dissent argues that *Rosales-Martinez* does not support our holding here because in that case we remanded "so the district court could address the viability of the plaintiff's complaint in the first instance." *Post*, at 1211. But the dissent misreads our opinion in *Rosales-Martinez*. We remanded that case *not* because we doubted that the state court's vacatur of Rosales-Martinez's three convictions invalidated them for purposes of *Heck*, but because his plea to the remaining count "suggest[ed] a continuous validity to a portion of his original conviction and sentence," and, therefore, "a possible incon-

sistency between it and a § 1983 action." *Rosales-Martinez*, 753 F.3d at 899. Indeed, on the same page of the opinion that the dissent cites for the proposition that we remanded the case "so the district court could address the viability of the plaintiff's complaint in the first instance," *post*, at 1211, we instructed the district court to determine Rosales-Martinez's prospects for compensatory damages "based on *the convictions that were vacated as invalid*," *Rosales-Martinez*, 753 F.3d at 899 (emphasis added). Guided by these decisions and the plain language of *Heck*, we must order reversal here.[10]

C

Nevertheless, the district court held, and the dissent argues, that vacatur-by-settlement does not qualify as invalidation under *Heck*. *See Roberts*, 2018 WL 5259453, at *8 ("All the Superior Court did was vacate plaintiffs' convictions pursuant to the settlement agreements and the stipulation. The Superior Court did not declare their convictions invalid."); *see post*, at 1210. The dissent's view that a conviction vacated by settlement is not "declared invalid" under *Heck* appears to arise out of its conflation of the favorable-

[10] There is a fundamental difference in how we and the dissent read *Heck*. The dissent cites language defining an "outstanding criminal judgment" in *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 204 L.Ed.2d 506 (2019) (quoting *Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007)). *See post*, at 1213. The dissent ignores the very next sentence in the *Wallace* opinion, which explains that the *Heck* rule for deferred accrual "delays what would otherwise be the accrual date of a tort action until the setting aside of *an extant conviction*." 549 U.S. at 393, 127 S.Ct. 1091. There are no extant convictions here. All convictions were set aside. In the absence of any remaining convictions, *Heck* does not bar § 1983 claims. Our reading of *Heck* comports with that of our circuit precedent in *Taylor* and *Rosales-Martinez*.

termination rule in the tort of malicious prosecution with *Heck*'s four distinct means of favorable termination.[11] *See post*, at 1214–15.

To be sure, *Heck* did create a favorable-termination rule, *see Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005), and the Supreme Court in *Heck* called malicious prosecution the "closest analogy" to a § 1983 suit for wrongful conviction, 512 U.S. at 484, 114 S.Ct. 2364. But *Heck*'s favorable-termination requirement is distinct from the favorable-termination element of a malicious-prosecution claim. *Compare Awabdy*, 368 F.3d at 1068 (malicious-prosecution plaintiff must "establish that the prior proceedings terminated in such a manner as to indicate his innocence"), *with Heck*, 512 U.S. at 486–87, 114 S.Ct. 2364 (favorable-termination rule satisfied when conviction or sentence is (1) reversed on direct appeal, (2) expunged by executive order, (3) declared invalid by a state court, or (4) called into question by a federal court's issuance of a writ of habeas corpus).

The dissent's contention to the contrary—that the analogy to malicious prosecution means that a § 1983

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[11] The dissent quotes from the Supreme Court's recent opinion in *McDonough* to support its apparent claim that *Heck* establishes an exact replica of the favorable-termination rule from the malicious-prosecution context. *See post*, at 1208. *McDonough*—a statute-of-limitations case—holds no such thing. Describing when a plaintiff may bring a § 1983 suit alleging fabrication of evidence, the Court wrote: "Only once the criminal proceeding has ended in the defendant's favor, *or* a resulting conviction has been invalidated within the meaning of *Heck* . . . will the statute of limitations begin to run." *McDonough*, 139 S. Ct. at 2158 (internal citation omitted) (emphasis added). By posing the favorable-termination rule and invalidation under *Heck* disjunctively, *McDonough* firmly undermines the dissent's insinuation that they are coterminous.

suit is barred by *Heck* unless the plaintiff could bring a claim for malicious prosecution at common law, *see post*, at 1214—is simply wrong. That argument contravenes the plain language of *Heck*, because convictions' being "called into question by a federal court's issuance of a writ of habeas corpus," *Heck*, 512 U.S. at 487, 114 S.Ct. 2364—the fourth listed exception to the *Heck* bar—does not necessarily indicate the innocence of the accused, as is required for a malicious-prosecution action to be maintained. The Second Restatement of Torts—the very source upon which the dissent relies, *see post*, at 1214—states that, where "new proceedings for the same offense have been properly instituted and have not been terminated in favor of the accused," there has been no "sufficient termination to meet the requirements of a cause of action for malicious prosecution." Restatement (Second) of Torts § 660; *see also id.* § 660 cmt. g ("When the charge has been properly revived under the criminal procedure of the particular jurisdiction, there can be no liability . . . until the new proceedings have terminated in favor of the accused."). *Prosser & Keeton on Torts* is in accord: "Any disposition of the criminal action which does not terminate it but permits it to be renewed . . . cannot serve as a foundation for the action [of malicious prosecution]." W. Page Keeton et al., *Prosser & Keeton on Torts* § 119, at 874 (5th ed. 1984). Thus, a "favorable" final order or disposition must "preclude[ ] the bringing of further proceedings against the accused." Restatement (Second) of Torts § 659 cmt. g; *see also id.* § 660 cmt. a ("Proceedings are 'terminated in favor of the accused,' . . . only when their final disposition is such as to indicate the innocence of the accused."). In short, there is no favorable termination in the malicious-prosecution context when new proceedings for the

same offense have been instituted and are not subsequently terminated in favor of the accused.[12]

In light of these well-established common-law principles, the dissent's suggestion that vacatur-by-settlement cannot qualify as a favorable termination under *Heck* because settlement was not considered a favorable termination at common law must fail. Convictions "called into question by a federal court's issuance of a writ of habeas corpus" routinely terminate in a manner that could not sustain a malicious-prosecution action. Indeed, it is not uncommon in the context of habeas relief for an individual to be subsequently re-tried and re-convicted on the same charges. *See, e.g.*, *Jackson*, 749 F.3d at 758. Our sister circuits are in accord. *See, e.g.*, *Pratt v. United States*, 129 F.3d 54, 56 (1st Cir. 1997); *United States v. Whitley*, 734 F.2d 994, 996 (4th Cir. 1984); *Gamble v. Estelle*, 551 F.2d 654, 654–55 (5th Cir. 1977); *Mullreed v. Kropp*, 425 F.2d 1095, 1096–97 (6th Cir. 1970).

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[12] The common-law treatises cited by the dissent, *see post*, at 1214 n.9, are in harmony. *See* 8 Stuart M. Speiser et al., *American Law of Torts* § 28:5 (2019) (regurgitating the standard recited in the Second Restatement); 54 C.J.S. *Malicious Prosecution* § 60 ("With respect to the malicious prosecution requirement that the prior proceeding must have terminated in plaintiff's favor, termination of the prosecution must be in such a manner that it *cannot be revived*." (emphasis added)); *id.* at § 61 ("The inquiry into whether a termination of a criminal prosecution was favorable to the defendant focuses on whether it was dispositive as to the defendant's innocence of the crime for which the defendant was charged."). *Cf. id.* § 63 ("A criminal proceeding in which the accused was originally convicted, but the conviction was reversed on appeal following a determination that the evidence on which the conviction was based had been obtained pursuant to a faulty search warrant, does not result in a favorable termination for the accused and thus cannot provide a basis for a malicious prosecution claim.").

Thus, the dissent's reading of *Heck*'s favorable-termination rule simply cannot be maintained. Both the common-law principles discussed above and our precedents in *Rosales-Martinez* and *Taylor* make clear that the law of our circuit is *not* that *Heck* bars a § 1983 suit unless the plaintiff could succeed in a malicious-prosecution action, as the dissent would apparently hold.[13]

D

The dissent accuses us of creating "a fifth method of favorable termination" in addition to *Heck*'s four—namely, vacatur-by-settlement. *Post*, at ——. Not so. We merely hold that where, as here, a § 1983 plaintiff's conviction is vacated by a state court, that conviction has been "declared invalid by a state tribunal authorized to make such determination," *Heck*, 512 U.S. at 487, 114 S.Ct. 2364 (the third exception to *Heck*'s bar), and that *Heck* is therefore no bar to the suit.

The dissent also claims that our holding today would allow "criminal defendants who served their sen-

[13] The dissent cites language from *Manuel v. City of Joliet, Ill.*, —— U.S. ——, 137 S. Ct. 911, 197 L.Ed.2d 312 (2017), arguing that it appears to undermine the contention that "favorable termination" is not coterminous in the malicious-prosecution and *Heck* contexts. *Post*, at 1208–09. Explaining its reliance on common-law principles "[i]n defining the contours and prerequisites of a § 1983 claim," the Supreme Court in *Manuel* cited *Heck* in support of the assertion that "[s]ometimes, th[e] review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort." 137 S. Ct. at 920–21. However, regardless of what the Court meant by its "adopt wholesale" statement, it cannot be interpreted in a manner inconsistent with the plain language of *Heck* itself. As described above, interpreting this passing statement to mean that the favorable-termination requirement is coextensive in both the malicious-prosecution and *Heck* contexts contravenes a plain reading of *Heck* and our circuit's case law.

tences" to "subsequently bring § 1983 actions to establish that they had been wrongfully convicted." *Post*, at 1213. That, too, is incorrect. That reasoning conflates "conviction" and "incarceration." A person who is released from incarceration after fully executing his sentence would be barred from bringing a § 1983 suit based on that conviction because the conviction remains "extant."[14] *Wallace*, 549 U.S. at 393, 127 S.Ct. 1091. Indeed, as noted above, our holding adheres to *Heck*'s requirement that a conviction be invalidated in accordance with one of the four methods set out by the Court.

The dissent's effort to demonstrate the continuing validity of Plaintiffs' vacated convictions is based on an incomplete analysis of the Settlement Agreement's stipulations. The dissent claims that the convictions are still valid, even post-vacatur, based in part on the following stipulation agreed to by the parties: "[T]he original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt." That conclusion is problematic for two reasons.

First, Plaintiffs allege the stipulations were the product of an unenforceable agreement to waive their civil-rights claims. The adjudication of that claim may well result in a very different outcome on remand.

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[14] The dissent accuses us of "play[ing] word games" in reaching this conclusion. *Post*, at 1212–13 n.6. However, the dissent provides no authority for its assertion that, based on our reasoning, "a court could conclude that a defendant who has fully served a sentence has satisfied or discharged the convictions so that it is no longer 'outstanding' or 'extant' " for purposes of *Heck*. *Id.* Nor can it. We explicitly disclaim that characterization of our opinion: under our holding today, a person who has served his sentence but whose conviction remains unimpeached is barred by *Heck* from bringing a § 1983 suit based on that conviction.

Second, even if the Settlement Agreement were deemed enforceable, reading this stipulation to mean that Plaintiffs agree the convictions are *currently* valid ignores the very next stipulation, which acknowledges that new evidence now undermines the validity of the original verdicts and "requires vacation of the conviction or sentence *in the interest of justice*" pursuant to Alaska Statute § 12.72.010(4) (emphasis added). That stipulation declares that "[t]he parties stipulate and agree that there is sufficient new evidence of material facts that a new trial could be ordered under AS § 12.72.010(4)." *Id.* Indeed, these stipulations reflect the parties' agreement that (1) the original verdicts were properly and validly entered in 1997, and (2) now, a new trial could be ordered based on new evidence calling into question whether Plaintiffs were actually the killers, thus requiring vacatur of their once-valid convictions.

While we do not make a finding regarding the newly introduced evidence, we do note that the dissent's conclusion that the vacated convictions are still valid is undermined by its failure to look at the actual result of the Settlement Agreement. There are no charges pending against any of these men four years after the Settlement Agreement was entered into. Nor do they stand convicted of anything.

IV

Defendants argue, in the alternative, that joinder requirements under Federal Rule of Civil Procedure 19 bar Plaintiffs' § 1983 claims because the State of Alaska is an indispensable party to this litigation. We reject this argument.

In deciding whether a party is indispensable, we "must determine: (1) whether an absent party is neces-

sary to the action; and then, (2) if the party is necessary, but cannot be joined, whether the party is indispensable such that in equity and good conscience the suit should be dismissed." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002) (internal quotation marks and citation omitted). Under Rule 19, a party is required to be joined, if feasible, when:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19.

We have held that joinder is "contingent . . . upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action." *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (quoting *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983)). In *Thomas, Head & Greisen Employees Trust v. Buster*, we similarly held that an entity was not an indispensable party to an action because "[it] had not claimed an interest in [the defendant's] limited partnership . . . at the time of the default

judgment and the district court was able to craft appropriate and meaningful relief in the absence of [the entity] which . . . did not prejudice [its] property rights." 95 F.3d 1449, 1460 n.18 (9th Cir. 1996).

The State of Alaska is not a necessary party here because it has not claimed any interest relating to the subject of this action, as confirmed by Defendants. Plaintiffs may obtain complete relief through their § 1983 claims against the City of Fairbanks and its officers—the alleged perpetrators of the § 1983 violations—if their action is successful. We therefore hold that the State is not an indispensable party under Rule 19 and reject Defendants' alternate ground for affirmance.

V

Defendants also argue that Plaintiffs' § 1983 claims may be dismissed based on the equitable doctrine of judicial estoppel, and that Plaintiffs failed to state claims for malicious prosecution, even if not barred by *Heck*, because they did not allege a favorable termination. Because these arguments turn in part on the enforceability of the Settlement Agreement—an issue not passed upon below—we will allow the district court to address these issues in the first instance. *See Town of Newton v. Rumery*, 480 U.S. 386, 392–93, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987); *Lynch v. City of Alhambra*, 880 F.2d 1122, 1125 (9th Cir. 1989).

In *Rumery*, the Supreme Court considered "whether a court properly may enforce an agreement in which a criminal defendant releases his right to file an action under 42 U.S.C. § 1983 in return for a prosecutor's dismissal of pending criminal charges." 480 U.S. at 389, 107 S.Ct. 1187. Rumery filed § 1983 claims against the town and its officers, alleging that they had "violated his constitutional rights by arresting

him, defaming him, and imprisoning him falsely." *Id.* at 391, 107 S.Ct. 1187. But before bringing suit, Rumery had agreed to release any claims he might have against the town and its officials to obtain the dismissal of criminal charges that had been brought against him. *Id.* at 390– 91, 107 S.Ct. 1187. In evaluating whether Rumery was free to bring § 1983 claims despite the release-dismissal agreement, the Court, in a plurality decision, held that the enforceability of the agreement must first be established. *Id.* at 392–93, 107 S.Ct. 1187. The Court adopted a case-by-case approach to determine (1) whether the agreement was entered into voluntarily, and (2) whether enforcement is in the public interest. *Id.* at 398, 107 S.Ct. 1187 ("[W]e conclude that this agreement was voluntary, that there is no evidence of prosecutorial misconduct, and that enforcement of this agreement would not adversely affect the relevant public interests."); *see also id.* at 399–401, 107 S.Ct. 1187 (O'Connor, J., concurring). We later concluded in *Lynch* that "*Rumery* requires the district court to hear the evidence and evaluate whether the public interest is served by enforcement of the release-dismissal agreement." 880 F.2d at 1128.[15]

Here, the district court dismissed Plaintiffs' claims at the pleading stage and did not hear any evidence to determine whether Plaintiffs voluntarily entered into

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[15] Following *Rumery*, we acknowledged that "the availability of release-dismissal agreements creates a risk that public officials will use the threat of criminal prosecution to suppress civil rights claims." *Lynch*, 880 F.2d at 1127 (citing *Rumery*, 480 U.S. at 394, 107 S.Ct. 1187). Given the facts before us in *Lynch*, we found that "[t]he limited empirical evidence available suggests that this may be the case." *Id.* We do not address that question here since the district court did not conduct a *Rumery* hearing.

the Settlement Agreement or whether enforcement is in the public interest.[16] Therefore it is premature for us to address whether the Settlement Agreement is enforceable, and we leave that issue for the district court.

VI

We hold that the district court erred in applying the *Heck* rule to dismiss Plaintiffs' claims. We therefore vacate the district court's dismissal order and remand for further proceedings consistent with this opinion.

REVERSED, **VACATED**, and **REMANDED** with instructions.

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[16] Generally, the burden of pleading and proving the enforceability of a release-dismissal agreement would fall to defendants. *Perry v. Merit Sys. Prot. Bd.*, —— U.S. ——, 137 S. Ct. 1975, 1986 n.9, 198 L.Ed.2d 527 (2017) ("In civil litigation, a release is an affirmative defense to a plaintiff's claim for relief, not something the plaintiff must anticipate and negate in her pleading." (citing Fed. R. Civ. P. 8(c)(1) and *Rumery*, 480 U.S. at 391, 107 S.Ct. 1187)); *see also Lynch*, 880 F.2d at 1125 ("Justice O'Connor, agreeing with the plurality's result, wrote separately to emphasize that the *burden of establishing the enforceability of such agreements is borne by the civil rights defendants.*" (emphasis added)); *id.* at 1126 n.5 ("We note, therefore, that a majority of the Supreme Court in *Rumery* expressed the view that the burden of establishing that a release-dismissal agreement does not violate public policy rests with the civil-rights defendant seeking to invoke the agreement as a defense."). Thus, to win on their judicial estoppel defense, Defendants have the burden of proving the enforceability of the Settlement Agreement. However, insofar as Plaintiffs have alleged the unenforceability of the Settlement Agreement to meet elements of their claims for relief, they would bear the burden of proof on enforceability.

IKUTA, Circuit Judge, dissenting:

The Supreme Court could not have been more clear: "[T]o recover damages for allegedly unconstitutional conviction or imprisonment," a § 1983 plaintiff "*must prove* that the conviction or sentence has been [1] reversed on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey*, 512 U.S. 477, 486–87, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (emphasis added). In other words, to claim tort damages for a wrongful conviction, the plaintiff must prove that a court (or the executive) recognized that the conviction was invalid and wiped out the conviction. In holding that the plaintiffs here can bring § 1983 claims without meeting this requirement, the majority squarely contradicts Supreme Court precedent. I therefore dissent.

I

A brief description of some key facts is in order. The plaintiffs were all tried and convicted of murder in 1997. Several years later, they filed petitions for post-conviction relief based on new evidence. The majority recounts in detail the striking and persuasive evidence adduced by the plaintiffs at a post-conviction hearing—but this evidence is irrelevant, as there was no judicial determination that the facts recited by the majority are true or the witnesses credible. All we know is that the plaintiffs chose not to wait for the state court's ruling on their petitions, but instead entered into settlement agreements with the state and the City of Fairbanks that left the truth about their underlying convictions undecided. In fact, the settlement agreements expressly state they do not address

issues related to the underlying convictions: the parties agreed that they had "not reached agreement as to . . . actual guilt or innocence." Rather than resolve the merits of their prior convictions, plaintiffs (all of whom were represented by counsel) agreed to withdraw their petitions for post-conviction relief, as well as all claims of actual innocence and all allegations of police and prosecutorial misconduct. The plaintiffs also agreed to release the state and the City of Fairbanks (and their employees) from all liability arising out of or related to their arrests and convictions.

As required by the settlement agreements, the parties filed a stipulation with the state court that went even further than the settlement agreements. Rather than describe the prior convictions as wrongful or invalid, the parties agreed that "the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt." The parties then agreed that the state court could vacate the judgment of conviction and order a new trial. Upon the court doing so, the state would dismiss the indictments. The court would then be obliged to order the plaintiffs' release.

Faced with the settlement agreements and the stipulation, the state court made clear that it was not opining on the merits of the underlying convictions or the terms of the settlements. At a hearing on December 17, 2015, a relative of the murder victim protested the settlements. In response, the state court explained that the attorney general was exercising his lawful authority to settle civil litigation, and the court had "no power of review or approval." "The duty of this Court, once that inherent authority is exercised, using the structures of the law, is to ministerially sign the

orders necessary to [e]ffect the decision of the attorney general." Because the settlement agreements were procedurally proper, the state court explained, it was required to enter the "appropriate order" to vacate the plaintiffs' convictions. And once the plaintiffs' convictions were vacated, the state attorney general had the authority to dismiss the indictments. Under state law, the court had no power to block this exercise of authority; rather, the court "would violate the separation of powers in any attempt to stop him." As the court summed up, "[t]hat's a long way of saying that this is a lawful settlement conducted under lawful procedure, under the inherent authority of the attorney general, over which this Court has no authority to . . . review or to criticize." The same day, the state court vacated the plaintiffs' judgments of conviction and commitment.

About two years later, on December 7, 2017, the plaintiffs filed a complaint against the City of Fairbanks and the police officers who were involved in obtaining the plaintiffs' convictions. The plaintiffs asked the court to order that the settlement agreements were unenforceable, which would relieve them from their agreements that their convictions were properly and validly entered as well as relieving them from their broad releases of liability. But the plaintiffs did not request vacatur of the stipulation, which was the basis for the dismissal of their indictments and vacatur of their convictions. Rather, the plaintiffs alleged that the dismissal of their indictments and vacatur of their convictions were "valid and cannot be undone even though the release cannot be enforced against" them. Thus, realizing the benefits of the stipulation while ignoring the obligations imposed by the settlement agreement, the plaintiffs alleged that the officers' "unlawful, intentional, willful, deliberately indifferent,

reckless, and bad-faith acts and omissions caused [the plaintiffs] to be falsely arrested and imprisoned, unfairly tried, wrongfully convicted, and forced to serve more than 18 years imprisoned." The district court dismissed the complaint as barred by *Heck*, and this appeal followed.

II

Given that the plaintiffs did not wait for a judicial ruling that their prior convictions were invalid, but instead chose to vacate those convictions by means of settlements, the question arises whether the plaintiffs can nevertheless bring constitutional tort claims for wrongful conviction under § 1983. The answer under *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), is no.

A

Heck v. Humphrey held that § 1983 "creates a species of tort liability," and that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." *Id.* at 483, 114 S.Ct. 2364 (quoting *Carey v. Piphus*, 435 U.S. 247, 257–58, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)). Accordingly, the Court held that the common law rules "defining the elements of damages and the prerequisites for their recovery[ ] provide the appropriate starting point for the inquiry under § 1983." *Id.* (quoting *Carey*, 435 U.S. at 257–58, 98 S.Ct. 1042).

In *Heck*, the petitioner had filed a suit in district court under § 1983 against two state prosecutors and a police investigator, alleging that they had engaged in an illegal investigation leading to the petitioner's

conviction. *Id.* at 478–79, 114 S.Ct. 2364. The petitioner's complaint sought compensatory and punitive monetary damages. *Id.* at 479, 114 S.Ct. 2364. *Heck* concluded that "[t]he common-law cause of action for malicious prosecution provides the closest analogy" to the petitioner's claims for damages because "it permits damages for confinement imposed pursuant to legal process." *Id.* at 484, 114 S.Ct. 2364.

Having identified malicious prosecution as the most analogous common-law cause of action for a claim of wrongful conviction, the Court focused on one of its key elements: "One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Id.* This element of favorable termination "avoids parallel litigation over the issues of probable cause and guilt" and "precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* (cleaned up). Accordingly, *Heck* concluded that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," which has "always applied to actions for malicious prosecution," is equally applicable to § 1983 damages actions that require "the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* at 486, 114 S.Ct. 2364. In other words, if a plaintiff had been convicted, and that conviction had not been invalidated on appeal or through procedures for post-conviction relief, the plaintiff cannot prevail in a civil

tort suit that requires the plaintiff to prove that the prior conviction or sentence was invalid. *See id.*[1]

Since *Heck*, the Court has reaffirmed the requirement that a plaintiff bringing a § 1983 malicious prosecution action must establish termination of the prior conviction in his favor. Indeed, just last year, the Court noted that "*Heck* explains why favorable termination is both relevant *and required* for a claim analogous to malicious prosecution that would impugn a conviction, and that rationale extends to an ongoing prosecution as well: The alternative would impermissibly risk parallel litigation and conflicting judgments." *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2160, 204 L.Ed.2d 506 (2019) (emphasis added); *see also Manuel v. City of Joliet, Ill.*, —— U.S. ——, 137 S. Ct. 911, 920–21, 197 L.Ed.2d 312 (2017) ("Sometimes, . . . review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. *See . . . Heck v. Humphrey*."); *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1138–39 (9th Cir. 2005) (discussing *Heck*'s "favorable termination rule").

After adopting malicious prosecution's favorable-termination rule, *Heck* articulated what satisfied the necessary element of "termination of the prior criminal proceeding in favor of the accused." 512 U.S. at

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[1] *Heck* also stated that a § 1983 action cannot be used as a substitute for a petition for writ of habeas corpus, 512 U.S. at 480, 114 S.Ct. 2364, although under *Heck*'s reasoning, the habeas statute and § 1983 "were never on a collision course in the first place because, like the common-law tort of malicious prosecution, § 1983 requires (and, presumably, has always required) plaintiffs seeking damages for unconstitutional conviction or confinement to show the favorable termination of the underlying proceeding," *id.* at 492, 114 S.Ct. 2364 (Souter, J., concurring).

484, 114 S.Ct. 2364. According to *Heck*, "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff *must prove* that the conviction or sentence has been [1] reversed on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486–87, 114 S.Ct. 2364 (emphasis added); *see also id.* at 489, 114 S.Ct. 2364 ("Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.").

Eliminating any doubt that a plaintiff *must* show one of these four terminations, *Heck* stated that "[a] claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is *not cognizable* under § 1983." *Id.* at 487, 114 S.Ct. 2364 (emphasis added). If a plaintiff cannot make the necessary showing, the plaintiff cannot bring a § 1983 malicious prosecution action that requires "the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* at 486–87, 114 S.Ct. 2364. Instead, the plaintiff can bring only those § 1983 claims that do not "demonstrate the invalidity of any outstanding criminal judgment against the plaintiff," such as "a suit for damages attributable to an allegedly unreasonable search," because "such a § 1983 action, even if successful, would not *necessarily* imply that the

plaintiff's conviction was unlawful." *Id.* at 487 & n. 7, 114 S.Ct. 2364.[2]

B

As *Heck* makes plain, the plaintiffs here are precluded from bringing a § 1983 malicious prosecution action because their underlying convictions were not invalidated but were instead vacated pursuant to settlement agreements. The plaintiffs expressly agreed that they had "not reached agreement as to . . . actual guilt or innocence" and stipulated that "the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt."[3] No court has ruled on the

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[2] As we have explained, "under certain circumstances a plaintiff's § 1983 claim is not *Heck*-barred despite the existence of an outstanding criminal conviction against him." *Jackson v. Barnes*, 749 F.3d 755, 760 (9th Cir. 2014). For example, "plaintiffs who had been convicted for driving under the influence of alcohol could challenge the way in which their blood had been drawn when they were arrested" because their convictions were based on their pleas, "not [on] verdicts obtained with supposedly illegal evidence." *Id.* (quoting *Ove v. Gwinn*, 264 F.3d 817, 823 (9th Cir. 2001)). Similarly, "a plaintiff convicted of resisting arrest could bring a § 1983 action for excessive use of force if the excessive force was employed against him after he had engaged in the conduct that constituted the basis for his conviction, because in such a case success on his § 1983 action would not imply the invalidity of the conviction." *Id.* (citing *Smith v. City of Hemet*, 394 F.3d 689, 693 (9th Cir. 2005) (en banc)).

[3] The majority argues that it is improper to consider the parties' stipulation, because the plaintiffs allege that the "stipulations were the product of an unenforceable agreement to waive their civil-rights claims." Maj. at 1203. The majority is mistaken; this allegation appears nowhere in the record. Rather, the record establishes that the plaintiffs rely on the validity of the stipulation by alleging that "[t]he dismissal of the indictment[s] and vacation of [their] conviction[s]" are "valid and cannot be undone

validity of the plaintiffs' prior convictions or made a finding as to the plaintiffs' guilt or innocence. Indeed, the state court explained in great detail that it had no power to review, approve, or block the attorney general's discretionary decision to vacate the convictions and dismiss the indictments. As the state court summed it up, "this is a lawful settlement conducted under lawful procedure, under the inherent authority of the attorney general, over which this Court has no authority to . . . review or to criticize." Far from declaring the plaintiffs' convictions invalid, the state court's ruling was merely the ministerial recognition of agreements between the plaintiffs and the state.

Because the plaintiffs' convictions were not "declared invalid by a state tribunal authorized to make such determination," nor reversed on direct appeal, expunged by executive order, or called into question by a federal court's issuance of a writ of habeas corpus, *Heck*, 512 U.S. at 486–87, 114 S.Ct. 2364, the plaintiffs are unable to show that their criminal proceedings were terminated in their favor.

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even though the release[s]" are unenforceable. Because the dismissal and vacatur are based on the stipulation, the continued existence of the stipulation is vital to the plaintiffs' claims.

Alternatively, the majority argues that the stipulation that plaintiffs' convictions were valid does not mean that plaintiffs agreed their convictions are *currently* valid, because the parties also stipulated that "there [was] sufficient new evidence of material facts that a new trial could be ordered under AS 12.72.010(4)." Maj. at 1203–04. This is a red herring. As the majority acknowledges, the only relevant issue for *Heck* purposes is whether the plaintiffs' convictions were "declared invalid by a state tribunal authorized to make such determination." Maj. at 1198. The state court did not do so here, and the parties' agreement that the convictions could be vacated for a new trial is merely a vacatur by agreement.

They are therefore barred from using a civil action to establish they were wrongly convicted. Thus, the plaintiffs' claim for damages stemming from their allegedly wrongful convictions are "not cognizable under § 1983." *Id.* at 487, 114 S.Ct. 2364. *Heck*'s clear holding resolves this appeal.

C

The majority raises two arguments to support its assertion that a conviction that is vacated by settlement is the same as a conviction that is "declared invalid by a state tribunal," 512 U.S. at 487, 114 S.Ct. 2364, and therefore qualifies as a favorable termination for *Heck* purposes, Maj. at 1198–1201. Neither has merit.

First, the majority asserts that there is no difference between vacatur of a conviction by settlement and a declaration that a conviction is invalid because a dictionary defines "vacate" to mean "invalidate." Maj. at 1198–99. But this theory is contrary to *Heck*. *Heck* refers to convictions that are "declared invalid by a state tribunal authorized to make such determination," 512 U.S. at 487, 114 S.Ct. 2364, and a vacatur by agreement of the parties does not constitute a state court's declaration that the conviction is invalid. While the word "vacate" could mean "invalidate" in certain contexts, it does not carry that meaning in this context. "In law as in life . . . the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 574 U.S. 528, 135 S. Ct. 1074, 1082, 191 L.Ed.2d 64 (2015). Accordingly, there is no fair way to read *Heck*'s reference to a conviction or sentence that is "declared invalid by a state tribunal authorized to make such determination," 512 U.S. at 487, 114 S.Ct. 2364, to mean a

conviction or sentence that is vacated pursuant to a settlement agreement.

Second, the majority contends that two Ninth Circuit cases support the position that vacatur by settlement is the same as a declaration of invalidity. *See Rosales-Martinez v. Palmer*, 753 F.3d 890 (9th Cir. 2014); *Taylor v. Cty. of Pima*, 913 F.3d 930 (9th Cir. 2019). But the majority's reliance is misplaced because neither holds that a vacatur by settlement qualifies as a favorable termination under *Heck*.

Rosales-Martinez v. Palmer, 753 F.3d 890 (9th Cir. 2014), does not help the majority because instead of addressing whether a vacatur by settlement constituted a favorable termination, we remanded so the district court could address the viability of the plaintiff's complaint in the first instance.

Rosales-Martinez considered a plaintiff's § 1983 complaint, which alleged that the state court had granted his state habeas petition and ordered his release from prison. *Id.* at 892. On appeal, the government filed a last-minute motion for judicial notice of several documents showing that this was incorrect; in fact, the parties had agreed to vacate the plaintiff's conviction on cumulative error grounds, and in return, the plaintiff agreed to plead guilty to one offense. *Id.* at 893. We took judicial notice of the documents proffered by the government, and noted the complexity they added to the case. *See id.* at 894–95. After considering the potential impact of these documents, we ultimately concluded that "[t]he viability and scope" of the plaintiff's "§ 1983 claim, in relation to *Heck v. Humphrey* . . . should be evaluated by the district judge on remand." *Id.* at 899. We explained that "[a] court of appeals should not rule on the significance of [the plaintiff's] plea in the absence of a complete record

and the comments of both sides, plaintiff and defendants, and without the benefit of the district court's analysis." *Id.*

Contrary to the majority, our decision in *Rosales-Martinez* to reverse the district court was not based on the finding that *Heck* permits a § 1983 action whenever a conviction has been vacated pursuant to a settlement agreement. Maj. at 1200. Instead, *Rosales-Martinez* held only that the district court erred in dismissing the plaintiff's claims as untimely, because the claims—to the extent they were viable at all—could not have accrued until the Nevada court vacated the underlying convictions. 753 F.3d at 896. Because we refrained from resolving the question whether the plaintiff's claims were viable, the district court, on remand, felt obliged to refer the case to a pro-bono program "for the purpose of identifying counsel to assist Plaintiff with addressing the threshold question of whether his § 1983 claims are barred under *Heck v. Humphrey*." *Martinez v. Palmer*, No. 3:10-cv-00748-MMD-VPC, 2015 WL 5554147, at *5 (D. Nev. Sep. 21, 2015). Given our failure to rule on the viability of plaintiff's § 1983 claims, the majority errs in relying on *Rosales-Martinez* for any authoritative ruling on this issue.

Nor does *Taylor v. County of Pima*, 913 F.3d 930 (9th Cir. 2019), support the majority's position, because that case ruled on an entirely different issue. In *Taylor*, a plaintiff who had been convicted of 28 counts of felony murder for starting a fire at a Tucson hotel brought a state post-conviction petition, raising a new theory based on an affidavit from an expert: the hotel fire was not caused by arson. *Id.* at 932. In light of this new evidence, the government and the plaintiff entered an agreement to vacate the original conviction

and replace it with a new conviction, and the state court resentenced the plaintiff to time served. *Id.* The plaintiff then brought a § 1983 action against the government based on alleged unconstitutional practices in securing the original conviction. *Id.*

We concluded that because all of the time that plaintiff served in prison was supported by a valid replacement conviction, he could not recover incarceration-related damages. *Id.* at 935. Although *Taylor* stated in passing that a plaintiff in a § 1983 action could challenge a conviction that had been "vacated by [a] state court," this statement was not necessary to its holding, because the resolution of the case was based on the determination that the plaintiff's valid replacement conviction barred his § 1983 claim. *Id.*[4] Accordingly, *Taylor* offered no reasoning to support its offhand comment, and it is inconsistent with *Heck*; such statements "made in passing, without analysis, are not binding precedent." *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007).[5]

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[4] Although the majority refers to "*Taylor*'s *understanding* that a vacated conviction was 'declared invalid' under *Heck*," Maj. at 1199 (emphasis added), the majority cannot—and therefore does not—point to any statement in *Taylor* to that effect; indeed, the words "declared invalid" never even appear in the opinion.

[5] The majority argues that *Taylor*'s comment that *Heck* does not apply when a conviction is "vacated by a state court" was not made in passing, because we later said that it was "[c]ritica[l]" that the time Taylor served in prison was supported by a new conviction. Maj. at 1199. Far from supporting the majority's position, this fact undermines it. It was "[c]ritica[l]" that a new conviction supported Taylor's entire period of incarceration because, at that point, it made no difference that Taylor's earlier conviction was "declared invalid": "even if Taylor proves constitutional violations concerning the 1972 conviction, he cannot establish that the 1972 conviction caused any incarceration-

In sum, the plaintiffs' convictions were not "declared invalid by a state tribunal." *Heck*, 512 U.S. at 487, 114 S.Ct. 2364. Rather, the convictions were vacated pursuant to settlement agreements, such that the "criminal judgment[s]" are still "outstanding," precluding the plaintiffs' claims for relief. *Id.* at 486–87, 114 S.Ct. 2364. Neither *Rosales Martinez* nor *Taylor* are to the contrary. Therefore, the plaintiffs cannot make the necessary showing to bring their § 1983 malicious prosecution action.

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Although the plaintiffs fail to show that their vacated convictions were favorably terminated in one of the four methods specified by *Heck*, the majority suggests that the plaintiffs can sidestep *Heck* to bring their § 1983 action.

First, according to the majority, *Heck* does not apply to a vacated conviction because the conviction is no longer "outstanding." 512 U.S. at 486–87, 114 S.Ct. 2364; Maj. at 1198. To support this theory, the majority points to *Heck*'s statement that "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." 512 U.S. at 487, 114 S.Ct. 2364; Maj. at 1198. According to the majority, this means that if a criminal judgment is no longer outstanding, i.e., it has been discharged or satisfied in

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related damages." *Id.* at 935. Thus, the assumption that Taylor's earlier conviction was "declared invalid" was "merely a prelude to another legal issue [i.e., the effect of Taylor's new conviction] that command[ed] the panel's full attention." *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001).

some way, the criminal defendants may bring a § 1983 action without showing that the judgment was invalidated in one of the four ways identified in *Heck*. *See* Maj. at 1198.

On its face, this conclusion is contrary to *Heck*. First, *Heck* precludes plaintiffs from bringing a § 1983 action unless they have shown that their conviction was invalidated by one of the four specific means. 512 U.S. at 486–87, 114 S.Ct. 2364. The majority, by contrast, allows plaintiffs to bring a § 1983 action if their conviction was discharged or satisfied by any means.[6] Second, *Heck* explains that one purpose of the favorable-termination rule is to avoid the risk that a criminal conviction could be deemed valid in the criminal context and invalid in the civil context. *See id.* at 484–85, 114 S.Ct. 2364. Under the majority's rule, this exact scenario could arise. If a conviction merely needs to be discharged or satisfied by some means, then criminal defendants who served their sentences could subsequently bring § 1983 actions to establish that they had been wrongfully convicted. And here the plaintiffs are attempting to invalidate their criminal judgments in a civil proceeding on the ground that they were "unfairly tried" and "wrongfully convicted," even though their criminal judgments were never invalidated in a criminal proceeding.

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[6] The majority plays word games by claiming that a vacated conviction, but not a conviction that has been satisfied by service of the sentence, can be the basis for a § 1983 malicious prosecution action. Maj. at 1203 & n.14. No binding precedent forecloses a court from concluding that a defendant who has fully served a sentence has satisfied or discharged the conviction so that it is no longer "outstanding" or "extant"; like a vacated conviction, a satisfied conviction is a historical fact but not a current condition.

Of course, *Heck* did not hold that plaintiffs could use civil actions to challenge convictions that had been discharged by *any* means. Read in context, it is clear that *Heck*'s reference to "outstanding criminal judgments" is a reference to judgments that have not been invalidated by one of the four methods of favorable termination listed in *Heck*. *Id.* at 487, 114 S.Ct. 2364. This common-sense reading is supported by the Court's subsequent use of the phrase "outstanding criminal judgment" as a synonym for a judgment not invalidated by one of these four means: "[T]he *Heck* rule comes into play only when there exists a conviction or sentence that has *not* been . . . invalidated, that is to say, an outstanding criminal judgment." *McDonough*, 139 S. Ct. at 2160 (internal quotation marks omitted) (quoting *Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007)).[7] Because the majority's conclusion that a plaintiff can bring a § 1983 malicious prosecution action so long as the underlying criminal judgment was discharged by *any* means is contrary to *Heck*, the majority's interpretation must be rejected.

Second, by claiming that vacatur by settlement qualifies as a favorable termination, even though it is not on *Heck*'s list of four qualifying methods of termination, the majority implicitly holds that vacatur by settlement is a fifth method of favorable termina-

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[7] The majority implies that it can ignore this definition of "outstanding criminal judgment," Maj. at 1201 n.10, because the Supreme Court has stated that, in light of *Heck*, the statute of limitations for bringing a § 1983 claim does not accrue "until the setting aside of an *extant criminal conviction*," *Wallace*, 549 U.S. at 393, 127 S.Ct. 1091. But the context makes clear that this statement merely echoes *Heck*'s rule that a plaintiff cannot bring a § 1983 action until a conviction has been favorably terminated in one of the four ways listed in *Heck*.

tion. Maj. at 1200–01. In other words, the majority asserts that a plaintiff can bring a § 1983 malicious prosecution claim to "demonstrate the invalidity" of a criminal judgment that has been vacated by agreement of the parties—even if the underlying conviction has not been reversed, declared invalid by a state court, expunged by executive action, or called into question by a grant of habeas corpus. 512 U.S. at 486–87, 114 S.Ct. 2364. This approach also fails.

As an initial matter, *Heck* makes clear that plaintiffs "must" show that their convictions were terminated in one of four specific ways. 512 U.S. at 486–87, 114 S.Ct. 2364. Vacatur by settlement is not on the list, and the list is exclusive: *Heck* does not permit other, unidentified ways of satisfying the favorable-termination requirement. *See id.* Thus, any attempt to recognize additional means of favorable termination is contrary to Supreme Court precedent. *See id.*

Moreover, recognizing vacatur by settlement as another method of favorable termination is contrary to *Heck*'s reliance on the common-law cause of action for malicious prosecution, which was the Court's "starting point" for determining the viability of a § 1983 claim. 512 U.S. at 483–84 & n.4, 114 S.Ct. 2364 (reiterating its "reliance on malicious prosecution's favorable termination requirement as illustrative of the common-law principle barring tort plaintiffs from mounting collateral attacks on their outstanding criminal convictions"). The common law did not recognize vacatur by settlement as a method of favorable termination: For over a century, courts have recognized that a claim for malicious prosecution does not lie if the prosecution

was abandoned based on a settlement or compromise.[8] The treatises are in accord.[9] Thus, if a criminal proceeding "is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the

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[8] *See, e.g.*, *Erie R. Co. v. Reigherd*, 166 F. 247, 250 (6th Cir. 1909) ("A termination of a prosecution by nol. pros. by consent of the defendant, or by a compromise, is such a termination as to leave no foundation for denying that there was probable cause."); *Woodson v. McLaughlin*, 153 Ark. 151, 239 S.W. 735, 736 (1922) ("The testimony being undisputed that a compromise was effected as a result of which the prosecution out of which this litigation arises, was settled, a verdict was properly directed in defendants' favor."); *Bell Lumber Co. v. Graham*, 74 Colo. 149, 219 P. 777, 778 (1923) ("It is well settled that a compromise voluntarily made, or a settlement by the consent of the accused, defeats a recovery in an action for malicious prosecution based upon a criminal proceeding."); *Leonard v. George*, 178 F.2d 312, 313 (4th Cir. 1949) ("Notwithstanding the protests and declarations of plaintiff made at the time, we think that he is unquestionably precluded by the settlement from suing for malicious prosecution with respect to the case thus disposed of."); *Ferreira v. Gray, Cary, Ware & Freidenrich*, 87 Cal. App. 4th 409, 413, 104 Cal.Rptr.2d 683 (2001) ("[Plaintiff] may have received a favorable *determination* at one point in the proceeding . . . [but] the litigation *terminated* as a result of a negotiated settlement in which both sides gave up something of value to resolve the matter.").

[9] *See, e.g.*, 8 Stuart M. Speiser et al., *American Law of Torts* § 28:5 n.2 (2019) ("[T]ermination resulting from negotiation, compromise, settlement, or agreement is not considered a favorable termination."); W. Page Keeton et al., *Prosser & Keeton on Torts* § 119, at 875 (5th ed. 1984) ("[W]here charges are withdrawn or the prosecution is terminated . . . by reason of a compromise into which [the accused] entered voluntarily, there is no sufficient termination in favor of the accused." (footnotes omitted)); 54 C.J.S. Malicious Prosecution § 67 ("Where both sides give up anything of value . . . to end litigation, a party cannot later claim he or she received a favorable termination . . . to establish malicious prosecution.").

accused," the resolution "is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution." Restatement (Second) of Torts § 660 (1977). "Although the accused by his acceptance of a compromise does not admit his guilt, the fact of the compromise indicates that the question of his guilt or innocence is left open." *Id.* § 660 cmt. c. As such, by entering into a settlement agreement and "[h]aving bought peace," an accused "may not thereafter assert that the proceedings have terminated in his favor." *Id.*[10] Accordingly, vacatur by settlement is not—and never was—recognized as a favorable termination at common law, so the majority's attempt to recognize it as a fifth means of favorable termination under *Heck* squarely contradicts *Heck*'s reliance on the "common law of torts." 512 U.S. at 483, 114 S.Ct. 2364.[11]

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[10] The majority points out that some courts construing the four means of favorable termination in *Heck* do not require a showing that the termination was inconsistent with guilt. Maj. at 1201–03; *see, e.g.*, *Pardue v. City of Saraland, Ala.*, No. CV 99-0799-CG-M, 2004 WL 7338484, at *6 (S.D. Ala. Aug. 11, 2004) (rejecting argument that *Heck* requires a "final determination in favor of the accused"). Other courts require such a showing. *See DiBlasio v. City of New York*, 102 F.3d 654, 658 (2d Cir. 1996) (issuance of a writ of habeas corpus was not an "indication of innocence," and thus did not qualify as a favorable termination under *Heck*, because plaintiff "conceded both the possession and sale of the cocaine"). But this subsequent elaboration of *Heck* has no bearing on the question whether *Heck* contemplated that vacatur by settlement—unanimously rejected as a favorable termination at common law—qualifies as a favorable termination for purposes of a § 1983 action.

[11] The majority mischaracterizes the dissent by arguing that the dissent would hold that a § 1983 plaintiff must be able to satisfy the common law's favorable-termination rule. Maj. at 1202–03. The dissent would merely hold that the plaintiffs' convictions were not "declared invalid by a state tribunal authorized

In sum, the majority has no authority to recognize a new means of favorable termination; *Heck*'s list is exclusive. *See id.* at 486–87, 114 S.Ct. 2364. And even if the majority could recognize new means of favorable termination, vacatur by settlement is not a favorable termination at common law, so there is no basis for deeming it a method of favorable termination here.

* * *

Simply stated, the plaintiffs did not have their prior convictions "declared invalid by a state tribunal authorized to make such determination," *Heck*, 512 U.S. at 487, 114 S.Ct. 2364, but instead reached an agreement with the state to vacate their convictions. Regardless of the plaintiffs' reasons for doing so, they cannot now claim that the prior convictions were terminated in a manner that provides a basis for bringing § 1983 malicious prosecution claims. In holding otherwise, the majority casts aside the favorable-termination rule articulated by *Heck v. Humphrey* and thus is inconsistent with Supreme Court precedent. Accordingly, I dissent.

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to make such determination," as required by *Heck*, and so the plaintiffs' § 1983 claims are "not cognizable." 512 U.S. at 487, 114 S.Ct. 2364; *see supra* Part II.B. The dissent discusses the common law only to show that the majority has no principled basis for recognizing vacatur by settlement as a fifth method of favorable termination under *Heck*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed October 22, 2018]

No. 4:17-cv-0034-HRH
[Consolidated with No. 4:17-cv-0035-HRH]

MARVIN ROBERTS,

Plaintiff,

vs.

CITY OF FAIRBANKS, JAMES GEIER, CLIFFORD AARON RING, CHRIS NOLAN, DAVE KENDRICK, DOE OFFICERS 1-10, and DOE SUPERVISORS 1-10,

Defendants.

EUGENE VENT, KEVIN PEASE, and GEORGE FRESE,

Plaintiffs,

vs.

CITY OF FAIRBANKS, JAMES GEIER, CLIFFORD AARON RING, CHRIS NOLAN, DAVE KENDRICK, DOE OFFICERS 1-10, and DOE SUPERVISORS 1-10,

Defendants.

ORDER

Motion to Dismiss

Defendants move to dismiss plaintiffs' second amended and consolidated complaint.[1] This motion is

[1] Docket No. 41.

opposed.[2] Oral argument was requested and has been heard.

Background

Plaintiffs are Marvin Roberts, George Frese, Kevin Pease, and Eugene Vent. Defendants are the City of Fairbanks, James Geier, Clifford Aaron Ring, Chris Nolan, and Dave Kendrick.

Plaintiffs were convicted of the October 11, 1997 murder of John Hartman[3] and then sentenced to prison sentences ranging from 30 years to 77 years.[4] Plaintiffs allege that their convictions were the result of manufactured evidence and false statements.[5]

In September 2013, plaintiffs filed petitions for post-conviction relief ("PCR") in the Alaska Superior Court, "arguing that newfound testimonial and physical evidence could prove their factual innocence."[6] A five-week evidentiary hearing on plaintiffs' PCR petitions was held in the fall of 2015.[7] Plaintiffs allege that "[t]his evidentiary hearing established that [they] were actually innocent of Hartman's murder" and that they "squarely placed their factual innocence at issue during the PCR hearing."[8] Plaintiffs allege that the evidence presented at the hearing included testimony from William Holmes "that he and his friends were

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[2] Docket No. 46.

[3] Second Amended and Consolidated Complaint at 2, ¶ 1; 22, ¶ 92, Docket No. 40.

[4] *Id.* at 22, ¶ 92.

[5] *Id.* at 3, ¶ 7; 22, ¶ 92.

[6] *Id.* at 25, ¶ 106.

[7] *Id.* at 26, ¶ 109.

[8] *Id.* at 27, ¶¶ 110-11.

Hartman's true killers," testimony from "at least eleven witnesses who corroborated his account[,]" and testimony that "the Alaska State Troopers had been able to corroborate key aspects of Holmes's confession and had been unable to locate any evidence placing [p]laintiffs at the scene of the Hartman homicide. . . ."[9]

Plaintiffs allege that "[a]t the conclusion of the PCR hearing in November 2015, the presiding judge told the parties multiple times that it would take him six to eight months to reach a decision."[10] They also allege that "[m]embers of the prosecution . . . stated publically that if the trial court concluded [that] the convictions should be vacated and ordered a new trial, the State would appeal that decision through to the Alaska Supreme Court."[11] Plaintiffs allege that "[t]his signaled an official willingness to delay further resolution of the case and release of all the [p]laintiffs, other than Roberts who had by this time served his sentence and had been released on probation."[12]

Plaintiffs allege that "[j]ust before Christmas, the prosecutors offered [them] a devil's bargain: the prosecution would consent to vacating the convictions and dismissing the charges but only if [they] would agree not to sue to vindicate their civil rights."[13] Plaintiffs allege that State prosecutors were attempting "to avert probable judicial findings that [p]laintiffs were innocent and/or that the convictions were marred by

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[9] *Id.* at 26-27, ¶¶ 109a, 109f.

[10] *Id.* at 28, ¶ 116.

[11] *Id.* at 29, ¶ 121.

[12] *Id.*

[13] *Id.* at 28-29, ¶ 117.

official misconduct."[14] Plaintiffs further allege that State prosecutors were attempting to "forestall [p]laintiffs' civil action, through the waiver of claims, that likely would expose FPD [Fairbanks Police Department] officers and their colleagues in the Fairbank District Attorney Office to unfavorable litigation and public scrutiny into police and prosecutorial misconduct. . . ."[15]

Plaintiffs took the deal that was offered and entered into settlement agreements with the State of Alaska and the City of Fairbanks.[16] The settlement agreements provided that plaintiffs would stipulate to the withdrawal of their PCR petitions and that the parties would stipulate to a court order vacating the judgments of conviction.[17] The State agreed to file dismissals of the indictments and "not to seek a retrial" but reserved the right to seek a retrial if "substantial new evidence of guilt is discovered[.]"[18]

The settlement agreements further provided that "[t]he parties have not reached agreement as to [plaintiffs'] actual guilt or innocence."[19]

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[14] *Id.* at 37, ¶ 167.

[15] *Id.* at 37, ¶ 168.

[16] Exhibits 1-4, Defendants' Request for Judicial Notice, Docket No. 43. The court has taken judicial notice of these exhibits and thus may consider them without converting the instant Rule12(b)(6) motion into a motion for summary judgment. *Intri-Plex Technologies, Inc. v. Crest Group, Inc.,* 499 F.3d 1048, 1052 (9th Cir. 2007).

[17] Settlement Agreement and Mutual Release of All Claims at 1-2, § IA-B, Exhibits 1-4, Defendants' Request for Judicial Notice, Docket No. 43.

[18] *Id.* at 2-3, § 1B, § II.

[19] *Id.* at 6, § V.

In the settlement agreements, plaintiffs

> release[d] and forever discharge[d] . . . the City of Fairbanks and its departments, divisions, agencies, agents, representatives, directors, past and current employees, attorneys, contractors, retained or non-retained experts, witnesses, predecessors or successors in interest, and assigns . . . of and from any and all past, present, or future actions, causes of action, controversies, suits, claims, demands, liabilities, complaints or grievances of every kind and nature, whether mature or to mature in the future, and whether known or unknown, for or by reason of any matter, thing, claim, or allegation arising out of or in any way related to the arrest, investigation, prosecution, appeal, legal representation, or incarceration associated with, connected to, or related in any way to any legal matters or actions referenced above, or any other matters arising prior to the date of this Settlement Agreement and Mutual Release of All Claims.[20]

More specifically, plaintiffs released

> any and all claims . . . arising out of the investigation into the death of Jonathan Hartman and the subsequent prosecution and incarceration of [plaintiffs], . . . including but not limited to claims for malicious prosecution, wrongful imprisonment, prosecutorial misconduct, legal malpractice, [and] violation

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[20] *Id.* at 3-4, § III.

> or deprivation of rights civil or constitutional[.[21]]

Plaintiffs also "release[d] any right [they] may now or hereafter have to reform, rescind, modify or set aside th[e] Settlement Agreement[s] and Mutual Release[s] of All Claims through mutual or unilateral mistake or otherwise."[22]

Plaintiffs

> declare[d] that the terms of th[e] Settlement Agreement[s] and Mutual Release[s] of All Claims have been carefully read and are fully understood and are voluntarily accepted [f]or the purpose of making a full and final compromise of any and all claims, disputed or otherwise, for and on account of the matters described above.[23]

The settlement agreements also provided that "[i]t is mutually understood by the [p]arties that the purpose of th[ese] Agreement[s] is that there be no further litigation by [plaintiffs] or others on [their] behalf related to this matter."[24] The settlement agreements also noted that the agreements had "been drafted by the [p]arties through the efforts of their respective legal counsel" and that "[t]he [p]arties warrant that the terms of th[e] Agreement[s] have been carefully reviewed and that each [p]arty understands [their] contents and has been advised as to the legal effect of th[e] Agreement[s] by legal counsel obtained by that

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[21] *Id.* at 4, § III.

[22] *Id.* at 5, § III.

[23] *Id.* at 6, § III.

[24] *Id.*

[p]arty."[25] Each of plaintiffs' lawyers represented that they had "carefully and fully explained the terms, provisions and effects of" the agreements and that their clients represented that they understood the terms of the agreements and the significance of the terms.[26]

The terms of the stipulation that was contemplated in the settlement agreements were presented to the Superior Court on December 11, 2015. Plaintiffs "stipulate[d] and agree[d] that the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt[,]" and the parties "stipulate[d] and agree[d] that th[e Superior c]ourt need not make findings of innocence under AS 12.72.020."[27] In paragraph 5 of the stipulation, "[t]he parties stipulate[d] and agree[d] that [the Superior c]ourt may immediately enter Orders vacating the Judgments of Conviction, Restitution Orders, and Rule 39 judgments for attorney fees in each" underlying criminal case "and award[] each Petitioner the relief of a new trial for each of the charges for which Petitioners were convicted."[28] The stipulation provided that "[u]pon entry of the Orders in paragraph 5, Petitioners withdraw their claims of prosecutorial misconduct asserted" in their PCR petitions.[29] The stipulation also provided that "[u]pon entry of the

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[25] *Id.* at 6, § IV.

[26] *Id.* at 9.

[27] Exhibit 5 at 2, ¶¶ 2, 4, Defendants' Request for Judicial Notice, Docket No. 43. The court has taken judicial notice of this exhibit and thus may consider it without converting the instant Rule12(b)(6) motion into a motion for summary judgment. *Intri-Plex Technologies,* 499 F.3d at 1052.

[28] Stipulation at 2, ¶ 5, Exhibit 5, Defendants' Request for Judicial Notice, Docket No. 43.

[29] *Id.* at 2, ¶ 6.

Orders in Paragraph 5, . . . the State will not seek retrial in any of the underlying criminal cases and will file dismissals pursuant to Criminal Rule 43(a) of the indictments. . . .”[30] Finally, “the parties stipulate[d] and agree[d] that upon the filing of the . . . dismissals, [the Superior c]ourt shall order the immediate and unconditional release of Petitioners from custody and supervision. . . .”[31]

On December 17, 2015, the Superior Court held a hearing to address the stipulation. At the hearing, the Superior Court judge read the stipulation into the record and declared that “[t]he orders vacating the judgment of conviction and commitment and probation and restitution will enter” and that he would “sign them off the record.”[32]

The State dismissed the charges against plaintiffs on December 17, 2015.[33] The orders vacating plaintiffs’ convictions and sentences were also signed on December 17, 2015 2015.[34] And, Vent, Pease, and Frese were released from prison on December 17, 2015.

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[30] *Id.* at 3, ¶ 7.

[31] *Id.* at 3, ¶ 8.

[32] Transcript of Settlement on the Record at 4:7-6:10, 12:25-13:4, Exhibit 10, Defendants’ Request for Judicial Notice, Docket No. 43. The court has taken judicial notice of this exhibit and thus may consider it without converting the instant Rule12(b)(6) motion into a motion for summary judgment. *Intri-Plex Technologies,* 499 F.3d at 1052.

[33] Exhibits 1-4, Plaintiffs’ Request for Judicial Notice, Docket No. 47. The court has taken judicial notice of this exhibit and thus may consider it without converting the instant Rule12(b)(6) motion into a motion for summary judgment. *Intri-Plex Technologies,* 499 F.3d at 1052.

[34] Exhibits 11-14, Declaration of Peter A. Scully, which is appended to Response to Court’s Order re: Requests for Judicial

On May 14, 2018, plaintiffs filed their second amended and consolidated complaint in this matter. In this complaint, they assert twelve causes of action. In the first cause of action, plaintiffs assert § 1983 deprivation of liberty claims. In the second cause of action, plaintiffs assert § 1983 claims for malicious prosecution. In the third cause of action, plaintiffs assert § 1983 *Brady* claims. In the fourth cause of action, plaintiffs assert § 1983 supervisor liability claims. In the fifth cause of action, plaintiffs assert § 1983 civil rights conspiracy claims. In the sixth cause of action, plaintiffs assert § 1985(3) conspiracy claims. In the seventh cause of action, plaintiffs assert *Monell* claims under § 1983 against the City of Fairbanks. In the eighth cause of action, plaintiffs assert § 1983 First Amendment right of access claims. In the ninth cause of action, Vent and Frese assert Fifth Amendment violation claims.[35] In the tenth cause of action, plaintiffs assert spoliation of evidence claims. In the eleventh cause of action, plaintiffs assert negligence claims. In the twelfth cause of action, plaintiffs assert intentional infliction of emotional distress claims.

Notice, Docket No. 58. The court takes judicial notice of these exhibits and thus may consider them without converting the instant Rule12(b)(6) motion into a motion for summary judgment. *Intri-Plex Technologies,* 499 F.3d at 1052.

[35] Although these claims are not expressly pled as § 1983 claims, the Ninth Circuit "has held that a litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983." *Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 925 (9th Cir. 2001); *see also, Azul-Pacifico, Inc. v. City of Los Angeles,* 973 F.2d 704, 705 (9th Cir. 1992) ("a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983").

Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, defendants now move to dismiss plaintiffs' claims for failure to state plausible claims. In the alternative, pursuant to Rule 12(b)(7), defendants move to dismiss plaintiffs' claims for failure to join the State of Alaska as an indispensable party.

Discussion

"'To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Zixiang Li v. Kerry,* 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal,* 556 U.S. at 678). "The plausibility standard requires more than the sheer possibility or conceivability that a defendant has acted unlawfully." *Id.* "'Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Iqbal,* 556 U.S. at 678). "[T]he complaint must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *In re Rigel Pharmaceuticals, Inc. Securities Litig.,* 697 F.3d 869, 875 (9th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). "In evaluating a Rule 12(b)(6) motion, the court accepts the complaint's well-pleaded factual allegations as true and draws all reasonable inferences in the light most favorable to the plaintiff." *Adams v. U.S. Forest Srvc.,* 671 F.3d 1138, 1142-43 (9th Cir. 2012). "However, the trial court does not have to accept as true conclusory allegations in a complaint

or legal claims asserted in the form of factual allegations." *In re Tracht Gut, LLC,* 836 F.3d 1146, 1150 (9th Cir. 2016).

As an initial matter, plaintiffs "do not oppose" the dismissal of their negligence and negligent infliction of emotional distress claims.[36] Defendants' motion to dismiss these two claims is granted. Plaintiffs' negligence and negligent infliction of emotional distress claims are dismissed with prejudice.

Plaintiffs do oppose the dismissal of their other ten claims. Defendants first argue that these claims are subject to dismissal because they are barred by *Heck v. Humphrey,* 512 U.S. 477 (1994).

The question before the Court in *Heck* was "whether a state prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983." *Id.* at 478. Heck had been convicted of voluntary manslaughter in state court and was serving a fifteen-year sentence. *Id.* He filed a § 1983 action in federal court, alleging that the state prosecutor and police investigator had conducted an unlawful investigation, destroyed evidence, and used illegal and unlawful evidence at his trial. *Id.* at 479. Heck sought damages; he did not seek to be released from custody. *Id.*

The Seventh Circuit had held that if a prisoner is challenging the legality of his conviction, "the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies." *Id.* at 480 (citation omitted). But, the Court found that "[t]he issue with respect to monetary damages challenging

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[36] Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 25, n.11, Docket No. 46.

conviction is not . . . exhaustion; but rather . . . whether the claim is cognizable under § 1983 at all." *Id.* at 483.

The Court then compared Heck's § 1983 claims to "[t]he common-law cause of action for malicious prosecution" and observed that for such a claim "[o]ne element that must be alleged and proved . . . is termination of the prior criminal proceeding in favor of the accused." *Id.* at 484. The Court found that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgment applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement[.]" *Id.* at 486. Thus, the Court held

> that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Id. at 486-87. "A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." *Id.* at 487. The Court explained that

> when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his

> conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id.

Finally, the Court found it unnecessary to consider a statute of limitations issue that the Seventh Circuit had addressed. *Id.* at 489. The Seventh Circuit had "concluded that a federal doctrine of equitable tolling would apply to the § 1983 cause of action while state challenges to the conviction or sentence were being exhausted." *Id.* The Court explained that there was no statute of limitations problem "[u]nder [its] analysis" because "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id.* at 489-90.

Thus, "[u]nder *Heck v. Humphrey,* a state prisoner cannot recover damages in a § 1983 suit if a judgment in favor of the plaintiff 'would necessarily imply the invalidity of his conviction or sentence . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.'" *Guerrero v. Gates,* 442 F.3d 697, 703 (9th Cir. 2006) (quoting *Heck,* 512 U.S. at 487). This rule from *Heck* is sometimes referred to as the "favorable termination rule. . . ." *Huftile v. Miccio-Fonseca,* 410 F.3d 1136, 1139 (9th Cir. 2005). It is also sometimes referred to as the "*Heck* preclusion doctrine. . . ." *Beets v. County of Los Angeles,*

669 F.3d 1038, 1042 (9th Cir. 2012). And, it is sometimes simply referred to as the "Heck bar." *Lockett v. Ericson,* 656 F.3d 892, 896 (9th Cir. 2011).

There is also a concomitant principle derived from *Heck* that is referred to as the deferred accrual rule. "[T]he *Heck* rule for deferred accrual 'delays what otherwise would be the accrual date of a tort action until the setting aside of an extant conviction which success in that tort action would impugn.'" *Rosales-Martinez v. Palmer,* 753 F.3d 890, 896 (9th Cir. 2014) (quoting *Wallace v. Kato,* 549 U.S. 384, 393 (2007)).

The *Heck* bar "applies with respect not only to . . . § 1983 claim[s] but also to . . . [§] 1985(3) . . . claims." *McQuillion v. Schwarzenegger,* 369 F.3d 1091, 1097 n.4 (9th Cir. 2004) (citation omitted). The *Heck* bar applies also to "'state law claims arising from the same . . . misconduct' alleged in § 1983 claims.'" *Berger v. Brandon,* Case No. 2:08-cv-01688-GEB-EFB, 2008 WL 5101338, at *1 (E.D. Cal. Dec. 3, 2008) (quoting *Susag v. City of Lake Forest,* 94 Cal. App. 4th 1401, 1412-13 (Calif. Ct. App. 2002)). Here, plaintiffs' spoliation claim is based on the same conduct alleged in some of plaintiffs' § 1983 claims.

In applying the *Heck* bar, the Supreme Court directs this court to first "consider whether a judgment in favor of the plaintiff[s] would necessarily imply the invalidity of [their] conviction[s] or sentence[s.]" *Heck,* 512 U.S. at 487. There is no question that a judgment in plaintiffs' favor on their § 1983, § 1985 and spoliation claims would necessarily imply the invalidity of their convictions and sentences. Were plaintiffs to succeed on these claims, they would, in effect, prove their innocence, which would mean that their convictions and sentences were invalid.

Plaintiffs however argue that *Heck* has no application here because "*Heck* applies only when there is an extant conviction. . . ." *Bradford v. Scherschligt,* 803 F.3d 382, 386 (9th Cir. 2015); *see also, Wallace,* 549 U.S. at 393 (quoting *Heck,* 512 U.S. at 487) ("the *Heck* rule for deferred accrual is called into play only when there exists 'a conviction or sentence that has *not* been . . . invalidated,' that is to say, an 'outstanding criminal judgment'"). Because their convictions have been vacated, plaintiffs argue that there are no extant convictions and thus *Heck* does not bar their § 1983, § 1985, and spoliation claims.

Plaintiffs are misreading *Bradford.* The issue in *Bradford* was "when a *Devereaux* claim accrues and starts the running of the limitation period." *Bradford,* 803 F.3d at 386. "A *Devereaux* claim is a claim that the government violated the plaintiff's due process rights by subjecting the plaintiff to criminal charges based on deliberately-fabricated evidence." *Id.*

Bradford had been convicted of burglary and rape in 1996. *Id.* at 383. "In 2008, after Bradford served his full ten-year sentence," his conviction was vacated by the Washington Court of Appeals, largely because "newly available DNA testing . . . excluded him as a contributor of genetic material found at the crime." *Id.* After his first conviction was vacated, Bradford was retried and acquitted in 2010. *Id.* Bradford filed his § 1983 *Devereaux* claim in 2013. *Id.* at 383-84. The district court determined "that the running of the three year statute of limitations" on this claim "began on the vacatur of Bradford's conviction and not the date of his acquittal[.]" *Id.* at 384.

On appeal, Bradford argued that his *Devereaux* claim would have been barred by *Heck* if he had "filed it immediately upon vacatur of his conviction." *Id.*

at 386. The Ninth Circuit disagreed. *Id.* The Ninth Circuit explained that

> *Heck* established the now well-known rule that when an otherwise complete and present § 1983 cause of action would impugn an extant conviction, accrual is deferred until the conviction or sentence has been invalidated. As the Supreme Court made clear in its decision in *Wallace,* however, *Heck* applies only when there is an extant conviction and is not implicated merely by the pendency of charges.

Id. In other words, *Heck* would not have barred Bradford's § 1983 claim had he filed it immediately after his conviction was vacated because at that point, his conviction had been vacated by the Washington Court of Appeals on grounds that suggested that the conviction was *invalid.* Bradford's § 1983 claim, had he filed it in 2008 after his conviction was vacated, would not have been barred by *Heck* because he likely could have shown that his conviction had been "declared invalid by a state tribunal authorized to make such determination[.]" *Heck,* 512 U.S. at 487.

Wallace also does not help plaintiffs. In *Wallace,* the issue before the Court was whether Wallace's § 1983 claim for damages "for an arrest that violated the Fourth Amendment" was timely. *Wallace,* 549 U.S. at 386. Wallace had been arrested, convicted, and sentenced for first-degree murder. *Id.* Wallace contended that he had been arrested without probable cause, and after two rounds of appeals, the state "prosecutors dropped the charges" against him. *Id.* at 387. Approximately one year later, Wallace brought a § 1983 false arrest suit against the City of Chicago and several Chicago police officers. *Id.* Wallace argued that his

§ 1983 false arrest claim accrued on the date on which he was released from custody. *Id.* at 391. The Court rejected this argument and instead held that the statute of limitations began to run "when he appeared before the examining magistrate and was bound over for trial" because that was when he began to suffer damages as a result of the false arrest. *Id.* at 391. Because Wallace had filed his § 1983 suit more than two years after he appeared before the examining magistrate, the Court concluded that his § 1983 suit was time barred. *Id.* at 391-92.

The Court rejected Wallace's "contention that *Heck* . . . compels the conclusion that his suit could not accrue until the State dropped its charges against him." *Id.* at 392. The Court set out the language from *Heck* that

> "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983."

Id. (quoting *Heck,* 512 U.S. at 486-87). The Court then stated that "the *Heck* rule for deferred accrual is called into play only when there exists 'a conviction or sentence that has *not* been . . . invalidated,' that is to say,

an 'outstanding criminal judgment.'" *Id.* at 393 (quoting *Heck,* 512 U.S. at 487). The Court explained that the *Heck* rule for deferred accrual "delays what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success in that tort action would impugn." *Id.* But, the Court explained that in Wallace's case, on the date on which the statute of limitations on his false arrest § 1983 claim began to run, "there was in existence no criminal conviction that the cause of action would impugn" because Wallace had not yet been convicted of anything. *Id.*

Wallace has little, if any, application here because it applies to § 1983 claims for false arrest. Specifically, the Court held "that the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process." *Id.* at 397. Plaintiffs have not asserted § 1983 false arrest claims. Moreover, *Wallace* stands for the proposition that *Heck* does not bar § 1983 claims if there is not *yet* a conviction in existence. That is not the case here. Plaintiffs were convicted and sentenced long before they brought their § 1983 claims.

The question here is not so much when did plaintiffs' § 1983 claims accrue, which is what was at issue in both *Bradford* and *Wallace.* The question here is whether plaintiffs' convictions have been invalidated for purposes of *Heck.* If they have been, plaintiffs' § 1983, § 1985, and spoliation claims are not barred by *Heck.* If they have not been, plaintiffs' § 1983, § 1985, and spoliation claims are barred by *Heck.*

Heck expressly provides that a conviction or sentence has been invalidated if it has "been reversed on

direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus[.]" *Heck,* 512 U.S. at 487. There is no question that plaintiffs' convictions and sentences were not reversed on direct appeal, expunged by executive order, or called into question by the issuance of a writ of habeas corpus. Plaintiffs' only avenue for satisfying *Heck* is to show that their convictions have been invalidated by a state tribunal.

Plaintiffs' convictions were vacated pursuant to a settlement agreement. But in that process, their convictions were not declared *invalid* by the Superior Court. In fact, the parties' stipulation expressly provided "that the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt."[37] All the Superior Court did was vacate plaintiffs' convictions pursuant to the settlement agreements and the stipulation. The Superior Court did not declare their convictions invalid.

Nonetheless, plaintiffs argue that the vacatur of their convictions and sentences by the Superior Court pursuant to the settlement agreements is sufficient for *Heck* purposes because the charges against them have been "fully and finally resolved and could no longer be brought against" them. *Bradford,* 803 F.3d at 389. But, that is not the requirement laid out in *Heck* nor was the *Bradford* court considering whether Bradford's conviction had been *invalidated* for purposes of *Heck.* Rather, the court in *Bradford* was con-

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[37] Exhibit 5 at 2, ¶ 2, Defendants' Request for Judicial Notice, Docket No. 43.

sidering when Bradford's § 1983 claim accrued under the "traditional rules of accrual. . . ." *Id.* at 386.

Plaintiffs next argue that an order dismissing their indictments is all that is needed to satisfy *Heck* because courts have found *Heck* satisfied when charges are dismissed by *nolle prosequi* or by a dismissal without prejudice. Plaintiffs cite to two cases in support of this argument.

First, plaintiffs cite to *Owens v. Baltimore City State's Attorneys Office,* 767 F.3d 379 (4th Cir. 2014). There, the issue before the court was whether Owens' § 1983 claims were barred by the statute of limitations. *Id.* at 388. Owens had been convicted of burglary and felony murder in 1988, but in 2007, "a state court granted Owens's 'petition to reopen his Post Conviction Proceeding' and ordered that 'by agreement of Counsel and this Honorable Court, . . . Petitioner shall be granted a new trial'" based on new DNA evidence. *Id.* at 387. "On October 15, 2008, the State's Attorney entered a *nolle prosequi,* dropping the charges against" Owens, and he was released from prison on that date. *Id.* On October 12, 2011, Owens brought § 1983 claims against the State's Attorney's Office and others. *Id.* at 388. On appeal, the defendants argued that Owens' § 1983 claims accrued on the date on which the state court vacated his conviction (June 4, 2007). *Id.* Owens argued that his § 1983 claims accrued on October 15, 2008, "the date on which prosecutors filed a *nolle prosequi,* finally resolving the proceedings against him," because it was on that date that the charges against him were finally resolved. *Id.* The court held that Owens' § 1983 claim accrued on the date on which the prosecutors filed a *nolle prosequi. Id.* at 390. The court rejected the contention that *Heck* required a different result, observing that

"the *Heck* bar to suit was removed as soon as the state court invalidated Owens's conviction and granted him a new trial." *Id.* at 391. Thus, the court found that it was not the filing of the *nolle prosequi* that removed the *Heck* bar, but rather the state court's *invalidation* of Owens' conviction. Here, no state court has *invalidated* plaintiffs' convictions. Rather, the state court vacated plaintiffs' convictions pursuant to the settlement agreements, and plaintiffs expressly stipulated that their judgments of convictions were valid.

Second, plaintiffs cite to *Spak v. Phillips,* 857 F.3d 458 (2nd Cir. 2017). There, Spak was arrested on June 15, 2010 on charges of tampering with or fabricating evidence. *Id.* at 460. "On September 10, 2010, the prosecuting attorney unilaterally dismissed the charges against Spak by entering a *nolle prosequi." Id.* at 461. On October 29, 2013, Spak filed a § 1983 malicious prosecution claim. *Id.* The issue before the court was on what date did Spak's § 1983 claim accrue. *Id.* Spak "argue[d] that his claim did not accrue on the date that the charges against him were *nolled,* but thirteen months later when Connecticut law mandated that the records of his *nolled* prosecution be erased." *Id.* The court observed that "as a general matter a *nolle prosequi* constitutes a 'favorable termination' for the purpose of determining when a Section 1983 claim accrues." *Id.* at 463. But, the court did not hold that a *nolle prosequi* is sufficient to satisfy the *Heck* requirement that a conviction or sentence be invalidated prior to a plaintiff bringing a § 1983 damages claim that would impugn the validity of that conviction or sentence. The court explained that

> *Heck* and its progeny generally deal with Section 1983 suits that are filed by plaintiffs asserting that a prior criminal conviction is

> invalid, and seeking to recover damages for the state's abuse of legal process. Those decisions thus require that the plaintiff demonstrate that the outstanding conviction has been conclusively invalidated in a manner that demonstrates his innocence before he can pursue his civil claim. They do not address the type of termination at issue here, in which a plaintiff was never convicted of a criminal offense, but the charges against him were dismissed in a manner that did not preclude future prosecution under a different charging instrument.

Id. at 465. *Spak* makes clear that, for purposes of the *Heck* bar, plaintiffs must show that their convictions were invalidated. *Spak* does not provide any support for a contention that a conviction that has been vacated pursuant to a settlement agreement would be sufficient to meet this requirement.

Finally, plaintiffs argue that the fact that the vacatur of their convictions was the result of the settlement agreements does not mean that their convictions were not invalidated for purposes of *Heck.* Plaintiffs cite to *Rosales-Martinez,* 753 F.3d 890, in support of this argument.

There, Rosales-Martinez was convicted in 2004 of three drug charges and sentenced to a term of imprisonment of ten to twenty-five years. *Id.* at 892. At some point thereafter, Rosales-Martinez filed a habeas petition in state court, alleging that the criminal history of the confidential informant who testified against him had not been disclosed to him. *Id.* "On December 2, 2008, the state District Court granted Rosales-Martinez's petition and ordered him released from prison." *Id.* Almost two years later, Rosales-Martinez

filed a § 1983 suit in federal district court, alleging *Brady* violations based on his allegations that the defendants had failed to disclose the confidential informant's "criminal history during pre-trial proceedings, and even after his conviction." *Id.* The federal district court dismissed RosalesMartinez's complaint on the grounds that it was barred by the statute of limitations, finding that Rosales-Martinez knew about the *Brady* violations prior to the December 2, 2008 order releasing him from prison. *Id.* at 893. The Ninth Circuit held that the district court erred because Rosales-Martinez's § 1983 claim "did not accrue until the Nevada court vacated those convictions on December 2, 2008[.]" *Id.* at 896.

That was not the end of the matter however because Rosales-Martinez's appeal was complicated by documents that had come to light during the pendency of his appeal. While his case was on appeal to the Ninth Circuit, it was discovered that Rosales-Martinez had entered into a stipulated agreement on December 2, 2008, that provided he would plead guilty "to the least serious of the charges of which he had been convicted" and that the sentence for this charge would be "a certain portion of the time he served in custody." *Id.* at 893. Rosales-Martinez also signed a guilty plea memorandum. *Id.* at 894. In "the minutes of a court proceeding based on the stipulation . . . the Washoe County District Court 'vacate[d] the convictions' in Rosales-Martinez's criminal case 'based on the cumulative errors . . . as alleged in his [habeas] petition.'" *Id.*

The Ninth Circuit explained that

> [t]he fact that Rosales-Martinez was reconvicted following the vacation of his initial conviction, means that he still has an out-

> standing conviction. This outstanding conviction raises the question whether Rosales-Martinez's § 1983 action is barred by *Heck's* holding that "a claim for damages [based] on a conviction or sentence that has not been so invalidated is not cognizable."

Id. at 897 (quoting *Heck,* 512 U.S. at 487). The Ninth Circuit, however, did not answer this question, instead remanding the matter to the district court to consider it in the first instance. *Id.* at 899. In doing so, the Ninth Circuit observed that

> the district judge may wish to consider the extent to which Rosales–Martinez can seek compensatory damages based on the convictions that were vacated as invalid, and the time he served on the count that remained valid, for which he was given credit for 501 days of time served. The district judge may also wish to consider whether any of the facts Rosales–Martinez allocuted to in his December 2, 2008 plea are inconsistent with his allegations in this § 1983 action.

Id. But, the Ninth Circuit did not hold that a conviction that has been vacated pursuant to a settlement agreement is sufficient to meet the *Heck* invalidation requirement.

In sum, plaintiffs have not shown that their convictions or sentences have been invalidated. Their convictions and sentences have been vacated. But that is not the same thing for purposes of *Heck. Heck* requires a showing that the conviction or sentence that the § 1983 claims would impugn has been "declared invalid by a state tribunal authorized to make such determination[.]" *Heck,* 512 U.S. at 487. No state tribunal

has declared plaintiffs' convictions and sentences invalid. Plaintiffs' § 1983, § 1985, and spoliation claims are barred by *Heck*.

Because plaintiffs' § 1983, § 1985, and spoliation claims are barred by *Heck,* the court need not consider defendants' argument that plaintiffs' claims are barred by the settlement agreements.[38] The court also need not consider defendants' alternative Rule 12(b)(7) argument that the State of Alaska is an indispensable party.

Conclusion

Defendants' motion to dismiss is granted. Plaintiffs' claims against defendants are dismissed. Plaintiffs' negligence and negligent infliction of emotional distress claims are dismissed with prejudice. Plaintiffs' § 1983, § 1985, and spoliation claims are dismissed without prejudice. Plaintiffs are not given leave to amend these claims as amendment would be futile at this time.

DATED at Anchorage, Alaska, this 22nd day of October, 2018.

/s/ H. Russel Holland
United States District Judge

[38] The court would note that plaintiffs only argue that the claims release provisions in the settlement agreements are unenforceable. They do not contend that other provisions in the settlement agreements are unenforceable nor do they contend that any of the terms of the stipulation were invalid.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed October 24, 2018]

Case Number 4:17-cv-00034-HRH
[Consolidated with 4:17-cv-00035-HRH]

MARVIN ROBERTS,

Plaintiff,

v.

CITY OF FAIRBANKS, et al.,

Defendant.

EUGENE VENT, et al.

Plaintiff,

v.

CITY OF FAIRBANKS, et al.

Defendant.

JUDGMENT IN A CIVIL CASE

__ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **DECISION BY COURT**. This action came to trial or decision before the court. The issues have been tried or determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT the plaintiffs' complaints are dismissed.

APPROVED:

s/ H. Russel Holland
United States District Judge
Date: October 24, 2018

Lesley K. Allen
Clerk of Court

APPENDIX D

962 F.3d 1165

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 18-35938

MARVIN ROBERTS; EUGENE VENT;
KEVIN PEASE; GEORGE FRESE,

Plaintiffs-Appellants,

v.

CITY OF FAIRBANKS; JAMES GEIER; CLIFFORD
AARON RING; CHRIS NOLAN; DAVE KENDRICK,

Defendants-Appellees.

Filed June 26, 2020

D.C. Nos. 4:17-cv-00034-HRH, 4:17-cv-00035-HRH

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ORDER

Before: Richard C. Tallman, Sandra S. Ikuta, and N. Randy Smith, Circuit Judges.

Order; Dissent by Judge VanDyke

Judge Ikuta voted to grant the petition for rehearing en banc. Judges Tallman and N.R. Smith recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

VANDYKE, Circuit Judge, joined by IKUTA, Circuit Judge, dissenting from the denial of rehearing en banc:

Decades ago, the Supreme Court ruled that a § 1983 plaintiff is generally barred from bringing a claim to "recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm . . . [that] would render a conviction or sentence invalid." *Heck v. Humphrey*, 512 U.S. 477, 486–87, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The Court recognized just four discrete exceptions to what has become known as the "*Heck* bar" on such § 1983 claims—where the plaintiff can prove "that the conviction or sentence has been [1] reversed on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court's issuance of a writ of habeas corpus . . . ." *Id*. Drawing from the common law, the Court said that "[j]ust as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor, so also a § 1983 . . . action for damages . . . does not accrue until the conviction or sentence has been invalidated." *Id*. at 489–90, 114 S.Ct. 2364.

The split panel decision in this case created an additional exception to the *Heck* bar that, as far as I can tell, is unprecedented—not only in our circuit, but across the federal courts. It did so by reinterpreting *Heck*'s *favorable* termination requirement into something less than even a *neutral* termination requirement. In doing so, it expressly refused to apply the "hoary principle[s]" adopted from the malicious prosecution context that were the express basis for the majority's decision in *Heck*. *Id.* at 486, 114 S.Ct. 2364. Now, in every situation where a criminal defendant's

conviction is ministerially vacated without any judicial determination that the conviction was actually "invalid," this new exception casts into doubt the *Heck* bar's applicability. This includes in the many states in our circuit that have statutes that automatically vacate some convictions once the defendant has served his sentence. *Heck* is a quarter-century old, and its better-established exceptions already bedevil federal courts across the country, including this one. The fact that no other court has conceived or applied the panel majority's new exception in over 25 years of applying *Heck* should be reason enough for this Court to rehear this case en banc before cracking this lid on Pandora's box.

I.

The four § 1983 plaintiffs in this case were tried and convicted of murder in 1997. *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1193–94 (9th Cir. 2020). Their prison sentences ranged from 30 to 77 years. *Id*. at 1194. Several years after their convictions, a man named William Holmes "confessed to his involvement in the murder and named Jason Wallace and three other men as the actual perpetrators of the crime." *Id*. Based in part on this confession, the "[p]laintiffs filed post-conviction relief ('PCR') petitions in Alaska Superior Court in September 2013." *Id*. The state court determined that the PCR petitions alleged "a prima facie case of actual innocence," and as a result, the plaintiffs engaged in discovery for two years. *Id*. At the close of discovery, the parties participated in "a five-week evidentiary hearing from October through November of 2015." *Id*. At the conclusion of the hearing, the judge told the parties that he would reach a decision in six to eight months. *Id*. at 1195.

After the hearing but before a decision, the prosecutors extended an offer to plaintiffs in which they would "consent to vacating the convictions and dismissing the charges, but only if all four plaintiffs agreed to release the State of Alaska and the City of Fairbanks (and their employees) from any liability related to the convictions." *Id*. Rather than await the state court's ruling on their PCR petitions, the plaintiffs executed settlement agreements with the State of Alaska and the City of Fairbanks and filed the settlement agreements in the Alaska Superior Court. *Id*. The parties "jointly stipulated that the court would be asked to vacate [p]laintiffs' convictions." *Id.* The settlement agreement confirmed that "[t]he parties have not reached agreement as to [plaintiffs'] actual guilt or innocence." *Id*. Instead, the plaintiffs specifically "stipulate[d] and agree[d] that the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt." *Id*. The parties further "stipulate[d] and agree[d] that there [was] sufficient new evidence of material facts that a new trial could be ordered," and "that this [state] Court may immediately enter Orders vacating the Judgments of Conviction . . . and awarding each [plaintiff] the relief of a new trial for each of the charges for which [plaintiffs] were convicted." *Id*.

The state court held a settlement hearing on December 17, 2015 where all parties participated. *Id*. At the hearing, the court stated that its duty was to "ministerially sign the orders necessary to [e]ffect the decision of the attorney general," and after concluding that the parties' settlement was "procedurally proper," the court acknowledged that it "had no authority to . . . review or to criticize" the decision made by the state attorney general to enter into this agreement. *Id*. At the end of the hearing, the state "court vacated

[p]laintiffs' convictions, the prosecutors dismissed all indictments, and [plaintiffs] were released from prison."[1] *Id*. Plaintiffs also dismissed their pending PCR petitions. *Id*. at 1206 (Ikuta, J., dissenting). The four plaintiffs have not subsequently been prosecuted, "and no new trial was ever ordered following the 2015 hearing." *Id*. at 1195.

Notwithstanding the terms of the settlement agreements and the parties' stipulations, the plaintiffs on December 7, 2017 filed a § 1983 cause of action—including a § 1983 deprivation of liberty claim and a § 1983 malicious prosecution claim—against the City of Fairbanks and four of its officers. *Id*. at 1207 (Ikuta, J., dissenting). The defendants moved to dismiss, and the district court granted the motion and denied plaintiffs' request to amend their complaint. *Id*. at 1196. Applying *Heck v. Humphrey*, the district court held "that vacatur of convictions pursuant to a settlement agreement was insufficient to render the convictions invalid" because "the parties' stipulate[ed] that 'the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt.'" *Id*. (citation omitted). The district court pointed out that "the Superior Court . . . vacate[d] plaintiffs' convictions pursuant to the settlement agreements and the stipulation. The Superior Court did not declare their convictions invalid." *Id*. Plaintiffs timely appealed. *Id*.

The primary question answered by the panel on appeal was "whether § 1983 plaintiffs may recover damages if the convictions underlying their claims were vacated pursuant to a settlement agreement." *Id*.

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[1] One of the plaintiffs was already on supervised parole but agreed to this arrangement along with the other three plaintiffs.

at 1193. The majority concluded that when "all convictions underlying § 1983 claims are vacated and no outstanding criminal judgments remain, *Heck* does not bar plaintiffs from seeking relief under § 1983." *Id*. In reaching that conclusion, the majority acknowledged that the plaintiffs' vacatur-by-settlement in this case would not satisfy the common law's favorable-termination requirement, but opined that "*Heck*'s favorable-termination requirement is distinct from the favorable-termination element of [the common law] malicious-prosecution claim." *Id.* at 1201.

II.

In *Heck v. Humphrey*, the Supreme Court addressed when someone who has been convicted of a crime may seek § 1983 damages for an alleged unconstitutional prosecution or imprisonment related to that conviction. The Court held that a § 1983 complaint in that context "must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The Court provided four specific ways that a plaintiff could show the conviction had been "so invalidated": "that the conviction or sentence has been [1] reversed on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court's issuance of a writ of habeas corpus." *Id*. at 486–87, 114 S.Ct. 2364. "A claim for damages . . . relat[ing] to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." *Id*. at 487, 114 S.Ct. 2364. "[A]s a cause of action for malicious prosecution does not accrue until the criminal proceedings *have terminated in the plaintiff's favor*, so also a § 1983 cause of action for

damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been *invalidated*." *Id*. at 489–90, 114 S.Ct. 2364 (emphasis added; citations omitted). The Court made clear that this "favorable termination" requirement, borrowed from the common law's malicious prosecution tort, was not merely an exhaustion requirement, but was an actual element of a § 1983 claim challenging wrongful prosecution or imprisonment.

Justice Souter inked a concurrence in *Heck* wherein he took issue with the Court's heavy reliance on the common-law tort of malicious prosecution. *Id*. at 491–503, 114 S.Ct. 2364 (Souter, J., concurring). He had no problem with looking to the malicious prosecution tort as a "starting point" in determining when a § 1983 claim can be brought by someone convicted of a crime, but disapproved that the *Heck* majority had incorporated the tort's "favorable termination" requirement as an actual *element* of a § 1983 claim in this context. *Id.* at 492–98, 114 S.Ct. 2364. Justice Souter argued that the four discrete "events" the majority said could demonstrate a prior conviction had been "invalidated" were not actually consistent with the historical understanding of a "favorable termination" in the malicious prosecution context. *Id.* at 496, 114 S.Ct. 2364. According to Justice Souter, even the *Heck* exceptions might not, without more, qualify as a "favorable termination" as the tort was historically understood and applied. *Id.* Moreover, Justice Souter expressed alarm that if a § 1983 plaintiff is required to show his conviction was "invalidated" in a manner similar to the "favorable termination" requirement at common law—that is, if the "invalidated" requirement is applied as an affirmative element of a § 1983 claim—then it would continue to bar a § 1983 suit even after the convicted

person was no longer in custody and could no longer bring a habeas suit. *Id.* at 499–502, 114 S.Ct. 2364.

The *Heck* majority did not leave Justice Souter's criticisms unanswered. First, the Court simply disagreed with Justice Souter's claim that the common law "favorable termination" requirement was dissimilar from the four specific "invalidating" events it listed. *Id.* at 484 n.4, 114 S.Ct. 2364. But even if Justice Souter was right that not all of the four *Heck* exceptions historically would have permitted a plaintiff to bring a malicious prosecution claim, the majority said that would only mean the four exceptions should have been narrower. *Id.* (arguing that "even if Justice Souter were correct . . . [t]hat would, if anything, strengthen our belief that § 1983, which borrowed general tort principles, was not meant to permit such collateral attack").

Second, the Court squarely rejected Justice Souter's argument that the *Heck* bar should only apply to someone who is still incarcerated or can otherwise still bring a habeas action to challenge his conviction. "We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id*. at 490, 114 S.Ct. 2364 n.10.

Since *Heck*, the Supreme Court has continued to apply *Heck*'s favorable termination requirement as borrowed from the common law malicious prosecution context. A decade after *Heck*, the Court restated its *Heck* holding: "we held [in *Heck*] that where success in a prisoner's § 1983 damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termi-

nation of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence." *Muhammad v. Close*, 540 U.S. 749, 751, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004) (per curiam). Then, only a few years ago, the Supreme Court explained that "[i]n defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts." *Manuel v. City of Joliet*, —— U.S. ——, 137 S. Ct. 911, 914, 197 L.Ed.2d 312 (2017). The Court cited *Heck* as an example, and noted "[s]ometimes, that review of common law will lead a court to adopt *wholesale* the rules that would apply in a suit involving the most analogous tort." *Id*. at 920–21 (emphasis added). And just last year, the Supreme Court again reviewed a § 1983 statute of limitations issue to resolve whether a claim accrues upon acquittal or when fabricated evidence is introduced. *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2153, 204 L.Ed.2d 506 (2019). The Court concluded that "[t]he statute of limitations for a fabricated-evidence claim . . . does not begin to run until the criminal proceedings against the defendant . . . have terminated in his favor." *Id*. at 2154–55. This result "follows both from the rule for the most natural common-law analogy (the tort of malicious prosecution) and from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment." *Id*. at 2155. "Only once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck* . . . will the statute of limitations begin to run." *Id*. at 2158 (internal citation omitted).

III.

The panel majority in this case divorced *Heck*'s favorable termination requirement from its common law roots. Taking inspiration from passing comments in *Rosales-Martinez v. Palmer*, 753 F.3d 890 (9th Cir. 2014) and *Taylor v. County of Pima*, 913 F.3d 930 (9th Cir. 2019), the panel majority concluded that a ministerial vacatur pursuant to a settlement agreement is a "favorable termination" within the meaning of *Heck*, and therefore the *Heck* bar doesn't apply. *Roberts*, 947 F.3d at 1198–1203. But "neither [*Rosales-Martinez* nor *Taylor*] holds that a vacatur by settlement qualifies as a favorable termination under *Heck*." *Id*. at 1211 (Ikuta, J., dissenting).

Rosales-Martinez sought damages under § 1983 for an allegedly unlawful conviction and imprisonment resulting from defendants' constitutional error. 753 F.3d at 891. He alleged that after the constitutional error came to light while he was imprisoned, "the Nevada state courts recognized the constitutional error, granted his petition for a writ of habeas corpus, and ordered him freed." *Id*. He filed a § 1983 lawsuit nearly two years after the alleged order. *See id*. The district court dismissed his lawsuit on the ground that the two-year statute of limitations began to run when he first learned of the constitutional errors, and thus had already expired when he filed his claim. *Id*. at 891. On appeal, this Court reversed, concluding that "[p]ursuant to *Heck* . . . [plaintiff's] cause of action did not accrue until his conviction was held invalid." *Id.*

Rosales-Martinez is somewhat confusing because the parties on appeal put forth contradictory views of what had actually happened to Rosales-Martinez's conviction in the state courts. Rosales-Martinez alleged that the state court granted his habeas petition

and then ordered him released. *Id*. at 894. But relying on information submitted on appeal "at the eleventh hour," the defendants argued that the state court actually vacated the plaintiff's conviction and released him as the result of a stipulated agreement: that plaintiff's conviction would be "vacated based on . . . cumulative errors" and the prosecution would recommend a sentence of time already served in exchange for Rosales-Martinez pleading guilty to one of the original crimes and dismissing his habeas petition. *Id*. at 894–95. It is not entirely clear therefore whose version of events the court in *Rosales-Martinez* was referencing when it concluded that "*Heck* therefore teaches that Rosales-Martinez's claims did not accrue until the Nevada court *vacated* those convictions on December 2, 2008." *Id*. at 896 (emphasis added).

The panel majority in this case highlights the above statement from *Rosales-Martinez* to assert that the court "implicitly held that vacating a conviction pursuant to a settlement agreement serves to invalidate the conviction under *Heck*." *Roberts*, 947 F.3d at 1200. But for several reasons, that significantly over-characterizes the *Rosales-Martinez* Court's consideration of vacatur as a means of invalidation.

First, it isn't clear which version of the parties' stories the *Rosales-Martinez* Court had in mind when it made this statement. If it was the plaintiff's version, then the case didn't involve vacatur-by-agreement at all because applying this version of the facts would result in a straightforward and uncontroversial application of *Heck*'s third type of favorable termination: "declared invalid by a state tribunal. . . ." *Heck*, 512 U.S. at 486, 114 S.Ct. 2364. There is some indication that this was the case, since the Court in *Rosales-Martinez* didn't analyze the impact of the "more

complicated picture of events than the simple allegation of [plaintiff's] complaint" until a later section of the opinion (Section V). *See* 753 F.3d at 897–99. Ultimately, because of the different facts presented by the government on appeal, the Court ordered that the "viability and scope of Rosales-Martinez's § 1983 claim, in relation to *Heck v. Humphrey* and pursuant to *Jackson* should be evaluated by the district judge on remand." *Id.* at 899. Thus, "our decision in *Rosales-Martinez* to reverse the district court was not based on the finding that *Heck* permits a § 1983 action whenever a conviction has been vacated pursuant to a settlement agreement." *Roberts*, 947 F.3d at 1211 (Ikuta, J., dissenting).

Even if the court in *Rosales-Martinez* was referencing vacatur-by-agreement, that still would not support the rule announced in *Roberts*. As just noted, the *Rosales-Martinez* Court didn't ultimately decide the *Heck* bar was inapplicable in that case; it remanded it to the district court to analyze in the first instance. 753 F.3d at 899. Because of the factual confusion, it is not terribly surprising that *Rosales-Martinez* never analyzed whether vacatur-by-agreement counts as "invalidation" or a "favorable termination" under *Heck*. That issue wasn't even raised until the "eleventh hour" of the appeal, *id.* at 894, and was ultimately remanded to the district court to sort out. So if some stray statement by the *Rosales-Martinez* Court did equate vacatur-by-agreement with invalidation (which, again, it is not clear it did), the statement was made in passing and with no analysis. *See*, *e.g.*, *In re Magnacom Wireless*, *LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007) ("In our circuit, statements made in passing, without analysis, are not binding precedent."); *Estate of Magnin v. C.I.R.*, 184 F.3d 1074, 1077 (9th Cir. 1999) ("When a case assumes a point without

discussion, the case does not bind future panels."); *see also United States v. Paul*, 583 F.3d 1136, 1138 (9th Cir. 2009) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (" '[C]ases that do not actually analyze the issue . . . and cases that erroneously rely on those cases for their implicit assumptions' do not bind future panels.") (quoting in part *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 937 (9th Cir. 2007)).

Relying on *Rosales-Martinez* as somehow sanctioning or even previewing the rule applied by the *Roberts* majority is therefore an overreading of *Rosales-Martinez*. The most that can be said is that *Rosales-Martinez* is not *inconsistent* with the *Roberts* rule. But that can be said about most cases—even most cases applying *Heck*—because, like *Rosales-Martinez*, most of those cases do not actually consider and analyze whether a vacatur-by-agreement suffices to meet *Heck*'s favorable termination requirement.

Taylor v. County of Pima, 913 F.3d 930 (9th Cir. 2019), is a closer call. In *Taylor*, "a jury convicted Louis Taylor . . . of 28 counts of felony murder" in 1972 "on the theory that he had started a deadly fire at a Tucson hotel." *Id.* at 932. While still in prison, Taylor in 2012 sought post-conviction relief based on new evidence that "arson did *not* cause the hotel fire." *Id*. (emphasis in original). Taylor entered into a plea agreement with the government in 2013 whereby his "original convictions were vacated and, in their place, Taylor pleaded no contest to the same counts, was resentenced to time served, and was released from prison." *Id*. Taylor then sued the County of Pima and the City of Tucson pursuant to § 1983 "alleging violations of his constitutional rights to due process and a fair trial." *Id*.

The district court dismissed Taylor's § 1983 wrongful incarceration damages claim as barred by *Heck*. *Id*.

at 935–36. On appeal, the panel majority said: "Here, Taylor's 1972 jury conviction has been vacated by the state court, so *Heck* poses no bar to a challenge to that conviction or the resulting sentence." *Id.* at 935. But the court observed that "Taylor's 2013 conviction, following his plea of no contest, remains valid," and "all of the time that Taylor served in prison is supported by the valid 2013 state-court judgment." *Id.* The *Taylor* Court thus affirmed the district court's dismissal of Taylor's § 1983 claim as *Heck*-barred. *Id.* at 936.

The *Roberts* majority is correct that the *Taylor* majority did equate a vacatur-by-settlement with a favorable termination under *Heck*. *See id.* at 935 ("Here, Taylor's 1972 jury conviction has been vacated by the state court [under a vacatur-by-agreement settlement], so *Heck* poses no bar to a challenge to that conviction or the resulting sentence.").

Taylor is the strongest support for the holding in *Roberts*. But *Taylor*'s conclusion that the *Heck* bar did not apply to Taylor's vacated conviction was classic dicta—it made no difference in the case because Taylor was still *Heck*-barred by his second conviction and his § 1983 claims were dismissed. Moreover, "*Taylor* offered no reasoning to support its offhand comment" that a vacated conviction is not barred by *Heck*, and there is no analysis in *Taylor* of why a vacatur-by-agreement satisfies *Heck*'s favorable termination requirement. *Roberts*, 947 F.3d at 1212 (Ikuta, J., dissenting). There is just the one sentence from *Taylor* that the *Roberts* majority relies on. That is it.

So *Taylor* certainly did not mandate the result in *Roberts*. The *Taylor* majority's passing statement "was not necessary to its holding," *id.*, was unreasoned, and did not affect the ultimate result in *Taylor* because

Taylor's 2013 plea barred his § 1983 claim under *Heck*. Its sentence was dicta "made in passing, without analysis," and "not binding precedent." *In re Magnacom Wireless, LLC*, 503 F.3d at 993–94; *see also United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001). But unlike in *Taylor*, the "*Roberts* exception" is now binding precedent—because of *Roberts*, the law in the Ninth Circuit is now that a vacatur-by-agreement of the parties is a favorable termination under *Heck*.

The practical effects of the negotiated vacatur in this case also reveal how the *Roberts* exception differs from an overturned conviction on appeal, executive expungement, and direct invalidation by an authorized court. For instance, the § 1983 plaintiffs agreed that their convictions were "properly and validly" secured in exchange for their release from custody. While the plaintiffs can rightfully assert that release from custody was a favorable result, they also expressly agreed that the convictions were "properly and validly" obtained. This concession by the plaintiffs that their convictions were valid cannot mean that their convictions were invalidated—it means the opposite. At best, this compromise constituted a neutral disposition of the convictions because the convictions were vacated without any discussion as to the plaintiffs' actual guilt or innocence. At worst, this was a less-than-neutral termination of the convictions because all parties agreed that the convictions were still valid—just as someone who would have agreed to time-served in exchange for release from prison.[2]

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[2] Even if this Court wanted to add the *Roberts* exception to the four *Heck* exceptions, this was not the proper case to do so. Here, all parties agreed the convictions *were* valid. Under the plain language of *Heck*, the still-valid convictions bar the plaintiffs' § 1983 claims.

IV.

The Supreme Court has not stepped away from *Heck*'s favorable termination requirement, and the *Roberts* exception is irreconcilable with *Heck*'s favorable termination rule. "[V]acatur by settlement is not—and never was—recognized as a favorable termination at common law, so the majority's attempt to recognize it as a fifth means of favorable termination under *Heck* squarely contradicts *Heck*'s reliance on the 'common law of torts.' " *Roberts*, 947 F.3d at 1214–15 (Ikuta, J., dissenting) (citing *Heck*, 512 U.S. at 483, 114 S.Ct. 2364). Two facts amplify this inconsistency.

First, the *Roberts* majority does not dispute that its rule is inconsistent with the common law's favorable termination rule from the malicious prosecution context. *Id*. at 1201. Instead, the majority insists that "*Heck*'s favorable-termination requirement is distinct from the favorable-termination element of a malicious-prosecution claim." *Id.* But this is not a faithful application of *Heck*—especially as illuminated by the back-and-forth between the Court and Justice Souter's concurrence. Justice Souter's entire complaint in *Heck* was that the Court was too extensively and too woodenly borrowing from the malicious prosecution tort in interpreting § 1983. Tellingly, the Court in *Heck* was unapologetic and responded tit-for-tat to "Justice Souter's critici[sm of] our reliance on malicious prosecution's favorable termination requirement." *Heck*, 512 U.S. at 484 n.4, 114 S.Ct. 2364.

In arguing that the *Heck* and malicious prosecution favorable termination requirements are different, the *Roberts* majority relies primarily on the argument that *Heck*'s four specific exceptions do not map on perfectly to the historical understanding of the malicious prosecution tort. 947 F.3d at 1201–03. But this does no

more than rehash Justice Souter's argument in *Heck*. *See Heck*, 512 U.S. at 496, 114 S.Ct. 2364 (Souter, J., concurring). The Supreme Court forcefully rejected that argument then (*see id.* at 484 n.4, 114 S.Ct. 2364), and we can't resurrect it to reinterpret *Heck*'s favorable termination requirement now. Especially when, just a few years ago, the Supreme Court reiterated that in *Heck* it had previously "adopt[ed] *wholesale* the rules that would apply in a suit involving the most analogous tort"—i.e., the malicious prosecution tort. *Manuel*, 137 S. Ct. at 920–21 (emphasis added).

Second, the fact that, in the quarter century since *Heck* was decided, no other court has applied the *Roberts* exception to the *Heck* bar is good reason to think carefully before we lock that in as the law in our circuit. As explained, until *Roberts*, none of this Court's precedents *required* that a vacatur-by-agreement be interpreted as a favorable termination under *Heck*. There are probably many good reasons for that, but one very serious concern comes to mind. Many states in our circuit allow for convictions to be automatically vacated after an offender has served his sentence. *See*, *e.g.*, Cal. Penal Code § 1203.4 (describing how verdicts may be vacated once a defendant fulfills the conditions of probation); Cal. Penal Code § 1203.41 (outlining how defendants may change their pleas and set aside a guilty verdict without a judicial determination that the plea or verdict was invalid); Wash. Rev. Code Ann. § 9.94A.640(1) (detailing how defendants can vacate their record of conviction after completing their sentences); Or. Rev. Stat. § 137.225 ("[A]t any time after the lapse of three years from the date of pronouncement of judgment, any defendant who has fully complied with and performed the sentence of the court . . . may apply to the court where the conviction was entered for entry of an order setting

aside the conviction."); Ariz. Rev. Stat. § 13-905 ("[E]very person convicted of a criminal offense, on fulfillment of the conditions of probation or sentence and discharge by the court, may apply to the court to have the judgment of guilt set aside."); Ariz. Rev. Stat. § 13-909 (allowing sex trafficking victims to vacate certain convictions); Nev. Rev. Stat. § 179.247 (providing certain nonviolent offenders with the option of vacating their judgment and sealing their records of conviction); Haw. Rev. Stat. § 712-1209.6 (giving convicted prostitutes the ability to vacate their convictions); Wash. Rev. Code Ann. § 10.05.120 (instructing courts to dismiss charges after the defendant successfully completes a deferred prosecution program); Mont. Code. Ann. § 46-16-130 (requiring automatic dismissal of prosecution upon compliance with the terms of a pre-trial diversion program); Nev. Rev. Stat. § 174.033 (mandating the dismissal of charges following a defendant's completion of "the terms and conditions of a preprosecution diversion program"); Or. Rev. Stat. § 135.891 (confirming that criminal charges will be dismissed with prejudice when a defendant fulfills the requirements of a diversion agreement); Ariz. Rev. Stat. § 11-361 ("[T]he county attorney of a participating county may divert or defer, before a guilty plea or a trial, the prosecution of a person who is accused of committing a crime. . . ."); Haw. Rev. Stat. § 853-1 (deferring further proceedings when a defendant enters a guilty or nolo contendere plea to allow the defendant to participate in a deferred prosecution program that requires dismissal of the criminal charges upon completion of the program); Alaska Stat. § 12.55.078 (permitting deferred adjudication wherein a defendant serves a term of probation in exchange for the dismissal of the criminal proceedings); Mont. Code. Ann. § 46-18-1104 (describing the conditions for

expungement of misdemeanors); Idaho Code § 19-2604 (authorizing courts to terminate a sentence, set aside a guilty plea or conviction, and dismiss the case if the court determines "there is no longer cause for continuing the period of [defendant's] probation").

Perhaps anticipating this issue, the Second Circuit and Third Circuit have rejected the argument that a mere neutral termination of a conviction can overcome the *Heck* bar. In the Second Circuit, petitioner Roesch participated in accelerated pretrial rehabilitation, and after he successfully finished "the two-year probationary period, the State Court dismissed the charges against him." *Roesch v. Otarola*, 980 F.2d 850, 852 (2d Cir. 1992). Roesch then filed a § 1983 action seeking damages and alleging in part that "various parties conspired to cause his arrest and incarceration without probable cause." *Id*. The Second Circuit held "that a dismissal pursuant to the Connecticut accelerated pretrial rehabilitation program is not a termination in favor of the accused for purposes of a civil rights suit." *Id*. at 853. "A person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal, or else waive his section 1983 claim." *Id*.

Similarly, in the Third Circuit, petitioner Petit participated in the Accelerated Rehabilitative Disposition (ARD) program wherein he avoided trial, served no jail time, and received an expungement of his record after completing a probationary period. *Gilles v. Davis*, 427 F.3d 197, 209 (3d Cir. 2005). Petit then brought a § 1983 action against public officials seeking damages. *Id*. at 203, 208–09. The Third Circuit applied the *Heck* bar, *id*. at 209–10, and held that "the ARD program is not a favorable termination under *Heck*." *Id*. at 211.

The reasoning in *Roesch* and *Gilles* aligns with *Heck's* favorable termination requirement as described in Judge Ikuta's dissent in *Roberts*, not the majority's decision. The *Roberts* decision will, at worst, require this Court in future panels to reach the opposite conclusion as our sister circuits with regard to § 1983 claims related to convictions that have been "invalidated" by state expungement statutes or good-behavior programs. At best, future panels will be required to creatively cabin *Roberts* or " 'impermissibly risk parallel litigation and conflicting judgments.'" *Roberts*, 947 F.3d at 1208 (Ikuta, J., dissenting) (quoting *McDonough*, 139 S. Ct. at 2160). Even though "one purpose of the favorable-termination rule is to avoid the risk that a criminal conviction could be deemed valid in the criminal context and invalid in the civil context," the *Roberts* exception now requires this Court to engage in judicial gymnastics to determine whether a § 1983 plaintiff may attack a conviction that has not actually been declared invalid by an authorized state tribunal. *Id*. at 1213 (Ikuta, J., dissenting) (citing *Heck*, 512 U.S. at 484–85, 114 S.Ct. 2364).

V.

"*Heck* makes clear that plaintiffs 'must' show that their convictions were terminated in one of four specific ways," and "[v]acatur by settlement is not on the list. . . ." *Roberts*, 947 F.3d at 1213–14 (Ikuta, J., dissenting). Here, "[n]o court has ruled on the validity of the plaintiffs' prior convictions or made a finding as to the plaintiffs' guilt or innocence." *Id*. at 1209–10 (Ikuta, J., dissenting). Instead, the plaintiffs expressly agreed that their convictions were "validly entered based on proof beyond a reasonable doubt." *Id*. at 1203. Because nothing in the record shows that the convictions are invalid (it shows just the opposite), "*Heck*

precludes plaintiffs from bringing a § 1983 action. . . ." *Id*. at 1212 (Ikuta, J., dissenting).

In the face of controlling Supreme Court precedent, the split-panel majority in *Roberts* created a novel exception to reach a result inconsistent with *Heck*. We should have considered this inconsistency en banc before cementing it as binding precedent in our circuit. I respectfully dissent from the denial of rehearing en banc.