No. 20-711

In the Supreme Court of the United States

CITY OF FAIRBANKS, ALASKA, ET AL.,
Petitioners,

v.

MARVIN ROBERTS, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that respondents' criminal convictions did not bar their § 1983 claims under *Heck v. Humphrey*, 512 U.S. 477 (1994), because a court vacated the convictions after the State stipulated that respondents were entitled to post-conviction relief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

The petition should be denied. The Alaska superior court vacated Respondents' murder convictions based on a stipulation that new evidence of their innocence warranted that relief. There is no split in how circuits have applied *Heck v. Humphrey*, 512 U.S. 477 (1994), to vacated convictions such as these. Of the two cases Petitioners identify for their purported split: one was decided before *Heck*; and the second did not involve a conviction at all, but rather participation in a pretrial diversion program.

The uniformity of the law in this area is unremarkable given this Court's settled precedent that *Heck* does not bar claims under 42 U.S.C. § 1983 when there is no outstanding criminal judgment, which the Ninth Circuit applied faithfully to this case. Petitioners claim the Ninth Circuit erred, emphasizing specific language in the release-dismissal agreement leading to the vacatur and particular circumstances surrounding its entry. These arguments are wrong, but they also demonstrate why granting review of this fact-bound case would not provide meaningful guidance to lower courts. And these distinctive facts implicate other, potentially dispositive, legal questions—including the enforceability of the release-dismissal agreement under *Town of Newton v. Rumery*, 480 U.S. 386 (1987)—which were neither passed on below nor part of the question presented.

Attempting to find a question that could merit this Court's review, Petitioners wander far afield from the Ninth Circuit's holding or the circumstances of this case. Respondents did not participate in a pretrial

diversion program or have their convictions expunged due to the passage of time. Rather, based on substantial evidence of their actual innocence of the crimes for which they had spent 18 years imprisoned, the State stipulated they were entitled to have their convictions vacated and dismissed all charges against them. The issues Petitioners highlight are not presented here and this would not be the appropriate case in which to reach them.

STATEMENT OF THE CASE

A. Factual background.

Plaintiffs/Respondents Marvin Roberts, George Frese, Kevin Pease, and Eugene Vent were arrested by the Fairbanks Police Department, tried, and convicted of a 1997 murder they did not commit. The men—three Alaska Natives and one Native American, known colloquially as "the Fairbanks Four"—were between the ages of 17 and 20. Pet. App. 3a.

While Respondents were imprisoned, new evidence of their innocence emerged, including a confession from an individual named William Holmes that he, Jason Wallace, and three other men—not Respondents—had actually committed the crime. Respondents filed petitions for post-conviction relief, and the Alaska Superior Court "ruled that the petitions stated a prima facie case of actual innocence, allowing [Respondents] to proceed with discovery, which lasted two years." Pet. App. 4a.

While that litigation was ongoing, former-Fairbanks-prosecutor and counsel-for-Jason-Wallace

Jason Gazewood wrote to the post-conviction prosecutors to warn that Respondents'

> 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 suit against those involved in procuring their wrongful convictions.

Pet. App. 4a–5a.

The state court then held a five-week evidentiary hearing, at which Respondents presented extensive evidence of their actual innocence. This included testimony from (1) William Holmes, who confessed on the stand that he had committed the crime with Jason Wallace and three others (not Respondents); (2) twelve witnesses—including an Alaska State Trooper—corroborating Holmes's confession; (3) four witnesses to whom Wallace had also confessed to the murder; (4) the sole witness to identify Respondents at trial, Arlo Olson, who testified that FPD officers had coerced him into making false identifications; (5) forensic experts who explained the purported match between Frese's boot print and the victim's injuries offered by

the prosecution was unreliable junk science; and (6) alibi witnesses for all four Respondents. Pet. App. 5a–6a.

After the hearing, the judge told the parties that he would not render a decision for another six to eight months. The 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." Pet. App. 6a.

Several weeks after the hearing and just before Christmas 2015, the prosecutors offered Respondents a deal: the prosecution would consent to vacatur of the convictions, dismissal of the charges, and immediate release of the three Respondents who were still imprisoned[1]—but only if all four men agreed to release the police and prosecutors from any liability related to their convictions. Pet. App. 6a. Having already spent 18 years each wrongly imprisoned, Respondents acquiesced.

As part of the release-dismissal agreement, Respondents and the State stipulated: (1) that the original judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt; (2) that there is sufficient new evidence that a new trial could be ordered under AS 12.72.010(4) (which allows for post-conviction relief when "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

[1] Marvin Roberts had already been released on supervised parole.

justice"); and (3) that the court could immediately vacate Respondents' convictions. Pet. App. 6a–7a.

Following a hearing, the Alaska Superior Court vacated the convictions of the four men, and Eugene Vent, George Frese, and Kevin Pease were released from custody. The State dismissed the indictments against the men and has never sought to retry them. Pet. App. 7a–8a.

B. Procedural history.

In 2017, Plaintiffs/Respondents Roberts, Vent, Frese, and Pease filed a lawsuit under 42 U.S.C. § 1983 against the City of Fairbanks and four of its police officers seeking damages for violations of Respondents' constitutional rights leading to their wrongful convictions. Pet. App. 8a. Respondents asserted that the release of their claims pursuant to the settlement agreement with the State of Alaska was invalid under *Town of Newton v. Rumery*, 480 U.S. 386 (1987), which holds that such "release-dismissal" agreements may be enforced only when defendants prove they are "voluntarily made, not the product of prosecutorial overreaching, and in the public interest." *Id.* at 401 (opinion of O'Connor, J., concurring in part and concurring in the judgment).

Respondents alleged the releases were the result of prosecutorial overreaching and did not serve the public interest because the State sought the release for the purpose of "suppressing complaints against official abuse," *id.* at 400, as opposed to "a legitimate criminal justice objective," *id.* at 401. Respondents also alleged they had no meaningful choice but to sign because

prosecutors threatened to keep three of the men imprisoned indefinitely unless all four signed the release.

Rather than attempt to meet their burden under *Rumery* to prove the release-dismissal agreement was enforceable, Defendants/Petitioners filed a motion to dismiss Respondents' lawsuit based on *Heck v. Humphrey*, 512 U.S. 477 (1994), arguing that the vacatur of Respondents' convictions pursuant to the release-dismissal agreement did not invalidate their convictions for purposes of *Heck*. Although neither Petitioners nor the district court cited a single case applying *Heck* to bar a § 1983 claim where, as here, all underlying convictions have been vacated, the district court granted Petitioners' motion.

Respondents appealed. On appeal, over a dozen prominent scholars (including three authors of leading federal courts treatises[2]), "troubled by the district court's egregious misapplication of *Heck* to dismiss plaintiffs' claims," submitted an *amicus* brief urging reversal. Br. of Amici Curiae Scholars in Support of Appellants at 1, *Roberts v. City of Fairbanks*, 947 F.3d 1191 (9th Cir. 2020), *available at* 2019 WL 540341. As the scholars summarized, while "[s]ome cases present difficult questions under *Heck*…[t]his is not one of them." *Id.* Rather, "[t]his case falls squarely within the

[2] Randy Hertz of Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (7th ed. 2018); Brandon Garrett and Lee Kovarsky of Brandon L. Garrett & Lee Kovarsky, *Federal Habeas Corpus* (2013). *See* Br. of Amici Curiae Scholars in Support of Appellants at v, 33, *Roberts v. City of Fairbanks*, 947 F.3d 1191 (9th Cir. 2020), *available at* 2019 WL 540341.

list of circumstances where *Heck* is inapplicable." *Id.* at 6.

The Ninth Circuit reversed in a published opinion authored by Judge Richard Tallman and joined by Judge N. Randy Smith. The Ninth Circuit held that because the "plain language" of *Heck* "requires the existence of a conviction in order for a § 1983 suit to be barred," dismissal pursuant to *Heck* was improper. Pet. App. 13a. The court noted that *Heck*'s instructions on this point are 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." *Heck*, 512 U.S. at 487 (quoted at Pet. App. 13a). In the present case, the Ninth Circuit concluded that "[b]ecause 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[.]" Pet. App. 13a.

The Ninth Circuit also noted that a number of other issues regarding the ultimate viability of Respondents' suit were not yet ripe. The court noted the district court had "not passed upon" the enforceability of the release-dismissal agreement, but rather "dismissed Plaintiffs' claims at the pleading stage," without hearing any evidence about "whether Plaintiffs voluntarily entered into the Settlement Agreement or whether enforcement is in the public interest." Pet. App. 27a–29a. The court therefore found it was

"premature" for it to address the enforceability of the release-dismissal agreement under *Rumery* and left that issue for the district court on remand. Pet. App. 29a. The Ninth Circuit similarly found it premature to address Defendants' argument that Plaintiffs' suit may be dismissed based on "the equitable doctrine of judicial estoppel," which also had not been addressed by the district court. Pet. App. 27a. Noting the district court had also not addressed whether Plaintiffs had sufficiently alleged a favorable termination to state § 1983 malicious prosecution claims, the Ninth Circuit left that issue, too, for the district court on remand. Pet. App. 27a.[3] Finally, because this appeal occurred at the motion-to-dismiss stage, the Ninth Circuit noted it was required to "accept[] all factual allegations in the complaint as true and construe them in the light most favorable to" Plaintiffs, and that the court accordingly did "not address whether Plaintiffs' allegations can be proven." Pet. App. 4a n.1 (quoting *Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018)).

Judge Sandra Ikuta dissented, and Petitioners filed a petition for rehearing en banc, which the full court denied. Judge Lawrence VanDyke dissented from the denial of rehearing, joined solely by Judge Ikuta.

[3] In addition to the § 1983 malicious prosecution claims, Respondents also have a number of other theories of liability, including § 1983 claims for fabrication of evidence, *Brady* violations, and civil rights conspiracy. Pet. App. 8a.

REASONS FOR DENYING THE WRIT

I. There is no circuit split that warrants this Court's intervention.

Despite Petitioners' claims to the contrary, there is no circuit split. The holding of the Ninth Circuit below is 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." Pet. App. 3a. Even though, as Petitioners note, the application of *Heck* "is one of the most frequently litigated issues in the federal courts," (Pet. 7) they do not identify a single court—anywhere—to reach the opposite result.

Petitioners assert old cases from the Second and Third Circuits arising in different circumstances suggest those courts would decide this case differently. Pet. 16–17. They do not.

First, *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005), does not demonstrate a conflict. In *Gilles*, the Third Circuit did not consider whether vacatur of a conviction lifts the *Heck* bar (the issue here) but rather whether participation in a pretrial diversion program was the functional equivalent of a conviction for purposes of *Heck*. *Gilles*, 427 F.3d at 209 (describing how participation in the pretrial diversion program "may be statutorily construed as a conviction" for certain purposes).[4] But in *Bronowicz v. Allegheny Cty.*,

[4] Each case Petitioner cites is interpreting the legal effect of a different state's statutory scheme, *see* Pet. 16–18, which could easily account for any divergent results. But even assuming for the sake of argument there were a split on how *Heck* applies to pretrial

804 F.3d 338 (3d Cir. 2015), the Third Circuit addressed a very similar argument to the one Petitioners make here (*see* Pet. 6)—and rejected it. The *Bronowicz* defendants argued *Heck* barred the plaintiff's § 1983 suit "because the Superior Court vacated the sentence but expressly declined to address [the plaintiff's] challenges to the legality of the sentence and proceedings—that is, the Superior Court never declared that it was an illegal sentence." *Id.* at 345 (internal quotation marks and citation omitted). Just as the court below did here, the Third Circuit rejected that argument as "a distinction without a difference," holding that by vacating the sentence the court "plainly invalidated" it for purposes of *Heck*. *Bronowicz*, 804 F.3d at 345.

The other case Petitioners point to, *Roesch v. Otarola*, 980 F.2d 850, 853 (2d Cir. 1992), did not address *Heck* at all, for the simple reason that it was decided in 1992—two years before *Heck* was decided. And the Second Circuit has since confirmed that it, like the Ninth Circuit below, agrees that *Heck* does not bar a § 1983 suit where the plaintiff's conviction has been vacated because "[a] court invalidates the final judgment in a state criminal trial when it vacates a conviction," and "[f]rom that moment on, a § 1983 suit would not demonstrate the invalidity of the vacated conviction." *Poventud v. City of New York*, 750 F.3d

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diversion programs, it would not be implicated here. Respondents did not participate in a pretrial diversion program; they spent 18 years wrongly imprisoned before their convictions were fully vacated based on a stipulation that new evidence of their innocence entitled them to post-conviction relief. After that order entered "[t]here are no charges pending against any of these men…Nor do they stand convicted of anything." Pet. App. 25a.

121, 134 (2d Cir. 2014) (en banc) (internal quotation marks and citation omitted).

In short, although some *Heck* questions may divide the federal courts, this one does not. The law is uniform that where all convictions have been vacated, *Heck* does not bar a plaintiff's § 1983 suit.

II. The decision below faithfully follows this Court's precedent.

The uniformity in the federal courts is hardly surprising, because the decision below flows directly from this Court's precedent. "[T]he Court in *Heck* held that in order to recover damages for allegedly unconstitutional conviction or imprisonment…a plaintiff in a § 1983 action first had to prove that his conviction had been invalidated in some way." *McDonough v. Smith*, 139 S. Ct. 2149, 2157 (2019). Here, that plainly happened: the state court vacated Respondents' convictions. The Ninth Circuit holding that *Heck* does not bar Respondents' claims follows straight from this Court's decisions.

In *Heck v. Humphrey*, this Court considered a claim "at the intersection of the two most fertile sources of federal-court prisoner litigation—the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254." *Heck*, 512 U.S. at 480.. While serving a 15-year sentence for voluntary manslaughter, separate and apart from his habeas challenges to his conviction, petitioner Roy Heck brought a *pro se* § 1983 suit for money damages, alleging that investigative misconduct

by prosecutors and investigators had caused him to be wrongly convicted. *Id.* at 478–79.

Motivated by "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," and not wanting to "expand opportunities for collateral attack," this Court announced a new rule. *Heck*, 512 U.S. at 486. In order to "recover damages for allegedly unconstitutional conviction or imprisonment," the § 1983 plaintiff must "demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 486–87. This Court described four ways a plaintiff could demonstrate invalidation of a conviction: "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. And it instructed "if…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." *Heck*, 512 U.S. at 487.

Thirteen years later, in *Wallace v. Kato*, this Court again emphasized that the *Heck* rule "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.'" *Wallace v. Kato,* 549 U.S. 384, 393 (2007) (alteration in original) (quoting *Heck*, 512 U.S. at 486–87). Most recently, in *McDonough v. Smith*, this Court yet again reaffirmed

Heck's basic holding. *McDonough,* 139 S. Ct. at 2157 (noting *Heck* requires a § 1983 plaintiff alleging he had been wrongly convicted "to prove that his conviction had been invalidated in some way").

Here, the Ninth Circuit held that the state court order vacating Respondents' convictions satisfied the third exception to *Heck*'s bar—namely, that Respondents' convictions were "'declared invalid by a state tribunal authorized to make such determination,' and that *Heck* is therefore no bar to the suit." Pet. App. 23a (quoting *Heck*, 512 U.S. at 487) (explanatory parenthetical omitted). As the Ninth Circuit explained:

> 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." 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.

Pet. App. 13a (quoting *Heck*, 512 U.S. at 487). This holding faithfully applied the governing precedent. There is no conflict.

Petitioners' argument to the contrary relies on their contention that, by analogizing to malicious

prosecution, this Court in *Heck* expressly adopted the common-law definition of favorable termination. But as the Ninth Circuit noted, that "contravenes the plain language of *Heck*" and is "simply wrong." Pet. App. 21a. Indeed, *Heck*'s list of four ways to prove invalidation of a conviction themselves do not demonstrate "favorable termination" as that is understood at common law. *See, e.g.,* Pet. App. 21a–22a (discussing how "a federal court's issuance of a writ of habeas corpus"—the fourth listed exception to *Heck*'s bar—does not constitute favorable termination at common law).

III. This case would be a poor vehicle for this Court's review.

Even if Petitioners had identified an important federal question meriting this Court's review—and they have not—this case would be a poor vehicle for resolving that question. This case does not involve a pretrial diversion program or an expungement statute, and thus any consideration of the impact of a ruling here on those dissimilar scenarios would be purely hypothetical. Rather, Petitioners' argument here turns on idiosyncratic facts—including the specific language of the release-dismissal agreement and circumstances of the entry of the vacatur—and is therefore unlikely to provide helpful guidance for other cases. Finally, pivotal legal questions—including the enforceability of the release-dismissal agreement under this Court's governing precedent—are not yet ripe for review in this interlocutory appeal.

A. This case is not an appropriate vehicle to resolve unrelated questions.

Because Petitioners cannot identify any truly analogous cases that would be impacted by the decision below, they instead speculate that it will lead to a raft of § 1983 claims arising from unrelated scenarios, such as the expungement of a conviction due to the passage of time or participation in a pretrial diversion program to avoid a record of conviction.[5] But those circumstances are so factually dissimilar that it would make no sense for the Court to accept review of this case in order to rule on such hypothetical fact patterns untethered from the record here.

This case does not present the question whether *Heck* bars civil suits arising from minor criminal charges that were avoided through pretrial diversion or later expunged. Respondents were convicted of a murder they did not commit and each spent nearly 18 years of their lives wrongly imprisoned for that murder. At a five-week hearing, Respondents presented substantial evidence of their actual innocence, including an on-the-stand confession from one of the true killers. The State then stipulated this new evidence required vacatur of the convictions, and the convictions were vacated and all charges dismissed.

[5] Petitioners do not advance the "floodgates" argument raised by Judge Ikuta's dissent from the panel decision: that it would allegedly permit anyone who had served out a sentence to bring a § 1983 suit. *See* Pet. App. 44a & n.6. As the Ninth Circuit majority decision points out, this improperly "conflates 'conviction' and 'incarceration,'" Pet. App. 24a; the majority specifically emphasizes that a person whose conviction still stands may *not* bring a § 1983 suit, even if his incarceration has ended, Pet. App. 24a & n.14.

Pet. App. 7a–8a. As the Ninth Circuit observed, at this point "[t]here are no charges pending against any of these men…. Nor do they stand convicted of anything." Pet. App. 25a.

In contrast, the rehabilitative statutes that Petitioners point to relieve an offender of some consequences of conviction; they *do not* fully vacate the conviction. *Compare, e.g.,* Pet. at 14 & n.5 (pointing to California Penal Code § 1203.4 and Wash. Rev. Code Ann. 9.94A.640) *with United States v. Hayden*, 255 F.3d 768, 772 (9th Cir. 2001) (California Penal Code § 1203.4 "provides a limited form of relief" and "does not 'erase' or 'expunge' a prior conviction"; the conviction may still be counted as offense under the three strikes law, used to revoke a license, or to impeach a witness) and *State v. Cooper*, 176 Wash. 2d 678, 682 (2013) (noting conviction expunged under Wash. Rev. Code. Ann. 9.94A.640 may still be used "as an element of a crime to determine guilt in a subsequent prosecution").

This record bears no resemblance to the cases Petitioners claim will bedevil the federal courts with complicated questions regarding the application of *Heck* to pretrial diversion and expungement. If this Court believes that one of those questions may warrant its intervention, it should wait to grant review of a case that presents it.

B. The significance of unique circumstances to Petitioners' argument makes this case a poor vehicle for the Court's review.

Petitioners' argument also hinges on the import of specific facts that are unlikely to recur. First, throughout their petition—in their question presented, in their statement of the case (Pet. 3), and again in their reasons for granting the writ (Pet. 13)—the Petitioners emphasize one particular portion of language in the stipulation leading to the vacatur of Respondents' convictions: that "the original jury verdicts and judgments of conviction were properly and validly entered based on proof beyond a reasonable doubt." Pet. 13. Second, Petitioners emphasize one oral remark made by the state court judge who vacated the conviction that they claim establishes his role was simply to "ministerially sign the orders necessary to [e]ffect the decision of the attorney general." Pet. 3. The combination of these two factors, Petitioners argue, means that even though the Alaska Superior Court vacated Respondents' convictions and they ceased to exist, there was never "a judicial determination that Respondents' convictions were unlawfully obtained or constitutionally infirm," which Petitioners assert is required by *Heck*. Pet. 13.

The significance of these idiosyncratic facts to Petitioners' arguments would make this case a poor vehicle for providing guidance on the *Heck* bar even if Petitioners' arguments were correct. But, as the Ninth Circuit recognized, Petitioners' arguments are wrong in any event. Pet. App. 24a–25a.

There is no dispute that the Alaska Superior Court vacated Respondents' convictions pursuant to the parties' stipulation "that there is sufficient new evidence of material facts that a new trial could be ordered under AS § 12.72.010(4)," which means "that the new evidence now undermines the validity of the original verdicts and 'requires vacation of the conviction or sentence *in the interest of justice*.'" Pet. App. 25a (quoting Alaska Stat. § 12.72.010(4) (emphasis added)). Petitioners neglect to mention this portion of the parties' stipulation anywhere in their petition—likely because it presents a textbook example of a conviction being "declared invalid by a state tribunal authorized to make such a determination," *Heck*, 512 U.S. at 487.

Petitioners argue instead that in this particular case, the combination of some of the other specific language of the parties' stipulation leading to the vacatur and a stray remark made by the judge who entered the order altered this presumptive conclusion and left the validity of Respondents' convictions undisturbed. That is incorrect.[6] More significantly,

[6] In the vast majority of jurisdictions, including Alaska, "rules of procedure [do not] authorize judges to amend sentences" that have become final unless a court has made the independent determination that conditions for post-conviction relief have been satisfied. Anup Malani, *Habeas Settlements*, 92 Va. L. Rev. 1, 37, 47 (2006); *McLaughlin v. State*, 214 P.3d 386, 386 (Alaska Ct. App. 2009) ("Alaska Statute 12.72.010 and Alaska Criminal Rule 35.1 define the grounds and the procedures…by which a person who is convicted of a criminal offense can attack a conviction."). Consistent with that requirement, here the parties presented the Alaska Superior Court with a stipulation that the legal grounds for relief under the statute were met (*i.e.*, that there was sufficient new evidence that a new trial would probably produce an

these unique circumstances that culminated in the split panel decision below and dissent from denial of rehearing are unlikely to recur in any other case and do not present an important question of federal law that should be settled by this Court. And a decision from this Court parsing Petitioners' fact-specific arguments based on those unusual circumstances is unlikely to provide meaningful guidance in more typical cases.

C. This appeal is interlocutory, and the enforceability of the settlement agreement is not ripe for review.

The interlocutory posture of this appeal—arising from a decision denying a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)—alone is reason to deny review. *See Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) (the Court "generally await[s] final judgment in the lower courts before" granting review); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory posture is "a fact that of itself alone furnishe[s] sufficient ground for the denial of" certiorari).

But here, that general precept applies with special force, given the vast array of potentially relevant legal issues never passed on by the courts below. Most prominent is the question of the enforceability of the release-dismissal agreement. Although this Court has a separate precedent devoted entirely to the enforceability of such agreements, *Town of Newton v.*

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acquittal), and based on that stipulation and the court's assessment that it lawfully used the structures required by Alaska Statute 12.72.010 the court vacated the convictions.

Rumery, 480 U.S. 386 (1987), Petitioners never addressed it below, choosing instead to focus on their *Heck* argument. That this and other intertwined legal issues are not ripe or presented for review provides yet another reason review here is unwarranted.

In *Rumery*, this Court rejected "a *per se* rule against release-dismissal bargains," *id.* at 394, while recognizing that in some cases, "release-dismissal agreements may not be the product of an informed and voluntary decision," *id.* at 393, or they may be used by prosecutors to "suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights," *id.* at 394 (quoting *Rumery v. Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985)). Justice O'Connor, who provided the fifth vote for the Court's judgment, wrote separately "to emphasize that it is the burden of those relying upon such covenants to establish that the agreement is neither involuntary nor the product of an abuse of the criminal process." *Id.* at 399 (O'Connor, J., concurring in part and concurring in the judgment). "The defendants in a § 1983 suit may establish that a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and in the public interest. But they must *prove* that this is so; the courts should not presume it[.]" *Id.* at 401.

On remand, Petitioners will have the opportunity to meet this burden. The Ninth Circuit did not rule whether, under *Rumery*, the release-dismissal agreement barred this suit because Petitioners had never pressed that argument and the district court had not yet addressed it; instead, it explicitly left that issue

for the district court on remand. Pet. App. 29a. Similarly, the opinion below never addressed Petitioners' argument that judicial estoppel barred Respondents' claims, or that Respondents had not sufficiently alleged favorable termination for their § 1983 malicious prosecution claims. Pet. App. 11a–12a, 27a. All of these legal issues are potentially intertwined with the question framed by Petitioners. But none of them is actually presented in the petition, and none is ripe for review by this Court. *See Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7 (2005) ("[W]e are a court of review, not of first view.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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