No. 20-711

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES

INTRODUCTION

The Ninth Circuit's decision below announced a categorical rule that vacatur of a conviction—for any reason—renders *Heck's* favorable-termination rule inapplicable. Pet. App. 13a. Contrary to Respondents' arguments, the Ninth Circuit's rule does not turn on any idiosyncratic facts specific to this case. The Ninth Circuit's rule also clearly conflicts with the law of other circuits and is a significant break from this Court's precedent. This Court should grant certiorari to provide much needed guidance and to correct a glaring departure from this Court's binding precedent.

I. The Ninth Circuit's New Categorical Rule Does Not Turn on Facts Specific to This or Any Other Case

Respondents suggest that this case is not worthy of the Court's review because it "hinges on the import of specific facts that are unlikely to recur." Br. in Opp. 17. That is not true. The Ninth Circuit's decision did not turn on any unique facts specific to the vacatur order. Instead, the Ninth Circuit announced a categorical rule that renders all such facts immaterial. According to the Ninth Circuit, "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. In other words, it does not matter how or why a conviction is vacated. Now, in the Ninth Circuit, the fact of vacatur, in and of itself, is dispositive for purposes of *Heck*. This is the opposite of a fact-bound determination. Rather, it is a blanket rule that applies to every vacated conviction in the circuit, regardless of the specific facts or manner of vacatur.

While the particular facts of this case did not factor into the Ninth Circuit's analysis, they do underscore why other circuits have looked beyond the absence of an outstanding conviction to determine whether a § 1983 plaintiff can satisfy *Heck's* favorable-termination rule. And they demonstrate why the question presented in this petition is outcome determinative. The Ninth Circuit's refusal to look beyond the fact of vacatur prevented it from considering facts establishing that Respondents' convictions and sentences were never "declared invalid" within the meaning of *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

II. The Categorical Rule Announced Below Conflicts with the Law of Other Circuits

Respondents argue no true conflict exists between the decision below, which holds that *Heck's* favorable-termination rule cannot apply in the absence of an outstanding conviction, and decisions from the Second, Third, and Fifth Circuits. *Compare* Pet. 16-17, *with* Br. in Opp. 9. Respondents assert the conflicting authorities were decided in the context of pre-trial diversion programs, and do not apply to cases like this, where a plaintiff was convicted, sentenced, and later had his conviction and sentence vacated. Br. in Opp. 9-10. But the categorical rule—that *Heck's* favorable-termination rule does not apply in the absence of an outstanding conviction—is in unavoidable conflict with these authorities. Courts in the Second, Third, and Fifth Circuits look beyond the absence of an outstanding conviction to evaluate whether criminal proceedings actually terminated in a § 1983 plaintiff's favor for purposes of *Heck*. *See Roesch v. Otarola*, 980 F.2d 850, 853 (2d Cir. 1992) ("[W]e hold that a dismissal pursuant to the . . . pretrial rehabilitation program is not a termination in favor of the accused for purposes

of a civil rights suit."); *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005) ("[W]e hold the [pre-trial diversion] program is not a favorable termination under *Heck*."); *accord Taylor v. Gregg*, 36 F.3d 453, 455-56 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (en banc). The Ninth Circuit, joining the Sixth, Tenth, and Eleventh Circuits, does not. *See Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1096 (10th Cir. 2009) ("[T]he Kansas pre-trial 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 Cnty. Bd. of Educ.*, 544 F.3d 633, 639 (6th Cir. 2008) ("*Heck* is inapplicable, and poses no bar to plaintiffs' claims.").

Respondents rely primarily on *Bronowicz v. Allegheny County*, 804 F.3d 338 (3d Cir. 2015), to argue that the Ninth Circuit's decision is in harmony with its sister circuits. But *Bronowicz* does not establish inter-circuit harmony. It perfectly illustrates the entrenched circuit split on this issue, and the fact that the conflict cannot be confined to pre-trial diversion cases.

The decision below held any vacatur will suffice to lift the *Heck* bar, regardless of the circumstances of the vacatur. But in *Bronowicz*, the Third Circuit held the opposite. There, defendants argued that plaintiff could not prove favorable termination under *Heck* because the order vacating his sentence did not specifically declare his sentence illegal. The Third Circuit rejected that argument, not because all vacaturs satisfy *Heck's* favorable-termination rule (as the Ninth

Circuit held below), but because the specific superior court order clearly amounted to a declaration that plaintiff's sentence was illegal.

Applying long-standing circuit precedent, *Bronowicz* ruled that in order for a vacatur to constitute a favorable termination under *Heck*, it must in essence declare that the § 1983 plaintiff's conviction or sentence was illegal. And in order to determine whether a vacatur amounts to a "declaration of illegality," courts in the Third Circuit are directed to consider the "particular circumstances" surrounding the order, "including relevant state law and the underlying facts of the case[.]" *Bronowicz*, 804 F.3d at 346. The order vacating a conviction need not contain any "magic words" to declare a conviction or sentence "invalid" within the meaning of *Heck*, but "the totality of the circumstances surrounding the prior proceedings [must] reflect a favorable outcome for the plaintiff that would be consistent with the success of the plaintiff's § 1983 claims." *Id*.

The court evaluated the order vacating Bronowicz's sentence "in the context of the…proceedings as a whole[.]" *Id*. at 347. First, it noted that under state law, the superior court could only disturb Bronowicz's sentence if it was, in fact, illegal. *Id*. Second, the superior court issued the order vacating plaintiff's conviction after the state conceded "an error committed at the time of sentencing," which was consistent with plaintiff's claim that his sentence was illegal. *Id*. Third, the superior court vacated the plaintiff's sentence in its entirety, without imposing any "unfavorable conditions or burdens on Bronowicz that would be inconsistent" with his illegality claim. *Id*. at 348. Under these specific circumstances, the Third Circuit held that "vacating a judgment as opposed to declaring it 'illegal' is a distinction without a difference," because

the circumstances made it clear that the superior court was declaring the sentence illegal. *Id.* at 345.

Respondents misconstrue *Bronowicz* as equating "vacatur" and "declaration of illegality" in all cases. Br. in Opp. 10. But this is plainly wrong, and ignores critical language. The Third Circuit actually said: "We think, however, that vacating a judgment as opposed to declaring it 'illegal' is a distinction without a difference here because the Superior Court order plainly invalidated Bronowicz's January 2011 sentence." *Bronowicz*, 804 F.3d at 345. In other words, the Third Circuit held that there was no practical difference between vacating plaintiff's sentence and declaring it illegal because the superior court had clearly declared the sentence illegal.

Moreover, the Third Circuit expressly recognized that *Bronowicz* was the necessary extension of *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005), stating "*Kossler* and *Gilles* control our analysis here because they are demonstrative of our general approach to favorable termination analysis." *Bronowicz*, 804 F.3d at 346. Respondents' effort to harmonize *Gilles* with the Ninth Circuit's decision by confining it to the context of pre-trial diversion programs is misplaced. The Third Circuit has expressly applied *Gilles* outside of that context to evaluate whether a vacated sentence has been "declared invalid" within the meaning of *Heck*. The precise issue presented in this petition. Under the Ninth Circuit's decision, a § 1983 plaintiff may proceed merely by establishing that the conviction or sentence is no longer outstanding. Similarly situated plaintiffs in the Second, Third, and Fifth Circuits may not. In those circuits, a § 1983 plaintiff must prove that their convictions or sentences were vacated in a way that indicates the sentence

was illegal. Respondents' claim of "uniformity in the federal courts" is incorrect. Br. in Opp. 11.

III. The Categorical Rule Announced is Not a Faithful Application of this Court's Precedent

A. The holding below is inconsistent with the plain language of *Heck*

The Ninth Circuit concluded that the "plain language of [*Heck*] requires the existence of a conviction in order for a § 1983 suit to be barred" and thus "the absence of a criminal judgment…renders the *Heck* bar inapplicable." Pet. App. 13a (quoting *Heck*, 512 U.S. at 487). Respondents urge the same interpretation of *Heck* here. But it cannot possibly be correct. *Heck* held that a § 1983 plaintiff "must prove" that his conviction was terminated in one of four specific ways. *Heck*, 512 U.S. at 486-87. But if the absence of an outstanding conviction, by itself, renders *Heck* inapplicable, then *Heck's* exclusive list of terminations that are "favorable" in the § 1983 context is surplusage.

The Ninth Circuit's error derives from a misinterpretation of *Heck*. After articulating the four ways that a § 1983 plaintiff can prove a favorable termination, the *Heck* Court stated that:

> [I]f 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. at 487. The Ninth Circuit concluded this meant the *Heck* bar can never apply unless there is an "outstanding criminal judgment." Pet. App. 13a. Thus, "if

a criminal judgment is no longer outstanding, *i.e.*, it has been discharged or satisfied in 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*." Pet. App. 43a-44a (Ikuta, J., dissenting). This error turns *Heck's* core holding into mere surplusage. *Heck* held that a § 1983 plaintiff "must prove" that his conviction was terminated in one of four specific ways. *Heck*, 512 U.S. at 486-87. But if the absence of an outstanding conviction, by itself, renders *Heck* inapplicable, then *Heck's* exclusive list of "favorable" terminations is meaningless.

Accordingly, the passage above cannot mean what the Ninth Circuit concluded it means. Instead, reading the passage in context yields a much more sensible interpretation. As Judge Ikuta's dissent explains:

> *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*. This common-sense reading is supported by the [Supreme] 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."

Pet. App. 45a (internal citation omitted). The dissent's reading harmonizes what at first glance appears to be conflicting directives from the Supreme Court, without doing unnecessary violence to *Heck's* core holding. Although the decision below recognizes that the Supreme Court's language "cannot be interpreted in a

manner inconsistent with the plain language of *Heck* itself," (Pet. App. 23a), its opinion does precisely that. It replaces *Heck's* core holding with a condensed favorable-termination rule that is inconsistent with *Heck's* plain language. "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." Pet. App. 45a (Ikuta, J., dissenting).

B. The decision below is inconsistent with this Court's subsequent precedent

Respondents also claim that the Ninth Circuit's categorical rule flows directly from *Wallace v. Kato*, 549 U.S. 384 (2007), which, according to Respondents, held 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."'" Br. in Opp. 12. But this is a misreading of *Wallace*. Like Respondents' *Bronowicz* argument, they omit critical language from this Court's opinion. In *Wallace*, this Court instructed: "the *Heck* rule for deferred accrual is called into play only when there exists…an 'outstanding criminal judgment[.]'" *Wallace*, 549 U.S. at 393. The "*Heck* rule for deferred accrual" is separate and distinct from *Heck's* favorable-termination rule, which *Wallace* did not address or disturb.

In *Heck*, this Court held that a § 1983 plaintiff must prove—as an element of their claim—that the underlying criminal proceeding terminated in their favor. Absent such proof, a damages claim for unconstitutional conviction or imprisonment is "not cognizable." *Heck*, 512 U.S. at 487. This is *Heck's* "favorable-termination" rule.

The Court also held in *Heck* that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue [for statute of limitations purposes] until the conviction or sentence has been invalidated." *Id*. at 489–90. This is the "*Heck* rule for deferred accrual." *See Wallace*, 549 U.S. at 393 ("[T]he *Heck* rule for deferred accrual is called into play only when there exists 'a conviction or sentence that has *not* been…invalidated[.]'").

The "favorable-termination" rule and the "*Heck* rule for deferred accrual" are separate rules. The former refers to a substantive element of proof for § 1983 claims. The latter relates to initiation of the statute of limitations period. *Wallace* did not dispense with *Heck's* substantive favorable-termination requirement; it held only that *Heck's* accrual principles do not apply in the absence of an extant conviction. Nor did *Wallace* disturb *Heck's* core holding that "favorable termination" is a substantive element of a § 1983 claim for wrongful conviction or incarceration.

Wallace itself acknowledges that *Heck's* "favorable-termination" rule and the "*Heck* rule for deferred accrual" are different concepts. The Court in *Wallace* noted that under certain circumstances a § 1983 claim could accrue before a conviction is entered and later be "*Heck*-barred" by a validly obtained conviction:

> If a plaintiff files a false-arrest claim before he has been convicted…, it is within the power of the district court … to stay the civil action until the criminal case or the likelihood of a criminal case is ended. If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal[.]

Id. at 393-94 (internal citations omitted).

Accordingly, *Wallace* does not support Respondents' position. That case dealt only with statute-of-limitations issues. It did not address, or disturb, *Heck's* core holding that a § 1983 plaintiff "must prove" that their convictions or sentences were invalidated in one of the four ways identified in *Heck*.

Finally, Petitioners agree with Respondents that "in *McDonough v. Smith*, this Court yet again reaffirmed *Heck's* basic holding." Br. in Opp. 12-13. What *McDonough* reaffirmed is that "invalidating" a conviction has specific meaning for purposes of *Heck's* favorable-termination rule. It is necessary, but not sufficient, for a § 1983 plaintiff "to prove that his conviction had been invalidated in some way." Br. in Opp. 13 (citing *McDonough v. Smith*, 139 S. Ct. 2149, 2157 (2019)). A § 1983 plaintiff must specifically establish that the conviction or sentence "has been invalidated *within the meaning of Heck*[.]" *Id*. at 2158. In other words, 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 486-87.

IV. The Interlocutory Posture of This Case Does Not Foreclose This Court's Review

The posture of this case does not deprive this Court of jurisdiction. While this Court is ordinarily reluctant to exercise its jurisdiction in the absence of a final judgment, "[its] cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts[.]" *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997). This Court has exercised its jurisdiction to review nonfinal judgments when they

present important questions "fundamental to the further conduct of the case." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *see also F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (vacating denial of motion to dismiss to resolve circuit split); *accord Estelle v. Gamble*, 429 U.S. 97, 98, 114-15 (1976) (vacating reversal of denial of motion to dismiss).

The questions raised in this petition warrant this Court's review because they are important and fundamental to the further conduct of this case. *Heck's* favorable-termination rule was motivated by the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," and this Court's reluctance to "expand opportunities for collateral attack." *Heck*, 512 U.S. at 485-86. *Heck* serves an important gatekeeping function that bars premature civil litigation over convictions and sentences that have never been declared invalid. *See Clarke v. Stalder*, 121 F.3d 222, 226 (5th Cir. 1997)[1] (stating same). Deferring review of *Heck's* favorable-termination rule until after a plaintiff has fully litigated the merits of a prior conviction or sentence would frustrate the purpose of the rule by allowing collateral attacks of criminal proceedings that have not been resolved in the plaintiff's favor.

[1] *Reh'g en banc granted, opinion vacated*, 133 F.3d 940 (5th Cir. 1997), and *opinion reinstated in part on reh'g*, 154 F.3d 186 (5th Cir. 1998).

CONCLUSION

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

Respectfully submitted,

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