No. 21-___

In the Supreme Court of the United States

ERIC LUND,

Petitioner,

v.

JEFFREY DATZMAN, ET AL.,

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

Heck v. Humphrey, 512 U.S. 477 (1994), held that, unless and until a criminal conviction is set aside, the convicted individual is barred from bringing any civil claim under 42 U.S.C. § 1983 that "would necessarily imply the invalidity" of the conviction. *Id.* at 486-87. The individual thus may not seek relief that either is "directly attributable to conviction" or would require disproving "an element of the offense." *Id.* at 486 & n.6. By contrast, "a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in [the] criminal trial." *Id.* at 487 n.7. As footnote 7 of *Heck* explained, "such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful," "[b]ecause of doctrines like independent source and inevitable discovery … and especially harmless error." *Id.* That footnote has spawned a deep and acknowledged circuit split presenting this important question:

Whether the *Heck v. Humphrey* bar on § 1983 suits is categorically inapplicable when a convicted individual brings a Fourth Amendment claim seeking damages for an unreasonable search or seizure but not for the conviction obtained using fruits of the constitutional violation, regardless of whether the factual record reveals a particular exclusionary-rule exception or harmless-error theory that could potentially sustain the conviction's validity despite the violation.

PARTIES TO THE PROCEEDING

Petitioner Eric Lund was a Plaintiff-Appellant in the court of appeals.

Susannah Lund was also a Plaintiff-Appellant in the court of appeals, but is not a petitioner here and thus is a respondent under Rule 12.6.

Respondents Jeffrey Datzman, Steve Carey, John Carli, David Kellis, Steve West, the Vacaville Police Department, the City of Vacaville, the California Highway Patrol, and the State of California were Defendants-Appellees in the court of appeals with respect to the claims directly at issue here.

Respondents Krishna Abrams, Tom Andrade, Eric Beal, John Blencowe, Ryan Duplissey, Mark Ferreira, Wanona Ireland, Jason Johnson, Chris Lechuga, Hai Luc, Matt Lydon, Ilana Shapiro, David Varao, Samuel Dickson, Kevin Domby, J.A. Farrow, Kevin Knopf, Nick Norton, Warren Stanley, Helen Williams, the Solano County District Attorney's Office, and the County of Solano were also Defendants-Appellees in the court of appeals, though with respect to claims not directly at issue here.

STATEMENT OF RELATED PROCEEDINGS

Present Civil Case under 42 U.S.C. § 1983

United States District Court for the Eastern District of California:

- *Lund v. Datzman*, No. 2:19-cv-02287 (order granting in part and denying in part motion to dismiss, July 1, 2020; order dismissing remaining claims and entering judgment, Sept. 29, 2020).

United States Court of Appeals for the Ninth Circuit:

Lund v. State of California, No. 20-17133 (affirming in part and vacating and remanding in part, Oct. 26, 2021; denying petition for rehearing or rehearing en banc, Dec. 3, 2021).

State Criminal Proceedings

Superior Court of California, Solano County:

People v. Lund, No. FCR310878 (judgment of conviction and sentence imposed, May 1, 2019).

Court of Appeal, First District, Division 4, California:

Lund v. Superior Court of Solano County, No. A149460 (interlocutory writ petition summarily denied, Dec. 8, 2016).

Lund v. Superior Court of Solano County, No. A150014 (interlocutory writ petition dismissed as moot, Apr. 3, 2017).

People v. Lund, No. A157205 (conviction and sentence affirmed on direct appeal, June 1, 2021).

California Supreme Court:

People v. Lund, No. S269625 (petition for review denied, Aug. 18, 2021).

State Post-Conviction Proceedings

Court of Appeal, First District, Division 4, California:

In re Eric Curtis Lund on Habeas Corpus, No. A161768 (summarily denied, June 1, 2021).

California Supreme Court:

In re Eric Curtis Lund on Habeas Corpus, No. S269624 (petition for review denied, Aug. 11, 2021).

Proceedings Under 28 U.S.C. § 2554

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The opinion of the Ninth Circuit (Pet.App. 1a-8a) is unreported but available at 2021 WL 4958985. The opinion of the United States District Court for the Eastern District of California on a motion to dismiss (Pet.App. 9a-22a) is unreported but available at 2020 WL 3572717. The district court's order entering judgment (Pet.App. 23a) is unreported. The Ninth Circuit's order denying a petition for rehearing and rehearing en banc (Pet.App. 24a) is unreported.

JURISDICTION

The Ninth Circuit issued its judgment on October 26, 2021. A timely petition for rehearing was filed on November 9, 2021, which the Ninth Circuit denied on December 3, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the Fourth Amendment, U.S. Const. amend. IV, and relevant provisions of the Civil Rights Act of 1871 as amended, 42 U.S.C. § 1983, and of the federal habeas corpus statute, 28 U.S.C. §§ 2241, 2254.

INTRODUCTION

Petitioner Eric Lund brought a Fourth Amendment claim under 42 U.S.C. § 1983 alleging that his car was unreasonably searched pursuant to a warrant based on false and misleading representations. The complaint expressly disclaimed seeking any relief for the conviction that was later obtained using fruits of the search, and proving the claim would not itself disprove any element of Lund's extant conviction or otherwise "necessarily imply [its] invalidity." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). Nevertheless, the Ninth Circuit held that *Heck* barred this § 1983 claim simply because the claim attacks the validity of the search that produced contraband Lund was convicted of possessing.

In so holding, the Ninth Circuit reaffirmed its precedent construing footnote 7 of *Heck* to bar a Fourth Amendment claim under § 1983 when, as a *factual* matter, no exclusionary-rule exception or harmless-error theory could sustain the validity of an extant conviction that was obtained using fruits of the illegal search or seizure. As the Ninth Circuit has acknowledged, however, "[t]here is a split in the circuits as to how *Heck*'s footnote seven should be interpreted." *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000), *abrogated on other grounds by Wallace v. Kato*, 549 U.S. 384 (2007). Although "the Second and Sixth Circuits" agree with the Ninth Circuit (as do the Fourth and Fifth Circuits), "[t]he Seventh, Eighth, Tenth and Eleventh Circuits" each disagree. *Id.* The latter four circuits would not have dismissed Lund's claim because they interpret footnote 7 of *Heck* to mean that, as a *categorical* matter, obtaining damages under § 1983 for an

unconstitutional search or seizure by the police does not "necessarily" prove or imply anything about whether prosecutors' later use of the fruits tainted the conviction.

That position correctly applies *Heck*'s rule and its rationales. Because the § 1983 suit seeks redress for harms to person or property without indirectly attacking the conviction, it is not an end-run around the federal habeas corpus statute's limitations, and it is not analogous to the common-law tort of malicious prosecution. *See Heck*, 512 U.S. at 480-87.

The Ninth Circuit's approach also has perverse consequences. It makes the availability of § 1983 claims seeking damages for unconstitutional searches or seizures turn on the fortuity of whether and how criminal proceedings later occurred. Even worse, it forces civil-rights plaintiffs to unnecessarily defend, and police officers to gratuitously impugn, the validity of criminal convictions that are not at issue. And worse still, it transforms the exclusionary rule that was created by judges as a supplemental deterrent against Fourth Amendment violations into a shield protecting police from the primary damages remedy that Congress enacted.

This case is an ideal vehicle to answer the question presented. Lund's § 1983 Fourth Amendment claim squarely raises the question, the Ninth Circuit's contested interpretation of *Heck* was the sole and dispositive basis for dismissing the claim, and no alternative grounds for affirmance exist that could pretermit this Court's review.

The Court should grant certiorari, resolve the circuit conflict, and reverse the Ninth Circuit's misapplication of *Heck* in this important context.

STATEMENT OF THE CASE

A. Legal Background

The federal habeas corpus statute and § 1983 both "provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation." *Heck*, 512 U.S. at 480. The former provides a specific cause of action for state prisoners seeking release from confinement that violates federal law, 28 U.S.C. §§ 2241, 2254, whereas the latter provides a general cause of action for anyone seeking legal or equitable remedies for the deprivation of any federal-law rights, privileges, or immunities by a person acting under color of state law, 42 U.S.C. § 1983. Moreover, the habeas statute erects numerous procedural and substantive barriers to relief that § 1983 does not impose. *Compare, e.g.*, 28 U.S.C. § 2254(b) (habeas statute requires exhausting state-court remedies), *with, e.g.*, *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 516 (1982) (§ 1983 does not require exhaustion).

This Court initially considered the relationship between these two overlapping provisions in cases where a state prisoner sought *injunctive relief* under § 1983 to obtain immediate or speedier release. The Court rejected such § 1983 suits, holding that "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983." *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973); *see also Wolff v. McDonnell*, 418 U.S. 539, 554 (1974) (§ 1983 may not be invoked for restoration of good-time sentencing credits).

Then, in *Heck v. Humphrey*, this Court addressed the question whether a state prisoner could seek *damages* under § 1983 for an unlawful conviction. 512 U.S. at 478, 480 n.2. The Court held that, "when a state prisoner seeks damages in a § 1983 suit … [and] judgment in favor of the plaintiff *would necessarily imply* the invalidity of his conviction … , the complaint must be dismissed unless the plaintiff can demonstrate that the conviction … has already been invalidated" through the post-conviction process. *Id.* at 487 (emphasis added).[1]

Heck's modest extension was "necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief—challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute." *Nelson v. Campbell*, 541 U.S. 637, 646-47 (2004); *accord Heck*, 512 U.S. at 480-82; *id.* at 497-98 (Souter, J., concurring in the judgment). *Heck* also reasoned that, because § 1983 "creates a species of tort liability," the Court would look to "[t]he common-law cause of action for malicious prosecution," which "provide[d] the closest analogy" because "it permit[ted] damages for confinement imposed pursuant to legal process." 512 U.S. at 483-84. And "[o]ne element that must be alleged and proved in a

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[1] The *Heck* rule applies equally to § 1983 claims that would necessarily imply the invalidity of the prisoner's sentence. 512 U.S. at 487. Because Fourth Amendment claims generally do not implicate the sentence, this petition focuses on the conviction, solely for ease of exposition. The petition likewise uses the term "post-conviction" to encompass both appeal and habeas.

malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Id.* at 484. Accordingly, the Court concluded 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." *Id.* at 486.

Heck thus explained that two types of § 1983 claims for damages are barred. The first specifically seeks "damages for allegedly unconstitutional conviction." *Id.*; *accord id.* at 486 n.6 ("damages directly attributable to conviction"). The second seeks damages for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." *Id.* at 486; *accord id.* at 486 n.6 (giving a hypothetical example where a prisoner convicted of resisting a lawful arrest sues the arresting officer for making an unlawful arrest, because the prisoner "would have to negate an element of the offense of which he has been convicted" to prevail in the civil suit). Success on such claims "would necessarily imply the invalidity of [the] conviction," as the civil claim is *logically predicated* on the unlawfulness of the criminal conviction. *Id.* at 487.

By contrast, *Heck* emphasized that a § 1983 claim is not barred when "the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." *Id.* Giving an "example," the Court stated that "a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged

search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." *Id.* at 487 n.7. As footnote 7 explained, "[b]ecause of doctrines like independent source and inevitable discovery [exceptions to the exclusionary rule], and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.* (citations omitted).

B. Factual and Procedural Background

1. Petitioner Eric Lund served as a California Highway Patrolman for over twenty-five years. Pet.App. 11a. Shortly before his planned retirement, he became the target of a criminal investigation. Pet.App. 11a-12a.

Respondent Datzman and other officers in the Vacaville Police Department were investigating a computer—identified by a "globally unique identifier" tied to file-sharing software—that a law-enforcement database tool had flagged as potentially involved with child pornography. Second Amended Complaint (SAC), D. Ct. Dkt. No. 43, ¶ 66. The police obtained a warrant, known as "Warrant E," to search Lund's personal vehicle (among other places). *Id.* ¶¶ 67-68.

The warrant application rested on four main points. *First*, Datzman theorized that the computer's user was a law-enforcement officer because certain periods at night when the computer was online corresponded to a common police shift schedule. *See id.* ¶¶ 112-13, 180-86. *Second*, Datzman surveilled a yogurt shop with wireless internet that had been previously accessed by the computer, and Lund was spotted outside one night in a patrol vehicle using a

lighted object. *See id.* ¶¶ 187-224. *Third*, Datzman created a table of certain IP addresses that had been previously accessed by the computer, and the use of those selected addresses was consistent with times when Lund had been on duty. *See id.* ¶¶ 166-79, 225-34. *Fourth*, Datzman had GPS trackers placed on the two patrol vehicles that Lund was most likely to use during his work shift, and the vehicle that Lund's commanding officer later asserted that he had used was tracked to the vicinity of an address where potential child-pornography activity had been flagged. *See id.* ¶¶ 235-52.

Pursuant to Warrant E, the police searched Lund's personal car, but only after first moving it. *Id.* ¶¶ 53-54. They claimed to find in the trunk a bag of technology containing, among other things, a laptop and external hard drive (both of which lacked any indicia of Lund's ownership or use). *Id.* ¶¶ 55-57. Each of those devices contained child pornography. *Id.* ¶¶ 56, 142.

2. Lund was charged with possession of child pornography seized during the search. Pet.App. 12a. Lund's first trial ended in a hung jury, but he was convicted and sentenced after a second trial. *Id.*

The California Court of Appeal rejected Lund's direct appeal as well as his request for post-conviction relief, and the California Supreme Court denied his petitions for review. *See supra* at iii. While under post-release supervision, Lund filed a federal habeas petition challenging his conviction in the District Court for the Eastern District of California. *See supra* at iv; *see also Maleng v. Cook*, 490 U.S. 488, 491-92 (1989) (parole restrictions satisfy the custody requirement for filing a habeas

petition); *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (Lund's later completion of post-release supervision does not moot the habeas challenge to his conviction). The § 2254 petition remains pending.

3. Lund filed the instant civil suit raising various federal and state claims against individuals and entities involved in investigating and prosecuting him. Pet.App. 10a. Lund filed suit after he was convicted and sentenced (but while his appeal was pending) because California law prohibits a criminal defendant from bringing any civil claims "relating" to the underlying investigation or prosecution until there is a final judgment in the sentencing court. Cal. Gov't Code § 945.3; *see id.* (tolling any applicable statutes of limitations during the period that suit is barred).

As relevant here, Lund alleged that the search of his car pursuant to Warrant E violated the Fourth Amendment because the warrant application included representations that were knowingly or recklessly false or misleading. SAC ¶¶ 66-292. The primary cause of action asserted was a § 1983 Fourth Amendment claim against the officers who obtained or executed Warrant E (or who supervised those officers). *Id.* ¶¶ 293-305 (Claim 1). There were related causes of action under § 1983 against the Vacaville Police Department, *id.* ¶¶ 306-09 (Claim 2), and under state-law analogues against the same defendants and other state entities, *id.* ¶¶ 310-25 (Claims 3-5).[2]

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[2] The complaint includes additional claims based on other aspects of the investigation and prosecution. Lund does not seek this Court's review of those claims. In fact, for most of them, the Ninth Circuit vacated the district court's dismissal

Lund alleged that the Warrant E application included numerous false or misleading statements or omissions. For example, Datzman skewed the table identifying IP addresses that had been previously accessed by the suspected computer, by leaving out additional IP addresses that corresponded to locations where Lund could not have been at the relevant times. *See id.* ¶¶ 166-79, 225-34; *see also id.* ¶¶ 180-86 (alleging that Datzman also did not mention that the law-enforcement database tool did not capture all activity by the computer, which called into question the reliability of inferences drawn from partial usage patterns). Moreover, Datzman failed to disclose that suspicious activity at the yogurt shop's IP address had suddenly ceased two weeks before Lund was spotted there and the same night that Datzman had mentioned the activity to the owners (who were his friends and former law-enforcement colleagues, which he also failed to disclose). *See id.* ¶¶ 187-95. Likewise, Datzman suggested that Lund was looking at a personal laptop computer while sitting in his patrol car outside the yogurt shop, but failed to disclose either that the lit object instead likely was the car's digital terminal or that another officer at the scene did not see a laptop in the car. *See id.* ¶¶ 203-05, 219-24.

Indeed, Datzman falsely stated that Lund's car was the only one outside the yogurt shop that night, despite bodycam footage from the other officer that depicted other vehicles in the same parking lot. *See id.* ¶¶ 196-202; *see also id.* ¶¶ 206-18 (additional

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and remanded for further consideration. Pet.App. 4a-5a. (Of course, the district court on remand would need to apply any precedent established here.)

misleading omissions concerning the yogurt shop incident). In addition, Datzman stated that Lund's commanding officer had accused Lund of using the patrol car that was GPS-tracked to the vicinity of an address where potential child-pornography activity had been flagged, but he failed to disclose that the commanding officer had provided no basis for the accusation, had no personal knowledge to support it, and had at best relied on hearsay from yet another officer who failed to substantiate it. *See id.* ¶¶ 235-52. Together, these omissions and misstatements called into question all the main points supporting the application for Warrant E.

Among other relief for the unconstitutional search of his car pursuant to the flawed warrant, Lund sought "[c]ompensatory damages, both special and general." *Id.* at 156. Critically, though, Lund made clear that he was not seeking damages for the use of evidence produced by the search in obtaining his conviction, because he was "not challenging the 'fact' or 'duration' of [his] current incarceration." *Id.* ¶ 64.

4. Respondents moved to dismiss the counts at issue under *Heck v. Humphrey* and its state-law analogue, *Yount v. City of Sacramento*, 183 P.3d 471 (Cal. 2008). The district court granted that request, reasoning that Lund's Fourth Amendment claim against the search of his car pursuant to Warrant E was "inextricably linked to [his] conviction and necessarily impl[ied] [its] invalidity." Pet.App. 15a.

The Ninth Circuit affirmed that ruling. It reasoned that, because the Fourth Amendment challenge to Warrant E "attack[ed] the probable cause basis for the search warrant that uncovered the child pornography for which Mr. Lund was convicted,

the district court properly dismissed those claims as *Heck*-barred." Pet.App. 3a. The panel's decision was based on settled circuit precedent holding that *Heck* bars § 1983 Fourth Amendment suits that "challenge the search and seizure of the evidence upon which [plaintiffs'] criminal charges and convictions were based." *Szajer v. City of Los Angeles*, 632 F.3d 607, 611 (9th Cir. 2011) (quoting *Whitaker v. Garcetti*, 486 F.3d 572, 583-84 (9th Cir. 2007)). Indeed, the panel expressly invoked *Szajer* and *Whitaker* in rejecting Lund's argument that his § 1983 Fourth Amendment claim is "categorically exempt" under footnote 7 of *Heck*. Pet.App. 3a. Those cases, in turn, were based on the Ninth Circuit's decision in *Harvey v. Waldron*, which directly addressed the "split in the circuits as to how *Heck*'s footnote seven should be interpreted." 210 F.3d at 1015. *Harvey* held that "the better approach" was that the *Heck* bar applies to claims "alleging illegal search and seizure of evidence upon which criminal charges are based," because that purportedly would "avoid the potential for inconsistent determinations on the legality of a search and seizure in the civil and criminal cases and [would] therefore fulfill the *Heck* Court's objectives of preserving consistency and finality." *Id.*

Although the court of appeals thus affirmed the dismissal of the Warrant E claims under *Heck*, it remanded to the district court "with instructions to amend the judgment to reflect that the dismissal of these claims is without prejudice to refiling in the event Mr. Lund's conviction is invalidated." Pet.App. 4a. The court of appeals subsequently denied a petition for rehearing en banc. Pet.App. 24a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW PRESENTS A DEEP AND ACKNOWLEDGED CIRCUIT SPLIT OVER THE APPLICATION OF *HECK V. HUMPHREY* TO § 1983 FOURTH AMENDMENT CLAIMS FOR UNLAWFUL SEARCHES OR SEIZURES

The Ninth Circuit has recognized that "[t]here is a split in the circuits as to how *Heck*'s footnote seven should be interpreted" in the context of § 1983 Fourth Amendment claims seeking damages for unreasonable searches or seizures but not for convictions resulting from use of the fruits obtained. *Harvey*, 210 F.3d at 1015. Whereas "[t]he Seventh, Eighth, Tenth and Eleventh Circuits have held that footnote seven creates a general exception to *Heck*" for such claims, the Ninth Circuit has taken a record-based "approach" that also has been adopted by "the Second and Sixth Circuits" (plus the Fourth and Fifth Circuits). *Id.* Lund's § 1983 Fourth Amendment claim thus would not have been dismissed in at least four other circuits. This Court should resolve that deep and acknowledged conflict among the courts of appeals.

A. Four Circuits Hold That The *Heck* Bar Is Categorically Inapplicable In This Context Without Regard To The Factual Record

1. The Seventh Circuit has repeatedly addressed the proper interpretation of *Heck*'s footnote 7 and reached the opposite conclusion from the Ninth Circuit. A leading example is *Copus v. City of Edgerton*, 151 F.3d 646 (7th Cir. 1998). The § 1983 plaintiff there alleged that the police had violated his Fourth Amendment rights by conducting a warrantless search of his home, which uncovered

illegal weapons and led to convictions for various weapons offenses. *Id.* at 646. The district court dismissed the claim under *Heck* because the plaintiff "ha[d] not argued that the [weapons] would have been admissible regardless of the Fourth Amendment violation." *Id.* at 647-48. The court of appeals reversed, invoking footnote 7. *Id.* at 648.

The panel initially acknowledged that "this footnote in *Heck* is a bit unclear." *Id.*

> On the one hand, it could mean that some Fourth Amendment claims brought under § 1983 would not necessarily be barred *if the record revealed* the tainted evidence used against the plaintiff at the criminal trial would have been admitted anyway … . On the other hand, the footnote might mean that Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so *in all cases* these claims can go forward.

Id. (emphasis added). The panel then reaffirmed that "[the Seventh] circuit has chosen the second" reading. *Id.*; *see id.* at 648-49 (citing cases).

The court thus explained that the *Heck* bar was inapplicable regardless of whether, under the facts of the case, the conviction actually could have been sustained, despite the use of fruits of the constitutional violation, under an exclusionary-rule exception or harmless-error theory. *See id.* at 649. "[I]t [was] enough," stressed the court, "that [such] possibilities exist, for they tell us what we need to know under *Heck*—that we cannot say with certainty that success on [plaintiff's] § 1983 claim 'necessarily' would impugn the validity of his conviction." *Id.* In fact, in one of the earlier cases cited in *Copus*, the

Seventh Circuit had held that the *Heck* bar was categorically inapplicable to a Fourth Amendment claim for unlawful arrest notwithstanding that it was *undisputed* that no exclusionary-rule exception or harmless-error finding was possible. The state courts had already found that the § 1983 plaintiff's murder "confession was the inadmissible product of [the] unlawful arrest" and that "the prosecutor did not have [sufficient] other evidence to produce against [him]"; the Seventh Circuit, however, reasoned that "there [was] nothing necessary or inevitable about that result" and thus held that the unlawful-arrest claim was never subject to the *Heck* bar. *Booker v. Ward*, 94 F.3d 1052, 1054, 1056 (7th Cir. 1996).[3]

The Seventh Circuit has continued to apply the categorical reading of *Heck*. *See, e.g.*, *Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014) (citing *Booker* and other cases for "the rule that claims based on out-of-court events, such as gathering of evidence, accrue as soon as the constitutional violation occurs … because misconduct by the police

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[3] Even though the conviction had already been set aside, *Booker* considered whether the *Heck* bar had been applicable until then because the § 1983 plaintiff argued that, if so, that would have delayed the accrual of the unlawful-arrest claim for statute-of-limitation purposes. 94 F.3d at 1056. In *Wallace v. Kato*, 549 U.S. 384 (2007), this Court rejected the premise of that argument, holding that a civil claim for unlawful seizure or search accrues immediately upon the violation, regardless of whether the *Heck* bar would apply if the claim would necessarily imply the invalidity of a future conviction based on the violation. *Id.* at 392-94. That alternative basis supporting *Booker*'s judgment does not undermine *Booker*'s holding that the *Heck* bar is categorically inapplicable to claims for unlawful seizure or search, which remains binding precedent in the Seventh Circuit post-*Wallace*, as discussed next.

does not (at least, need not) imply the invalidity of any particular conviction"); *cf. Johnson v. Winstead*, 900 F.3d 428, 438-39 (7th Cir. 2018) (applying *Moore*'s "categorical approach," but concluding that a Fifth Amendment compelled-confession claim "necessarily implies the invalidity of the conviction" because it "seeks a civil remedy for a trial-based constitutional violation that results in wrongful conviction"). Indeed, the Seventh Circuit adheres to *Copus* and *Booker* notwithstanding that the Ninth Circuit has highlighted that they are "in direct conflict" with its precedent. *Szajer*, 632 F.3d at 612.

Accordingly, Lund's § 1983 Fourth Amendment claim would not have been dismissed in the Seventh Circuit. That court would deem immaterial the Ninth Circuit's reasoning that Lund "attack[ed] the probable cause basis for the search warrant that uncovered the child pornography for which [he] was convicted," Pet.App. 3a, and that he therefore "challenge[d] the search and seizure of the evidence upon which [his] criminal charges and convictions were based," *Szajer*, 632 F.3d at 611. Under the Seventh Circuit's contrary "categorical approach," *Johnson*, 900 F.3d at 438, "misconduct by the police does not (at least, need not) imply the invalidity of any particular conviction," *Moore*, 771 F.3d at 446. That is so "in all cases" raising "Fourth Amendment claims for unlawful searches or arrests." *Copus*, 151 F.3d at 648. Indeed, that rule not only applies without regard to whether the particular factual "record reveal[s]" that the conviction resulting from the use of fruits of the violation could be sustained under an exclusionary-rule exception or harmless-error theory, *id.*, but even if the record confirms that it could not be, *Booker*, 94 F.3d at 1056.

2. Although the Seventh Circuit's direct conflict with the Ninth Circuit on this important question is sufficient to warrant this Court's review, the split is deeper than that. The Eighth, Tenth, and Eleventh Circuits likewise interpret footnote 7 of *Heck* to categorically exempt Fourth Amendment claims seeking damages for unlawful searches or seizures but not the ensuing convictions. Lund's claim would not have been dismissed in any of these circuits.

For example, in *Moore v. Sims*, 200 F.3d 1170 (8th Cir. 2000) (per curiam), the Eighth Circuit applied the categorical reading of *Heck* to an unlawful-seizure claim. The § 1983 plaintiff there alleged that the police had violated his Fourth Amendment rights by detaining him without probable cause that he was unlawfully drunk, which led to a search of his person finding cocaine and a conviction for drug possession. *Id.* at 1170-71. Reversing the district court, the court of appeals held that dismissal was not proper under *Heck* because footnote 7 confirmed that, even "[i]f [the plaintiff] successfully demonstrates that his initial seizure and detention by officers was without probable cause, such a result does not necessarily imply the invalidity of his drug-possession conviction." *Id.* at 1171-72. Importantly, the Eighth Circuit so held without identifying any exclusionary-rule exception or harmless-error theory that could possibly sustain the conviction despite the offending drugs being the direct fruits of the unlawful seizure, and no such argument appears viable. *See id.*; *accord Whitmore v. Harrington*, 204 F.3d 784 (8th Cir. 2000) (per curiam) (invoking *Moore* and footnote 7 to reverse a *Heck*-based dismissal of an unlawful investigative-stop claim without even mentioning any case-specific facts, let alone identifying a possible

exclusionary-rule exception or harmless-error theory).

Likewise, in *Beck v. City of Muskogee Police Department*, 195 F.3d 553 (10th Cir. 1999), the Tenth Circuit held that the *Heck* bar is categorically inapplicable to Fourth Amendment claims for unreasonable searches or seizures. *Id.* at 558-59. The court noted that other circuits had "held that whether a plaintiff's illegal arrest claim is affected by *Heck* depends on whether evidence obtained as a product of the arrest is used at trial." *Id.* at 559 n.4 (citing cases from the Second and Fifth Circuits). The Tenth Circuit, however, "generally disagree[d] with the holdings in these cases because they run counter to *Heck*'s explanation that use of illegally obtained evidence does not, for a variety of reasons, necessarily imply an unlawful conviction." *Id.* (citing *Heck*, 512 U.S. at 487 n.7).[4]

Finally, the Eleventh Circuit also applies *Heck*'s footnote 7 categorically. In *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995) (per curiam), for example, the § 1983 plaintiff alleged that the police had violated

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[4] Although *Beck* noted in dicta that it was "not faced with the rare situation … where all evidence was obtained as a result of an illegal arrest," it provided no reason why *Heck* might apply differently in such a scenario. 195 F.3d at 559 n.4. Similarly, in *Garza v. Burnett*, 672 F.3d 1217 (10th Cir. 2012), a panel majority opined that the *Heck* bar would apply if no exclusionary-rule exception or harmless-error finding were possible, *id.* at 1219-20, but that was dicta given the procedural posture. The panel's judgment was to certify to the Utah Supreme Court a statute-of-limitations tolling question, *id.* at 1222, and the majority's reading of *Heck* was not clearly essential to that disposition, as confirmed by the third judge's decision to concur only in the judgment, *id.* at 1222 (Hartz, J.).

his Fourth Amendment rights by searching his car, which yielded a rifle and led to a conviction for being a felon in possession of a firearm. *Id.* at 253. The court concluded that *Heck* posed "no bar to [the] civil action because, even if the pertinent search did violate the Federal Constitution, [the] conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error." *Id.* at 253 n.1. The court so concluded without identifying any exclusionary-rule exception or harmless-error theory that might even be possible on the facts presented, and none is evident. *See id.* Moreover, in subsequent cases like *Harrigan v. Metro Dade Police Department Station #4*, 977 F.3d 1185 (11th Cir. 2020), the Eleventh Circuit has repeatedly emphasized its position that "the concept of logical necessity … is at the heart of the *Heck* opinion," and thus the *Heck* bar is inapplicable "when the facts required for a prisoner to prove his § 1983 case do not necessarily logically contradict the essential facts underlying the prisoner's conviction." *Id.* at 1193 (quotation marks omitted). Although *Harrigan* involved a § 1983 excessive-force claim, its reasoning forecloses applying the *Heck* bar to unlawful search or seizure claims. The facts necessary to prove the civil-rights claim that a search or seizure was unlawful are entirely unrelated to, and thus "do not necessarily logically contradict," the facts concerning the criminal-law inquiry whether an exclusionary-rule exception or harmless-error theory may apply.

B. Five Circuits Hold That The *Heck* Bar May Apply In This Context Depending On The Factual Record

In this case, the Ninth Circuit followed its settled precedent that the *Heck* bar applies to § 1983 claims seeking damages for unlawful searches or seizures when the Fourth Amendment violation was essential to obtaining the evidence upon which the ensuing criminal conviction was based. *See supra* at 12. Although the Ninth Circuit's position would warrant review even if it were an outlier among the circuits, this Court's intervention is particularly needed because the Second, Fourth, Fifth, and Sixth Circuits also misread footnote 7 of *Heck* to require a fact-based analysis of whether an exclusionary-rule exception or harmless-error theory may apply.

For example, in *Covington v. City of New York*, 171 F.3d 117 (2d Cir. 1999), the Second Circuit reaffirmed its view that "[t]he inquiry as to whether a recovery on [a] § 1983 false arrest claim … would necessarily imply the invalidity of any conviction … is inherently a factual one." *Id.* at 122; *see id.* at 122-23 (discussing *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam)). The court reasoned that, "in a case where the *only* evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence." *Id.* at 123. And because the court "ha[d] no information before [it] as to the nature of the evidence which might have been available" against the § 1983 plaintiff in his criminal proceedings, it "remand[ed] the case to the district court to make th[e] determination." *Id.*

Similarly, in *Ballenger v. Owens*, 352 F.3d 842 (4th Cir. 2003), the Fourth Circuit held that *Heck*'s "footnote 7 does not provide a blanket protection for all § 1983 damage suits alleging an unreasonable search." *Id.* at 846. The court reasoned that the *Heck* bar still applies "[w]hen evidence derived from an illegal search would have to be suppressed in a criminal case … and the suppression would *necessarily* invalidate the criminal conviction." *Id.* And the court found that scenario presented on the factual record there, because if the challenged automobile stop and search were unlawful, "there could be no independent source for the cocaine [found] and no inevitable discovery of it" that would preclude suppression, and "there could be no harmless error" finding given that "there would be no [other] evidence of illegal drug trafficking." *Id.* at 847. The court thus concluded that, "[i]n th[ose] particular circumstances," the § 1983 Fourth Amendment claim was *Heck*-barred because it "would necessarily imply invalidity of [the plaintiff's extant] conviction." *Id.*

Moreover, in *Hudson v. Hughes*, 98 F.3d 868 (5th Cir. 1996), the Fifth Circuit applied a very loose version of "necessarily" under the fact-based reading of *Heck*'s footnote 7. *Id.* at 872. The court deemed it sufficient to trigger the *Heck* bar that "it [was] *improbable* that doctrines such as independent source, inevitable discovery and harmless error" could sustain the § 1983 plaintiff's conviction as a felon in possession of a firearm when the arrest during which the firearm was discovered was unlawful. *Id.* (emphasis added).

Last, in *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999), the Sixth Circuit similarly concluded that, under its reading of *Heck*, "a prisoner seeking to challenge an allegedly unconstitutional search and seizure in a § 1983 claim must show that a decision in his favor would not imply the invalidity of his outstanding conviction." *Id.* at 398. And the court made clear that this showing depends on record-specific facts, such as whether fruits of the violation were "the only evidence" introduced in the criminal trial or "an exception to the exclusionary rule" was available. *Id.* *Shamaeizadeh* further held that, when such a showing could not be made, the *Heck* bar's applicability would delay the accrual of the statute of limitations, *see id.* at 398-99, but that additional holding was abrogated by this Court's decision in *Wallace*, *see supra* at 15 n.3. Nevertheless, *Shamaeizadeh*'s adoption of the fact-based approach to *Heck*'s applicability in the unlawful search or seizure context remains good law in the Sixth Circuit. *See, e.g.*, *Holson v. Good*, 579 F. App'x 363, 365 (6th Cir. 2014) (reaffirming that *Heck* bars claims when, as was true there, the "contested search produced the *only* evidence supporting the conviction and no legal doctrine could save the evidence from exclusion").

In sum, the circuit split is wide and entrenched. Like the Ninth Circuit, the Second, Fourth, Fifth, and Sixth Circuits all hold that *Heck* bars § 1983 Fourth Amendment claims seeking damages for unlawful searches or seizures if the constitutional violation was essential to obtaining the evidence upon which the ensuing criminal conviction was based. Accordingly, each of those courts would have dismissed the claims that the Seventh Circuit permitted in *Booker* and *Copus*, that the Eighth

Circuit permitted in *Moore* and *Whitmore*, that the Tenth Circuit permitted in *Beck*, and that the Eleventh Circuit permitted in *Datz*. *See supra* at Part I.A. The question presented thus has been thoroughly aired and further percolation would add nothing material. This Court's intervention is needed to provide a definitive resolution.

II. THE NINTH CIRCUIT INCORRECTLY ANSWERED AN IMPORTANT QUESTION BY OVERREADING THE *HECK* BAR AND UNDERMINING § 1983 FOURTH AMENDMENT CLAIMS FOR UNLAWFUL SEARCHES OR SEIZURES

Properly construed, the *Heck* bar is categorically inapplicable to § 1983 Fourth Amendment claims that seek damages for an unreasonable search or seizure but not for the conviction obtained using fruits of the violation. The courts on the Ninth Circuit's side of the split have fundamentally erred in holding that the *Heck* bar applies to such § 1983 claims if a fact-based inquiry into criminal-law issues determines that no exclusionary-rule exception or harmless-error theory could sustain the conviction in light of the constitutional violation to be proved in the civil-rights suit. That position contradicts *Heck*'s rule and its rationales. Indeed, the position turns both *Heck* and the exclusionary rule on their heads, creating perverse anomalies in how § 1983 civil-rights suits and criminal post-conviction proceedings interact. The Court should correct this important error.

A. The Fact-Based Approach Violates *Heck*'s Rule

Heck established the rule that, unless and until a criminal conviction is set aside, the convicted

individual is barred from bringing a civil claim under 42 U.S.C. § 1983 if, *but only if*, that claim "would necessarily imply the invalidity" of the conviction (or sentence). 512 U.S. at 486-87. A § 1983 Fourth Amendment claim for unlawful search or seizure will trigger that rule in the two situations identified in *Heck*: (1) when the § 1983 claim "seek[s] damages directly attributable to conviction," *id.* at 486 n.6, as in *Heck* itself, *id.* at 480 n.2; or (2) when proving the § 1983 claim would require "negat[ing] an element of the offense," as in a hypothetical case where a person convicted of resisting a lawful arrest seeks damages on the ground that the arrest was unlawful, *id.* at 486 n.6. Otherwise, a § 1983 Fourth Amendment claim for unlawful search or seizure "will *not* demonstrate the invalidity of any outstanding criminal judgment … [and] the action should be allowed to proceed." *Id.* at 487. As *Heck* explained in the footnote accompanying that sentence, "even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction[,] [b]ecause of doctrines like independent source and inevitable discovery [exceptions to the exclusionary rule], and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.* at 487 n.7 (citations omitted).

Contrary to the Ninth Circuit's position, footnote 7 in no way invites a record-based inquiry into whether, *in fact*, there is a particular exclusionary-rule exception or harmless-error theory that could potentially sustain the conviction despite the constitutional violation. Such a fact-based approach is irreconcilable with *Heck*'s articulation of the rule.

First, it flouts the plain meaning of "necessarily." That term means "unavoidably" or "as a logical result or consequence." Merriam-Webster's Collegiate Dictionary 828 (11th ed. 2020); 10 The Oxford English Dictionary 275 (2d ed. 1989). Proving that an unlawful search or seizure occurred in the § 1983 suit will not "unavoidably" or "logical[ly]" imply the conviction's invalidity, because that turns on an *additional* analysis of criminal-law issues concerning exclusionary-rule exceptions and harmless-error theories. Regardless of how clear the answer to those distinct questions may be, they do not and cannot "necessarily" follow from success in the § 1983 suit alone. That should be dispositive, especially given this Court's admonition that it was "careful in *Heck* to stress the importance of the term 'necessarily.'" *Nelson*, 541 U.S. at 647. Indeed, *Heck* used the word "necessarily" seven different times, and emphasized it in footnote 7 for good measure. 512 U.S. at 481, 483, 486 & n.6, 487 & n.7, 488.

Second, footnote 7 itself was phrased in a categorical rather than fact-based manner. It said that a § 1983 "suit for damages attributable to an allegedly unreasonable search," even if successful, "**would not** *necessarily* imply" the conviction's invalidity in light of exclusionary-rule and harmless-error doctrines. *Id.* at 487 n.7 (boldface added; italics in original). The Court did not say that such a suit *might not* necessarily imply the conviction's invalidity depending on the facts, or would not so imply *only if* an exclusionary-rule exception or harmless-error finding were possible. Rather, *Heck* said that these suits categorically *would not* so imply. *See Nelson*, 541 U.S. at 647 (describing footnote 7 categorically).

Finally, this reading of footnote 7 is confirmed by *Heck*'s earlier formulation of the rule. The Court held that the favorable-termination requirement of the tort of malicious prosecution "applies to § 1983 damages actions that *necessarily require the plaintiff to prove* the unlawfulness of his conviction." 512 U.S. at 486 (emphasis added). Again, a § 1983 plaintiff seeking damages for an unlawful search or seizure is not required "to prove" the unlawfulness of his conviction, "necessarily" or otherwise. Indeed, proving such a claim does not even require that there be a conviction at all, let alone one based on fruits of the violation, much less one that is necessarily tainted despite doctrines recognizing exclusionary-rule exceptions and harmless error. None of those criminal-law issues have anything to do with proving the elements of the civil-rights claim under § 1983, as confirmed by the fact that it is the police-officer *defendants* who are injecting those issues into the cases.

B. The Fact-Based Approach Conflicts With *Heck*'s Rationales

Heck rests on two complementary rationales. *First*, the Court sought to harmonize § 1983 with the federal habeas corpus statute in order to prevent convicted individuals from using the § 1983 civil remedy to end-run the procedural and substantive limits on collaterally attacking state convictions through the federal habeas corpus statute. *See Heck*, 512 U.S. at 480-82; *id.* at 497-98 (Souter, J., concurring in the judgment); *accord Nelson*, 541 U.S. at 646-47. *Second*, the Court analogized to the common-law tort of malicious prosecution, which provided damages for wrongful conviction but

required favorable termination of the prosecution. *See Heck*, 512 U.S. at 483-85. Neither rationale supports a fact-based approach to footnote 7.

A successful § 1983 Fourth Amendment claim challenging an unlawful search or seizure does not permit convicted prisoners to "do[] indirectly through damages actions what they could not do directly by seeking injunctive relief—challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute." *Nelson*, 541 U.S. at 647. Again, obtaining compensation for the harm directly caused by a wrongful search or seizure does not necessarily imply that the person is entitled to release from prison for a conviction obtained based on fruits of the violation, as that depends on the additional resolution of a host of criminal-law remedial issues. In short, the fact of conviction is "simply irrelevant to the legality of [a] search under the Fourth Amendment or to [a plaintiff's] right to compensation from state officials under § 1983" for an allegedly illegal search. *Haring v. Prosise*, 462 U.S. 306, 316 (1983). To be sure, while proving the illegality of the search or seizure is not *sufficient* to prove the invalidity of the conviction obtained based on the fruits, it is a necessary step in an actual challenge to the conviction. *Heck*, however, expressly rejected a "broader" rule that would have barred a § 1983 suit whenever it "would resolve a necessary element to a likely challenge to [an extant] conviction, even if the § 1983 court [need] not determine that the conviction is invalid." 512 U.S. at 488 (alteration in original).

Likewise, a successful § 1983 Fourth Amendment claim for damages limited to the unlawful search or

seizure is not at all analogous to the tort of malicious prosecution. Rather, it is directly analogous to the torts of "trespass or false arrest," which were the common-law actions where "questions regarding the legality of [a search or seizure] typically arose" "at the founding." *See Torres v. Madrid*, 141 S. Ct. 989, 1001 (2021) (quotation marks omitted). Those torts did not impose a favorable-termination requirement in the random event that a conviction was later obtained using fruits of the illegal investigation. *Compare* Dobbs, The Law of Torts § 586 (2d ed. June 2021 update) (elements of malicious prosecution include "that the plaintiff's wrongful prosecution … terminated favorably to the plaintiff"), *with id.* §§ 41, 49, 60 (elements of false arrest and trespass do not include favorable termination). Such a requirement would make no sense, because those torts provide recompense for harms to person or property from the unlawful search or seizure itself, whether or not a conviction later occurs. Indeed, imposing a favorable-termination requirement on the § 1983 version of those torts would be anachronistic. "[T]he common-law rule [was] that a trial court must not inquire, on Fourth Amendment grounds, into the method by which otherwise competent evidence was acquired." *Stone v. Powell*, 428 U.S. 465, 483 n.19 (1976). It is thus the 20th-century creation of the exclusionary rule (*see id.* at 482-83) that has caused criminal post-conviction proceedings to overlap with civil-rights suits under § 1983 raising Fourth Amendment claims for unlawful search or seizure. *See Gonzalez v. Entress*, 133 F.3d 551, 554-55 (7th Cir. 1998) (using this point to bolster the Seventh Circuit's categorical reading of *Heck*'s footnote 7).

C. The Fact-Based Approach Has Perverse Consequences

In addition to lacking any support in *Heck*, the fact-based reading of footnote 7 causes the very problems *Heck* sought to avoid. That approach improperly injects into the § 1983 suit issues that otherwise would be decided exclusively in the criminal proceedings, and it displaces the § 1983 damages remedy without any statutory basis.

First, rather than ensuring that the general § 1983 cause of action does not intrude on the specific domain of the federal writ of habeas corpus, the fact-based approach forces courts in § 1983 suits to gratuitously decide issues that are appropriately resolved in criminal post-conviction proceedings. Namely, the courts on the Ninth Circuit's side of the split must scrutinize the full record of the criminal investigation and trial to determine whether an exclusionary-rule exception or harmless-error theory may be available. *See supra* at Part I.B. And they must do so even though those issues have nothing whatsoever to do with whether the § 1983 plaintiff can prove damages from an unlawful search or seizure. Thus, even when dismissing § 1983 cases under their misreading of the *Heck* bar, they end up intruding on the post-conviction proceedings more than the courts that simply adjudicate the Fourth Amendment claim on the merits under the categorical approach to *Heck*.

Second, not only does the fact-based approach needlessly inject criminal-law issues into the § 1983 suit, but it also corrupts the adversarial system by forcing the parties to litigate these issues in an unnatural posture. Under that approach, the

convicted individual who seeks to bring a § 1983 claim must argue in favor of exclusionary-rule exceptions and harmless-error theories, while the state officers must argue against them—the *precise opposite* of what each side would normally argue in the criminal proceedings. This leads to the spectacle of a § 1983 plaintiff who is permitted to seek damages for an unlawful search only by convincing the court—over the government's opposition—that the search was nevertheless carried out in good faith and so his conviction remains valid. *See, e.g.*, *Naselroad v. Mabry*, 763 F. App'x 452, 457-58 (6th Cir. 2019). The conflicts of interest inherent in this inversion of the adversarial process call into question the soundness of the precedents being established in these § 1983 cases, which will then apply in criminal cases too.

Finally, the fact-specific approach turns the exclusionary rule on its head. That prophylactic doctrine rests on the idea that civil remedies provide insufficient deterrence against Fourth Amendment violations in the context of criminal investigations. *See Herring v. United States*, 555 U.S. 135, 140-42 (2009). But here, courts like the Ninth Circuit are using a Fourth Amendment violation's implications under the exclusionary rule to displace the § 1983 damages remedy. This prophylactic judge-made rule meant to deter constitutional violations should not be invoked as a means to shield those very violations from the civil remedy Congress enacted in § 1983. Indeed, "[t]o hold otherwise would … cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination—suits that could otherwise have gone forward had the plaintiff not been convicted." *Nelson*, 541 U.S. at 647. Simply put, a subset of victims of unlawful

searches or seizures should not be deprived of the compensation that § 1983 provides due to the fortuity that they were later convicted based on fruits of the violation and were unable to get the conviction set aside in post-conviction proceedings.

III. This Case Is An Ideal Vehicle To Resolve The Question Presented

This case squarely and cleanly presents the question of how the *Heck* bar applies to § 1983 Fourth Amendment claims seeking damages for an unlawful search or seizure but not the ensuing conviction. As to the claim at issue here—Lund's Fourth Amendment claim challenging the search of his car pursuant to Warrant E—the *Heck* bar was the sole basis for both the district court's dismissal, Pet.App. 14a-16a, and the Ninth Circuit's affirmance, Pet.App. 3a-4a. Moreover, the answer to how footnote 7 of *Heck* should be applied was dispositive. Lund's claim would not have been dismissed under the categorical approach adopted by the Seventh, Eighth, Tenth, and Eleventh Circuits, but it must be dismissed under the fact-based approach adopted by the Ninth Circuit as well as the Second, Fourth, Fifth, and Sixth Circuits. *See supra* at 16, 22-23. And the Ninth Circuit's position is wrong, *see supra* at Part II, so granting review in a case on this side of the split is preferable in order to correct an erroneous judgment below.

Nor is there any risk that this Court's review could be pretermitted by an alternative ground for affirming the dismissal of Lund's Fourth Amendment claim. As the Ninth Circuit noted, dismissals under *Heck* are without prejudice to refiling in the event the conviction is set aside. Pet.App. 4a. Because any

alternative grounds for dismissal, such as qualified immunity, would *not* permit refiling in the event the conviction is set aside, they would expand the scope of respondents' judgment and thus be impermissible absent a cross-petition. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). And even if respondents were to file a cross-petition, it would have no chance of warranting certiorari. Not only did the district court and the Ninth Circuit decline to address any question other than the *Heck* bar for the claim dismissed here, but even for other claims that the Ninth Circuit remanded for further consideration, the court expressly "le[ft] it to the defendants to argue specifically and the district court to determine in the first instance whether … dismissal on other grounds" was warranted. Pet.App. 4a-5a. As to any potential alternative ground for affirmance, therefore, the Ninth Circuit's (non-)decision cannot plausibly be said to be incorrect, let alone to conflict with the decision of any other court.

In any event, for Lund's Fourth Amendment claim challenging the search of his car pursuant to Warrant E, neither qualified immunity nor any other alternative ground for dismissal exists. It has long been clearly established that the Fourth Amendment prohibits officers from knowingly or recklessly submitting a false or misleading warrant application. *Liston v. Cnty. of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997) ("[A] Fourth Amendment violation occurs where the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." (quotation marks omitted)); *see Franks v. Delaware*, 438 U.S. 154 (1978). That is precisely what Lund alleged

occurred for Warrant E, and his detailed factual allegations in that regard are both plausibly pled, *see supra* at 10-11, and particularly ill-suited for this Court's review, *see Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (Alito, J., respecting the denial of certiorari) ("[W]e generally do not grant [certiorari] to decide highly fact-specific questions.").

Finally, given that *Heck* governs "the intersection of the two most fertile sources of federal-court prisoner litigation," 512 U.S. at 480, this Court has routinely granted review to ensure the proper application of *Heck*. Indeed, there are two cases on distinct *Heck*-related issues currently pending on the Court's merits docket. *See Nance v. Ward*, No. 21-439 (whether as-applied method-of-execution claim would "necessarily imply the invalidity" of death sentence when alternative proposed method is not currently authorized by state law); *Thompson v. Clark*, No. 20-659 (whether "favorable termination" requirement demands that prosecution end in manner that "affirmatively indicates" innocence or simply that is "not inconsistent with" innocence); *see also, e.g.*, *McDonough v. Smith*, 139 S. Ct. 2149 (2019) (deciding accrual date for fabricated-evidence claim in light of *Heck*).

In comparison, the question presented here is more important because it sweeps far more broadly and raises a fundamental issue about *Heck*'s application that will be neither addressed nor informed by the pending cases. Unlike the narrow questions of what counts as "invalidating" a death sentence or "terminating" a conviction, the question presented here concerns the common situation of a Fourth Amendment claim seeking damages for an

unconstitutional search or seizure that later led to a conviction based on fruits of the violation. And resolution of that question requires deciding the basic and cross-cutting issue whether *Heck*'s "necessarily imply" rule entails consideration of facts beyond what must be proven in the § 1983 suit itself. Given those features as well as the deep and acknowledged circuit split and the Ninth Circuit's serious error, this Court's review is especially warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 23, 2022

Respectfully submitted,

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