No. 21-1179

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

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

Respondents' briefs opposing certiorari repeatedly mischaracterize the petition as contending that *Heck v. Humphrey*, 512 U.S. 477 (1994), is categorically inapplicable to *all* § 1983 Fourth Amendment search or seizure claims. *E.g.*, State BIO 9; Non-State BIO 10. The petition acknowledged from the outset, however, that *Heck* bars *some* civil claims for Fourth Amendment violations that led to criminal convictions—namely, those that "necessarily" imply a conviction's invalidity by *either* seeking damages for the conviction *or* logically negating an element of the offense. Pet. i, 2-3 (citing *Heck*, 512 U.S. at 486-87 & nn.6-7). The petition thus made clear that the question presented is instead whether *Heck* is categorically inapplicable to civil claims that do *not* seek such conviction-impugning relief *even if* the alleged violation happened to be clearly essential to *obtaining the evidence* upon which the conviction rested. *Id.* Respondents fail to show this Court's review of *that* question is unwarranted.

First, Respondents fail to rebut the circuit conflict's existence. They ignore that courts on both sides—including the Ninth Circuit—have acknowledged the deep split. Nor do they meaningfully contest that the Seventh and three other circuits have categorically refused to apply *Heck* to this class of Fourth Amendment claim in numerous published decisions that are irreconcilable with the fact-based approach of the Ninth and four other circuits. Instead, Respondents suggest the courts on the Seventh Circuit's side have backtracked in other decisions, but that is incorrect. Respondents cite no published decision from any (much less each) of those circuits

dismissing a Fourth Amendment claim as *Heck*-barred because the violation's fruits were essential to the conviction. Rather, Respondents cite some decisions that are inapposite because plaintiffs denied an element of the offense and others that are dicta because the court did not dismiss under *Heck*. Tellingly, Respondents cite no case even asserting the conflict has dissipated.

Second, Respondents cannot rehabilitate the fact-based approach's fundamental flaw. A § 1983 search or seizure claim seeking neither to recover damages for a resulting conviction nor to disprove an offense element does not "*necessarily require the plaintiff to prove* the unlawfulness of his conviction." *Heck*, 512 U.S. at 486 (emphasis added). Success in such a civil-rights suit implies nothing about the distinct criminal-procedure questions whether the conviction is nevertheless valid despite any use of the violation's fruits, under an exclusionary-rule exception or harmless-error theory. *Id.* at 487 n.7. Respondents have no defense to the illogic of allowing police to invoke the judge-created exclusionary remedy as a shield against statutory damages claims that are independent of the conviction. Instead, they pivot to explaining why *other* Fourth Amendment claims are properly *Heck*-barred, and they complain about the limited overlap between civil and criminal proceedings that *Heck* expressly tolerated.

Finally, Respondents' vehicle objections are baseless. They emphasize that Lund's underlying Fourth Amendment claim is fact-intensive and subject to a potential issue-preclusion defense. Each point is exaggerated and, regardless, neither one impedes this Court's ability to decide whether the

Ninth Circuit's threshold *Heck*-based dismissal was correct. This Court routinely grants review of cert-worthy questions even if the petitioner might lose on remand on other grounds. That approach is particularly appropriate here, where Lund's objection is that the lower courts erroneously prevented him from litigating his Fourth Amendment claim on the merits *and* Respondents tacitly concede that the procedural posture precludes this Court from itself deciding any alternative grounds for dismissal.

ARGUMENT

I. RESPONDENTS DO NOT UNDERMINE THE DEEP AND ACKNOWLEDGED CIRCUIT SPLIT

The petition demonstrated a significant circuit split on the question presented, recognized by courts on both sides. Pet. 13, 16, 18, 22-23. Respondents admit the Ninth Circuit, like the Second, Fourth, Fifth, and Sixth Circuits, hold that "application of *Heck* in this context requires consideration of the factual circumstances" concerning whether the challenged search or seizure was plainly essential to obtaining evidence upon which the conviction rested. State BIO 12; *see* Non-State BIO 27-28. And while Respondents assert it is unclear whether the Seventh Circuit, or the Eighth, Tenth, and Eleventh Circuits, categorically reject *Heck*'s applicability in this context, their efforts to muddy the waters fail.

A. Respondents grudgingly concede that "the Seventh Circuit appears to have endorsed a categorical rule" under *Heck* that disavows "case-by-case examination" of whether "the fruits of a particular arrest were a necessary part of a plaintiff's conviction." State BIO 10, 12-13; *see* Non-State BIO

11 ("some" Seventh Circuit cases "appear to recognize a categorical exclusion"). Respondents try to unsettle the status of the Seventh Circuit's categorical approach, State BIO 12-15; Non-State BIO 10-12, but they overread the additional cases invoked.

First, Respondents contend the Seventh Circuit has abandoned (or might abandon) its categorical approach due to this Court's decision in *Wallace v. Kato*, 549 U.S. 384 (2007). But the very case that identified some "mixed signals" post-*Wallace* itself ensured "greater consistency" going forward by reaffirming that the "categorical approach" of *Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014), "makes sense in this context." *Johnson v. Winstead*, 900 F.3d 428, 437-39 (7th Cir. 2018); *see* Pet. 15-16 (citing *Moore* and *Johnson*). It is implausible that the Seventh Circuit will backslide now, four years post-*Johnson* and fifteen years post-*Wallace*, especially since *Wallace* in no way undermines the categorical approach. *See infra* at 10.

Second, Respondents contend the Seventh Circuit recognizes a purported "exception" to the categorical approach for claims that assert "innocence." *See Mordi v. Zeigler*, 870 F.3d 703, 708 (7th Cir. 2017). But this red herring raises issues distinct from the question presented. Under the categorical approach, *Heck* applies where proving the elements of the Fourth Amendment claim would negate an offense element, *Heck*, 512 U.S. at 486 n.6, and the cited Seventh Circuit cases address how that rule applies where *supporting factual allegations*, rather than the claim itself, would necessarily disprove guilt. *Compare, e.g.*, *Mordi*, 870 F.3d at 708 (allegations of innocence constituting "background information"

unnecessary to "relief" do not trigger *Heck*), *with, e.g.*, *Evans v. Poskon*, 603 F.3d 362, 364 (7th Cir. 2010) (allegations of innocence constituting basis for relief are *Heck*-barred, but claim can proceed with such allegations dismissed or stayed). Regardless of whether such "assertion of innocence" cases properly apply *Heck* footnote 6, they are irrelevant to the circuit split on *Heck* footnote 7 presented here—namely, the Seventh Circuit deems irrelevant, whereas the Ninth Circuit deems dispositive, whether *use of evidence obtained* via the challenged search or seizure clearly tainted the conviction. Pet. 16.[1]

B. Respondents fare no better in addressing the three other circuits on the Seventh Circuit's side of the split. State BIO 15-18; Non-State BIO 12-17.

Respondents principally object that the lead cases the petition cited from the Eighth and Eleventh Circuits were brief and per curiam. But that does not render those published precedents any less authoritative or less irreconcilable with the fact-based approach. Respondents cannot dispute that those cases categorically rejected *Heck*'s applicability without any factual analysis whether the Fourth Amendment violation was essential to obtaining evidence supporting the conviction. Nor can Respondents identify any plausible implicit factual rationale there that the fruits' use was either permissible or harmless. Pet. 17-19.

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[1] Insofar as Respondents suggest that allegations in Lund's complaint trigger the "assertion of innocence" cases, that is not what the courts below held, Pet. 11-12, and it mischaracterizes the relevant part of the complaint, *see infra* at 11.

Unsurprisingly, therefore, Respondents fail to identify any contrary published Eighth or Eleventh Circuit decision. They cite dicta from two cases where the court did not apply the *Heck* bar even considering the cases' factual circumstances. *Shultz v. Buchanan*, 829 F.3d 943, 949 (8th Cir. 2016); *Hughes v. Lott*, 350 F.3d 1157, 1160-61 (11th Cir. 2003). (And *Hughes* expressly acknowledged the very split Respondents claim it undermined.) They also cite two excessive-force cases, where the courts considered facts only to determine whether success on the civil claim would logically negate an offense element, *not* whether the violation's fruits tainted the conviction. *Dyer v. Lee*, 488 F.3d 876, 878-84 (11th Cir. 2007); *Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1192-97 (11th Cir. 2020). Likewise, they cite two cases challenging probable cause to arrest where "the basis for the arrest and for the conviction [we]re one and the same." *Gerling v. City of Hermann*, 2 F.4th 737, 743 (8th Cir. 2021); *see Anderson v. Franklin Cnty.*, 192 F.3d 1125, 1128 (8th Cir. 1999). Whether or not these cases properly apply the "negate an element" rule of *Heck* footnote 6, they leave untouched circuit precedent applying the categorical approach to *Heck* footnote 7 and Fourth Amendment fruits.

Finally, Respondents have no persuasive answer to the Tenth Circuit's express "disagree[ment]" with the Ninth Circuit's side of the split. *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 559 n.4 (10th Cir. 1999). Besides invoking two more inapposite excessive-force cases, *Hooks v. Atoki*, 983 F.3d 1193, 1200-01 (10th Cir. 2020); *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1125 (10th Cir. 1999),

Respondents emphasize that *Beck*'s reasoning was described as dicta in *Garza v. Burnett*, 672 F.3d 1217 (10th Cir. 2012). They insist *Garza*'s description of *Beck* was not itself dicta because it was purportedly necessary for certifying a statute-of-limitations question to a state court. But they cannot reconcile that characterization with Judge Hartz's opinion concurring only in the judgment—*i.e.*, agreeing to certify the question as framed by the majority *without joining* their description of *Beck*. Pet. 18 n.4.

C. In sum, Respondents do not deny that the Seventh, Eighth, Tenth, and Eleventh Circuits have issued numerous published decisions categorically rejecting *Heck*'s applicability under footnote 7 *regardless of whether* (*and even when*) the Fourth Amendment violation was clearly essential to obtain evidence supporting a conviction. Respondents have cited no published decision from any, much less each, of those circuits dismissing a Fourth Amendment claim under *Heck because* the violation's fruits tainted the conviction. Accordingly, Respondents are wrong that these circuits' law is unsettled. Moreover, even if some intra-circuit confusion existed, that would only underscore the benefits of resolving the inter-circuit split between the Seventh and Ninth Circuits that Respondents all but admit exists.

II. RESPONDENTS DO NOT REHABILITATE THE NINTH CIRCUIT'S FUNDAMENTAL ERROR

A civil-rights plaintiff alleging an unlawful search or seizure, but seeking neither to recover damages for a resulting conviction nor to disprove an offense element, need not say or imply anything about whether the violation tainted the conviction.

Accordingly, such a claim should *never* trigger *Heck*'s rule barring § 1983 suits that "necessarily require the plaintiff to prove the unlawfulness of his conviction." 512 U.S. at 486; *see* Pet. 23-26. The Ninth Circuit's contrary conclusion inverts *Heck*'s rationales by injecting irrelevant criminal-procedure questions about exclusionary-rule exceptions and harmless-error theories into § 1983 civil-rights suits, and it causes the judge-made supplemental exclusion remedy to displace Congress's primary damages remedy. Pet. 26-31. Unable to meaningfully refute *any* of this, Respondents engage in misdirection.

First, Respondents stress that *Heck* footnote 7 said that unreasonable-search claims "may lie" despite a search producing evidence used to obtain a conviction, not that such claims *will* lie. Non-State BIO 26; State BIO 21. But the reason for "may," as the footnote made clear two sentences later, is that such claims do not lie *if* they seek damages for "the 'injury' of being convicted." *Heck*, 512 U.S. at 487 n.7; *see also id.* at 486 n.6 (same *if* they "would have to negate an element of the offense"). Otherwise, such claims *do* lie, because they "would not *necessarily* imply" the conviction's invalidity, given exclusionary-rule exceptions and harmless-error theories that need not be litigated in § 1983 suits. *Id.* at 487 n.7.

Second, Respondents observe that most criminal-trial rights also trigger harmless-error review yet are not categorically exempt from *Heck*. Non-State BIO 27. That is because claims for violation of such rights are *directly analogous* to "malicious prosecution" suits. *Heck*, 512 U.S. at 484. As the Seventh Circuit has explained, "a § 1983 claim alleging a trial-based constitutional violation necessarily seeks damages for

the resulting conviction." *Johnson*, 900 F.3d at 438. By contrast, claims for "constitutional wrongs that occur and are complete *outside* a criminal proceeding (for example, unreasonable searches) … are independently actionable *regardless of their impact on a conviction*." *Id.* at 436.

Third, Respondents complain that briefing and discovery for § 1983 claims like Lund's will overlap with post-conviction proceedings and may produce conflicting Fourth Amendment determinations. Non-State BIO 30; State BIO 21-22. But *Heck* expressly rejected a "broader" rule barring § 1983 suits that "would resolve a necessary element to a likely challenge to a conviction, even if the § 1983 court [need] not determine that the conviction is invalid." 512 U.S. at 488 (alteration in original). And Respondents ignore that their position, not Lund's, improperly injects otherwise-irrelevant criminal-procedure issues into § 1983 suits.

Fourth, Respondents note that Lund's § 1983 claim is *Heck*-barred under the Ninth Circuit's approach only because he failed to establish a Fourth Amendment violation in the criminal proceedings. Non-State BIO 30-31. While true, that does not justify the perverse distortion of *Heck* they defend: the § 1983 damages remedy that Congress provided Lund has been displaced *because* this Court created the exclusionary rule *to supplement* § 1983, as Lund's challenge to the search of his car could not possibly impugn his conviction absent the exclusionary rule.

Finally, Respondents contend that this Court's post-*Heck* decisions support the fact-based approach. Non-State BIO 24-25; State BIO 23-24. Not so.

Wallace v. Kato merely refused to apply the *Heck* bar to civil claims that might "impugn *an anticipated future conviction*." 549 U.S. at 393. Although the Court recognized that the bar could later arise "[i]f" the plaintiff were convicted and the claim "would impugn that conviction," *id.* at 394, and the Court rejected an assertion that Fourth Amendment claims "can never" be *Heck*-barred, *id.* at 395 n.5, the Court did not address the question presented here of *which* Fourth Amendment claims impugn a conviction. The closest it came was the observation that applying *Heck* to anticipated convictions was "impractical[]" in part because "it can hardly be known what evidence the prosecution has in its possession." *Id.* at 393. But that brief reference to "evidence" does not suggest *Heck* requires fact-based analysis whether the Fourth Amendment violation clearly produced evidence essential to the conviction. *Wallace* was underscoring the "impracticality" of applying *Heck* to anticipated convictions, which would require "speculat[ing] about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict." *Id.* That observation tracks *Heck*'s categorical approach to Fourth Amendment claims, which requires knowing the *elements* of any offense for which the § 1983 plaintiff stands convicted.

Thompson v. Clark, 142 S. Ct. 1332 (2022), is even further afield. That case addressed when "favorable termination" of an existing conviction occurs under *Heck*. *Id.* at 1335. Although recognizing that *Heck*'s favorable-termination requirement applied to "a Fourth Amendment claim under § 1983 *for malicious prosecution*, sometimes referred to as a claim for

unreasonable seizure pursuant to legal process," the Court expressly distinguished "a Fourth Amendment claim *for unreasonable seizure* (labeled a false arrest claim), based on [an] initial arrest before charges were filed." *Id.* at 1337 & n.1 (emphasis added). Lund's unreasonable-search claim is likewise independent of any charges filed—*i.e.*, the direct analogue of common-law trespass, *not* malicious prosecution. Pet. 27-28.

III. RESPONDENTS' VEHICLE CONCERNS ARE BASELESS

Respondents emphasize the complaint's length. Non-State BIO 17-18; State BIO 24. But the vast majority is irrelevant to Lund's petition given the Ninth Circuit's judgment, which applied *Heck* to dismiss *only one narrow set of related claims* alleging an unreasonable search of Lund's car under a warrant obtained through material lies and omissions. Pet. 9 & n.2.

Respondents do not and cannot contend that *any of those* allegations (SAC ¶¶ 66-325) would require going beyond the search's invalidity to prove Lund's ultimate innocence. Any allegations of innocence in *other* complaint sections challenging *other* unconstitutional conduct would have no effect on this Court's review of the question presented (and regardless, they are extraneous allegations that could be disregarded or severed, *see Mordi*, 870 F.3d at 708 (citing *Evans*, 603 F.3d at 364)).

Respondents also object that Lund's Fourth Amendment claim is issue-precluded given his failed suppression motion. Non-State BIO 18-19; State BIO 24-25. But *Heck* itself granted certiorari to decide

whether an extant conviction barred a § 1983 claim notwithstanding the court of appeals' statement that the "suit would in all likelihood be barred by res judicata" regardless. 512 U.S. at 480 n.2 Moreover, this Court routinely grants review of cert-worthy questions even when respondents may well prevail on alternative grounds on remand. *E.g.*, *Torres v. Madrid*, 141 S. Ct. 989, 1003 (2021) (granting certiorari and holding petitioner was seized, despite respondents' alternative arguments that seizure was reasonable, harmless, and shielded by qualified immunity); *Jones v. Hendrix*, No. 21-857 (U.S.) (certiorari granted to resolve split over scope of habeas "saving clause," despite Solicitor General's contention that petitioner could not invoke the clause even if split were resolved in his favor).

That approach is particularly appropriate here. The entire point of the question presented is that *Heck* does not bar Lund from litigating his claim on the merits, so he should have the opportunity to respond to any issue-preclusion defense on remand. Indeed, Respondents tacitly concede this Court cannot *itself* consider that defense because dismissal with prejudice would improperly expand the without-prejudice dismissal under *Heck*. Pet. 31-32. There is thus no impediment to this Court's review, and no reason to speculate about any remand proceedings.[2]

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[2] Regardless, Respondents oversell their issue-preclusion defense. They have not demonstrated that the "identical issue[s]" were litigated in the suppression motion, and even assuming so, Respondents ignore that California courts "will not apply the doctrine if policy considerations outweigh the doctrine's purpose in a particular case." *Samara v. Matar*, 8 Cal. App. 5th 796, 804 (2017).

CONCLUSION

Certiorari should be granted.

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Respectfully submitted,

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