No. 21-130

In the Supreme Court of the United States

JACK DARRELL HEARN, ET AL., PETITIONERS

v.

STEVEN C. MCCRAW, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an admitted sex offender who pleaded guilty in the early 1990s may use the "continuing-violation" doctrine to bring a claim in 2018 that the State breached his plea agreement when it changed a background principle of law in 1997 or at least no later than 2005.

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INTRODUCTION

Petitioners have brought the wrong claim in the wrong court at the wrong time. In the early 1990s, after admitting to having committed violent sexual assaults, Petitioners were sentenced to serve periods of supervised release of between five and ten years. In 1997, the Texas Legislature exercised its power to protect the public by requiring certain violent sexual predators to register as such for the remainder of their lives. It extended that requirement to nearly all violent sexual predators in 2005. In 2018, Petitioners asked the federal courts to allow them to pursue an exception to this rule based on the so-called "continuing-violation doctrine" that was developed along with a gloss on the term "adverse employment action" in Title VII.

This Court should decline that invitation. Even if Petitioners were correct regarding the question presented—and they are not—they still would not be entitled to relief under the principles of fairness discussed in *Santobello v. New York*, 404 U.S. 257 (1971). Relief under *Santobello* would presume that Petitioners pleaded guilty based on a promise from the prosecutor—which was subsequently breached—regarding the length of the period that they would be required to register as sex offenders. Though this case went to trial, Petitioners did not make such a showing; they did not even establish that such a promise was ever made. Moreover, Petitioners did not establish that they satisfied the requirements in *Heck v. Humphrey*, 512 U.S. 477 (1994), which they must because the relief they seek challenges the validity of their pleas and sentences. Given these additional bars to relief, the Fifth Circuit's unpublished—and entirely correct—resolution of the question presented does not merit review.

STATEMENT

I. Petitioners' Early 1990s Convictions for Sexual Assault and Registration as Sex Offenders.

In the early 1990s, Petitioners each admitted to committing an offense that is reportable under Texas's sex-offender registration laws. Jack Darrell Hearn was indicted on July 24, 1992, for vaginal rape "by the use of physical force and violence," ROA.958,[1] a second-degree felony punishable by 20 years' imprisonment, ROA.959. Rather than face such a lengthy prison sentence, he pleaded guilty to that charge on August 12, 1993, ROA.959-60, in return for a recommendation of "five (5) years deferred adjudication + condition of no contact" with his victim, ROA.960, and 240 hours of community service, ROA.965. He completed his period of community supervision in August 1998. ROA.968.

Donnie Lee Miller was indicted on November 12, 1993, for "causing his finger to penetrate the female sexual organ" of his victim "by the use of physical force and violence." ROA.981. This too was a second-degree felony and punishable by 20 years' imprisonment. ROA.986. He pleaded guilty to this charge on May 18, 1995, in exchange for a recommendation of ten years' community supervision, a no-contact order with his victim, and an agreement to "pay for all (medical) costs incurred by the victim as a result of this offense" for a year. ROA.982-85. Miller completed his period of community supervision on April 21, 2004. ROA.992.

James Warwick Jones was indicted on August 21, 1993, for "penetration of the anus" of his victim without consent when Jones "knew that as a result of mental

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[1] "ROA" refers to the record on appeal in *Hearn v. McCraw*, No. 20-50581 (5th Cir. 2020).

disease and defect," his victim was "incapable of either . . . appraising the nature of the act or resisting it." ROA.994. Once again, this was a second-degree felony and punishable by 20 years' imprisonment. ROA.995. Jones pleaded *nolo contendere* in exchange for a recommendation of ten years' community supervision with a number of conditions, including "no unsupervised contact with anyone under 18 years old + no contact" with his victim.[2] ROA.995-96. Jones completed his period of community supervision on May 3, 2004. ROA.1001.

Petitioners have never maintained that any representative of Texas—let alone Respondents—made representations regarding if or for how long Petitioners would have to register as sex offenders. To the contrary, Petitioners have admitted that any such understanding came entirely from discussions with their own lawyers about the relevant statute. ROA.939, 943-44, 948. At the time of the pleas, Texas law required Jones and Miller to register as sex offenders until the expiration of their terms of community supervision; Hearn did not have to register at all. Pet. App. 14a-15a.

II. Texas's 1997 and 2005 Amendments to Its Sex-Offender Registration Laws.

"Texas's sex-offender registration statute was first enacted in 1991." *Rodriguez v. State*, 93 S.W.3d 60, 66 (Tex. Crim. App. 2002) (citing Act of June 15, 1991, 72d Leg., R.S., ch. 572, 1991 Tex. Gen. Laws 2029, 2029-32). Since then, "the Texas Legislature has made a series of amendments to the sex offender registration and notification statute." *Id.* at 65.

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[2] With one exception not relevant here, a plea of *nolo contendere* has the same legal effect as a guilty plea under Texas law. Tex. Code Crim. Pro. art. 27.02(5).

Until now, this case has focused on one amendment: the Act of June 1, 1997, 75th Leg., R.S., ch. 668, § 1, 1997 Tex. Gen. Laws 2253, 2260-61 ("1997 Act").[3] In their petition, Petitioners now insist that the Act of May 25, 2005, 79th Leg., R.S., ch. 1273, 2005 Tex. Gen. Laws 4049 ("2005 Act"), is also relevant. Both statutes made a number of changes to Texas's registration scheme in response to changes in federal law[4] as well as to "new ideas as well as enhancements [that] became evident as [registration] laws were practiced within the community." Senate Research Center, Bill Analysis at 1, Tex. S.B. 875, 75th Leg., R.S. (1997); *see also* House Research Organization, *Debate Continues on Texas' Sex Offender Notification Law*, Tex. Focus Report No. 74-23 (July 24, 1996) (summarizing existing law and proposed amendments).

After significant debate, the 1997 Act "expanded the class" of those who must register to include those, like Petitioner Hearn, who have "had a 'reportable conviction or adjudication' since September 1, 1970, and who continued to be under some form of state supervision." *Rodriguez*, 93 S.W.3d at 66. The statute also required lifelong registration for certain offenses, *id.* at 77, and extended the time period for others until ten years after the end of supervised release, *see id.*; Tex. Code Crim.

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[3] In the record below, Petitioners have referred to the "Act of June 13, 1997," the date on which the Governor signed the law. *See, e.g.*, ROA.563. To avoid confusion, Respondents refer to Texas's sex-offender registration laws in the manner adopted by the Texas Court of Criminal Appeals in *Rodriguez*, 93 S.W.3d at 65.

[4] Sex Offender Registration and Notification Act, tit. 1, subt. A, Pub. L. No. 109-248, 120 Stat. 587 (2006); Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act of 1993, tit. 17, subt. A, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

Pro. art. 62.101(b). The Legislature expanded the list of offenses requiring lifetime registration in 2005. Pet. App. 15a; Tex. Code Crim. Pro. art. 62.101(a).

Petitioners became aware of their ongoing obligation to register past the end of their periods of supervised release no later than "early 1998." Pet. App. 2a. Each Petitioner has testified that he experienced emotions ranging from "shock[]," ROA.939 (Hearn); to "fear," ROA.944 (Miller); to fury, ROA.949 (Jones).

The record does not reveal when Petitioners learned of the 2005 Act. It was not at issue in the Fifth Circuit because in the Fifth Circuit, Petitioners maintained that they learned they would have to register for life "[i]n late 1997 or 1998." Appellant's Brief, *Hearn v. McCraw*, No. 20-50581, 2020 WL 6211757, at *8 (5th Cir. Oct. 13, 2020) (Hearn); *id.* at *14 (Miller); *id.* at *18-19 (Jones). Regardless of which position is accurate, the Court should presume that Petitioners were on notice of this obligation no later than 2005. Generally, "[e]very citizen is presumed to know the law." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020). And Petitioners have never claimed ignorance. To the contrary, with only one exception (Hearn in 2006), ROA.969-80, Petitioners have consistently registered as sex offenders since the 1990s, ROA.939-49.

III. Petitioners' 2018 Lawsuit for Breach of Contract.

A. Two decades after they became aware of their ongoing obligation to register under the 1997 Act and 13 years after the 2005 Act became law, Petitioners sought a judicial exception to their registration requirements under 42 U.S.C. § 1983. Petitioners expressly admitted that the statutory changes were not punitive in nature and thus did not violate the Ex Post Facto Clause. ROA.731. Nevertheless, they sought (1) a declaration

that by changing the law to require their ongoing registration, the State of Texas breached their negotiated plea agreements in violation of substantive due process under *Santobello*, 404 U.S. 257; ROA.734; Pet. App. 2a-3a, 16a-17a; and (2) injunctive relief amounting to specific performance of the plea agreements, ROA.735; Pet. App. 3a, 17a.

B. As the district court noted in its ultimate ruling, the facts in this case are "generally uncontested, and resolution of this case turns chiefly on legal disputes." Pet. App. 17a. Respondents never denied that Petitioners were required to register. Petitioners have never alleged—let alone shown—that they ever attacked that requirement through any state court proceeding such as an application for a writ of habeas corpus.

After a brief bench trial, the district court issued its findings of fact and conclusions of law. *Id.* at 13a-25a. Over Respondents' contrary argument, the court concluded that Respondents were proper defendants; but the court went on to explain that the application of the registration program to Petitioners did not offend the Ex Post Facto Clause or substantive due process. *Id.* at 19a-23a. The district court also concluded that, in any event, the statute of limitations barred Petitioners' claims. *Id.* at 23a-25a. The court rejected Petitioners' continuing-violation argument, correctly concluding the only alleged violation was a breach of a plea bargain promise, which allegedly occurred decades earlier. *Id.* at 23a-25a. Because Texas's two-year statute of limitations applies to suits under § 1983, *Redburn v. City of Victoria*, 898 F.3d 486, 496 (5th Cir. 2018); Tex. Civ. Prac. & Rem. Code § 16.003, the district court issued a take-nothing judgment on the grounds that the claims were untimely, Pet. App. 26a-27a.

C. Petitioners appealed to the Fifth Circuit. That court issued an unpublished decision, addressing only the statute of limitations. *Id.* at 1a-7a. It agreed with the district court that Petitioners' claims are time barred. *Id.* at 3a-7a. As the Fifth Circuit put it:

> In this case, no one disputes that the law was amended in 1997 to require annual lifetime registration, and no one disputes that [Petitioners] were made aware of this change, at the latest, by 1998. As [Petitioners] have framed their argument, that change in the law constituted a breach of their agreements. Applying the two-year statute of limitations, then, these claims were time barred by 2000.

Id. at 4a. Citing to both its own caselaw and that of its sister circuits, the Fifth Circuit rejected Petitioners' continuing-violation argument because that "doctrine extends the limitations period when a violation manifests itself over time, rather than as discrete acts," such as the alleged breach of agreement that occurred here. *Id.* at 5a, 6a (citing authority from the First and Third Circuits). Petitioners now seek review in this Court, requesting a departure from or a drastic rewriting of the Court's precedents.

REASONS TO DENY CERTIORARI

This case does not merit the Court's review. Because Petitioners' claims fail regardless of the answer to the question presented, this is a poor vehicle to resolve the extent to which the continuing-violation doctrine applies to section 1983 claims outside an employment context. Moreover, the Fifth Circuit correctly concluded the doctrine does not apply where Petitioners challenge the continuing *effect* of an alleged legal violation, rather than a legal violation that it, itself, "continuing." Finally, the

Fifth Circuit's unpublished, non-precedential decision does not conflict with the decisions of other circuits.

I. This Is a Poor Vehicle to Resolve the Question Presented Because Multiple Alternative Grounds Support the Judgment.

Review is unwarranted because even if the Fifth Circuit's unpublished decision incorrectly applied the continuing-violation doctrine, multiple other grounds bar Petitioners' requested relief. In particular, the district court correctly concluded that Petitioners—who proceeded all the way to trial—have not shown viable claims under *Santobello*, 404 U.S. 257. Moreover, though neither lower court has yet reached the question, assuming Petitioners' claims had merit, they have been pursued in the wrong court—because a claim under *Santobello* attacks the validity of Petitioners' pleas or sentences, Petitioners must show that they have satisfied the requirements of *Heck*, 512 U.S. 477.[5] They have not. Because either of these alternative grounds would support the district court's take-nothing judgment, a ruling by this Court on the question presented would not afford Petitioners any real-world relief.

A. The district court correctly ruled against Petitioners on the merits of their claims.

Review by this Court is unwarranted as an initial matter because Petitioners have brought the wrong claim: because Petitioners seek an exception to a change in background principles of Texas substantive law, their claims sound properly in the Ex Post Facto Clause. But

[5] Because local officials both entered the relevant plea bargain and actually provide the data for the registry, Petitioners have also sued the wrong defendants.

they have strategically disclaimed any such theory. ROA.731. And for good reason: a general challenge to the retroactivity of Texas's sex-offender registration laws has been foreclosed by precedent both from this Court, *United States v. Kebodeaux*, 570 U.S. 387, 395-96 (2013); *Smith v. Doe*, 538 U.S. 84, 105-06 (2003), and the Fifth Circuit, *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019) (per curiam); *King v. McCraw*, 559 F. App'x 278, 292 & n.2 (5th Cir. 2014) (per curiam).

And even with the benefit of discovery and trial, Petitioners have not shown that the claims they *did* bring has any merit. Petitioners have argued that they cannot be subjected to Texas's amended registration requirements because *Santobello* gives them a "federally protected constitutional right" that sounds in "substantive due process under the Fourteenth Amendment" to specifically enforce the terms of their plea agreements—including terms incorporated into those agreements by operation of law. ROA.728. This theory fundamentally misunderstands the limited relief that *Santobello* offered, which sounds in procedural due process and does not include the remedy that Petitioners seek.

1. The most glaring problem with Petitioners' reliance on *Santobello* is that *Santobello* is a case about *procedural* due process. That affects not only Petitioners' burden of proof but also the relief that is available.

Substantive due process protects fundamental rights—described as "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Washington v. Glucksberg*, 522 U.S. 702, 727 (1997). The Court has limited that protection, "for the most part," to "matters

relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality op.). The district court correctly concluded that the Respondents would prevail on the merits: "there is not a 'fundamental' substantive-due-process right to be free from registering [as a sex offender]." Pet. App. 23a; *infra* at I.A.5. *Santobello* does not change that.[6]

A substantive-due-process claim asks for the recognition of a "fundamental liberty interest[]," which the government may not infringe without compelling justification "*at all*, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quotation marks omitted). A procedural-due-process challenge, on the other hand, "call[s] into question . . . the adequacy of procedures." *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989) (plurality op.). A procedural-due-process plaintiff asserts that the government may not deprive him "of [his] asserted liberty interest . . . on the basis of the procedures it provide[d]." *Reno*, 507 U.S. at 306. In other words, procedural due process is implicated when a plaintiff alleges some defect in the *method* by which an interest was taken away; substantive due process is implicated only when a plaintiff contends that the interest may *never* be taken away.

2. Though it did not say so explicitly, *Santobello* falls into the procedural genre of due-process claims. There,

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[6] Though Petitioners have argued (Appellant's Brief, *Hearn v. McCraw*, No. 20-50581, 2020 WL 6211757, at *44 (5th Cir. Oct. 13, 2020)) that the district court misconstrued their claims, the Court may affirm, and Respondents may "defend the judgment below on any ground which the law and the record permit," *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982); *accord United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924).

a criminal defendant in state court agreed to plead guilty based on the prosecutor's agreement "to make no recommendation as to the sentence." *Santobello*, 404 U.S. at 258. Instead, the prosecutor recommended—and the judge ordered—the *maximum* sentence. *Id.* at 259-60. The Court held that principles of fairness require that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The majority's reasoning resounds with the language of procedural due process. For example, the Court reasoned that "[t]his phase of the process of criminal justice . . . must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262. Justice Douglas's concurrence similarly focused on how a defendant's plea waives procedural protections, such as the right "to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt." *Id.* at 264 (Douglas, J., concurring) (citations omitted). And he agreed with the majority that waiver of these procedural rights may not be "unfairly obtained." *Id.*

Both the majority and the concurrence are thus clear that the Court's concern in *Santobello* was not that the State had infringed some inviolable liberty interest (as substantive due process prohibits), but rather that the *procedure* by which the defendant had given up his rights was unfair. Indeed, its language closely tracks the Court's explanation in other cases that "[p]rocedural due process rules" ensure individuals receive the "process constitutionally [] due" in the relevant context to "minimize substantively unfair or mistaken deprivations." *Carey v. Piphus*, 435 U.S. 247, 259-60 (1978); *see also*, *e.g.*, *Gilbert v. Homar*, 520 U.S. 924, 931 (1997). Because

Santobello speaks in terms of fair procedure and not in terms of a fundamental liberty interest that cannot be taken away, it did not involve substantive due process. *Albright*, 510 U.S. at 272 (plurality op.); *see also* 1 WAYNE R. LEFAVE, ET AL., CRIMINAL PROCEDURE § 2.7(d) (4th ed.).

To the extent any doubt remained about the basis of *Santobello*'s holding, this Court has since clarified that there is no substantive-due-process right to "'specific performance' under the terms of the . . . plea bargain agreements," as Petitioners demand. ROA.735. In *Mabry v. Johnson*, for example, the Court considered a challenge to a withdrawn plea-agreement offer. 467 U.S. 504, 505-06 (1984). The Court recognized that "Santobello expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise," *id.* at 510 n.11, and "le[ft] to the discretion of the state court" the decision whether to grant specific performance or permit the defendant to withdraw the guilty plea, *Santobello*, 404 U.S. at 263. *Mabry* confirmed that *Santobello* was concerned about "the *manner* in which persons are deprived of their liberty"—*i.e.*, a violation of procedural due process. 467 U.S. at 511 (emphasis added); *accord Puckett v. United States*, 556 U.S. 129, 141 (2009) ("A plea breach does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (internal quotation marks omitted)).

3. This distinction shows that review is inappropriate for at least three reasons. *First*, Petitioners repeatedly asserted that their *only* claim is for a violation of substantive due process; any claim under procedural due process is therefore waived. ROA.728, 734.

Second, before a plaintiff may come to a federal court claiming a State has not afforded procedural due process, he must avail himself of procedures the State made available to remedy the deprivation of his protected interest. *See Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990). Only then may he bring a section 1983 suit claiming those procedures were insufficient. *See id.*; *Castellano v. Fragozo*, 352 F.3d 939, 969 (5th Cir. 2003) (Barksdale, J., concurring); *see also, e.g.*, *Carmody v. Bd. of Trs. of Univ. of Ill.*, 747 F.3d 470, 479 (7th Cir. 2014). The record does not reflect that Petitioners pursued any such state-law remedies.

Third, the remedy for a procedural-due-process violation is to repeat the process with the appropriate constitutional protections—not for a court to dictate the outcome. *Cf. United States v. Montalvo-Murillo*, 495 U.S. 711, 721-22 (1990); *United States v. Morrison*, 449 U.S. 361, 364-65 (1981); *Ford v. Wainwright*, 549 F.2d 981, 982-83 (5th Cir. 1977) (per curiam). Petitioners demonstrably do *not* want to repeat the procedures in this case and again expose themselves to potentially 20 years in prison for violent sexual assault. Instead, they ask for an injunction to dictate an outcome—specific performance of the alleged plea promise.

4. Even if *Santobello* did sound in substantive due process, Petitioners' claims would still fail. *Santobello* is about fairness concerns when prosecutors make promises that fraudulently induce a plea bargain. *Supra* at 11. But Petitioners—who proceeded to trial below—have not shown that the prosecutors in their case promised them *anything* regarding the length of their registration period. To the contrary, they submitted affidavits in which they admitted that whatever understanding they may have had came entirely from the relevant statutes

and their discussions with their own lawyers. ROA.939, 943-44, 948. Petitioners have argued that the statute itself is incorporated as a term of their plea bargains by operation of law. ROA.729-30. But this Court has *never* held that *Santobello* reaches that far. To the contrary, as discussed above, it has consistently limited *Santobello* to its specific facts: namely an express misrepresentation by prosecutors that is promptly raised to the trial court. *See, e.g.*, *Mabry*, 467 U.S. at 509-10.

5. Adopting a new substantive-due-process right not just to enforce thirty-year-old plea bargains but to enforce allegedly implied-in-law terms in such bargains would be entirely out of step with this Court's thirty-year "reluctan[ce] to expand the concept of substantive due process." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). The lack of "guideposts for responsible decisionmaking" and the "doctrine of judicial self-restraint require[] [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." *Id.* As a result, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright*, 510 U.S. at 272 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-49 (1992)). Claims based on any right that is "markedly different from those recognized in this group of cases" are routinely rejected. *Id.* Moreover, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998).

Petitioners do not present a viable substantive-due-process claim. This Court "focus[es] on the allegations in the complaint to determine how [plaintiff] describes the constitutional right at stake and what the [government] allegedly did to deprive" the plaintiff "of that right." *Collins*, 503 U.S. at 125; *see also Washington*, 521 U.S. at 721 (requiring "a 'careful description' of the asserted fundamental liberty interest"). Nowhere does the petition explain how a request to enforce a plea bargain has anything to do with "marriage, family, procreation, and the right to bodily integrity." *Albright*, 510 U.S. at 272. Instead, because Petitioners' claim is "covered by" either procedural due process or by the Ex Post Facto Clause, "[s]ubstantive due process analysis is . . . inappropriate." *Lewis*, 523 U.S. at 843. And because Petitioners do not present a viable claim for relief on the merits, their petition is a poor vehicle to determine whether their complaint presenting that claim was timely asserted.

B. The *Heck* doctrine bars Petitioners' claims.

This case is also a poor vehicle to assess the contours of the continuing-violation doctrine because Petitioners have brought it in the wrong court and used the wrong procedural device. If Petitioners are correct that their claims are properly characterized as *Santobello* claims—rather than as direct challenges to the application of the registration program or as Ex Post Facto challenges—they must demonstrate their plea proceedings did not comport with the due-process right to a fair trial. *See Petition of Geisser*, 627 F.2d 745, 749 (5th Cir. 1980) (describing *Santobello*'s import). Because such a challenge calls into question the integrity of their pleas or sentences, Petitioners cannot bring that challenge under 42 U.S.C. § 1983 without first obtaining reversal or

expungement of their convictions, or a writ of habeas corpus in state or federal court.

1. A claim under *Santobello* is a direct challenge to the validity of Petitioners' pleas—or at minimum their sentences. Indeed, the premise of *Santobello* was that adjudication of guilt by acceptance of a plea "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." 404 U.S. at 262. Mandatory amongst those safeguards is the principle that, when promises between prosecutor and defendant "can be said to be part of the inducement or consideration" for the plea, those promises "must be fulfilled." *Id.* A prosecutor's failure to uphold those promises implicates the voluntary and knowing nature of the plea. *See id.* at 261-62.

When *Santobello* has mandated some form of remedy it is because the breach of a plea-deal promise called into question the validity of the plea or sentence. *But see supra* at I.A.2 (explaining that a *Santobello* violation does not necessarily undermine the validity of a plea). Ultimately, that remedy might be specific performance, such as resentencing, or it might include the option to withdraw the plea. *Santobello*, 404 U.S. at 263. Either way, it undermines the judgment of conviction, as numerous lower courts have held. *See, e.g.*, *Orr v. Nevada*, No. 2:18-CV-1558, 2019 WL 2527091, at *4 (D. Nev. June 18, 2019); *Labreck v. Mich. Dep't of Corr.*, No. 14-CV-10298, 2014 WL 667963, at *2 (E.D. Mich. Feb. 20, 2014); *Holle v. Indiana*, No. 1:07-CV-206, 2008 WL 4936969, at *3-4 (N.D. Ind. Nov. 17, 2008); *Mann v. Denton County*, No. 4:08-CV-162, 2008 WL 11429978, at *2 (E.D. Tex. Aug. 4, 2008); *Burhman v. Wilkinson*, No. C-3-01-359, 2003 WL 23770597, at *8-9 (S.D. Ohio Feb. 7, 2003).

The "specific performance" remedy the *Santobello* Court suggested is precisely what Petitioners seek here. ROA.735. Petitioners seek specific performance by attacking the fairness—the voluntary and knowing nature—of their pleas on the ground that Respondents failed to keep promises that induced those pleas and deprived them of their right to a fair trial. *Santobello*, 404 U.S. at 261-62; *Mabry*, 467 U.S. at 509-11; *Geisser*, 627 F.2d at 749. As a result, their claims implicate the validity of the criminal judgments that require them to register as sex offenders.

2. For more than 25 years, this Court has held that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Heck*, 512 U.S. at 486. Where *Heck* is implicated, a plaintiff cannot proceed under 42 U.S.C. § 1983 unless he can show "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 487. For this purpose, it matters naught what relief the plaintiff seeks (damages or equitable relief) nor who his suit targets; he attacks the validity of his plea and that is enough. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

Because Petitioners bring a claim for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid," their claims implicate this principle. *Heck*, 512 U.S. at 486-87. The Fifth Circuit has held that a Texas deferred adjudication order is a conviction for *Heck* purposes, *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656 (5th Cir. 2007), and Petitioners do not challenge that conclusion here. As a result, they must show that they have received a favorable termination of their

criminal judgments. Petitioners have not met, nor attempted to meet, *Heck*'s requirement. Thus, "the complaint must be dismissed" on the merits.[7] *Heck*, 512 U.S. at 487.

Due to its conclusion that Petitioners' claims were time barred, the Fifth Circuit never had to decide these two questions. Nevertheless, because either is a sufficient and independent ground to uphold a take-nothing judgment in favor of Respondents, this case is a poor vehicle to address any error in the Fifth Circuit's analysis regarding the continuing-violation doctrine.

II. The Fifth Circuit Correctly Concluded That Petitioners' Claims Are Time Barred.

The Court should also decline to disturb the Fifth Circuit's decision because it did not err in determining that Petitioners' claims accrued no later than 1998 and expired no later than 2000—rendering Petitioners' 2018 suit nearly 20 years stale. Petitioners cannot avoid the expiration of the limitations period by attempting (at 8-13) to shoehorn their case into the "continuing-violation" doctrine or relying (at 12) on hyperbolic comparisons to a hypothetical state law or policy that would authorize indiscriminate, warrantless searches of homes. They challenge not an ongoing violation of federal law or a specific application of an unconstitutional law to them. Instead, they challenge a civil registration requirement that they have admitted would be constitutional but for a single alleged constitutional violation—the purported breach of their plea agreements. Such a claim accrued

[7] The federal district court cases cited above (at 16) all reached this same conclusion under similar circumstances. Respondents are aware of no federal courts that have held the contrary.

when the breach happened, and it became time barred two years later.

A. Petitioners' claims accrued well outside the limitations period.

Petitioners' claims have been time barred for almost 20 years. It is well-established law that federal courts apply the forum State's statute of limitations "for personal-injury torts" to claims under 42 U.S.C. § 1983. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). In Texas, the applicable limitations period is two years. *Redburn*, 898 F.3d at 496; Tex. Civ. Prac. & Rem. Code § 16.003. Accrual, on the other hand, is determined by federal law. *Wallace*, 549 U.S. at 388.

Assuming Petitioners can even bring their *Santobello* claims without first invalidating their convictions under *Heck* (and they cannot), the cause of action accrued "when the wrongful act or omission result[ed] in damages." *Id.* at 391. Or, as the Fifth Circuit has described, the limitations period "beg[an] to run the moment the plaintiff bec[a]me[] aware that he ha[d] suffered an injury or ha[d] sufficient information to know that he ha[d] been injured." *Jackson v. City of Hearne*, 959 F.3d 194, 205 (5th Cir. 2020) (internal citation and quotation marks omitted).

Petitioners' theory is that Respondents breached their plea agreements when the Legislature passed the 1997 amendments that required their lifetime sex-offender registration. They admit that they knew of this change and of the requirement no later than "early 1998." ROA.939, 944, 949. Since Petitioners knew of "the facts that would ultimately support [their *Santobello*] claim," *Piotrowski v. City of Houston*, 237 F.3d 567, 576

(5th Cir. 2001), more than 20 years ago, the two-year limitations period has clearly run.[8]

B. Petitioners cannot rely on the continuing-violation doctrine to save their long-stale claims.

Petitioners cannot avoid the conclusion that their claims are time barred based on the so-called continuing-violation doctrine. In the canonical case recognizing the doctrine, the Court explained that a "continuing violation," perhaps more appropriately called a "cumulative violation," by its very nature involves repeated conduct. *Nat'l R.R. Passenger Corp., v. Morgan*, 536 U.S. 101, 115 (2002). Here, there is no repetitive conduct: Petitioners have challenged a solitary breach of a plea agreement. At most, they complain of the continuing effect of that breach, not a continuing breach.

1. The continuing-violation doctrine is a limited rule that allows a court to assess the timeliness of a claim that accrues over a period of time. Mere repetitions of discrete violations do not constitute a continuing violation—rather, continuing violations "are based on the cumulative effect of individual acts" that would "not be actionable on [their] own." *Id.* This Court developed this doctrine largely in the context of employment discrimination under Title VII, which treats the creation of a hostile work environment as a form of adverse employment action. Created by statute, and unknown at the common

[8] Even with their belated discovery of the 2005 amendments to Texas's registration laws, their claims would still be untimely. As discussed above (at 5), Petitioners have never claimed—let alone offered evidence—to have been unaware of these amendments at the time they passed. As a result, any claims based on the 2005 amendments became stale in 2007, more than a decade before the complaint was filed.

law, a hostile-work-environment claim "is composed of a series of separate acts that *collectively* constitute one [violation]." *Id.* at 117 (emphasis added). As a result, so long as at least one "act contributing to the claim occurs within the [limitations] period," a court may consider "the entire time period of the [continuing violation]" to determine liability. *Id.* That doctrine does *not*, however, allow the plaintiff to sue for a discrete violation that occurred before the limitations period simply because he feels the effect of that violation within the limitations period. *See id.* at 110-15.

Though lower courts have, in limited circumstances, expanded the doctrine beyond the Title VII context, they have uniformly recognized that it is limited to violations that are "based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant." *Heath v. Bd. of Supervisors*, 850 F.3d 731, 737 (5th Cir. 2017) (quoting *O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006)). Thus, "the [limitations period] cannot begin running with the first act, because at that point the plaintiff *has no claim* . . . because the full course of conduct is the actionable infringement." *Id.* (quoting *O'Connor*, 440 F.3d at 128).

2. The doctrine does not apply to Petitioners' claims, which are based on a single act: the alleged breach of their plea agreement in 1997 (or 2005). The alleged acts within the limitations period—namely, the processing of periodic paperwork related to Petitioners' registration as violent sexual predators—are simply harms stemming from the single, original alleged violation. *See, e.g.*, *Gorelik v. Costin*, 605 F.3d 118, 122-23 (1st Cir. 2010).

Indeed, if Petitioners' theory were correct, they had *no* claim in 1997 or 1998 when their plea agreements were allegedly breached. The continuing-violation

doctrine exists because certain non-actionable acts accumulate and ripen into a claim over a period of time. *Morgan*, 536 U.S. at 115. Thus, for it to apply here, Petitioners necessarily argue that they could not have sued in 1997 or 1998 when they first experienced the shock and anger of learning of the alleged breach. ROA.939, 944, 949. Nor could they have sued when they first had to provide their information or when their registration paperwork was first processed. Instead, they had no claim until at some point Respondent's fifth or sixth or seventh or n'th acceptance of registration paperwork broke the proverbial camel's back, and the cumulative effect of those actions ripened into a claim. *See Morgan*, 536 U.S. at 115. That makes no sense. And it is inconsistent with this Court's instruction in *Puckett* that any alleged breach of a plea agreement should be raised promptly so that it can be dealt with by the trial court overseeing the criminal prosecution. 556 U.S. at 134-35, 140.

Instead, if Petitioners ever had a *Santobello* claim, it was clearly actionable, at the very latest, in 1997 or 1998 when they learned that the statutory sex-offender registration requirements applicable to them had changed. The Fifth Circuit correctly held that such claims became stale no later than 2000. Pet App. 4a-6a.

C. Petitioners cannot revive their claims based on renewed applications of an allegedly unconstitutional policy.

Equally off base is Petitioners' argument (at 12) that their ongoing obligations to comply with the sex-offender registration program constitute renewed applications of an allegedly illegal "policy" akin to a law that would allow the State to engage in warrantless searches of an individual's home. Petitioners hyperbolically insist that the Fifth Circuit's decision would render unactionable a

search that took place in 2021 because there had been a separate search of the same individual's home in 1997. This insistence fails to raise the need for the Court's review for four reasons.

1. The theory has not been properly preserved. Through the litigation in the district court and briefing in the Fifth Circuit, Petitioners pursued a single theory for why their claims were timely: the continuing-violation doctrine. *See, e.g.*, ROA.535-43, 733-34, 820-23. The only time Petitioners raised anything akin to this theory was at the podium during oral argument in the Fifth Circuit.[9] As a result, the argument that the ongoing registration requirement is, standing alone, the repeated enforcement of an unconstitutional law or policy has been forfeited. *Puckett*, 556 U.S. at 134.

2. The position misstates Fifth Circuit law. For decades, the Fifth Circuit has recognized that a party may bring an as-applied challenge to an unlawful policy even when that policy was enacted outside the limitations period. *See, e.g.*, *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997). The Fifth Circuit's unpublished decision does not—and indeed *could* not—change that law. To the extent Petitioners maintain that the Fifth Circuit *misapplied* that law, the case presents precisely the sort of error correction that this Court routinely finds unworthy of review. STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 240 (10th ed. 2013).

3. The Fifth Circuit's decision did not apply that rule here because Petitioners do not actually challenge the application of any state policy. Nor could they: this Court

[9] Oral Arg., *Hearn*, 856 F. App'x 493, https://www.ca5.uscourts.gov/OralArgRecordings/20/20-50581_3-30-2021.mp3 (last accessed Dec. 1, 2021).

has explained that even if mandatory sex-offender registration implicates a liberty interest, "the categorical abrogation of that liberty interest by a validly enacted statute" does not necessarily violate the Constitution. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003) (Scalia, J., concurring). Thus, "[a]bsent a claim . . . that the liberty interest in question is so fundamental as to implicate so-called 'substantive' due process, a properly enacted law can eliminate it." *Id.* The Texas Legislature has seen fit to mandate that certain persons, convicted of certain crimes, must register. As the Court's precedents establish, the application of that categorical rule to Petitioners does not violate the Ex Post Facto Clause or due process, *supra* at 9.

4. Stripped of the argument of a continuing violation under *Santobello*, there is no allegation that the application of the State's generally applicable registration requirements violates Petitioners' constitutional rights. The ongoing requirement that Petitioners register under the program is thus not the ongoing application of an unconstitutional policy but the ongoing effect of the allegedly unconstitutional broken promise. Thus, Petitioners' defaulted argument suffers from the same problem as their argument under the continuing-violation doctrine: the only potential violation of their constitutional rights occurred only once, over 20 years ago. The Fifth Circuit correctly held such claims to be untimely.

III. The Purported Circuit Split to Which the Petition Points Does Not Exist and Does Not Necessitate This Court's Review.

The Fifth Circuit's ruling is also entirely consistent with those of its sister circuits. Petitioners cite decisions of the Ninth, Sixth, Seventh and Fourth Circuits in an effort to manufacture a circuit split for this Court to

resolve. But three of these decisions were issued before *Morgan* and thus provide little insight into how those Courts would apply the continuing-violation doctrine now. And even if they did, there is no conflict between the Fifth Circuit and the decisions Petitioners cite, and certainly no divide of positions among the circuits that requires this Court's intervention.

A. The Ninth Circuit has adopted a rule very similar to the Fifth Circuit rule applied below. In *Bird v. Department of Human Services*, 935 F.3d 738, 747-48 (9th Cir. 2019) (per curiam), *cert denied sub nom. Bird v. Hawaii*, 140 S. Ct. 899 (2020), the Ninth Circuit examined the timeliness of a due-process challenge to Hawaii's child-abuse registry. After several years on the registry, the wife of a convicted child abuser requested that a report identifying her as a "'confirmed' child abuser" be removed from Hawaii's child-abuse registry. *Id.* at 742-43. The Court examined *Morgan* and held that the harm to the plaintiff came from a "discrete act"—namely the initial publication of the data or entry into the registry—not the simple maintenance of the information on the registry. *Id.* at 748. The "continual lack" of process to remove the data did not change that outcome. *Id.* at 748. Unsurprisingly, Petitioners did not cite *Bird*.

Flynt v. Shimazu, 940 F.3d 457 (9th Cir. 2019)—Petitioners' only authority that post-dates *Morgan*—is not to the contrary because it did not involve a continuing-violation theory. In that case, the court addressed California's prohibition, for card-room licensees, against investments in casinos in other States that would be illegal in California. *Id.* at 459-60. The scheme was enforced through a regime whereby card-room licensees had to prove compliance every two years, or the State would deny license renewal. *Id.* The authorities issued an

adverse decision in June 2014, and the plaintiffs sued in November 2016, outside California's two-year statute of limitations. *Id.* at 460. The Ninth Circuit concluded that the claim was timely *not* based on the continuing-violation doctrine, but based on discrete acts of "continued *enforcement* of a statute" that "inflict[ed] a continuing or repeated harm." *Id.* at 462 (emphasis added). Here, by contrast, Petitioners have expressly disclaimed any theory—for example, under the Ex Post Facto Clause—that registration alone violates their constitutional rights. ROA.731. Instead, their complaint is only from the single breach of their plea agreements in 1997. *Supra* at 4-5.

B. Equally misplaced is Petitioners' reliance on the Sixth Circuit's decision in *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997), which was decided before *Morgan* and involved vastly different factual circumstances than those here. In that case, the County passed a resolution banning large trucks from certain county roads, including one the plaintiff used regularly to access a quarry. *Id.* at 518. Due to an unfavorable decision in separate state-court litigation, the County later stopped enforcing the ban. *Id.* More than two years after the County passed the resolution, but less than two years after it stopped enforcing it, the plaintiff claimed that the ban constituted a taking and deprived it of both property and liberty interests protected by the Due Process Clause. *Id.* at 518, 520, 521. The Sixth Circuit examined the timeliness of each claim in turn, concluding that any takings violation and any deprivation of property occurred when the resolution was passed. *Id.* at 521. Any due-process claim based on a liberty deprivation, however, occurred on an ongoing basis because the law deprived the plaintiffs of the presumed right to use the road each day. *Id.* at 522.

To the extent *Kuhnle* is a useful guide to determine how *Morgan* (which it predates) applies here, it is to show that the Fifth Circuit was right to hold that the ongoing effects of a single violation do *not* establish a continuing violation. In *Kuhnle*, any property right related to use of the road was vitiated when the resolution was passed and did not reoccur every time plaintiffs had to use a different road. *Id.* at 520-21. Here, any right that Petitioners have under *Santobello* was violated, if ever, when state officials allegedly breached the plea-bargain promise. That violation, like a property deprivation, was complete, and the harm "was fully effectuated" and was "measurable and compensable," the moment the promise was broken—even if it continued to be felt years thereafter. *Id.* at 521.

C. Petitioners' reliance on *Palmer v. Board of Education of Community School District 201-U*, 46 F.3d 682 (7th Cir. 1995), suffers many of the same flaws. Like *Kuhnle*, it predates this Court's articulation of the continuing-violation doctrine in *Morgan*. Moreover, it involved the continued enforcement of an allegedly unconstitutional law—not the continued effect of a single alleged unconstitutional act.

In *Palmer*, the plaintiffs challenged the desegregation plans of a school district more than two years after the adoption of the complained-of policies. *Id.* at 684. The Seventh Circuit held that the statute of limitations did *not* apply to the prospective enforcement of allegedly unconstitutional laws that continued to injure the plaintiffs. *Id.* at 685. Specifically, the court concluded that each plaintiff's limitations period began to run when they were injured by the policies, not when the district instituted the violative policies. *Id.* In reaching this conclusion, like Respondents here, the court distinguished

between the ongoing injury caused by a single violative act and an injury that accrues from a series of violative acts: "[l]ike punching someone in the nose, this act may lead to injury in the future, but when there is only one wrongful act, the claim accrues with the first injury." *Id.* at 686.

Here, there is (at most) the ongoing injury from a single violative act. The wrong complained of is the breaking of a plea-bargain promise, and the injury arose when the promise was broken in 1997 or 1998. ROA.939, 944, 949. Like the victim of *Palmer*'s hypothetical assault, Petitioners felt "injury" from it no later than the first time they were required to register. That the pain of the allegedly wrongful act—whether it be a bloody nose or an ongoing obligation to register—is felt in the future, outside the limitations period, is of no legal significance. Assuming their claims are permissible under *Heck* (and they are not), Petitioners' cause of action accrued when they first felt the injury.

D. Finally, the Fourth Circuit's decision in *Virginia Hospital Association v. Baliles*, 868 F.2d 653 (4th Cir. 1989), does not support Petitioners' assertion of a circuit split over how to apply *Morgan*. Like the last two cases, it was decided well before *Morgan*. Its discussion of the statute of limitations was also cursory. *Id.* at 663. The plaintiff, a healthcare industry group, alleged that part of Virginia's Medicaid plan violated the Medicaid act and due process. *Id.* at 656. The district court held, and the court of appeals summarily agreed, that the plaintiff had alleged an ongoing violation for largely the same reasons Judge Easterbrook set forth in *Palmer*—namely, that each individual application of the State's regime constituted a separate violation. *Id.* at 663. For the same reasons explained above, this case does not show a circuit

split or a conflict with this Court's precedents in a case that involved a single alleged violation—the breach of a plea agreement—that occurred (if at all) more than 20 years ago.

* * *

In sum, Petitioners argue the Fifth Circuit has effectively rejected the line of cases that began with *Brown v. Board of Education*, 347 U.S. 483 (1954), by making repeated applications of the same unconstitutional statute henceforth nonactionable. The Fifth Circuit did no such thing. The Fifth Circuit's unpublished opinion simply recognized that Plaintiffs' own theory of harm—a breach of a plea agreement—is a single, violative act that can have long-term consequences. Nothing in the Fifth Circuit's opinion conflicts with this Court's decisions or those of its sister circuits. And nothing in the Fifth Circuit's decision warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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