No. 22-____

IN THE

Supreme Court of the United States

CITY OF STOCKTON, STOCKTON POLICE DEPARTMENT, ERIC JONES, KEVIN JAYE HACHLER, ERIC B. HOWARD, MICHAEL GANDY, CONNER NELSON, AND JASON UNDERWOOD,

Petitioners,

v.

FRANCISCO DUARTE,

Respondent,

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "*Heck* Bar," which this Court created in *Heck v. Humphrey*, 512 U.S. 477 (1994), bars a 42 U.S.C. Section 1983 claim where the plaintiff is a criminal defendant who pled *nolo contendere* (no contest) as part of a plea deal where he agreed to perform terms through the criminal justice system in exchange for the criminal charges being dismissed upon successful completion of the terms.

PARTIES

Petitioners are the City of Stockton; the City of Stockton Police Department; former Chief of Police Eric Jones; police officers Kevin Jaye Hachler, Eric B. Howard, Michael Gandy, and Conner Nelson; and Sergeant Jason Underwood. Each Petitioner was a defendant in the district court and an appellee in the Ninth Circuit appeal from which this petition is taken.

Francisco Duarte, Respondent on this petition, was a plaintiff in the district court and the appellant in the Ninth Circuit.

RELATED PROCEEDINGS

Duarte v. City of Stockton, et al., United States District Court, Eastern District of California, Case No. 2:19-cv-00007-MCE-CKD, judgment entered on October 22, 2021.

Duarte v. City of Stockton, et al., United States Court of Appeals for the Ninth Circuit, Case No. 21-16929, judgment entered on February 16, 2023.

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OPINION AND ORDERS BELOW

1. The Ninth Circuit's opinion (Pet. App. 1-17) is published at 60 F.4th 566 (9th Cir. 2023).

2. The district court's unpublished Memorandum and Order granting Defendants' motion to dismiss certain claims (Pet. App. 37-51) is at 2020 U.S. Dist. LEXIS 90574, 2020 WL 2615023 (E.D. Cal. May 22, 2020).

3. The district court's unpublished Memorandum and Order granting Defendants' summary judgment motion as to all remaining claims (Pet. App. 18-36) is at 2021 U.S. Dist. LEXIS 204609, 2021 WL 4942878 (E.D. Cal. Oct. 22, 2021).

JURISDICTION

The Ninth Circuit issued its opinion and judgment on February 16, 2023.

This Court has jurisdiction to review the decision of a United States Court of Appeals by petition for writ of certiorari. 28 U.S.C. § 1254(1).

This petition is being timely filed within 90 days after entry of judgment in the Ninth Circuit, pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent's claims are under the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

> any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On May 5, 2017, Petitioners Stockton police officers Kevin Jaye Hachler and Michael Gandy arrested Respondent Francisco Duarte ("Respondent") for willfully resisting, delaying, or obstructing their attempt to discharge their duties, a violation of California Penal Code Section 148(a)(1).[1] On May 15, 2017, the San Joaquin District Attorney's Office filed

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1 Section 148(a)(1) states, in pertinent part:

> Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

a criminal complaint against Respondent with the San Joaquin County Superior Court, charging him with violation of Section 148(a)(1).

Respondent initially entered a plea of not guilty. At a hearing on July 12, 2018, however, Respondent, represented and with private counsel physically present, changed his plea to a plea of *nolo contendere* to violating Penal Code Section 148(a)(1). (Pet. App. 57.)

Under California law, a plea of *nolo contendere* is "the same as a plea of guilty." Cal. Penal Code § 1016(3). Section 1016(3) mandates that, "upon a plea of *nolo contendere*, the court shall find the defendant guilty." (italics added).

At that same hearing, Respondent also completed and signed a document entitled "Misdemeanor Advisement of Rights, Waiver and Plea Form" (the "Plea Form") stating he was pleading no contest. (The Plea Form uses the terms "no contest" and "*nolo contendere*" interchangeably. (*See, e.g.*, Pet. App. 52. at ¶ 2.)) His counsel also signed the Plea Form, attesting she had explained to him all the consequences of the plea. (*Id.* at 55.) Respondent and his counsel presented the completed and signed Plea Form to the criminal court.

Consistent with Section 1016(3), paragraph 2 of the Plea Form specifically explained to Respondent his no contest plea "will have exactly the same effect in this case as a plea of guilty." He placed his initials right next to that language. (*Id.* at 52, ¶ 2.)

Paragraph 7 of the Plea Form states the terms of the plea deal were that if Respondent completed 10 hours of community service within six months, the case would be dismissed, but if he failed to do so, he would receive "CTS" (credit for time served) and three years' informal probation. (*Id.* at 54, ¶ 7.)

Paragraph 8 of the Plea Form, beside which Respondent also initialed, specifically referred to his no contest plea as a "conviction" ("I understand that this conviction could be used against me in the future as a prior conviction"). (*Id.* at ¶ 8.)

The judge signed the Plea Form under the heading "Court's Findings and Order," stating the court "finds that the defendant has expressly, knowingly, voluntarily and intelligently waived his or her constitutional rights." (*Id.* at 56.) It goes on to state "the Court finds . . . there is a factual basis for the plea," "accepts the defendant's plea(s) and admission(s)," and "orders this form . . . filed and incorporated in the docket by reference." (*Id.*)

On that same day, the Court Clerk issued a minute order confirming the terms of the plea deal and noting the Plea Form was "in file." (*Id.* at 57-58.) It also states "[c]ourt's acceptance of plea held in abeyance." (*Id.* at 57.)

On January 14, 2019, the Court Clerk issued a minute order stating "[c]ase dismissed upon motion of DDA [deputy district attorney], interest of justice." (Pet. App. 59.) However, neither that court nor any other court issued any order *vacating* Respondent's plea of no contest, which, as stated above, is equivalent to a guilty plea and a conviction.

On December 31, 2018, Respondent filed the lawsuit that gives rise to the instant petition. His operative First Amended Complaint alleges Petitioner police officers violated the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983 by using excessive force in arresting him, falsely arresting him, and falsifying police reports, and it sues Petitioners City of Stockton and Stockton Police Department on a *Monell* theory (*Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)), for allegedly having unconstitutional customs, policies, or practices.

The district court had jurisdiction over Respondent's claims pursuant to 28 U.S.C. Section 1331 because they are based on federal law.

By Memorandum and Order issued on May 22, 2020, the district court granted Petitioner police officers' motion to dismiss Respondents' false arrest and false police report claims without leave to amend based on the *Heck* Bar. The district court held these claims were barred by *Heck* because "Plaintiff[] here cannot plausibly argue that completing mandatory community service, after pleading no contest to a charge of resisting law enforcement, can possibly constitute a 'favorable termination' of the proceedings for [him]." (Pet. App. 48.)[2]

By Memorandum and Order issued on October 22, 2021, the district court granted summary judgment in favor of Petitioner police officers on

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2 The order also granted the City of Stockton and the Stockton Police Department's motion to dismiss the *Monell* claims without leave to amend. (Pet. App. 49-51.)

Respondent's remaining claim, for excessive force, also because of the *Heck* Bar, finding "*Heck* would seem to apply to the community-service sentence Plaintiff[] received in response to plea of nolo contendere," and the disposition of the charges after Respondent complied with the terms of the plea deal did not constitute a favorable termination. (Pet. App. 27.) That ruling disposed of the case.

As stated above, Respondent timely filed a Notice of Appeal. On February 16, 2023, the Ninth Circuit issued its published opinion reversing both orders in full and remanding the case for further proceedings. *Duarte v. City of Stockton*, 60 F.4th 566, 574 (9th Cir. 2023). (Pet. App. 1-17).

The opinion specifically notes there is an inter-circuit split on the issue of whether a criminal defendant who receives pretrial diversion and then has his criminal case dismissed without a formal conviction can sue for the incident that gave rise to the plea, stating it was choosing to follow decisions in the Sixth, Eighth, Tenth, and Eleventh Circuits that allow such a criminal defendant to sue (60 F.4th at 572 (citing *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633 (6th Cir. 2008), *cert. denied*, 556 U.S. 1208 (2009); *Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022); *Vasquez Arroyo v. Starks*, 589 F.3d 1091 (10th Cir. 2009), *cert. denied*, 568 U.S. 864; *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007))), rather than "contrary" decisions in the Third and Fifth Circuits that found the *Heck* Bar precludes a lawsuit in that situation. *Duarte*, 60 F.4th 572-73 (citing *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *DeLeon v. City of Corpus Christi*, 488 F.3d 649 (5th Cir. 2007)).

ARGUMENT

A. Introduction.

This case presents an important question of federal law—and Supreme Court-created federal law at that (the *Heck* Bar)—over which there is an inter-circuit split.

Rule 10(a) of this Court's Rules specifically states an inter-circuit split is important to the Court in considering whether to exercise its judicial discretion in favor of granting certiorari. *See* Sup. Ct. R. 10(a) ("a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

This Court has recognized the existence of an inter-circuit split is an important factor in deciding to grant certiorari. *See, e.g.*, *Wilkins v. United States*, 215 L. Ed. 2d 116, 122 (2023) ("[t]his Court granted certiorari to resolve the split"); *Wright v. North Carolina*, 415 U.S. 936, 937 (1974) (Douglas, J., dissenting) (explaining the Supreme Court has an "obligation to provide uniformity on . . . important federal constitutional questions").

In fact, in the *Heck* context, this Court has identified the fact of a circuit split in explaining why it granted certiorari. *See, e.g.*, *Muhammad v. Close*, 540 U.S. 749, 754 (2004) (per curiam) (acknowledging the Court granted certiorari to resolve a conflict among the circuits as to the applicability of *Heck* to prison disciplinary proceedings); *Spencer v. Kemna*,

523 U.S. 1, 6-7 (1998) (identifying a split among three circuit courts of appeal on a *Heck* issue).

As we explain in more detail in the following section, there is a significant inter-circuit split on the important and recurring issue of nationwide federal law this petition presents, such that this Court should grant certiorari.

B. The Inter-Circuit Split.

1. The Circuits Where the *Heck* Bar Applies (the Third and Fifth Circuits).

In *Gilles*, 427 F.3d 197, the Third Circuit held *Heck* barred a Section 1983 lawsuit a criminal defendant filed against police officers after he pled to resisting arrest to obtain pretrial diversion, even though under the pretrial diversion program all the criminal charges were dismissed and his criminal record was expunged once he completed the program. *Id*. at 202, 209 & n.8, 211-12. The court so ruled even though it acknowledged that, under applicable state law, the pretrial diversion program was "not intended to constitute a conviction," and the plaintiff "does not admit guilt." *Id*. at 209.

As the court explained, pretrial diversion "imposes several burdens upon the criminal defendant not consistent with innocence, including a probationary term, 'restitution[,] imposition of costs, and [other fees],'" all of which constitute "judicially imposed limitations on freedom." *Id.* at 211.

As stated above, the Ninth Circuit in the instant case specifically chose not to follow *Gilles*

because it found it "unpersuasive." *Duarte*, 60 F.4th at 572.

The *Duarte* court also suggested *Gilles* had been abrogated by *Wallace v. Kato*, 549 U.S. 384 (2007), which held *Heck* does not bar Section 1983 claims inconsistent with *ongoing* criminal charges. *Duarte*, 60 F.4th at 572 (citing *Wallace*, 549 U.S. at 393-94). But, respectfully, that was a misreading of *Gilles* because, in *Gilles*, the criminal proceedings were *not* ongoing; they had *terminated*. As the *Gilles* court explained, the criminal defendant in *Gilles* (just like Respondent in the instant case) successfully completed his pretrial diversion program. *See Gilles*, 427 F.3d at 209 ("[a]fter a successful probationary period, the charges were expunged from his criminal record").

In *DeLeon*, 488 F.3d 649, the Fifth Circuit held *Heck* barred a Section 1983 lawsuit a criminal defendant filed after he entered into a pretrial diversion program under which he pled guilty, paid a $2,500 fine, and received probation. *Id*. at 651, 653. The court held entering into the pretrial diversion program is the functional equivalent of a conviction or sentence under *Heck* because it creates "a judicial finding that the evidence substantiates the defendant's guilt, followed by conditions of probation that may include a fine and incarceration" and a "final judicial act." *Id.* at 655-56. As the court held, "an order deferring adjudication, though not formally a conviction or sentence, is its functional equivalent in light of *Heck*'s rationale." *Id*. at 654.

The decision below cited *DeLeon* and stated it "do[es] not adopt that logic" (*Duarte*, 60 F.4th at 573), thus again conceding the inter-circuit split.[3] Indeed, the *DeLeon* court's specific finding that entering a plea and participating in a pretrial diversion program creates a *Heck* Bar because it is the "functional equivalent" of a conviction or sentence is directly contrary to the decision below, which specifically held a "functional equivalent" is not sufficient to create a *Heck* Bar; there must be an "actual judgment of conviction, not its functional equivalent." *Id*. at 571.

The decision below also attempted to distinguish *DeLeon* by stating the criminal defendant in that case had not completed the terms of his pretrial diversion program, whereas Respondent had (*Duarte,* 60 F.4th at 573), but that attempted distinction does not detract from the split.

First, as stated above, the *DeLeon* court—in direct conflict with the decision below—specifically found the order *admitting* the plaintiff into the pretrial diversion program was a conviction within the meaning of *Heck*. *DeLeon*, 488 F.3d at 656 (holding "a deferred adjudication order is a conviction").

Second, more recently, the Fifth Circuit expressly applied the *Heck* Bar to Section 1983 claims

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3 At oral argument at the Ninth Circuit, Judge Hurwitz specifically stated to Respondent's counsel: "it seems to me, if we rule the way you want us to, we will be creating a circuit split with *DeLeon*, will we not?" Oral Arg. at 9:45, *Duarte*, 60 F.4th 566 (2023) (No. 21-16929), https://www.ca9.uscourts.gov/media/audio/?20221115/21-16929/. He also commented as follows to Respondent's counsel: "I must say, if you were arguing in the Fifth Circuit right now, you would be in big trouble." *Id.* at 40:40.

challenging criminal charges that were in fact disposed of through a *completed* pretrial diversion agreement. *Morris v. Mekdessie*, 768 F. App'x 299, 301-02 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 870 (2020) ("Morris [the criminal defendant] completed a pretrial diversion program").

So, even if there is a factual distinction between *DeLeon* and the instant case on this one point, that factual distinction has been eviscerated by more recent Fifth Circuit authority.

Therefore, there is a direct conflict between controlling authority in the Third and Fifth Circuits and the Ninth Circuit in *Duarte*.

2. The Circuits Where the *Heck* Bar Does Not Apply (the Sixth, Eighth, Tenth, and Eleventh Circuits).

In *S.E.*, 544 F.3d 633, the Sixth Circuit held *Heck* did not bar civil rights claims by a criminal defendant who entered into and completed a pretrial diversion program under which she agreed to probation and was required to participate in a drug education class. *Id.* at 639; *see S.E. v. Grant Cnty. Bd. of Educ.*, 522 F. Supp. 2d 826, 831 (E.D. Ky. 2007) (characterizing the diversion program as "anticipatory probation"); Defs.' Mem. Supp. Summ. J. at 2, *id.*, (No. 06-CV-00124), 2007 WL 4515917 (noting the plaintiff participated in a drug education class as a term of her diversion). Like the Ninth Circuit in *Duarte*, the Sixth Circuit in *S.E.* found the *Heck* Bar did not apply because there was no "conviction" or "sentence" (*S.E.*, 544 F.3d at 639), and it also noted the Sixth Circuit's disagreement with *Gilles*. *Id.*

In *Mitchell*, 28 F.4th 888, the Eighth Circuit held *Heck* did not bar civil rights claims by a criminal defendant who was charged, entered into a pretrial diversion program under which the criminal charges were dismissed, and then sued police officers under Section 1983 based on the same incident. *Id.* at 894-96. The court acknowledged its decision was inconsistent with *Gilles* (*id.* at 896), but (like *S.E.* and the Ninth Circuit in *Duarte*), held *Heck* did not apply because there was no actual "conviction" or "sentence." *Id.* at 895-96.

Similarly, in *Vasquez Arroyo*, 589 F.3d 1091, the Tenth Circuit held *Heck* did not bar the criminal defendant's civil rights claims against police officers despite inconsistent criminal charges that were terminated through a pretrial diversion agreement. *Id*. at 1093, 1095. Again, the court recognized there is a split of authority "as to whether the *Heck* bar applies to pre-trial programs similar to diversion agreements," also citing *Gilles*. *Vasquez Arroyo*, 589 F.3d at 1095. Again, the court rested its decision on the fact "[t]here is no . . . conviction here." *Id.* The court reached that decision despite the fact the criminal defendant stipulated to facts supporting the charges and the criminal court ordered the plaintiff to complete a drug and alcohol dependency program and pay fines and fees. Compl. Ex. 2, *Vasquez v. Starks*, No. 07-3298 (D. Kan. Apr. 25, 2008), 2008 WL 11429983.

Finally, in *McClish*, 483 F.3d 1231, the Eleventh Circuit held *Heck* did not bar Section 1983 claims filed by a criminal defendant who obtained dismissal of criminal charges pursuant to Florida's

pretrial diversion program, which required him to attend counseling and education sessions and submit to criminal supervision. *Id.* at 1251-52; *see McClish v. Nugent*, No. 8:04-CV-2723-T-24TGW, 2006 U.S. Dist. LEXIS 118238, at *28-29 ("defendant . . . is under the supervision of the Department of Corrections during the pretrial intervention period" (citing Fla. Stat. § 948.048 [*sic*, § 948.08] (2002)). Again, the court found the *Heck* Bar did not apply because there was no conviction. *McClish,* 483 F.3d at 1251-52.

As can be seen, there is a sharp inter-circuit split on this issue, and only this Court can resolve it.[4]

3. Confusion in the District Courts.

Adding to the conflict in the circuit courts, district courts in circuits that have not yet ruled on

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4 Petitioners have been unable to find either a district court or appellate court decision in the D.C. Circuit on this issue. The Second Circuit, in *Roesch v. Otarola*, 980 F.2d 850 (2d Cir. 1992), and *Singleton v. City of New York*, 632 F.2d 185 (2d Cir. 1980) (both decided before *Heck*), held criminal defendants who entered pretrial diversion programs were barred from suing because the programs did not satisfy the favorable termination element of Section 1983 claims for malicious prosecution and false arrest. Some courts have considered *Roesch* and *Singleton* to contribute to the inter-circuit split on the question this petition presents. *See, e.g.*, *Cabot v. Lewis*, 241 F. Supp. 3d 239, 251 (D. Mass. 2017). Petitioners have been unable to find a case within the Second Circuit squarely applying the logic of *Roesch* and *Singleton* to the *Heck* context. Further, although Petitioners have not found a Circuit case stating as much, this Court's decision in *Thompson v. Clark*, 142 S. Ct. 1332 (2022), may have abrogated *Roesch* and *Singleton*. *See Perez v. City of New York*, No. 20-cv-1359 (LJL), 2022 U.S. Dist. LEXIS 166418, 2022 WL 4236338, at *44-47 (S.D.N.Y. Sept. 14, 2022). Thus, courts in these jurisdictions are without guidance on this issue.

this issue are also divided. Again, guidance from this Court would eliminate the confusion.

For example, district courts in the Fourth Circuit are in conflict even with each other. *Compare McCullough v. Ann Arundel Cnty.*, No. CCB-19-926, 2022 U.S. Dist. LEXIS 58402, 2022 WL 959516, at *19 (D. Md. Mar. 30, 2022) (pretrial diversion is equivalent to a conviction for the purposes of *Heck*), *and Stutzman v. Krenik*, 350 F. Supp. 3d 366, 379-80 (D. Md. 2018) (same), *with Lail v. Caesar*, No. 2:21-cv-148, 2022 U.S. Dist. LEXIS 40213, 2022 WL 672164, at *19 (E.D.V.A. Mar. 7, 2022) (pretrial diversion did not trigger *Heck*), *and Tomashek v. Raleigh Cnty. Emergency Operating Ctr.*, 344 F. Supp. 3d 869, 874-75 (S.D.W.V. 2018) (pretrial diversion is "a means of *avoiding* a judgment" and therefore does not trigger *Heck*) (emphasis in original).

In the First Circuit, which also has not ruled on the issue, district courts have held *Heck* applies in analogous situations. *See, e.g.*, *Cabot*, 241 F. Supp. 3d at 255 (the *Heck* Bar applied because "a state court judge of competent authority concluded that [pretrial probation] was an appropriate consequence under the circumstances[; Plaintiff] now seeks, in substance, to prove that no consequence should have been imposed because there was no basis for the arrest or the charge"); *Cardoso v. City of Brockton*, 62 F. Supp. 3d 185, 186-87 (D. Mass. 2015) (pretrial probation not a favorable termination under *Heck* because it "constitutes an 'unfavorable' period of judicially imposed limitations on freedom") (quoting *Gilles*, 427 F.3d at 211); *Kennedy v. Town of Billerica*, No. 10-11457-GAO, 2014 U.S. Dist. LEXIS 138268, 2014 WL

4926348, at *7 (D. Mass. Sept. 30, 2014); *Salcedo v. Town of Dudley*, 629 F. Supp. 2d 86, 102 (D. Mass. 2009) ("[t]he Court sees no reason why a plea to sufficient facts—which is a formal admission of guilt in open court—should be treated any differently [than a conviction under *Heck*]").

The Seventh Circuit also has not ruled on this issue, and at least two district courts in that circuit have reached contradictory holdings. *Compare Hudkins v. City of Indianapolis*, No. 1:13-cv-01179, 2015 U.S. Dist. LEXIS 103039, 2015 WL 4664592, at *29-30 (S.D. Ind. Aug. 6, 2015) (*Heck* did not apply to Section 1983 claims involving conduct for which the plaintiff was charged, pled guilty, and completed pretrial diversion)*, with Jackson v. Parker*, No. 08 C. 1958, 2009 U.S. Dist. LEXIS 99776, 2009 WL 3464138, at *10 (N.D. Ill. Oct. 26, 2009) ("[t]he state court judge's finding of guilt and imposition of supervision constitutes a conviction and sentence for the purposes of *Heck*'s favorable termination rule").

Such a nationwide patchwork approach to this important (and obviously recurring) federal issue creates confusion and is unnecessary. The instant case presents this Court with the opportunity to issue a rule of law that will eliminate the confusion and the massive amount of litigation the above litany of cases shows has been generated over this discrete issue.

C. The Issue is an Important Issue of Federal, Supreme Court-Created, Law.

1. The Supreme Court Created the *Heck* Bar in 1994, and Has Taken Up Many *Heck* Cases Since Then.

In *Heck*, Justice Scalia, writing for the Court, created the rule that a plaintiff cannot pursue a Section 1983 claim that would call into question the lawfulness of the plaintiff's conviction or sentence unless the conviction or sentence have been invalidated. *Heck*, 512 U.S. at 489-90 (1994). The main purpose of *Heck* was to preclude a criminal-defendant-turned-civil-plaintiff from filing a tort action arising out of the same incident, because such a result would be "in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Heck*, 512 U.S. at 484 (1994).

The *Heck* bar applies unless the criminal defendant proves, in the civil case, "the conviction or sentence has been [(1)] reversed on direct appeal, [(2)] expunged by executive order, [(3)] declared invalid by a state tribunal authorized to make such determination, or [(4)] called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87.

Over the years, this Court has issued multiple decisions refining the contours of the *Heck* Bar. For example, in 1997, this Court extended the *Heck* Bar to Section 1983 actions challenging the loss of "good-time credits" in prison disciplinary proceedings (where, like in the instant case, there is technically no "conviction,"

"judgment," or "sentence"), because such civil lawsuits "necessarily imply the invalidity of the punishment imposed." *Edwards v. Balisok*, 520 U.S. 641, 648 (1997).

As this Court held more recently in the context of prison good time credit cases, "*Heck* uses the word 'sentence' to refer not to prison procedures, but to substantive determination as to the length of confinement." *Wilkinson v. Dotson*, 544 U.S. 74, 83 (2005).

More recently, in 2019, this Court reaffirmed *Heck's* significance, holding "*Heck* explains why favorable termination is both relevant and required for a claim analogous to malicious prosecution that would impugn a conviction . . . . The alternative would impermissibly risk parallel litigation and conflicting judgments." *McDonough v. Smith*, 139 S. Ct. 2149, 2160 (2019).

This Court has issued other opinions refining the scope of the *Heck* Bar, which confirms the scope of the *Heck* Bar is of significance to this Court. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521 (2011); *Wallace*, 549 U.S. at 393; *Muhammad*, 540 U.S. at 754-55.

2. The Need for Clarification on this Issue is Enhanced Because of the Prevalence of Pretrial Diversion.

The importance of the *Heck* issue in the instant case is highlighted by the ubiquity of the use of pretrial diversion in both state and federal courts across the nation. As this Court has recognized, plea deals and the willingness of prosecutors and

defendants to negotiate over them "are important components of this county's criminal justice system." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

Pretrial diversion is common in both state and federal courts nationwide. *See, e.g.*, Audit Div., Office of the Inspector Gen., *Audit of the Departments Use of Pretrial Diversion and Diversion-Based Court Programs as Alternative to Incarceration* (2016);[5] Bureau of Justice Assistance, U.S. Dep't of Justice, *Pretrial Diversion Programs Research Summary* 2 (2010).[6]

In 2013, one study catalogued no fewer than 298 pretrial diversion programs in 45 states, plus the District of Columbia and the U.S. Virgin Islands. Center for Health and Justice at TASC, *A National Survey of Criminal Justice Diversion Programs and Initiatives* 6 (2013).[7]

Moreover, likely because of the crowded court system in this country, such programs are becoming *more prevalent* throughout the United States. *See* Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 Berkeley J. Crim. L. 47, 50 (2017) (identifying the rise

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5 Available at https://www.oversight.gov/sites/default/files/oig-reports/a1619.pdf.

6 Available at https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PretrialDiversionResearchSummary.pdf.

7 Available at https://www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report_web.pdf.

in such programs in the federal system since 2013);[8] *see generally Pretrial Diversion*, Nat'l Conf. of St. Legislatures (updated Sept. 28, 2017) (tracking statutory diversion programs in 48 states and the District of Columbia).[9]

Here, Respondent's plea deal and pretrial diversion agreement are precisely what create the issue over which Petitioners ask this Court to grant certiorari. His plea deal and pretrial diversion agreement allowed him to avoid the expense and risk of more serious punishment as the result of a trial (as well as the possibility of an expensive appeal) in exchange for entering a plea that is the equivalent of a guilty plea and a conviction, and receiving punishment that is the equivalent of a sentence. This process—similar to plea deals reached every day—allowed Respondent to resolve his criminal matter efficiently, with certainty, and without added expense.

Such a benefit, however, should be available only if such dispositions are accorded "a great measure of finality." *Blackledge*, 431 U.S. at 71. Allowing a criminal defendant who enters a plea that is the equivalent of guilty and submits to punishment that is the equivalent of a sentence to bring a civil action arising out of the incident would "undermine the finality of plea bargains and jeopardize society's interest in a system of compromise resolution of criminal cases." *Olsen v. Correiro*, 189 F.3d 52, 69 (1st Cir. 1999) (while declining specifically to hold the *Heck*

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8 Available at https://lawcat.berkeley.edu/record/1127901?ln=en.

9 Available at https://www.ncsl.org/civil-and-criminal-justice/pretrial-diversion

Bar applied where a criminal defendant pled *nolo contendere* as part of a plea deal, the court stated that "[a]llowing [the criminal defendant] to call into question, through a civil jury's award of damages for incarceration, the legal validity of an unimpeached criminal sentence would lead to inconsistency and an undermining of the criminal process").

D. This Case Presents this Court with an Appropriate Vehicle to Resolve the Conflict.

1. This Case Squarely Frames the Issues.

Respondent's criminal case was dismissed only after (and *because*) he entered a plea that was the equivalent of guilty and agreed to perform the equivalent of a sentence and he performed the terms. His Section 1983 claims would require him to show Petitioner police officers were acting unlawfully when they arrested him, but that would contradict the charges to which he pled and served the equivalent of a sentence. *See Heck*, 512 U.S. at 486 n.6 (explaining that an example of a lawsuit that is barred is one in which the criminal defendant is convicted of resisting arrest, and then files a civil rights lawsuit against the arresting officer for an unreasonable seizure).

Yet, the Ninth Circuit decision below declined to apply the *Heck* Bar, despite all these *Heck* indicia, because there was no actual document entitled "conviction," "sentence," or "judgment." *See Duarte*, 60 F.4th at 571, 572 (concluding the *Heck* Bar "requires an actual judgment of conviction, not its functional equivalent," and relying on *Black's Law Dictionary* definitions of "sentence" and "conviction,"

while conceding "Duarte entered the equivalent of a guilty plea").

The inter-circuit split on this issue that *Duarte* has now deepened thus gives this Court a prime opportunity to decide whether it is the *form* of the criminal process or the *substance* of it that determines whether the *Heck* Bar applies. Petitioners urge this Court to find it is not the form (per *Duarte*, following the other courts that ruled *Heck* did not apply), but the substance (per *Gilles* and *DeLeon*). As the *DeLeon* court held, that result more closely comports with *Heck*'s rationale. 488 F.3d at 654.

Moreover, deciding this issue based on the substance of what happened, and not the form, will also avoid federal courts having to enmesh themselves in often conflicting and inconsistent (and sometimes arcane) niceties of the criminal procedures of the 50 states. The instant case is a prime example of this, where (as explained above in the Statement of the Case), by statute, once Respondent pled, the criminal court was mandated to find him guilty, yet the criminal court apparently did not do so, for unknown reasons.[10]

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10 The Ninth Circuit in *Duarte*, while acknowledging Penal Code Section 1016(3) *required* the criminal court to find Respondent guilty when he pled no contest, then cited Penal Code Section 1000.10(a) for the proposition that "[a] defendant's plea of guilty shall not constitute a conviction for any purpose unless a judgment of guilty is entered." 60 F.4th at 572. But, Section 1000.10(a) did not apply to Respondent. The prefatory language in Section 1000.10(a) states it applies "to this chapter" (Chapter 2.6 of the Penal Code), and Section 1000.8 states that

Focusing on the substance will avoid such technicalities that only detract from the true purpose of *Heck*.

Petitioners acknowledge this Court denied certiorari several years ago on *Heck* issues in *Morris v. Mekdessie*, 140 S. Ct. 870 (2020), but that case lacked an important factor the instant case (as well as the contrasting cases *Gilles* and *DeLeon*) contains, which militates in favor of this Court granting certiorari in the instant case: In *Morris*, there was no plea. *See* Pet. Cert. 6, 140 S. Ct. 870 (2020), (No. 19-266) 2019 U.S. S. CT. BRIEFS LEXIS 3591 ("[h]e entered no plea"). Moreover, *Morris* was unpublished, whereas *Duarte* is published.

This Court also denied certiorari more than a decade ago in *S.E.* (556 U.S. 1208 (2009)) and *Vazquez Arroyo* (568 U.S. 864 (2012)), but the inter-circuit split is now more pronounced: two additional circuits have spoken on the issue—the Eighth Circuit in *Mitchell* in 2022 and the Ninth Circuit, here, just this year.

Moreover, the Ninth Circuit's opinion in the instant case *deepens* the inter-circuit split. The Sixth, Eighth, Tenth, and Eleventh Circuit cases held the *Heck* Bar did not apply, but it is not clear from their opinions whether the criminal defendants in those cases had pled. By contrast, as discussed above, in both *Gilles* and *DeLeon*, the criminal defendants had pled, and those courts found the *Heck* Bar applied, whereas in the instant case, the criminal defendant

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chapter applies only to "first-time nonviolent felony drug offenders"—of which Respondent was not one.

(Respondent) also pled, and the Ninth Circuit found the *Heck* Bar did not apply despite the plea.[11]

Thus, to the extent the Sixth, Eighth, Tenth, or Eleventh Circuits may not have been 100% in conflict with the Third and Fifth Circuits, the Ninth Circuit is 100% in conflict with the Third and Fifth Circuits. Now is the time to clear up the conflict on this important issue.

2. The Ninth Circuit's Decision Does not Stand up to Scrutiny.

While Petitioners will leave substantive briefing for the merits brief, a few words are appropriate to explain further why the Ninth's Circuit's mechanical approach of determining whether the *Heck* Bar applies based on whether there was a dictionary definition "conviction," "sentence," or "judgment" is inconsistent with the purposes of *Heck*.

As this Court has long instructed lower courts, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821)).

Indeed, Justice Thomas has specifically made this point in the *Heck* context. *Skinner*, 562 U.S. at 543-44 (Thomas, J., dissenting) ("As we recognized in *Heck*, evaluating the boundaries of § 1983 is not a narrow, mechanical inquiry. [A court should] inquire[]

11 Moreover, the *Duarte* court noted the Ninth Circuit had never ruled on this issue (60 F.4th at 570), again confirming its ruling in the instant case has deepened the Circuit split.

further and return[] to first principles to determine [whether the claim is] cognizable under § 1983.").

In the instant case, there is no substantive difference between a "technical" conviction and sentence and the process Respondent submitted to. Indeed, the Ninth Circuit's analysis did not even purport to claim there was. (To the contrary, as explained above, the Ninth Circuit expressly conceded Respondent entered "the equivalent of a guilty plea." 60 F.4th at 572.)

Thus, allowing Respondent to sue under Section 1983 despite having entered the equivalent of a guilty plea would be inconsistent with the result of the criminal process against him: not only the equivalent of a guilty plea, but also the equivalent of a sentence.

To add to that, not only did Respondent *enter* such a plea, the criminal court judge specifically *found* "there is a factual basis for the plea(s)," signed the text stating it "accepts the defendant's plea(s) and admission(s)," and ordered the Plea Form "incorporated in the docket." (Pet. App. 56.)

As explained above, under California law, once Respondent entered his plea, the criminal court was mandated, by statute, to "find the defendant guilty." Cal. Penal Code § 1016(3). The Ninth Circuit's opinion tried to sidestep that requirement, stating that, "ordinarily," upon a plea of *nolo contendere*, the criminal court is to find the defendant guilty (60 F.4th at 571), but that is not a correct statement of the law. Section 1016(3) provides no exception to its requirement that upon a plea of *nolo contendere*, the

criminal court *must* find the defendant guilty (and the Ninth Circuit did not cite any exceptions). Thus, the fact that the criminal court here did not issue a document stating Respondent was guilty is of no import, because he was guilty, as a matter of law.

The decision also relied on the fact that the criminal court "held" the plea "in abeyance" (*id.* at 572), but whatever it means to "hold a plea in abeyance" (the Ninth Circuit cited only a dictionary definition, and did not cite California law for what this means (*id.*)) is immaterial because the criminal court judge specifically signed the Plea Form stating he "*accepts*" the plea (Pet. App. 56 (emphasis added)), and the Plea Form was placed in the criminal court file. (*Id.* at 56, 58.) *Cf. People v. West*, 3 Cal. 3d 595, 612 (1970) ("[a] defendant who knowingly and voluntarily pleads guilty or nolo contendere can hardly claim that he is unaware that he might be convicted of the offense to which he pleads; his plea demonstrates that he not only knows of the violation but is also prepared to admit each of its elements").

Indeed, recent California case law specifically treats a *nolo contendere* plea under Penal Code Section 1016(3) made in conjunction with a pretrial diversion agreement as the equivalent of *a conviction* for purposes of *Heck*. *Fetters v. Cnty. of Los Angeles*, 243 Cal. App. 4th 825, 836 (2016) ("whether the bargained-for plea is guilty or nolo contendere, it is an admission of the truth of the facts in the petition" and a plea of *nolo contendere* "constitutes a conviction subject to an inquiry under *Heck*").

Moreover, no one can make the claim that the result of the criminal court proceedings was anything other than that Respondent's liberty was curtailed, just the same as a criminal defendant as to whom there is a document entitled "sentence." And, Respondent's liberty was curtailed specifically because he was (i) charged criminally, and (ii) entered a plea that was the equivalent of a guilty plea (iii) for which the criminal court expressly found there were sufficient facts to support the plea. (*See* Pet. App. 56 ("The Court finds . . . there is a factual basis for the plea(s).").)

Therefore, regardless whether there is a document entitled "conviction," "sentence," or "judgment," success on Respondent's Section 1983 lawsuit would undermine both his plea and the criminal court's acceptance of it, as well as the criminal court's finding of facts sufficient to support the plea and imposition of the equivalent of a sentence. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 77 (2009) (Alito, J., concurring) (finding claims barred that "would, by definition, undermine respondent's guilt or punishment if his allegations are true"). Such a result would create the "tension with which *Heck* was principally concerned." *Duarte*, 60 F.4th at 573.

Again, as noted above, a ruling by this Court that what counts is the substance, and not the form, would eliminate the uncertainty created by the way various states handle these criminal procedural matters.

On the other hand, if the Ninth Circuit's ruling is allowed to stand, and Respondent is permitted to proceed with his civil rights action and he is successful, he will then have succeeded in obtaining money damages for the very crime for which he entered the equivalent of a guilty plea, received the equivalent of a conviction, and served the equivalent of a sentence. That contradictory result is precisely what *Heck* says should not be allowed to occur.

CONCLUSION

The Court should issue the requested writ of certiorari.

Respectfully submitted,

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