No. _____

In The
Supreme Court of the United States

COUNTY OF SONOMA, STEVE FREITAS,
and MARCUS HOLTON,

Petitioners,

vs.

GABBI LEMOS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Heck v. Humphrey*, 512 U.S. 477, 486-87, 486 n.6 (1994), the Court held that a claim under 42 U.S.C. § 1983 is barred—even if it does not seek damages directly attributable to conviction or confinement—if success in the action would "necessarily imply" the invalidity of a plaintiff's conviction or sentence, unless the conviction has already been reversed, expunged, or otherwise set aside. The Ninth Circuit, sitting en banc, narrowly interpreted *Heck* to bar a § 1983 action only if success would "necessarily require" plaintiff to prove the unlawfulness of the underlying conviction. The question presented by this petition is:

> Does *Heck's* "necessarily imply" standard bar a § 1983 suit only if, as some circuit courts have held, success would "necessarily require" plaintiff to negate the underlying conviction, or is it enough, as other circuits and California appellate courts have decided, that prevailing on the § 1983 claim would "impugn," "tend to undermine," or "cast a shadow over" the conviction?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- County of Sonoma, Sheriff Steve Freitas and Deputy Marcus Holton, defendants in the district court, appellees in the Ninth Circuit and petitioners here; and
- Gabbi Lemos, plaintiff and appellant below and respondent here.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- *Gabbi Lemos v. County of Sonoma; Steve Freitas; Marcus Holton*, United States Court of Appeals for the Ninth Circuit, Case No. 19-15222.
- *Gabbi Lemos v. County of Sonoma, et al.*, United States District Court, Northern District of California, Case No. 4:15-cv-05188-YGR.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

OPINIONS BELOW

The district court's unpublished January 19, 2019 order granting summary judgment to petitioners is reproduced in the appendix to this petition ("Pet. App.") at pages 65-80. The Ninth Circuit's July 16, 2021 opinion, *Lemos v. Cnty. of Sonoma*, 5 F.4th 979 (9th Cir. 2021) is reproduced in the appendix at pages 26-65. The Ninth Circuit's unreported January 21, 2022 order vacating the three-judge panel opinion and granting rehearing en banc is reproduced in the appendix at page 25. The Ninth Circuit's July 19, 2022 en banc opinion, *Lemos v. Cnty. of Sonoma*, 40 F.4th 1002 (9th Cir. 2022), is reproduced in the appendix at pages 1-24.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction to review the Ninth Circuit's July 19, 2022 en banc opinion on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed within 90 days of entry of the en banc opinion.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action under 42 U.S.C. § 1983, which 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.

Respondent alleges petitioners violated her rights secured by the United States Constitution's Fourth Amendment, which provides:

> 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.

STATEMENT OF THE CASE

A. Background Of The Action.

Late in the evening on June 13, 2015, petitioner Marcus Holton, a Sonoma County Sheriff's Deputy, was on patrol in Petaluma, California when he came upon a pickup truck stopped in front of a house on a rural, two-lane road. (Pet. App. 2, 66.) Holton heard raised voices, reference to a "fight," and stopped to investigate. (*Id.* at 2-3.) He activated his body camera to record what happened next.[1] (*Id.* at 3.)

Holton approached and asked the driver to exit the vehicle. (*Id.*) The driver complied, and explained that the passenger, his girlfriend, was drunk and upset because she had misplaced her cell phone. (*Id.*) Holton then walked around to the passenger side to confirm the story, and encountered the girlfriend, Karli Labruzzi, speaking with a group of three women standing nearby: Her two sisters, including plaintiff and respondent Gabbi Lemos, and their mother. (*Id.*)

When Holton asked, "Is everything ok?" all four women began yelling at him. (*Id.*) Holton tried to open the truck door to see if Labruzzi was injured, and Lemos—who had "just graduated from high school" and "consumed three Jack Daniels and Cokes" earlier that evening—responded by stepping between him and the door and shouting, "You're not allowed to do that!"

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[1] The video evidence was manually filed with the excerpts of record (ER 329-341), and as the dissent from the en banc opinion notes, "a narrative description of the conduct simply cannot do it justice." (*Id.* at 19.)

(*Id.*) Holton told Lemos to step back and pushed her hand away. (*Id.*)

Lemos and the other women continued to protest, insisting Holton needed a warrant to open the truck door, demanding the involvement of "a woman cop," and ignoring his repeated requests to calm down. (*Id.*) Holton called for backup. The responding deputy, Robert Dillion, could hear the women's screams over the radio. (*Id.*)

After Dillion arrived, Holton separated Lemos's mother from her daughters and explained he was trying to investigate whether Labruzzi was the victim of a domestic incident. (*Id.* at 4.) Dillion separately tried to speak with the daughters, but they responded by again demanding a "woman cop," claiming to be sober, accusing Holton of "assault," and disparaging Holton and his mother in sexual terms. (*Id.*)

Approximately five minutes after the initial encounter at the truck door, Lemos's mother told her to go inside the house. (*Id.*) Lemos began walking toward the house and ignored Holton's orders to stop. (*Id.*) Holton, who had not cleared the house, ran after Lemos, and grabbed her wrist to handcuff her. (*Id.* at 4, 70.)

When Lemos pulled away, Holton tackled her and brought her to the ground. (*Id.*) Lemos continued to resist, forcing Holton to straddle her with one knee on each side of her body to handcuff her. (*Id.* at 70-71.) Her mother ran up, kicked Holton, and grabbed the

back of his collar, causing Dillion to intervene and pull the mother off. (*Id.* at 71.)

After the arrest, Holton asked Lemos if she was injured, and she responded with an expletive and laughed. (*Id.* at 71.) Later that night, Lemos was treated and released for injuries she sustained during the incident. (*Id.* at 4, 71.) Holton sustained injuries to his left knee and the right side of his neck. (*Id.* at 71.)

B. The Lawsuit And The Criminal Case.

Lemos filed a 42 U.S.C. § 1983 action against Holton, his supervisor, Sonoma County Sheriff Steve Freitas, and Sonoma County, asserting that Holton acted with excessive force at two different points: when he "violently shoved" Lemos away from the truck door and during her arrest a few minutes later. (*Id*. at 83-84.) The complaint characterizes Holton's contact at the truck door as a "physical assault." (*Id.* at 83.) It goes on to allege that Holton, "advancing" on Lemos, caught her "from behind around the neck in a chokehold" and ground "her face into the gravel." (*Id.* at 83-84.) The complaint does not concede any criminal misconduct by Lemos. Rather, it alleges the district attorney's office "completed their review" and declined to file a case against her. (*Id.* at 85.)

That turned out to be untrue. The Sonoma County District Attorney charged Lemos with resisting, obstructing, or delaying a peace officer in violation of California Penal Code § 148(a)(1). (*Id.* at 5.) The parties jointly requested a stay of civil proceedings on the

grounds that Lemos was "being criminally prosecuted for her conduct during the same incident that gave rise to the present lawsuit." (*Id.* at 92.) The district court granted the stay and the criminal case proceeded to trial. (*Id.*)

In her defense, Lemos presented evidence regarding Holton's excessive force both at the truck door and during her arrest. (ER 193 [when Lemos "stepped forward" at the truck, Holton "grabbed her by the throat and he pushed her aside"], 197 [Holton picked Lemos "up by the neck about 2 feet in the air and slam[med] her face first into the ground."].)

The jury was instructed that it needed to find the following elements beyond a reasonable doubt to find Lemos guilty:

> (1) Deputy Marcus Holton was a peace officer lawfully performing or attempting to perform his duties;
>
> (2) The defendant willfully resisted, obstructed, or delayed Deputy Marcus Holton in the performance or attempted performance of those duties; and
>
> (3) When the defendant acted, she knew or reasonably should have known that Deputy Marcus Holton was a peace officer performing or attempting to perform his duties.

(Pet. App. 72.) The jury was further instructed that Holton was not lawfully performing his duties if he was "unlawfully arresting or detaining someone or using unreasonable or excessive force." (*Id.* at 5.)

The instructions required the jury to unanimously agree that Lemos committed at least one of four alleged acts: (1) making physical contact with the deputy as he was trying to open the truck door; (2) placing herself between the deputy and Labruzzi; (3) blocking the deputy from opening the truck door and speaking with Labruzzi; and/or (4) pulling away from Holton when he attempted to grab her. (*Id.* at 5-6.) The jury found Lemos guilty and used a general verdict form that did not specify which act or acts they agreed Lemos committed. (*Id.*)

After the criminal proceedings concluded, the district court lifted its stay, and the defendants filed a motion for summary judgment, asserting that Lemos's action was barred by *Heck*. (*Id.* at 6.) The district court granted summary judgment in defendants' favor. (*Id.* at 65-79.) The court construed *Heck* as barring a § 1983 action where "the unlawful behavior" for which civil damages are sought is "fundamentally inconsistent" with a "criminal conviction arising out of the same facts." (*Id.* at 75.) The court determined there was "no temporal or spatial distinction or other separation between the conduct for which Lemos was convicted, by a jury, and the conduct which form[ed] the basis for her section 1983 claim." (*Id.* at 79.) Rather, because Holton's actions formed "one uninterrupted interaction," the jury's finding that "he did not use excessive force" was "inconsistent with a Section 1983 claim based on an event from that same encounter." (*Id.*)

C. The Appeal.

Lemos appealed, and a divided Ninth Circuit affirmed summary judgment. (*Id.* at 26-65.) Senior district judge Ivan Lemelle, sitting by designation, authored the opinion, joined by Judge Ikuta. The opinion stated, "Lemos' resistance was clearly viewed by her trial jury as continuous throughout the entire transaction," and reasoned that—given the instruction precluding Lemos from being convicted if Holton had used excessive force—the guilty verdict established the lawfulness of Holton's conduct throughout this "continuous chain of events." (*Id.* at 37, 40.) Lemos's § 1983 excessive-force claim was therefore *Heck*-barred because it "necessarily implied" her underlying criminal conviction was invalid. (*Id.* at 34, 42-43.)

Judge Berzon dissented. (*Id.* at 43-64.) She asserted *Heck* did not bar Lemos's excessive force claim because the verdict could have been based upon her earlier obstruction at the truck door, so her conviction did not "necessarily" establish the lawfulness of the deputy's conduct during her arrest a few minutes later. (*Id.* at 55-56.) In the dissent's articulation, the *Heck* bar does not apply whenever the record leaves "open the possibility that the officer's lawful conduct supporting the § 148(a)(1) conviction is different from the officer's alleged unlawful application of excessive force. . . ." (*Id.* at 55.) Judge Berzon also asserted it was of "no moment" whether the jury instructions "properly reflected California law" because their identification of "disparate acts" as the basis for conviction made what

the criminal jury "*necessarily* decided" a black box. (*Id.* at 61-63.)

The court granted Lemos's petition for rehearing. (*Id.* at 25.) During oral argument at the en banc hearing, Lemos abandoned her excessive force claim premised on Holton's conduct at the truck door.[2] Relying in part on that concession, the en banc court reversed the panel opinion. (*Id.* at 2-15.)

Judge Miller, writing for the majority, narrowly interpreted *Heck* as barring a § 1983 claim only if "success in the action would 'necessarily require' " the plaintiff to prove the unlawfulness of her conviction. (*Id.* at 7.) The court agreed that *Heck* would bar Lemos's § 1983 claim to the extent it was based on force used during the conduct that was the basis for her conviction. (*Id.* at 10.) But, noting Lemos "expressly stated" at oral argument that her excessive force claim was limited to Holton's conduct during her arrest, the court decided the record did not "necessarily" establish such overlap. (*Id.* at 10-11.) The jury could have concluded Lemos obstructed Holton during the lawful performance of his duties, by blocking him from opening the truck door, *and* that he used excessive force during her subsequent arrest. (*Id.* at 11.) The majority also rejected that Lemos's conviction was based on the " 'entire incident as a whole' " because the instructions allowed the jury to find her guilty based

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[2] Oral Argument at 11:50-12:58, *Lemos v. Cnty. of Sonoma*, 40 F.4th 1002 (9th Cir. 2022) (en banc) (No. 19-15222), [https://www.youtube.com/watch?v=THXj9Damw9A].

on any one of four charged acts, so the conviction did not necessarily establish Holton's use of force was lawful throughout. (*Id.* at 11-12.)

Judge Callahan, joined by Judge Lee, dissented. "Like a wolf in sheep's clothing," the dissent characterized the majority opinion as creating an "escape hatch to *Heck*" by presupposing that "an uninterrupted interaction with no temporal or spatial break" could be "broken down into distinct isolated events to avoid the application of the *Heck* bar." (*Id.* at 15-16.) Slicing up the factual basis for the § 148(a)(1) conviction in this way violated "the very purposes cited by the Supreme Court when it established the *Heck* preclusion doctrine" because it (1) undermined "the strong policy against the creation of two conflicting resolutions arising out of a single transaction," and (2) ignored "the Supreme Court's concerns for finality and consistency between criminal and civil judgments." (*Id.* at 16.)

Judge Callahan also rejected the majority's parsing of the jury instructions because it ignored California's continuous course of conduct rule, which disallows multiple § 148(a)(1) counts for conduct that was part of the same continuous transaction.[3] (*Id.* at

[3] During en banc oral argument, Lemos's counsel affirmed that Lemos advocated for the instruction identifying the four acts as a single § 148(a)(1) violation and took the position that separate charges were impermissible under California Penal Code § 654, which prohibits multiple punishment for crimes arising from an indivisible course of conduct. Oral Argument at 13:08-13:25, 1:01:00-1:02:21, *Lemos v. Cnty. of Sonoma*, 40 F.4th 1002 (9th Cir. 2022) (en banc) (No. 19-15222) [https://www.youtube.com/watch?v=THXj9Damw9A].

17-18.) Paraphrasing the California Supreme Court's decision in *Yount v. City of Sacramento*, 43 Cal. 4th 885 (2008), the dissent called it "anomalous" to construe Lemos's criminal conviction broadly as a shield to prevent "a new prosecution arising from these events," only to then "turn around and construe the criminal conviction narrowly" "as a sword" to permit her § 1983 claim to proceed. (*Id.* at 21.)

According to the dissent, the relevant inquiry was "whether Lemos's obstructive acts" could be "separated, temporally or otherwise, from Deputy Holton's alleged excessive force" under California law. (*Id.* at 21.) Using the jury instructions to dodge that analysis and artificially deconstruct a "single indivisible chain of events," the majority opinion expanded "opportunities for collateral attack on criminal convictions" and interpreted the *Heck* preclusion doctrine in a manner that threatened to swallow the rule, "despite clear Supreme Court guidance to the contrary." (*Id.* at 16, 22-24.)

WHY CERTIORARI IS WARRANTED

As the dissent from the en banc opinion notes, the Ninth Circuit's decision here cannot be reconciled with either the language or policies underlying this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). The opinion transforms ubiquitous criminal proceedings for interfering with a peace officer into a "heads I win, tails you lose" proposition for criminal defendants and

would-be civil plaintiffs. They can take advantage of California's prohibition on the prosecution of temporally related acts of interference as separate counts. But then, if convicted—and despite the lawful use of force being a necessary factual predicate for conviction—the same plaintiffs can separate out their multiple acts of interference, charged as a single crime, to sow doubt that the conviction necessarily established the lawfulness of the officer's conduct throughout, thereby avoiding the *Heck* bar. This incongruous result underscores the need for this Court to grant review for two reasons.

First, the Ninth Circuit's decision is emblematic of confusion among the circuit courts as to what *Heck*'s "necessarily implies" standard means. Some Courts of Appeals, including the Ninth Circuit in *Lemos*, construe the *Heck* bar narrowly, as applying only if a successful § 1983 claim "necessarily demonstrates" or there is "necessary logical connection" between success and invalidity of the conviction. For these courts, so long as there is a version of the facts—pled or not—that allows a plaintiff's civil suit to coexist with the underlying conviction without conflict, the § 1983 claim can go forward.[4] Other Courts of Appeals hold plaintiffs to the allegations pled in their complaints, and broadly apply *Heck* to preclude § 1983 claims that

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[4] *See, e.g.*, Pet. App. 7 ("'necessarily require'"); *Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1193 (11th Cir. 2020) ("necessary logical connection"); *McKithen v. Brown*, 481 F.3d 89, 101 (2d Cir. 2007) ("necessarily demonstrates") (original italics omitted).

"impugn," "compromise," "tend to undermine," "cast a shadow over" or are "inconsistent with" plaintiff's conviction.[5] There is further discord on *Heck*'s reach between California state and federal appellate courts, with *Lemos* applying the *Heck* bar far more narrowly than California courts with concurrent jurisdiction.[6]

Second, review is necessary because *Lemos*'s application of *Heck* is inconsistent with California appellate court decisions. This undermines the policies of comity that underlie *Heck*, and has the further practical, pernicious effect of driving such claims to federal court, as no plaintiff would pursue such claims in state court, given that application of state law interpreting *Heck* would bar their claims.

Heck was intended to create a bright-line rule to prevent the collateral attack of criminal convictions. But in practice, the *Heck* standard has turned into a Rorschach test, allowing courts to apply an excessively malleable standard essentially however they want. *Heck*'s dysfunction shows no sign of resolving itself in

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[5] *E.g.*, *Hill v. Murphy*, 785 F.3d 242, 248 (7th Cir. 2015) ("cast a shadow"); *Barnum v. Hilfiger*, 340 F. App'x 508, 509 (10th Cir. 2009) ("tend to undermine") (J. Gorsuch); *Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998) ("impugn"); *Wilson v. Johnson*, 535 F.3d 262, 266 (4th Cir. 2008) ("compromise"); *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019) ("call into question").

[6] *Compare* Pet. App. 7 ("'necessarily require'"), *with Yount*, 43 Cal. 4th at 893 ("calling into question"); *Baranchik v. Fizulich*, 10 Cal. App. 5th 1210, 1220 (2017) ("inconsistent with"); *Fetters v. Cnty. of Los Angeles*, 243 Cal. App. 4th 825, 841 (2016) ("tend to undermine").

the lower appellate courts. And because the conflict stems from competing understandings of this Court's caselaw, only this Court can restore uniformity on an essential question regarding the reach of § 1983 in this context.

The question presented is fundamental to any *Heck* case: Without clarity on what the "necessarily implies" standard means, the Courts of Appeals will continue to apply the doctrine in a haphazard fashion, with broad implications for civil and criminal law. On the civil side, courts must know to what extent a plaintiff's civil allegations define the *Heck* inquiry. On the criminal side, the meaning of *Heck* has direct implications on how prosecutors charge criminal defendants. The question is particularly important in the excessive force context, where a plaintiff's multiple acts of resistance are often deeply intertwined with the application of force, making a plaintiff's civil allegations a key barometer for what the § 1983 claim "necessarily implies" about the underlying conviction. *Lemos*, which disregards the plaintiff's allegations in favor of speculation regarding the jury's deliberations, invites further and deeper discord in appellate courts' application of *Heck*.

This Court should grant review.

I. Certiorari Is Warranted To Clarify *Heck*'s "Necessarily Implies" Standard And Resolve A Conflict Among The Appellate Courts Concerning Its Breadth.

A. The Line Drawn By *Heck*—Barring § 1983 Claims That Necessarily Imply The Invalidity Of A Sentence Or Conviction—Intended To Be Bright, Has Grown Blurry.

Roy Heck, imprisoned for voluntary manslaughter for murdering his wife, filed a 42 U.S.C. § 1983 claim alleging that the police officers and prosecutors involved in his case had destroyed exculpatory evidence and violated his constitutional rights. *Heck*, 512 U.S. at 478-79. The Court held his civil claim was barred because it "would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487.

The preclusion doctrine was premised on two grounds. First, the Court analogized to the common law tort of malicious prosecution, which "permits damages for confinement imposed pursuant to legal process," but only if the plaintiff can allege and prove "termination of the prior criminal proceedings in favor of the accused," thereby precluding the "possibility" of "'two conflicting resolutions arising out of the same or identical transaction.'" *Id.* at 484 (internal quotation marks and citations omitted). The Court concluded the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" that has "always applied to actions for malicious prosecution" should also apply to

§ 1983 claims that challenge a plaintiff's underlying conviction. *Id*. at 486.

Second, the Court focused on federal-state comity. It reaffirmed its holding from *Preiser v. Rodriguez*, 411 U.S. 475 (1973) that the "exclusive remedy for a state prisoner who challenges the fact or duration of his confinement" is a habeas corpus action after exhaustion of state court post-conviction remedies. *Id.* at 481. Damages claims that "necessarily imply" the invalidity of a state court conviction are not cognizable under § 1983 because they undermine habeas corpus and exhaustion of state post-conviction remedies as the specific federal remedy to challenge the validity of a conviction. *Id.* at 486-89.

Since *Heck* was decided, this Court has "struggled to limit § 1983 and prevent it from intruding into the boundaries of habeas corpus." *Skinner v. Switzer*, 562 U.S. 521, 537-44 (2011) (Thomas, J., dissenting); *Dist. Attorney's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 76 (2009) ("[I]t is sometimes difficult to draw the line between claims that are properly brought in habeas and those that may be brought under 42 U.S.C. § 1983.") (Alito, J., concurring). This is, in part, a function of *Heck*:

- Some language connotes a narrow reading. *Heck*, 512 U.S. at 486 (§ 1983 claim is inappropriate where it would "necessarily require" the plaintiff to prove unlawfulness of the conviction or confinement), 486 n.6 (§ 1983 action will not lie where plaintiff "would have to negate an element of the offense of which he has

been convicted"), 487 (inquiry is whether action will "demonstrate the invalidity of any outstanding criminal judgment").

- Other language, including the term "necessarily imply" denotes a broader standard. *See id*. at 487, *see also* 483 (distinguishing *Wolff v. McDonnell*, 418 U.S. 539 (1974) because claim did not "call into question the lawfulness" of plaintiff's confinement), 490 (dismissal appropriate where damages claim "challenged" the legality of the conviction). This broader approach is also supported by the majority's pushback on Justice Souter's concurrence, which espoused a narrower application of *Heck*. *Id.* at 491-503 (Souter, J., concurring). The majority (1) rejected the *Heck* bar could only apply to a plaintiff who remained incarcerated or could otherwise still bring a habeas action, and (2) acknowledged that, to the extent malicious prosecution's favorable termination requirement did not perfectly map onto the four exceptions articulated by *Heck*, it would not change that § 1983 "was not meant to permit such collateral attack." *Id.* at 484 n.4, 490 n.10.

The tension inherent in *Heck* has persisted in this Court's jurisprudence. *Compare Wallace v. Kato*, 549 U.S. 384, 393-95, 395 n. 5 (*Heck* bar applies if Fourth Amendment claim would "impugn" a criminal conviction), *with Nance v. Ward*, 142 S.Ct. 2214, 2220-21 (2022) (underscoring implication must be necessary and concluding a § 1983 claim challenging the sole method of execution authorized by the state of Georgia

was not barred because success would not "necessarily" prevent the state from carrying out plaintiff's sentence because it could change its laws to allow different methods of execution).

As Justice Roberts noted during oral argument in *Skinner*, "the critical formulation in *Heck*, 'necessarily implies' " is "difficult" because "the adverb points one way, and the verb points the other." Transcript of Oral Argument at 13-14, *Skinner*, 526 U.S. 521 (No. 09-9000). The oxymoronic quality of the *Heck* standard has invited confusion amongst the Courts of Appeals ever since. *See, e.g.*, *Teichmann v. New York*, 769 F.3d 821, 829 (2d Cir. 2014) (Calabresi, J., concurring) ("[W]hat 'necessarily demonstrates' the invalidity of a sentence or conviction is often anything but easy to decide, and hence the applicability *vel non* of *Heck* can be, to put it mildly, troublesome."); *see also Roberts v. City of Fairbanks*, 962 F.3d 1165, 1166 (9th Cir. 2020) (VanDyke, J., dissenting) ("*Heck* is a quarter-century old" and its exceptions "bedevil federal courts across the country, including this one").

B. The Courts of Appeals' Application of *Heck* Is Profoundly Inconsistent.

Intended to create a bright-line rule, the application of *Heck* has been anything but straightforward in practice, with the Courts of Appeals applying *Heck* in fundamentally different ways. As a result, whether a convicted individual may proceed with a § 1983 claim too often depends—not on a clear legal standard that

is consistently applied—but on where a plaintiff resides, and the particular panel assigned.

The schism in *Heck* jurisprudence is particularly stark when it comes to civil actions that present the possibility—not the inevitability—of undermining the plaintiff's criminal conviction. The Fifth, Seventh and Tenth Circuits emphasize that the choices a plaintiff makes in pleading his civil case matter: "[A] plaintiff's claim is *Heck*-barred despite its theoretical compatibility with his underlying conviction if specific factual allegations in the complaint are necessarily inconsistent with the validity of the conviction. . . ." *McCann v. Neilsen*, 466 F.3d 619, 621 (7th Cir. 2006); *accord DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656-57 (5th Cir. 2007) (declining to consider plaintiff's argument that claims of excessive force were separable from an aggravated assault conviction where the civil complaint presented the excessive force claim as a single violent encounter during which plaintiff was wholly innocent); *Havens v. Johnson*, 783 F.3d 776, 783-84 (10th Cir. 2015) (where plaintiff does not present a scenario consistent with his conviction, and his "only theory of relief is based on his innocence, and this theory is barred by *Heck*," the § 1983 claim "must be barred in its entirety").

Okoro v. Callaghan, 324 F.3d 488 (7th Cir. 2003) exemplifies this framework. There, it did not matter that the plaintiff could have been "guilty of drug violations yet also have been the victim of theft by the officers who arrested him." *Id.* at 489. It was also "irrelevant" that the plaintiff "had disclaimed any

intention of challenging his conviction." *Id.* at 490. The plaintiff's civil allegations drove the analysis. Because the version of the facts alleged in the complaint—that there were no drugs in his home and plaintiff was framed so the officers could steal his gems—amounted to a "collateral attack on his conviction" and could not be true "without undermining the criminal case against him," his § 1983 claim was *Heck*-barred. *Id.* at 489-90; *accord Tolliver v. City of Chicago*, 820 F.3d 237, 244 (7th Cir. 2016) (because plaintiff was "the master of his ground, and because the allegations he makes now necessarily imply the invalidity of his conviction, *Heck* bars his civil suit").

But in the Eleventh Circuit, theoretical possibilities cut in the other direction. *Harrigan* considered the application of *Heck* to a § 1983 plaintiff, who was convicted of aggravated assault and fleeing to elude a law enforcement officer, and alleged he was the victim of "illegal assault and battery" by the police. 977 F.3d at 1190. In the Eleventh Circuit's estimation, "'logical necessity'" was "'at the heart'" of the *Heck* doctrine. *Id.* at 1193. If it was "possible that a § 1983 suit would not negate the underlying conviction," the suit was not *Heck* barred. *Id.* ("necessarily implies" standard is not satisfied absent a "necessary logical connection between a successful section 1983 suit and the negation of the underlying conviction."); *accord Hadley v. Gutierrez*, 526 F.3d 1324, 1331 (11th Cir. 2008) (no *Heck* bar because there was a "version of [the] facts" that made it "theoretically possible" for the § 1983 suit and underlying conviction to coexist). *Harrigan*, 977

F.3d at 1196, also rejected the "'inconsistent-factual-allegations rule,'" calling it a "gloss on the *Heck* analysis" that applies only where the inconsistent allegations are "necessary" to success on a plaintiff's § 1983 suit.

Lemos purports to cite both Seventh and Eleventh Circuit precedent with approval, although those circuits take fundamentally different approaches to *Heck*. (Pet. App. 8, 10, citing *Harrigan*, 977 F.3d at 1194, *McCann*, 466 F.3d at 621.) If the Ninth Circuit had followed the Seventh Circuit's approach, the outcome would have been different. Under the Seventh Circuit's (and Fifth and Tenth Circuits') interpretation of *Heck*, it would not matter whether Lemos could theoretically be guilty of violating § 148(a)(1) *and* be the victim of excessive force. The allegations in Lemos's civil complaint—that Holton used excessive force during her arrest and at the truck door, coupled with her allegation that video footage of the incident exonerated her—amounted to a collateral attack on her conviction and undermined its validity. (Pet. App. at 83-85.)

That also would have been the correct result. Holding plaintiffs to the allegations pled in their civil complaints avoids the problem of judges reviewing bodycam footage long after the fact, speculating about factual scenarios—that were never pled—in service of avoiding the *Heck* bar. It does not matter if there is some version of events that makes it theoretically possible for Lemos's § 1983 claim and underlying conviction to coexist without conflict, because that is *not* the version of events she alleged in her civil complaint.

Holding plaintiffs to their civil allegations also forces them to make choices that inhere to the integrity of civil and criminal proceedings. The en banc majority found Lemos's eleventh hour disavowal of part of her excessive force claim during oral argument significant in reversing summary judgment. (*Id.* at 10.) It should not have. Preclusion should turn on what *actually* happened as alleged by a plaintiff, not on what theoretically could have happened or is expedient in the moment to avoid *Heck*.

Discord in the circuit courts' emphasis on theoretical possibilities versus alleged facts is symptomatic of a broader dissonance in Courts of Appeals' application of *Heck*. This Court decided *Heck* because it acknowledged its prior precedent, *Preiser*, was an "unreliable, if not an unintelligible, guide." 512 U.S. at 482. Appellate precedent demonstrates that *Heck* has similarly proven to be unreliable, if not unintelligible. The Courts of Appeals see what they want to see in the "necessarily implies" standard and apply *Heck* in very different ways without acknowledging they are doing so.

Some construe the *Heck* bar quite narrowly. *See, e.g.*, *Harrigan*, 977 F.3d at 1193 (necessarily implies standard requires a "necessary logical connection" between a successful § 1983 suit and invalidity of the conviction); *McKithen*, 481 F.3d at 103 (even if plaintiff's motive is to challenge his conviction, a post-conviction claim for access to evidence is cognizable under § 1983 because success in *that* action would not

invalidate the conviction; plaintiff would have to initiate a separate action).

Other courts interpret the *Heck* bar broadly. *See, e.g.*, *O'Brien*, 943 F.3d at 529 (*Heck* barred excessive force claim that was "'so interrelated factually' with his state convictions arising from those events" that a civil judgment in plaintiff's favor would "'necessarily imply'" the invalidity of those convictions); *Hill*, 785 F.3d at 248 ("'Imply' is not synonymous with 'invalidate'"; *Heck* bars a § 1983 claim that would "cast a shadow over" plaintiff's conviction, even if it would not invalidate the conviction or provide grounds for post-conviction relief); *Beets v. Cnty. of Los Angeles*, 669 F.3d 1038, 1040, 1048 (9th Cir. 2012)[7] (§ 1983 claim by the parents of a deceased coparticipant's was *Heck*-barred because it "would tend to undermine" the accomplice's conviction and "allow for conflicting resolutions arising out of a single transaction and undermine consistency and finality").

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[7] *Beets*, which *Lemos*, 40 F.4th at 1009, distinguishes but does not disapprove, is in many ways the poster child to exemplify the problems with *Heck*. *Lemos* does not acknowledge that it is applying *Heck* in a fundamentally different way than *Beets*. *Beets* also demonstrates that the *Heck* standard is so malleable that a California appellate court, considering the exact same facts, came to a different conclusion than the Ninth Circuit. *Cf. Beets v. Cnty. of Los Angeles*, 200 Cal. App. 4th 916, 926 (2012) (parents' lawsuit was not *Heck*-barred because a judgment in favor of parents would not "necessarily lead to habeas corpus relief" for the accomplice, noting that if decedent had survived, the outcome of his criminal trial could have been inconsistent with the verdict of his coparticipant).

"Tends to undermine" or "casts a shadow" does not mean the same thing as "logical necessary connection." "Necessarily establish" is not equivalent to "impugn." The *Heck* standard is not functioning as it should when Courts of Appeals have the discretion to construe it broadly or narrowly depending on what their chosen outcome requires.

When this Court provides the guidance that the Courts of Appeals so urgently need, petitioner submits that the Seventh Circuit's interpretation is most loyal both to the letter and spirit of *Heck*, and to the standard it articulates. The Seventh Circuit appropriately binds plaintiffs to the specific allegations in their complaints and is cognizant that the "necessarily implies" standard stops short, by design, of requiring proof that a civil claim will invalidate a plaintiff's conviction. *McCann*, 466 F.3d at 621; *Hill*, 785 F.3d at 248. As this Court made clear in *McDonough v. Smith*, *Heck* is "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related *possibility*"—not inevitability—"of conflicting civil and criminal judgments." 139 S.Ct. 2149, 2157 (2019) (emphasis added.) That means the avoidance of "collateral attacks" on criminal judgments is a broader concept than *Lemos* acknowledges. *Hill*, 785 F.3d at 248, puts it well: The question is whether the "implication of invalidity would be enough to establish the impropriety of the civil suit," even if a judgment in plaintiff's favor would "not be a collateral attack in the literal sense, because a judgment in favor of the plaintiff would not invalidate his conviction."

C. The Ninth Circuit And California Appellate Courts Conflict In Their Application Of The *Heck* Doctrine.

It is not just the federal appellate courts that apply *Heck* in fundamentally different ways. California appellate courts apply *Heck* far more broadly than the Ninth Circuit does in *Lemos.* In *Lemos*, the majority characterizes the *Heck* standard as barring a § 1983 claim only if success in the action would "'necessarily require' the plaintiff to prove the unlawfulness of his conviction or confinement," and cites *Harrigan*'s narrow interpretation with approval. (Pet. App. 7-8.)

By contrast, California appellate courts more broadly construe *Heck* as barring a § 1983 claim if prevailing on that claim could "call into question," be "inconsistent with," or "tend to undermine" the validity of plaintiff's conviction. *See Yount*, 43 Cal. 4th at 893, 895-96 (*Heck* precludes § 1983 claim "calling into question the lawfulness of a plaintiff's conviction"); *Baranchik*, 10 Cal. App. 5th at 1220 (*Heck* precludes § 1983 excessive force claim that "is inconsistent with a prior criminal conviction arising out of the same facts"); *Fetters*, 243 Cal. App. 4th at 861 (§ 1983 claim was *Heck*-barred where "specific factual allegations" in plaintiff's complaint were "necessarily inconsistent with the validity of his admission in his criminal proceeding" and would "tend to undermine or imply the invalidity" of his conviction); *Truong v. Orange Cnty. Sheriff's Dep't*, 129 Cal. App. 4th 1423, 1429 (2005) (civil rights actions cannot "call into question" undisturbed convictions).

This Court needs to clarify the standard.

II. Certiorari Is Warranted Because The Ninth Circuit's Erroneous Ruling Will Result In The Channeling Of Excessive Force Claims Into Federal Court, Undermining The Comity Considerations That Inform The *Heck* Preclusion Doctrine.

The Ninth Circuit's errors in *Lemos* have another deleterious effect that warrants this Court's intervention. By using criminal jury instructions to artificially delineate four distinct acts underlying Lemos's single § 148(a)(1) offense, the court carved a path where her conviction and § 1983 claim could coexist without conflict. But that path does not square with California's continuous course of conduct rule. As the dissent in *Lemos* recognized, because "[t]he majority opinion fails to appreciate California law on this issue" (Pet. App. 20), federal courts are now bound by *Lemos* to allow a broad swathe of California excessive force claims to go forward that would never survive in state court. *Lemos's* sidestepping of the continuous course of conduct rule, coupled with California's broader interpretation of the *Heck* bar, will disproportionately channel California excessive force claims into federal courts, and in so doing both undermine the comity considerations that animate the *Heck* doctrine and expand the opportunities to collaterally attack criminal convictions. This alone is a powerful reason to grant review.

In California, "to ensure that a defendant's punishment is commensurate with his culpability and that

he is not punished more than once for what is essentially one criminal act," (*People v. Hicks*, 17 Cal. App. 5th 496, 514 (2017)), California Penal Code § 654 bars multiple punishments for acts that comprise a continuous or indivisible transaction (*People v. McFarland*, 58 Cal. 2d 748, 760 (1962)). Given the many different circumstances wherein a criminal course of conduct may be deemed a single act or omission, there is "no universal construction" directing the "proper application" of the rule. *Hicks*, 17 Cal. App. 5th at 514. Courts look at whether acts were sufficiently separated in time such that the defendant had the opportunity to "reflect and renew" his or her criminal intent before committing the next offense. *People v. Deegan*, 247 Cal. App. 4th 532, 542 (2016); *see also People v. Mendoza*, 74 Cal. App. 5th 843, 854 (2022). They also consider whether the crimes "were completed by a single physical act," and if not, whether defendant's "course of conduct reflects a single intent and objective or multiple intents and objectives." *In re L.J.*, 72 Cal. App. 5th 37, 43 (2021) (internal quotation marks and citations omitted).[8]

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[8] *Yount* does not discuss the intersection of § 148(a)(1) and the continuous course of conduct rule. But the California Supreme Court's recognition that "two isolated factual contexts" may exist within the context of a "chain of events" involving the violation of § 148(a)(1)—one giving rise to criminal liability on the part of the defendant, and the second giving rise to civil liability on the part of the arresting officer—does not conflict with this fundamental tenet of California law even if it was inapplicable under the particular facts of that case. *Yount*, 43 Cal. 4th at 899.

If Lemos had filed her § 1983 claim in state court, her case would be barred by *Heck* under controlling California law. *See, e.g.*, *Baranchik*, 10 Cal.App.5th at 1222, 1224 (*Heck* bar applied because—where there was "no separation" between plaintiff's obstructive actions and the officer's deployment of the taser—the jury necessarily found the officer's conduct "to be lawful and not an unreasonable use of force"); *Fetters*, 243 Cal. App. 4th at 840, 841 (*Heck* barred plaintiff's claim where "there was no meaningful temporal break" between plaintiff's provocative act and the officer's use of force, noting the "*Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome," only whether success would "*imply* the invalidity of his conviction or sentence") (original italics); *Truong*, 129 Cal. App. 4th at 1429 (*Heck* barred excessive force claim because a "chain of events began" when plaintiff disobeyed a lawful order to disrobe, and was not "somehow over" once "plaintiff changed her mind and started to remove her sweater," noting this would put officers in "untenable situations, where they are required to guess the mindset of the arrestee").

By contrast, the federal district courts in California are bound by the en banc decision here, which means that forum selection will be outcome determinative for a broad category of excessive force claims arising out of resisting or obstructing an officer. Concurrent jurisdiction of such claims will become a farce, and the federal courts will by default become the sole

forum for such claims, since no plaintiff's lawyer would risk dismissal in state court when they have a free pass on *Heck* in federal court.

The disproportionate channeling of § 1983 claims into federal court is not a theoretical problem. "Few if any crimes . . . are the result of a single physical act," and that is particularly true of § 148(a)(1) violations, which are among the most common criminal offenses. *Mendoza*, 74 Cal. App. 5th at 869 (alteration in original). By the time an officer has responded to obstruction or resistance with the application of force, the individual has, almost without exception, disobeyed the officer's verbal commands as well. Allowing criminal defendants to take advantage of the continuous course of conduct rule to minimize their criminal culpability, but then *benefit* from their multiple acts of resistance to avoid *Heck*, so long as they file in federal court, is not just "anomalous" as *Yount*, 43 Cal. 4th at 897, put it. It broadens § 1983 liability in a way that is directly contrary to *Heck*'s policy objectives.

Comity is at the heart of *Heck*. A standard that is applied in federal appellate courts more strictly than state courts with concurrent jurisdiction, and that fails to acknowledge that state's doctrines of criminal law, is at odds with that core value. *Lemos*'s interpretation of *Heck* misapprehends this Court's precedents, is inconsistent with the common law precepts upon which the *Heck* doctrine is based, and conflicts with the holdings of other Courts of Appeals and California

appellate courts. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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