No. _____

In the
Supreme Court of the United States

LOUISVILLE-JEFFERSON COUNTY METROPOLITAN GOVERNMENT, TONY FINCH, GARY HUFFMAN, TERRY JONES, JIM LAWSON, SHAWN SEABOLT, TROY PITCOCK, AND JAMES HELLINGER,

Petitioners,

v.

JOHNETTA CARR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1994, this Court held that an individual convicted of a crime may not bring a 42 U.S.C. § 1983 claim unless "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

The question presented is:

May a convicted offender, subsequently pardoned, bring a § 1983 action where the pardon fails to expunge the underlying criminal conviction or call its validity into question?

PARTIES TO THE PROCEEDING

Petitioners Louisville-Jefferson County Metropolitan Government, Tony Finch, Gary Huffman, Terry Jones, Jim Lawson, Shawn Seabolt, Troy Pitcock, and James Hellinger were defendants in the District Court and defendants-appellees in the Court of Appeals for the Sixth Circuit.

Respondent Johnetta Carr was the plaintiff in the District Court and plaintiff-appellant in the Court of Appeals for the Sixth Circuit.

STATEMENT OF RELATED PROCEEDINGS

1. *Johnetta Carr v. Louisville-Jefferson County, Kentucky, et al.*, No. 21-5736 (6th Cir.) (opinion issued and judgment entered June 16, 2022, Petition for Rehearing denied July 21, 2022).

2. *Johnetta Carr v. Louisville-Jefferson County, Kentucky, et al.*, 3:20-CV-818-CRS (W.D. Ky.) (opinion issued and final judgment entered July 22, 2021).

Apart from the proceedings directly on review in this case, there are no other directly related proceedings in any court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's denial of the Petition for Rehearing is unpublished and available at 2022 WL 2915299. The Sixth Circuit's opinion (Pet. App. 1-12) is published at 37 F.4th 389. The district court's opinion (Pet. App. 13-25) is unpublished and available at 2021 WL 3115389.

JURISDICTION

The Sixth Circuit entered its opinion on June 16, 2022. A Petition for Rehearing was denied on July 21, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides:

> 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.

42 U.S.C.A. § 1983 (West). *Heck v. Humphrey*, 512 U.S. 477 (1994) established that when an individual has been convicted of a crime, that individual may not bring § 1983 claims stemming from the criminal charges unless the conviction has been set aside or otherwise invalidated.

STATEMENT OF THE CASE

A. Factual Background

Planes Adolphe ("Adolphe") was found murdered in front of his apartment building in 2005. (Pet. App. 3). Respondent, Johnetta Carr ("Carr"), was dating Adolphe at the time of his murder. *Id.* She was arrested for Adolphe's murder in January 2006. (Pet. App. 14). In 2008, Carr entered an *Alford* plea to manslaughter in the second degree, conspiracy to commit robbery, conspiracy to commit burglary, and tampering with physical evidence. Carr received a twenty-year sentence. She was granted parole in December 2009. Carr was released from parole in 2018. (Pet. App. 3).

Carr never appealed her conviction, sought to have her conviction overturned or set aside by way of state post-conviction remedies, or sought habeas relief during her period of incarceration, all of which are remedies available in Kentucky to individuals that

claim to have been wrongfully convicted. On December 6, 2019, Carr applied for a pardon to then Governor, Matthew Bevin. (Pet. App. 3). Three days later, on December 9, 2019, Governor Bevin granted Carr's pardon request (Pet. App. 3), one of the over 650 pardons and commutations of sentences he issued in the last days of his term. Carr claimed in her pardon application that she had not committed the offense for which she pleaded guilty and that new evidence had been uncovered. The new evidence referenced in her pardon application was simply the purported recantation of witnesses with no supporting documentation from those witnesses. (Pet. App. 32-51). Carr expressly acknowledged in her pardon application that the alleged new evidence may not be sufficient to overturn her conviction, a remedy which she never sought either before or after obtaining her pardon. (Pet. App. 43). Governor Bevin's pardon made no reference to Carr's innocence, nor did it discredit the underlying investigation or call into question her conviction. (Pet. App. 30-31).

B. Proceedings Below

Following her pardon, Carr filed a civil lawsuit alleging Constitutional violations pursuant to § 1983 in U.S. District Court for the Western District of Kentucky. The district court properly dismissed all claims, concluding that "the mere issuance of a pardon, without language that questions or discredits a judicial finding of guilt," does not invalidate a criminal conviction under *Heck v. Humphrey*. (Pet. App. 24). Carr appealed the dismissal, and the Sixth Circuit determined that any "full pardon, **regardless of its**

implications for the question of innocence, meets the requirements of *Heck*." (Pet. App. 12). Petitioners then sought rehearing en banc. The Sixth Circuit denied that request. (Pet. App. 28-29).

REASONS FOR GRANTING THE PETITION

This petition satisfies the criteria for certiorari. *See* Sup. Ct. R. 10(a). In ruling that all full pardons satisfy *Heck*, the Sixth Circuit incorrectly resolved an important federal question and fundamentally misconstrued what this Court said in *Heck*. The Sixth Circuit ignored Kentucky's clearly established law that a Governor's pardon relieves a convict of the legal consequences of conviction and restores civil rights but does **not** expunge or erase the conviction. In doing so, the Sixth Circuit circumvented *Heck* to effectively expand 42 U.S.C. § 1983's application. Its ruling exposes law enforcement officers and municipalities to money damages based on executive action that, in this and many other cases, has absolutely no bearing on the underlying conviction. This finding is in direct contravention of *Heck*.

Certiorari is also warranted because lower courts have been unclear as to how to treat pardons. This lack of clarity has resulted in increasingly broad interpretations of what was meant by the term "expungement by executive order" when the *Heck* opinion provided the exclusive means by which a conviction could be invalidated prior to bringing § 1983 claims. Only this Court can clear up the uncertainty in how to treat executive pardons in this context and make clear that pardons and expungement by executive order are fundamentally distinct.

I. The Sixth Circuit's ruling is too broad and conflicts with *Heck*.

a. *Heck v. Humphrey* requires invalidation of a conviction prior to assertion of § 1983 claims.

42 U.S.C. § 1983 is a general statute that "provides a remedy for deprivations of rights secured by the Constitution and laws of the United States." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 924 (1982). *Heck* made it very clear that an individual who has been convicted of a crime only has a cognizable § 1983 claim when the underlying criminal conviction has been invalidated.

Much like this case, the plaintiff in *Heck* was convicted of voluntary manslaughter and filed a civil lawsuit alleging that the police officers,

> [A]cting under color of state law, had engaged in an 'unlawful, unreasonable, and arbitrary investigation' leading to [Heck's] arrest; 'knowingly destroyed' evidence 'which was exculpatory in nature and could have proved [his] innocence'; and caused an illegal and unlawful voice identification procedure' to be used at [his] trial.

Id. at 479. This Court determined that the district court's dismissal of Heck's lawsuit was proper and set out four limited ways in which a convicted individual may establish a right to pursue a § 1983 claim: "a § 1983 plaintiff **must** prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal

authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id*. at 486-87 (1994) (emphasis added). This Court further concluded that "[a] claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." *Id*. at 487 (emphasis in original). This Court was very clear that no other post-conviction actions could invalidate a conviction.

§ 1983 actions "necessarily require the plaintiff to prove the unlawfulness of his conviction. . ." *Heck*, 512 U.S. at 486. The rationale behind the *Heck* requirement that a conviction be invalidated in one of the ways set forth above is the same as the requirement for favorable termination in a malicious prosecution action. The purpose is twofold. It both,

> avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."

Id. at 484.

Despite *Heck's* clear requirement that convictions be invalidated in one of only four ways, the Sixth Circuit expanded the *Heck* methods of invalidation to allow all full pardons to invalidate a conviction, without any consideration given to the reason for issuance or the effect of the pardon under state law. The Sixth Circuit

is the first and only federal circuit to find that any full pardon invalidates a conviction such that § 1983 claims may be brought absent analysis of the pardon itself.

Heck did not include pardons as a method of invalidating a conviction. The Sixth Circuit's decision that any full pardon meets the requirements of *Heck* conflicts both with *Heck*'s explicit holding requiring that a conviction be invalidated in one of four exclusive ways prior to bringing § 1983 claims and with its stated purpose of preventing conflicting resolutions.

b. The Sixth Circuit Ignored Kentucky Law.

The Sixth Circuit wholly ignored Kentucky law with respect to the treatment of pardons. The parameters of a state pardon depend entirely on the issuing state. Each state must be given the right to determine through its own legislative process what impact post-conviction actions such as pardons have on convictions. The scope of a governor's pardon power is necessarily determined by state law. "A federal court must accept a state court's interpretation of that state's statutes and rules of practice." *Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986) (citing *Hutchison v. Marshall*, 744 F.2d 44, 46 (6th Cir. 1984), *cert. denied,* 469 U.S. 1221 (1985)); *see also Kolender v. Lawson*, 461 U.S. 352, 355 (1983) ("[A] federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered"). This would certainly apply to a state court's interpretation of the state's own constitution. Kentucky courts have been clear on this point.

Kentucky law gives the power to grant pardons to the Governor of the Commonwealth. Ky. Const. § 77. Kentucky recognizes a pardon as nothing more than "the act or an instance of officially nullifying punishment or other legal consequences of a crime." *Anderson v. Commonwealth*, 107 S.W.3d 193, 196 (Ky. 2003) (citing *Black's Law Dictionary* 7th ed. 1999)). Kentucky law expressly rejects any notion that a pardon voids a conviction.

In *Harscher*, the Kentucky Court of Appeals considered the effect of nearly identical language in a pardon when deciding whether a full pardon may expunge the record of conviction. In the *Harscher* pardon, former Governor Fletcher said,

> NOW, THEREFORE, I Ernie Fletcher, Governor of the Commonwealth of Kentucky, in consideration of the foregoing, and by the virtue of the authority vested in me by Sections 77, 145, and 150 of the Constitution of the Commonwealth of Kentucky, do hereby unconditionally pardon Frank Harscher III and return to him all rights and privileges of a citizen of this Commonwealth.

Harscher v. Commonwealth, 327 S.W.3d 519, 521 (Ky. App. 2010). The Kentucky Court of Appeals found that, "while a full pardon has the effect of removing all legal punishment for the offense and restoring one's civil rights, it does not wipe out either guilt or the fact of the conviction." *Id*. at 522. Significantly, the language of the pardon issued to Carr mirrors this language, stating:

> NOW, THEREFORE, I, Matthew G. Bevin, Governor of the Commonwealth of Kentucky, in consideration of the foregoing, and by virtue of the authority vested in me by Sections 77, 145, and 150 of the Constitution of the Commonwealth of Kentucky, do hereby unconditionally pardon Johnetta Carr and return to her all rights and privileges of a citizen of this Commonwealth.

(Pet. App. 31).

To this point, a Kentucky "pardon does not preclude the pardoned offense from enhancing punishment for an habitual criminal." *Leonard v. Corrections Cabinet*, 828 S.W. 2d 668, 673 (Ky. Ct. App. 1992) (citing *Stewart v. Commonwealth*, 479 S.W.2d 23 (1972). *See also Mount v. Commonwealth*, 63 Ky. 93, 95 (Ky. Ct. App. 1865) (Upholding a sentence enhancement based on a previously committed felony for which Mount had received a pardon, finding that "the pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more.") This can only be done because a pardon does not preclude consideration of the prior conviction.

Kentucky does not provide for expungement by executive order. Actual expungement may only be done through the courts, as authorized by the Kentucky statutes. *See* KRS 431.076 and KRS 431.078. The Sixth Circuit relied on *Snyder v. City of Alexandria*'s conclusion that, "[t]here is no reason in principle or policy for the Supreme Court, for these purposes, to distinguish between prisoners in states where executive expungement orders are available, and

prisoners in states . . . that do not recognize such a remedy." *Snyder v. City of Alexandria*, 870 F. Supp. 672, 686 (E. Dist. Va. 1994). *Snyder* went on to conclude that executive pardons and judicial expungement orders "seem to be within the reach of the Court's language." *Id*. The Sixth Circuit ignored *Snyder*'s additional conclusion that certainly not **all** pardons fit within *Heck*'s framework. *Id*. at 680-681.

The Sixth Circuit found that the only application of state law is in determining if the pardon is a full pardon. (Pet. App. 11). The Sixth Circuit reasoned that, "none of the examples in *Heck* require innocence or complete elimination of the fact of conviction." (Pet. App. 12). This marked the second time that the Sixth Circuit referred to the list of invalidating events provided by this Court as "examples." (Pet. App. 11-12). The list of invalidating events provided in *Heck* are not mere examples, but the exclusive means of invalidation with respect to post-conviction actions. This fact was made clear when this Court stated that any claim for damages related to a conviction that has not been invalidated in one of the listed methods is not cognizable. *Heck*, 512 U.S. at 487. Beyond expungement by executive order, the other *Heck* methods of invalidation may not require innocence or the complete elimination of the fact of conviction, but they all do require recognition of an underlying defect in the conviction, rendering it invalid. A pardon or executive action that carries with it no such effect cannot be within *Heck*'s reach.

Not only must state law control whether a pardon is full and unconditional, it also determines if the

pardon has an erasure effect to qualify as an expungement by executive order. If the state does not give this power to the executive, the limited effect of a pardon must be recognized by the federal courts. While federal law governs the interpretation of § 1983, each state has the right to establish its own laws and procedures relating to post conviction remedies, including gubernatorial pardons. Simply put, federal law as established by *Heck* allows for executive actions to invalidate convictions only where the action erases or expunges the conviction. Just as each state has its own laws, rules, and procedures for post-conviction appeals and the setting aside of convictions, each state must be permitted to establish its own laws, rules, and procedures for the impact of executive actions.

In 1994 when *Heck* was decided, expunge was defined as "[t]o destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information – including criminal records – in files, computers, or other depositories." *Black's Law Dictionary* 582 (6th ed., West 1990). An expungement of record was defined as the "[p]rocess by which record of criminal conviction is destroyed or sealed after expiration of time." *Id*. Kentucky law says that a Governor's pardon does not destroy, blot out, obliterate, or erase a conviction. Consequently, a Kentucky pardon is not the same, nor does it have the same effect, as an expungement by executive order.

Moreover, in Kentucky, the Governor is required to file with each pardon application, "a statement of the reasons for his decision thereon." Ky. Const. § 77. Here, Governor Bevin's statement was short and

devoid of any reasons which call the validity of Ms. Carr's conviction into question:

> Johnetta Carr is a strong and highly motivated woman with a very bright future. I am confident that she will contribute in powerful ways to society as a whole and to those in her community specifically. God clearly has His hand on her.

(Pet. App. 30). Notably absent from this statement is any language relating to innocence or calling into question the validity of her underlying conviction, though the opportunity for such statement was present. In contrast, in the *Wilson* case, Governor Carnahan clearly explained his reason for invalidating the conviction at issue:

> To meet my responsibilities under the Constitution, this office has conducted an exhaustive investigation into the facts of this case. We have spent literally hundreds of hours re-examining the evidence in this case. We have reviewed all the transcripts and re-interviewed the key witnesses including the prosecutor and law enforcement officials involved in this case.
>
> From this investigation, it is clear that Johnny Lee Wilson's confession is false and inaccurate. Furthermore, there is no evidence to corroborate or substantiate it. Quite to the contrary, there is significant evidence to indicate that it is false.

Wilson v. Lawrence County, Mo, 154 F.3d 757, 759 (8th Cir. 1998). Not only does Kentucky law not give the

Governor the power to expunge convictions, the actual language of the pardon at issue illustrates no reflection on the conviction, the investigation, or Carr's purported innocence.

Federal law requires that the federal courts give the conviction the same effect that it would be given by the Kentucky state courts. *See* 28 U.S.C. § 1738; *see also Allen v. McCurry*, 449 U.S. 90, 96 (1980) (stating that, "Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so.") Where a state court continues to treat a conviction as valid (even after a pardon), subsequent courts are also required to give the conviction the same effect. *Id.* Because Kentucky does not allow for a pardon to invalidate or expunge a conviction, the pardon must be given the same limited effect of nullifying only the legal consequences of the conviction and restoring civil rights in federal proceedings.

Importantly, Kentucky law provides remedies to individuals like Carr who believe they have been wrongly convicted that do satisfy *Heck*. For example, once the alleged new evidence came to light, Carr could have sought to have her conviction set aside. *See e.g. Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (Kentucky Rule of Civil Procedure 60.02 allows a final criminal judgment to be set aside in cases where there has been newly discovered evidence.)

Carr did not seek judicial relief through CR 60.02, conceding in her pardon application that she was not sure that she had enough evidence to have the

conviction set aside. (Pet. App. 43). As Carr's conviction has not been set aside or overturned, it remains a valid conviction in Kentucky. Under these circumstances, if Ms. Carr were to prevail in her civil action it would conflict with her underlying conviction, undercutting the very purpose of *Heck*.

The Sixth Circuit erroneously determined that the *Heck* concerns of parallel litigation and preventing collateral attacks on a conviction through civil suit are met by allowing full pardons to invalidate convictions. (Pet. App. 9-10). The *Heck* concern of preventing collateral attacks on convictions is based on the goal of preventing "conflicting resolutions arising out of the same or identical transaction." *Heck*, 512 U.S. at 485. This concern may only be met if the state of conviction no longer treats its conviction as valid. It confounds common sense to say that there are not conflicting resolutions where, as here, recovery of civil damages is allowed for a conviction that is treated as valid in the state of issuance. Certainly, such a result was never the intent of *Heck*.

c. Innocence is not required, but invalidation is.

The Sixth Circuit correctly found that an affirmative finding of innocence is not required by *Heck* or as an element of malicious prosecution for pre-conviction claims. (Pet. App. 11). The Sixth Circuit erred, however, in ignoring the invalidation requirement and finding that any full pardon meets the requirements of *Heck*.

An executive action that serves only to remove legal consequences of a crime (like Carr's pardon) does not invalidate a conviction. The Sixth Circuit focused solely on innocence and lost sight of the real issue – invalidation. In concluding that any full pardon, regardless of its implications for the question of innocence, meets the requirements of *Heck*, the Sixth Circuit failed to analyze how a pardon, which is not given expungement effect by state law and which includes no language indicating that the pardonee's conviction was defective, wields the power to invalidate that conviction. In failing to conduct this analysis, the Sixth Circuit ignored the fact that pardons are often granted which have no bearing whatsoever on the validity or invalidity of an underlying conviction.

Here, there is no indication either in the pardon itself or elsewhere in the record that Carr was wrongfully convicted. Her pardon was one of over 650 pardons and commutations of sentences granted within a span of approximately two months. At least one of those pardons granted by Governor Bevin during this time prompted Kentucky Attorney General Daniel Cameron to request an FBI investigation into the Governor's actions. *See USA Today, Kentucky attorney general asks FBI to investigate ex-Gov. Matt Bevin's pardons, https://www.usatoday.com/story/news/politics/2020/01/02/bevins-pardons-kentucky-attorney-general-asks-fbi-investigate/2799819001/*. Specifically, Carr's pardon was granted within three days of application. This series of pardons represents the counterpart to the *Wilson* pardon in which the Eighth Circuit determined that it was a "prime example of the usefulness of the pardon process to vindicate the

innocent, and it demonstrates that the Court's faith in the viability of executive clemency was not misplaced." *Wilson* 154 F.3d at 761. The *Wilson* pardon made clear the executive intent to invalidate the conviction. The facts and circumstances of the pardon in this case are a stark contrast to the facts and circumstances in *Wilson* and demonstrate why not all pardons trigger § 1983 liability.

II. The issue of whether all pardons invalidate a conviction under *Heck* should be settled by this Court.

Absent clarity from this Court, lower courts have been left to grapple with how to treat pardons in the context of § 1983 litigation. Pardons were not included in the list of invalidating events set forth by this Court, though they certainly could have been if it were intended. The analysis has been conducted under the "expungement by executive order" method of invalidation. This Court should address this question and make clear that pardons and expungements are categorically different.

While some pardons might expunge a conviction, not **all** full pardons invalidate convictions. The reason is simple: not all pardons carry the same effect. Simple pardons which are given no expungement or erasure effect cannot give rise to § 1983 claims as such pardons do nothing to render the conviction invalid. Holding otherwise is a circumvention of the narrow methods of invalidation provided by this Court and is counter to the intent of this Court.

In allowing § 1983 claims to be brought after there has been a conviction only in certain and limited circumstances, this Court used the phrase "expungement by executive order" but not pardon. As previously discussed, the definition of expunge requires obliteration or erasure. Conversely, pardon was defined in 1994 as,

> An executive action that mitigates or sets aside punishment for a crime. An *act of grace* from governing power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense.

Black's Law Dictionary at 1113. A District Court in the Western District of Michigan recognized that, "as the very essence of a pardon is forgiveness or remission of penalty, a pardon implies it does not obliterate the fact of the commission of the crime and the conviction thereof; it does not wash out the moral stain; as has been tersely said, it involves forgiveness and not forgetfulness." *Murphy v. Ford*, 390 F.Supp. 1372, 1375 (W.D. Mich., 1975), quoting *Page v. Watson*, 140 Fla. 536 (Fl. 1938). At the time that this Court decided *Heck*, it was clear that a pardon does not blot out or erase the conviction. This Court could have included forgiveness or pardon in its narrow list of methods of invalidation but did not. It is the erasure of the conviction that is required to satisfy *Heck*. The lack of inclusion of pardons is proper as pardons rarely touch on the validity of the underlying conviction. This Court should make clear that not all pardons qualify as expungements by executive order.

a. There is not a consensus between the Circuits as to how to treat pardons.

In the few cases that have addressed whether a specific pardon falls within *Heck's* reach, courts have considered the question under the premise that a pardon may, but not automatically will, qualify as an expungement by executive order. The Circuits are split in how far reaching they have taken this analysis. The Seventh Circuit has generally used the terms "pardon" and "expungement by executive order" interchangeably with no analysis. *Manuel v. City of Joliet, III*, 903 F.3d 667, 670 (7th Cir. 2018); *Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014); *Gilbert v. Cook*, 512 F.3d 899, 900 (7th Cir. 2008). However, it has never actually examined the issue. That question has only been presented to the Seventh Circuit once, and it was not properly before the court at the time that it was presented. The Seventh Circuit determined that the pardon at issue was a favorable termination and gave rise to § 1983 claims, but it declined to analyze the issue of whether all pardons meet the *Heck* requirements. The Seventh Circuit stated, "we leave for another day the consideration of whether some state executive action labeled 'pardon' does not meet *Heck*'s standard." *Savory v. Cannon*, 947 F.3d 409, 430 (7th Cir. 2020).

The Eighth Circuit has allowed a pardon to invalidate a conviction under *Heck* after careful analysis of the specific pardon. In *Wilson*, the pardon specifically stated, "it is clear [Wilson] did not commit the crime . . ." and that the "pardon obliterates said conviction . . ." *Wilson*, 154 F.3d at 761. The Court

used this language to conclude that "Wilson's pardon is therefore an 'executive order' that 'expunged,' 'obliterated,' and 'invalidated' his conviction. *Id*. In *Wilson,* the Missouri Governor's statement explained that his office conducted "an intense investigation" prior to the pardon being granted.

This issue has also been addressed by a District Court in Virginia. In *Snyder*, the District Court concluded that the specific pardon at issue invalidated the conviction, but only after a careful examination of Virginia law and the language used in the pardon. *Synder*, 870 F. Supp. at 679. The *Snyder* pardon was granted after DNA evidence conclusively established that the pardonee did not commit the crime of conviction. The pardon specifically said that the DNA results, "place a cloud upon the verdict and raise a doubt concerning the ultimate issue of whether [Snyder] is guilty of the crime for which he was convicted. *Id*. at 677. The *Snyder* Court found that "a pardon that, by its terms and circumstances, substantially impugns or discredits a conviction, is a pardon that satisfies the reasons for, and substance of, the favorable termination requirement." *Id*. at 680. Based on the language of the pardon, in combination with the exonerating DNA evidence, the *Snyder* Court concluded that the pardon "substantially impugns and discredits his conviction, and therefore qualifies as a favorable termination of the prosecution against him." *Id*. at 681.

Even in finding that the pardon at issue met the invalidation requirement and purpose of *Heck*, the *Snyder* court recognized that many pardons would not.

> Some focus on a variety of matters unrelated to a person's innocence. For example, the governor may pardon a person because that person is deemed to have paid his societal debt and to be fully rehabilitated. Yet other pardons may be issued because of unusually sympathetic circumstances, or indeed even to relieve prison overcrowding. In all of these instances, the guilt or innocence of the pardon's recipient is irrelevant to the reasons for the issuance of the pardon. And it is for this reason that recipients of pardons of this sort may not rely on such pardons to satisfy the favorable termination requirement. The opposite is true for pardons that impugn, displace, or discredit a judicial finding of guilt. These pardons, like not guilty verdicts, merits dismissals, and some decisions not to prosecute, fully serve the purposes for which the favorable termination requirement exists.

Id. at 680-681.

Following the Sixth Circuit's ruling, the Sixth and Seventh Circuits now effectively allow any pardon to give rise to § 1983 claims despite *Heck*'s clear requirement that convictions be invalidated in one of four ways. The Eighth Circuit allows a pardon to qualify as an expungement by executive order, but it only reached this conclusion after analyzing the language of the pardon. *Wilson* recognized that federal habeas relief does not touch on the underlying conviction. *Wilson*, 154 F.3d at 761. This may be true, but with respect to the method of expungement by

executive order, this Court chose the specific word "expungement." This does not leave room for interpretation as to this method of invalidation. The executive relief must carry with it an expungement effect to give rise to § 1983 claims.

III. The Question Presented is Exceptionally Important and Warrants Review in This Case.

Whether law enforcement officers and municipalities may be sued under § 1983 when a pardon is issued that in no way touches on the conviction, investigation, or innocence of the convicted individual is an important issue. Such litigation causes significant burden and costs on individual officers and municipalities. Within the Western District of Kentucky alone, two § 1983 lawsuits resulted from the flurry of controversial pardons issued by Governor Bevin. Under the Sixth Circuit's ruling, law enforcement officers and Louisville-Jefferson County Metropolitan Government are subject to liability for money damages based on hastily issued pardons which do not invalidate the convictions in compliance with *Heck*.

Here, the pardon fails to expunge for two reasons. The first is that Kentucky does not allow a pardon to have the effect of expungement or erasure. *Harscher*, 327 S.W.3d at 522. Kentucky takes the position set out in *Murphy* that a pardon forgives but does not forget. The second is that the language of this pardon is silent as to any desire of the Governor to erase the conviction, any criticism of the conviction or investigation, or any determination that Carr was innocent such that the

conviction should no longer be considered valid. Kentucky does not provide the executive with the authority to expunge a conviction, and the Governor provided no language indicative of any such intent as did the pardons that have been found to expunge convictions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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