NO. 23-387

In the Supreme Court of the United States

TAYLOR CARLISLE, INDIVIDUALLY AND AS REPRESENTATIVE MEMBER OF A CLASS, ET AL.,

Petitioners,

v.

JOSEPH P. LOPINTO, III, SHERIFF AND ADMINISTRATOR OF THE JEFFERSON PARISH CORRECTIONAL CENTER, ET AL.,

Respondents.

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

REPLY BRIEF OF PETITIONERS

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2. **USDC_Doc (number), p. ____**
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3. **Pet.App. ___**
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5. **Pet.__**
   Petition for Writ of Certiorari filed in this Court on September 20, 2023 in this case

6. **McNair BIO.__**
   Brief in Opposition filed by Respondents Joe McNair, McNair & McNair, LLC, Philadelphia Indemnity Insurance Company (hereinafter globally "McNair")

7. **Sheriff BIO.__**
   Brief in Opposition filed Respondents Newell Normand and Joseph P. Lopinto, III, Sheriff and Administrator of the Jefferson Parish Correctional Center's (hereinafter "the Sheriff")

REPLY BRIEF OF PETITIONERS

1. Plaintiffs Briefed, and Did Not Abandon, their Challenge to *Heck's* Favorable Termination Rule as Applied to Persons Not in Custody (refuting Sheriff BIO. i, 17-18)

A. Supreme Court

The issue is briefed at Pet.10, 23-24.

B. District Court

The lower court directly acknowledged Plaintiffs' *Spencer*[1] argument, regarding the split in the circuits owing to the "in custody" requirement:

> Plaintiffs also argue that a majority of the Supreme Court now only believe *Heck* applies to prisoners still serving the sentence of which they complain. The Fifth Circuit, however, explicitly rejected that interpretation and recognizes *Heck* as an unequivocal bar.

Pet.App.142a (Order October 31, 2017).

She denied injunctive/declaratory relief reasoning Plaintiffs were discharged from the treatment program and "not likely to suffer future harm" (Pet.App.135a), an argument that Plaintiffs had refuted in opposition memoranda.[2]

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[1] 523 U.S. 1 (1998).

[2] *See*, USDC_Doc.115, p.3, 4, 6, and n.11, Plaintiffs' Opposition; *See also*, plaintiffs' arguments at USDC_Doc.167, p.17-19.

C. Fifth Circuit

The issue in Question #2 is whether *Heck* and *Preiser* bar the over-detention claims, which is argued in 5th_Doc.43 on Appeal (pp.67,72) and as to which the panel affirmed the district court, and *in addition,* the question of the impact of *Spencer*. Plaintiffs preserved the *Spencer* argument for review by this Court by filing the "Petition for Leave to Appeal under Fed. R. Civ. P. 23(f)" filed November 15, 2021, in No. 21-90052 (Fifth Cir. decided Sept. 1, 2021) (*see* decision at Reply.App.1a) and incorporated it by direct reference in the Brief on final appeal in No.22-30031, p.21.

In No. 21-90052, Plaintiffs began this argument, USDC_Doc.00516092488, as follows, at Pacer, p.20:

> Habeas relief is "not available." Justice Souter and four other justices in *Heck* and *Spencer v. Kumna*, [*sic*] 523 U.S. 1 (1998) appear to agree that *Heck* does not bar the claim where habeas relief or state court relief is "not available."

Thereafter, Plaintiffs-Appellants argued WHY habeas relief is "not available," and specifically challenged the courts' reliance on the Fifth Circuit opinion in *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000)—that *Heck* is an "unequivocal bar." *Id*. pp. 20-21.

In the brief on interlocutory appeal, No. 18-30002, dismissed on McNair's motion, Pet.App.182a, Petitioners argued in "Section C. The Court improperly applied *Preiser* to Deprive Plaintiffs of Standing" at pp. 53-4:

> Procedural barriers, *i.e.*, the mootness doctrine, prevent realistic relief.

> Through no fault of Carlisle's he was prevented from obtaining a decision on the merits reversing the six months sanction while incarcerated on that sanction—on the basis that his contempt sentence was expired at the time of the federal decision. This would certainly also be the case if Plaintiffs challenged the shorter sanctions of 30 and 90 days.
>
> As genuine habeas relief is effectively unavailable, *Preiser* and *Heck* certainly would not apply. *Spencer v. Kemna*, 523 U.S. 1 (1998) (no basis for extending the "favorable termination" requirement to case in which the direct conflict between Section 1983 and habeas corpus is impossible because habeas is unavailable. *Ibid*.

No.18-30002, Plaintiffs-Appellants Brief, USDC_Doc. 00514652711 in Case No.18-30002, p.69, filed Sept. 21, 2018.[3]

In No.22-30031, 5th_43, p.22-23; Appellants' Brief, section entitled "Issues for Review/ First Issue" Plaintiffs-Appellants further identified as Issue #1: [T]he court's application of the same "favorable outcome doctrine" under *Heck* and *Preiser* to dismiss the jail credit claim and claim based on "awaiting a bed in a CTRP" and as Issue #3: "Whether the Court erroneously denied, based on *Preiser v. Rodriguez*, the Plaintiffs claims for injunctive relief?"

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[3] As against the co-defendants, drug court administrators, in No. 18-30002 the panel affirmed <u>*all*</u> rulings of the lower court, *per curiam*, without discussion. Pet.App.180a. In No. 19-30027 the Fifth Circuit affirmed based on No. 18-30002. Pet.App.185a.

The issue is additionally addressed in the sections entitled: "The Sheriff's Unconstitutional Policy and Practice" (pp.33-34) and in "Trial Court Actions" (p.45).

In the Summary and Argument sections Plaintiffs-Appellants urged the Court to adopt Judge Feldman's legal analysis in *Johnny Traweek v. Gusman*, 414 F. Supp. (E.D. La. 2019), and precedents cited therein. 5th_Doc.43, p.68-72.

Plaintiff-Appellants also noted,

> In fact, the Commitment order for both Carlisle and Heron, both expressly state plaintiffs are NOT waiving La. Code Crim. Proc. art. 880." Doc.580-4.

5th_Doc.43, p.40.

In other words, Plaintiffs have "standing" to claim mandatory jail credits against their post revocation sentences, despite no longer being in custody on the contempt sanctions.

2. The Sheriff's Contention, Now and During the Appeal (Which the Panel Below Adopted Without Examination) That Plaintiffs Abandoned Their Challenge to "Invalid Orders," Is Belied by the District Court Opinions, and the Record Below.

The panel adopted without examination the Sheriff's argument "plaintiffs did not contest authorities pursued them at all times pursuant to court orders." The multiple district court orders addressing Plaintiffs' challenge to the minute entries demonstrate the absurdity of this position. This was addressed at length in Pet.11-12. *See also*, *e.g.*, District Court opinions at Pet.App.95a and Pet.App.142a.

3. Plaintiffs Briefed and Did Not Abandon their Challenge to Qualified Immunity / Due Process Waiver in All Lower Courts (refuting McNair BIO.16)

A. Fifth Circuit

In the Brief, 5th_Doc.66-1, filed August 29, 2022, No. 22-30031, p.10, Plaintiffs argued:

> . . . Judge Milazzo decided to grant McNair qualified immunity. She concluded the Plaintiffs' counsel could not show that Waiver II was clearly prohibited by law and thus presumed the waiver was valid, without hearing to demonstrate "knowledge and intent." This is reversible error.

Plaintiffs argued the waiver was *not* knowing (as they had also alleged in the Complaint[4] and argued in Brief, 5th_Doc.43, filed June 9, 2022, pp.28-29, 39, 66-69) due in part to the Handbook's limitations on jail time to "multiple days" citing to *Adams v. U.S. ex rel. McCann*, 317 U.S. 269 (1942), *See*, Brief, p.11, and n.5.

Plaintiffs further argued McNair violated "established federal rights" because contempt is a "new separate offense" which requires public trial (citing *In re Oliver*[5]). p.12, Brief.

Plaintiffs argued the denial of the right to a public trial is a "structural constitutional defect" citing *Ariz. v. Fulminante,* 499 U.S. 279, 309-310 (1991) quoting

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[4] USDC_Doc.1, p.21-22, ¶¶35(5)-36, p.44-46.

[5] 333 U.S. 257 (1947).

Waller v. Georgia, 467 U.S. 39, 49, n. 9 (1984). Brief, pp.12-13).

B. District Court

Plaintiffs challenged qualified immunity, relying on "*Harlow*"[6] – "*clearly established statute or constitutional law*" of which a reasonable person would have known – citing three "established" rights:

a) the liberty interest involved in remaining free from confinement;[7]

b) the federal right to compulsory process, public trial and a record;[8]

c) the right to proof that waivers are "knowing" before they are enforced.[9]

Although the circuits are mixed in their adoption of the "functionally identical precedent" standard set out in *Ashcroft v. Al-Kidd*,[10] in deference to the *Al Kidd* standard, Plaintiffs, (in USDC_Doc.74, p.14-15) also directed the lower court to a federal opinion addressing a drug court waiver releasing the team of liability, *Hendrick v. Knoebel*, No.4:15-cv-00045, n.3, 2017 U.S. Dist. LEXIS 71172 (S.D. Ind., Order May 10, 2017) *aff'd,* No. 17-2750, 894 F.2d 836 (7th Cir.

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6 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

7 *Jones v. City of Jackson*, 203 F.3d 875 (5th Cir. 2000) and *Jauch v. Choctaw Cty.*, 874 F.3d 875 (5th Cir. 2017).

8 *See, In Re Oliver*.

9 *Adams v. U.S. ex rel. McCann*, 317 U.S. 269 (1942).

10 553 U.S. 731, 741 (2011). The McNair motion was decided before this Court issued *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) and *Whate v. Pauly*, 137 S. Ct. 548, 551 (2017).

2018) (expressing "serious doubts" as to enforceability of drug court's waiver executed at time of entry to the program releasing team from intentional tort liability.)

Plaintiffs argued the absence of an appellate opinion with similar factual precedent is not determinative, at 49-50, citing *United States v. Lanier*, 520 U.S. 259 (1997) and the drug court case in *Inouye v. Kemna*, 504 F.3d 705, 715 (9th Cir. 2007) ("lack of unanimity does not mean a legal principle has not been "clearly established"").

Plaintiffs directed the district court to federal § 1983 precedents finding similar privately contracted, profit making clinical/supervisors/case managers are not to be shielded by immunity when they act outside the court. These included *Hoffman v. Jacobi,*[11] where the drug court was suspended in light of the allegations of "unlawful conduct by *drug court staff* and *drug court practices* harmful to participants . . . "

Plaintiffs referred the court to *Manis v. Corrections Corp. of America*, 859 U.S. 302 (M.D. Tenn. 1994) (held qualified immunity shield not applicable to private company maximizing profits) and other cases including *Hanas v. Inner City Christian Outreach Inc.*, No. 2:06-cv-10290, p. 17. (E.D. Mich. February 29, 2008) citing *Galvan v. Garman*, 710 F.2d 214 (5th Cir. 1983). *See*, USDC_Doc.74 at n.60, p. 7 of 16. In *Hanas* a drug court social worker/counselor was denied immunity because she "refused to exercise her powers and instead permitted a blatant violation of plaintiff's constitutional rights to continue unabated"

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[11] *Hoffman v. Jacobi*, 4:14-cv-00012-SEB-TAB. (S.D. Ind. 10-17-2014) p.2 (denying R. 12 motion by former Drug Court Judge).

and could be said to "contribute to the constitutional violation and was not entitled to qualified immunity."

Plaintiffs requested the court take judicial notice of the qualified immunity argument they made in their opposition to the Administrators' motion. *See*, *e.g.*, Plaintiffs' discussion of qualified immunity. USDC_Doc.88, p.17-19, and on p.24 and n.31 and 32.[12] Plaintiffs re-urged the argument on request for reconsideration to no avail. See USDC_Doc. 653, filed 10/10/21, p.10 and n.14.

4. Federal Circuits Are Split as to Where the Burden to Demonstrate Qualified Immunity Lies in a § 1983 Action During R.12 motions; *and* as to Whether "Prospective Waivers of Federal Rights" are Enforceable.

Since qualified immunity is an affirmative defense, the burden of pleading it rests *with the defendant.*" *Gomez v. Toledo*, 446 U.S. 635, 641 (1980).

The lower court imposes the burden of persuasion on the Plaintiffs—thus splitting the Fifth Circuit from the Second. *Compare*, *e.g.*, *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 413 (5th Cir. 2021) with *Triolo v. Nassau Cnty.*, No.19-4107-cv. 2022, 24 F.4th 98 (2d Cir. Jan. 21, 2022) (burden is on § 1983 defendant) citing *Gomez* at 640 and *Vasquez v. Maloney*, 990 F.3d 232, 238 (2d Cir. 2021) (burden on § 1983 defendant at summary judgment stage).

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[12] *See,* USDC_Doc.88, n.35, citing *MacMillan Bloedel Ltd. v. Flintkote Co.*, 760 F.2d 580, 587 (5th Cir. 1985)("A court may take judicial notice of related proceedings and records in cases before the same court.").

Even more concerning, the panel granted immunity based entirely on a "prospective waiver" of *all federal due process rights* applied *ex ante*. *Cf.*, *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021) (prospective waivers violate public policy.)

The violation the lower court "waived"—denial of a public trial, judicial record, judicial orders prior to imprisonment or referral to in custody rehabilitation detention—is undoubtedly within the category of those rights "so fundamental to the reliability of the factfinding process that they may never be waived without irreparably "discredit[ing] the federal courts"" . . . because "some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." *See*, *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995).

By granting immunity, the court demonstrated how truly "Kevlar coated"[13] the immunity defense has become.

If the burden were placed *on McNair,* to show "knowing waiver" and "established federal law" *supporting* the grant of immunity *to* a drug court's "clinical supervisor" based on a prospective due process waiver applied *ex ante*, he could not meet it. *See*, Pet.38-41.

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[13] *See*, Judge Willett's concurrence "*dubitante*" in *Zadeh v. Robinson, et al.*, 902 F.3d 483 (5th Cir. 8/31/2018), *petition for cert. denied* June 15, 2020.

5. Heron and Carlisle Met F.R.Civ.P. 8 Requirements Sufficient to Defeat R. 12 Motion (refuting McNair BIO.14) and to Establish a Class against McNair, based on the Proximate Causal Connection between McNair's Actions As the Team's Clinical Supervisor and the Violation of Federal Rights (refuting McNair BIO.18).

In *Hoffman v. Jacobi,* (*see discussion*, *supra*, p.7, re: *Hendrick v. Knoebel*, *same case sub nom*, and n.11), the Magistrate certified a § 1983 class *against the team* for incarcerating participants while awaiting a bed in drug treatment facilities, without any due process. *See*, Order issued 9/29/2015.

Heron's complaint adopted all Carlisle's claims against "the program *team* officials" who proximately caused similar violations of federal rights of all the probationers. USDC_Doc.1, p.25, ¶43.

In USDC_Doc.14 (1stAm.) Heron alleged McNair to be *the Team's* designated "Treatment Professional" . . . contracted to provide professional "clinical services" as the "chief counselor" and McNair acts jointly with the other members of "the team." USDC_Doc.14 ¶105.

Heron alleged, *inter alia*, that in violation of "national standards," (USDC_Doc.14 ¶87) the team imposed multiple flat time sanctions in the parish jail as "treatment" without orders,[14] (¶75) detention for

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[14] Heron also went to jail for six months on December 15, 2015 even though the D.A. Motion for Revocation (USDC_Doc. 524-5) lists no detention on December 15, 2015; nor does the Sheriff show that time in his jail in the master record sent to State Corrections upon revocation. USDC_Doc. 580-3, Pl.Ex.2, pp.16 of

"associating with a convicted felon" – in Heron's case his own wife who had never been convicted (¶76); and detention in the parish jail for many months, also without judicial orders, "awaiting a bed" in a custodial rehabilitation center (CTRP) (¶78); detention for seven and one half months in Assisi Bridge House, in Shreveport, twelve hours driving distance from his wife, five children including new born; detention for a year at Oxford House -- a fee based rehabilitation center, an hour's distance, for those who had "relapsed." There was no evidence that he had used drugs or failed a drug screen. ¶80.

It is undisputed that no "treatment" is provided in the Jefferson Parish jail.

In USDC_Doc. 117 (2d Am. Comp.), Heron outlined each of the six team member's roles. ¶113-14. Heron alleged the team contributed to the violation of Heron's and the class's federal rights (¶116-120) through unlawful *ex parte* communications with the assigned judge, resulting in "predetermined guilt" of noncompliance, in a closed courtroom. ¶119-129, 127-135, 153; *see*, argument at USDC_Doc.142-1, p.4.

In contrast, McNair protests he provided only "limited treatment services" and "supervised individuals applying for licensure." McNair BIO.2, 3, 10.

However, the Supreme Court Drug Court Offices (SCDCO) website promises those who join the program " . . . *receive the highest level of* <u>care</u> *possible*"[15] and

19; USDC_Doc. 611-2, p.11; Sheriff Dep.p.042, L.8-11 regarding USDC_Doc.524-5. p.8, item 16, p.2.

15 https://www.lasc.org/court_managed_prog/drug_courts.asp under the section titled "Drug Courts in Louisiana."

the SCDCO Manual—also available online—advises that the Clinical Supervisor and Treatment Supervisor was charged with providing each participant with an "up to date *treatment plan*." USDC_Doc. 556-3, p.17-19. *See,* discussion, Pet.31.

McNair's own publicly accessible website states he "provides by contract to the Jefferson Parish drug court . . . *clinical direction, assessment, and substance abuse treatment services*"[16] . . . and " . . . *coordination of therapeutic services* for the program, clients and their families." USDC_Doc. 556-4, p. 1.

Substance abuse treatment program "Clinical Supervisors" are defined and regulated by state licensing requirements under ADRA, requiring his certification—which McNair lacked.[17] USDC_Doc.556-2, p.24-5,27; USDC_Doc.556-4,p.2-3,29 (McNair Dep. p.103).

With respect to causal connection (contrary to McNair's BIO.159 referring to App.51a. and the Order at Pet.App.163a) Carlisle was "told by staff" that the judge ordered him to Oxford House. However, there is NO written order (or even minute entry) directing Carlisle (or Heron) to Oxford House, so he was misinformed.

McNair repeatedly demoted Heron and Carlisle to repeat phases despite never having failed drug screens.

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[16] *See*, web page Ex.E to USDC_Doc.167 print out of https://www.Linkedin.com/in/joe-mcnair-ba-lpc-s-ba-lmft-s-2279004.

[17] Louisiana's Addictive Disorders Practice Act, Acts 2004, No. 803, § 3, eff. July 8, 2004 ("ADRA") La.Revised.Statutes Ann. § 37:3386-3390).

USDC_Doc.1, ¶43. There are no orders or minute entries for that either.

McNair ensured the Plaintiffs were sent for repeated stints in the parish jail (as opposed to being remanded to a certified state facility for treatment, as the statute required), after which he directed them to earlier program phases despite any clinical justification. This "kept up the numbers." It increased McNair's contract fees and funded the parish jail. USDC_Doc.117, p.21-25, 139-150, 161, 165. Carlisle alone incurred 7,805.00 dollars in program fees—paying even while in jail. USDC_Doc.1, p.18, ¶28.

Still laundering lies, McNair asserts: "Carlisle *did not appear* before the court his day for drug court." McNair BOI, p.6. The Sheriff STILL claims: "Later on August 25, 2015 he was sanctioned with six months flat time for contempt *when he failed to appear for a hearing*." Sheriff BIO.3.

Both ignore sworn testimony (Pet.17-18) proving the clerk's minute entry and writ of attachment for Carlisle for "failure to appear" on August 25, 2015 was contrived by staff. Even Judge Faulkner admitted he had appeared and was dismissed.

6. McNair was Not Entitled to Sovereign/ Judicial Immunity (refuting McNair BIO.14-15).

On R. 12 motion, the lower court dismissed the § 1983 claims *against McNair* on the basis that it is "actually a suit against the entity—24th JDC itself," barred by the 11th Amendment (Pet.App.174a).

Licensed clinical professionals in contract with the state cannot be said to function as a judge or a

judicial officer. *See*, *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). They are not part of the state. *Takle v. Univ. of Wisc. Hosp. Clinics Auth.*, 402 F.3d 768 (7th Cir. 2005).[18]

In fact, the McNair contract (¶7) prohibits any supervision by the drug court employees of him or his employees and he "indemnifies . . . the Drug Court, . . . for damage . . . to any person incurred by McNair's . . . acts or omissions and services performed." USDC_Doc. 556-2, p.15, 16-19 Dep.P.56.

[18] *See*, Argument at USDC_Doc.142-1, p.2-9.

CONCLUSION

Petitioners respectfully request the Court grant certiorari.

Respectfully submitted,

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