No. 24-470

IN THE

Supreme Court of the United States

MICHELLE R. GILBANK,

Petitioner,

v.

WOOD COUNTY DEPARTMENT OF HUMAN SERVICES, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents concede that the question presented is exceptionally important. They concede that it recurs frequently. And they concede that an entrenched circuit split persists. Apart from a few quibbles, Respondents' main objection is to the vehicle's quality. But make no mistake: this case offers an ideal setup for the Court to break its 20-year *Rooker-Feldman* hiatus and give necessary guidance on a doctrine that "continues to wreak havoc across the country." *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 405 (6th Cir. 2020) (Sutton, J., concurring). As "all members of the en banc court" below "agree[d]," their "different understandings of the *Rooker-Feldman* doctrine" show "a need for [ ] Supreme Court" review. Pet.App.3a.

Respondents' assertion that Gilbank prevailed is as confounding as it is wrong. Gilbank lost. The judgment was against her. And this Court "does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015) (emphasis in original).

The adverse en banc judgment was on *Rooker-Feldman* grounds and affirmed a district court judgment dismissing Gilbank's claims on *Rooker-Feldman* grounds. Pet.App.90a, 105a–106a. The only *Rooker-Feldman* approach necessary to the Seventh Circuit's judgment—and the only one actually applied to Gilbank's claims—was the broad, practical approach set forth in Judge Hamilton's controlling lead opinion.

To argue Gilbank won, Respondents look to Judge Kirsch's opinion. But that opinion dissented from the

judgment, and the votes of those "who *dissented* from the *judgment* are not counted in trying to discern a governing holding from divided opinions." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014) (second emphasis added). Indeed, take away Judge Kirsch's opinion entirely, and absolutely nothing changes—nothing about the judgment, and nothing about the reasoning supporting the judgment.

One concurring judge's drive-by *Heck*-ing changes nothing, either. Rooted in a blatant departure from the party-presentation principle, Judge Easterbrook's idiosyncratic view of *Heck v. Humphrey*—a waivable, waived, and inapplicable non-jurisdictional defense—was disclaimed by all ten other judges below and need not detain this Court for a second.

In truth, the setup from below could hardly be more hospitable for this Court's review. The dispositive, purely legal question presented was thoroughly briefed and argued below. The en banc court produced well-developed, competing opinions that mirror the deep and ongoing nationwide rift. The circuits are intractably split over the important and recurring question of *Rooker-Feldman*'s reach, and this Court's review is necessary.

I. This case is an excellent vehicle.

Resting in the heartland of the types of disputes most commonly prompting *Rooker-Feldman* puzzles, this case is an excellent vehicle to decide the question presented. A pure legal issue, the question presented is dispositive. It was thoroughly litigated before the en banc court below. And it yielded square disagreement

that neatly tracks the deep, acknowledged circuit split. Pet.29–30.

Respondents challenge none of that. Instead, their vehicle objection rests on the premises that Gilbank prevailed below and that alternative grounds disrupt clean review. Respondents' premises are invalid.[1]

A. Respondents misunderstand the decision below.

1. This Court "does not review lower courts' opinions, but their *judgments*." *Jennings*, 574 U.S. at 277 (emphasis in original); *accord Camreta v. Greene*, 563 U.S. 692, 704 (2011).

The judgment below was adverse to Gilbank. The district court dismissed the claims at issue solely for lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine. Pet.App.105a–106a. The Seventh Circuit's judgment affirmed the district court's dismissal. Pet.App.2a.

On the claims at issue, Pet.12, the en banc judgment was supported by a bare six-judge majority. Five of those judges (Hamilton, Rovner, Brennan, Jackson-Akiwumi, Pryor) voted to affirm the district court's

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[1] Gilbank maintains that the Petition's presentation of background facts and procedural history is both fair and accurate—not "sensationalized." BIO 2. To be sure, differences in the parties' fact presentations are irrelevant to deciding the purely legal question presented. But Gilbank pauses to point out the particular irrelevance of Respondents' uncalled-for and unsubstantiated statements about a "lengthy criminal history" and "multiple DUI offenses," BIO 3, and to refer the Court to the district court's recitation of facts and allegations, which largely tracks the Petition's presentation. Pet.App.91a–103a; *see* D. Ct. Dkt. 41 at 2–6.

dismissal based on *Rooker-Feldman*. Pet.App.16a, 26a–28a, 90a. The sixth judge (Easterbrook) voted to affirm based on *Heck*. Pet.App.68a.

The response gaslights. First, Respondents say "Gilbank's claims were not dismissed because of *Rooker-Feldman*." BIO 20. But the judgment affirming the district court's dismissal was self-consciously based on "*Rooker-Feldman* grounds." Pet.App.90a; Pet.App.2a. Indeed, it had to be: *Rooker-Feldman* was the only ground for affirmance endorsed by Judge Hamilton's lead opinion, which was necessary for the judgment. Second, Respondents say the "en banc panel found that the *Rooker-Feldman* doctrine did not apply to Gilbank's claims." BIO 14. But the *Rooker-Feldman* analysis actually applied to Gilbank's claims was that found in Judge Hamilton's controlling lead opinion: *Rooker-Feldman* barred Gilbank's claims.

To be sure, Judge Kirsch's opinion reasoned that *Rooker-Feldman* did not bar Gilbank's claims. But that opinion's reasoning was not part of the judgment. Put otherwise, if Judge Kirsch's opinion disappeared *in its entirety*, nothing whatsoever would change—nothing about the judgment, and nothing about the reasoning supporting the judgment.

2. Individual opinions' "majority" and "dissent" labels are wholly untethered to the judgment. They need not distract from the clean presentation of the question presented.

To be clear, there is *no majority reasoning* in support of the judgment. Judge Hamilton's five-judge lead opinion and Judge Easterbrook's concurrence are both necessary to the judgment, but they neither

overlap in reasoning nor provide a "common denominator" for the judgment. *Gibson*, 760 F.3d at 619.

Despite claiming "majority" status, Judge Kirsch's opinion dissented from the judgment. The votes of those "who *dissented* from the *judgment* are not counted in trying to discern a governing holding from divided opinions." *Id.* at 620 (second emphasis added). Indeed, no part of Judge Kirsch's opinion played any role in assembling the votes necessary to the judgment. It thus cannot be a majority in any sense that creates Seventh Circuit precedent or impedes this Court's review. *Cf.* Richard M. Re, *Beyond the* Marks *Rule*, 132 Harv. L. Rev. 1942, 1954 n.87 (2019) ("[N]onmajority opinions sometimes speak as though they have majority support, perhaps due to simple error or to claim precedential influence for minority views.").

The "majority" and "dissent" labels are made possible only by Judge Easterbrook's self-contradictory positions joining in segments of multiple opinions. Pet.16.[2] Because Judge Easterbrook's positions are

[2] For instance, Judge Easterbrook joined both Part V of Judge Hamilton's opinion and Part I of Judge Kirsch's opinion. Part V of Judge Hamilton's opinion embraced a "narrow exception" and "safety valve with respect to the review-and-reject element" when a plaintiff "had no reasonable opportunity to raise her claims in state court." Pet.App.43a. But such a "safety valve" becomes relevant only if one disagrees with Part I of the Kirsch opinion, because Judge Kirsch's narrow approach does not depend on the issues litigated in state court. *Compare id. with* Pet.App.87a. Similarly, Judge Easterbrook also joined Part VI of Judge Hamilton's opinion, which rejected a so-called "fraud exception" to *Rooker-Feldman*. Pet.App.48a. But that too becomes
(footnote continued)

self-contradictory, so too are the competing "majorities" his joinder helps constitute.

In light of all this, the judgment below is 5-1-5, with a 5-5 split on the dispositive *Rooker-Feldman* question presented—a tie affirming the district court's dismissal on *Rooker-Feldman* grounds. Pet.App.105a–106a. The "majority" and "dissent" labels are irrelevant for purposes of this petition. The judgment was adverse to Gilbank, it was on "*Rooker-Feldman* grounds," Pet.App.2a, 90a, and this Court reviews only "*judgments*," *Jennings*, 574 U.S. at 277.

B. Neither *Heck* nor any other "alternative ground" compromises the vehicle.

1. Seizing on Judge Easterbrook's solo concurrence, Respondents claim that if this Court grants certiorari, it would "need to address" *Heck v. Humphrey*, 512 U.S. 477 (1994). BIO 22. They are wrong.

Respondents' claim is built on the flawed assumption that Judge Easterbrook's unshared rationale controlled the decision below. But Respondents never explain why that is or offer any authority in support. In truth, under no theory of fractured opinions could Respondents' argument be correct. *See Gibson*, 760 F.3d at 619. *See generally* Re, *supra*.

This Court would not need to—and would have no reason to—address *Heck*. As a jurisdictional question, *Rooker-Feldman* comes before *Heck*, which is non-

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relevant only if one rejects the underpinnings of Part I of the Kirsch opinion. *Compare id. with* App.77a. The internal inconsistency of Judge Easterbrook's positions further brings into relief the need for this Court's review.

jurisdictional. *Bell v. Raoul*, 88 F.4th 1231, 1234 (7th Cir. 2023). No matter which way the Court resolves the dispositive *Rooker-Feldman* question presented, it would not proceed to *Heck*.

On the one hand, if this Court were to follow the broad, practical approach to *Rooker-Feldman*, Pet.17–21, then it would affirm. There would be no subject-matter jurisdiction, no further issues would arise, and the case would be over.

On the other hand, if this Court were to follow the narrow, formal approach to *Rooker-Feldman*, Pet.21–23, then it would reverse the judgment and remand to the district court. This Court would have no reason to reach other non-jurisdictional defenses, including *Heck*.

What's more, even if this Court or a court on remand technically *could* consider *Heck*, every reason counsels against doing so. *Heck* is waivable, and no party raised or briefed *Heck* at any point in any court below. *Bell*, 88 F.4th at 1234; *Whitfield v. Spiller*, 76 F.4th 698, 714 (7th Cir. 2023). Judge Easterbrook's uninvited interposition of *Heck* defies the party-presentation principle. *United States v. Sineneng-Smith*, 590 U.S. 371 (2020); *Crittindon v. LeBlanc*, 37 F.4th 177, 190 (5th Cir. 2022). No other member of the en banc court agreed that *Heck* applied. *See* Pet.App.58a–61a, 84a–85a. And for good reason: Gilbank's claims have nothing to do with a criminal conviction, a sentence, or any aspect of confinement—the only situations to which this Court or any Court of Appeals has ever extended *Heck*.

2. As for Respondents' other alleged alternative grounds, not only would this Court not *have* to reach them, but it *could not* reach them. BIO 32–33. To change the district court's *Rooker-Feldman* without-prejudice dismissal to a with-prejudice dismissal based on immunity, preclusion, or the merits, Respondents had to file a cross-appeal—but they did not. Pet.App.89a–90a; *Jennings*, 574 U.S. at 276; *Bernstein v. Bankert*, 733 F.3d 190, 224 (7th Cir. 2013). It matters whether dismissals are jurisdictional or not. Pet.36; *cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). *Contra* BIO 32.

At any rate, no court below passed on any of the alternative grounds Respondents suggest. The district court dismissed the claims at issue solely for lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine. Pet.App.105a–106a. If this Court reverses and remands, the district court could address other non-jurisdictional defenses in due course. The mere fact that Gilbank's claims could be rejected later supplies no reason to deny certiorari on the jurisdictional *Rooker-Feldman* question presented.

II. The question presented is of continuing importance and warrants review now.

According to Respondents, the deep circuit split is resolving itself, Seventh Circuit law is a model of clarity, and Gilbank seeks mere "error correction." BIO 24. But if any of that were true, the 11 judges below would not have unanimously and expressly "agree[d]" there is "a need for the Supreme Court to clarify application of the doctrine." Pet.App.3a.

The truth is that *Rooker-Feldman* "continues to wreak havoc across the country." *VanderKodde*, 951 F.3d at 405 (Sutton, J., concurring). Entrenched intercircuit and intracircuit conflicts persist, the doctrine is invoked on a daily basis, and the question presented is of exceptional importance.

1. Respondents cannot obscure the open and entrenched circuit split. The circuits, including the Seventh, are in disarray.

Respondents emphasize how the Sixth and Eleventh Circuits have adopted the narrow, formal approach to *Rooker-Feldman*. BIO 29; *see Hohenberg v. Shelby Cnty.*, 68 F.4th 336, 341 (6th Cir. 2023); *Behr v. Campbell*, 8 F.4th 1206, 1210, 1213 (11th Cir. 2021). From these decisions, Respondents contend that the circuits are reaching accord. BIO 28–31.

But Respondents' focus on one side of the split neglects the other. Respondents do not contest that the Ninth, Tenth, and D.C. Circuits, at minimum, continue to apply the broad, practical approach to *Rooker-Feldman*. Pet.17–21. Nor do they address the remaining circuits' often erratic and confusing approaches to the doctrine. Pet.23–26.[3] The cases highlighted in the Petition, moreover, are far from exhaustive. Cato Am.Br.3–10. After the decision below acknowledged a split with the Eleventh Circuit, Pet.App.32a n.7, that circuit issued another *Rooker-Feldman* decision arguably creating an intracircuit conflict on a related

[3] Respondents' portrayal of *Dorce v. City of New York*, 2 F.4th 82 (2d Cir. 2021), BIO 28–29, ignores that case's internal inconsistency, Pet.24–25.

Rooker-Feldman issue. *See Efron v. Candelario*, 110 F.4th 1229 (11th Cir. 2024), cert. pet. pending, No. 24-694. Other doctrinal inconsistencies abound, and the "result is a snarl of disagreements." Law Profs. Am.Br.5, 7–9, 11.

This chaos extends to the Seventh Circuit, despite Respondents' contrary protests. True enough, in the past few months some courts in the Seventh Circuit (in unpublished orders) have followed the narrow approach to *Rooker-Feldman*.[4] BIO 16–17. But courts have also applied the broad, practical approach, in line with Judge Hamilton's controlling lead opinion and the judgment below. *E.g.*, *White v. Moran*, No. 24-CV-262-WMC, 2024 WL 4542461, at *1 (W.D. Wis. Oct. 22, 2024) (holding plaintiff's damages claims for constitutional violations related to child custody case were barred by *Rooker-Feldman*); *Martin v. Greenwood*, No. 24 CV 1421, 2024 WL 5168673, at *1 (N.D. Ill. Dec. 19, 2024) (holding *Rooker-Feldman* barred claim for damages that was "implicit[ly]" "a challenge to the state court criminal judgment"); *Jackson v. Evans*, No. 23-CV-14590, 2024 WL 4252798, at *4 (N.D. Ill. Sept. 20, 2024); *Rodriguez v. Lancaster Grant Cnty. Child Support Agency*, No. 24-CV-180-WMC,

[4] Contrary to what Respondents represent, some of the cases they cite either do not apply Judge Kirsch's reasoning, reach an outcome inconsistent with it, or both. *E.g.*, *Keith v. Off. of Sec. of State*, 24-CV-1015-JPS, 2024 WL 4119481, at *4 (E.D. Wis. Sept. 9, 2024) (citing *Gilbank* but reaching outcome inconsistent with Judge Kirsch's opinion, holding claim for damages was barred by *Rooker-Feldman*); *E. Gate-Logistics Park Chicago, LLC v. CenterPoint Properties Tr.*, No. 24-C-3742, 2024 WL 4265184, at *3–4 (N.D. Ill. Sept. 23, 2024) (citing only Judge Hamilton).

23-CV-755-WMC, 2024 WL 3924576, at *2 (W.D. Wis. Aug. 23, 2024); *Carradine v. Wisconsin*, No. 24-CV-1092-JPS, 2024 WL 4039889 (E.D. Wis. Sept. 4, 2024).

Underscoring the intracircuit chaos is the ongoing confusion over the status of *Hadzi-Tanovic v. Johnson*, 62 F.4th 394 (7th Cir. 2023). Issued shortly before the decision below, that case applied the broad, practical approach to *Rooker-Feldman*. Respondents dismiss it as "old Seventh Circuit precedent." BIO 29. Yet no opinion below interred *Hadzi-Tanovic*, and courts within the Seventh Circuit continue to cite it and apply the broad, practical approach. *E.g.*, Pet.App.49a–50a; *Holt v. Holt*, No. 3:24-CV-01614-NJR, 2024 WL 5055040, at *2 (S.D. Ill. Dec. 9, 2024); *Motykie v. Motykie*, No. 23 CV 1779, 2024 WL 3984277, at *3 (N.D. Ill. Aug. 28, 2024).

The confounding state of play in the Seventh Circuit only amplifies the need for review.

2. The question presented is important and recurring.

Respondents do not dispute the question's exceptional importance. Nor could they: the scope of *Rooker-Feldman* has profound federalism implications and affects thousands of civil-rights plaintiffs seeking to access federal courts. Pet.27–28. *See generally* Cato Am.Br.

Although Respondents downplay how often the question presented arises, BIO 30–31, overwhelming evidence proves it recurs with enduring regularity. As of 2015, courts were applying *Rooker-Feldman* more often after *Exxon Mobil* than before. Raphael

Graybill, *The Rook That Would Be King:* Rooker-Feldman *Abstention Analysis After* Saudi Basic, 32 Yale J. on Reg. 591, 591–92 (2015). That trend has continued since. Cato Am.Br.13–14. Added up, *Rooker-Feldman* "has been invoked in tens of thousands of circuit and district court decisions" over the past two decades. Pet.App.15a.

Twenty years removed from this Court's last guidance in *Exxon Mobil*, the lower courts have intractably split, and *Rooker-Feldman* is "back to its old tricks of interfering with efforts to vindicate federal rights and misleading federal courts into thinking they have no jurisdiction over cases Congress empowered them to decide." *VanderKodde*, 951 F.3d at 405 (Sutton, J., concurring); *see Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). This Court's intervention is necessary once again.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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