No. 24-597

IN THE

Supreme Court of the United States

JONATHAN BRUNSON,

Petitioner,

v.

JEFF JACKSON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Jennifer Franklin
WILLIAM & MARY LAW SCHOOL
Supreme Court & Appellate Litigation Clinic
P.O. Box 8795
Williamsburg, VA 23187

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
jrosenkranz@orrick.com

Nicole Ries Fox
Elizabeth A. Bixby
Lauren A. Weber
ORRICK, HERRINGTON & SUTCLIFFE LLP
355 S. Grand Avenue
Suite 2700
Los Angeles, CA 90071

Counsel for Petitioner

PARTIES TO THE PROCEEDING

Petitioner is Plaintiff-Appellant Jonathan Eugene Brunson below.

Respondents include the Defendants-Appellees below. They are Jeff Jackson;* Barry H. Bloch; Jessica B. Helms; Elizabeth B. Jenkins; Benjamin S. Gurlitz; Charlton L. Allen; Philip A. Baddour, III; Yolanda K. Stith; Myra L. Griffin; Kenneth L. Goodman; James C. Gillen; Tammy R. Nance; Christopher C. Loutit; Brian R. Liebman; Amanda M. Phillips; Kimberlee Farr; Brittany A. Puckett; and Emily M. Baucom.

* Jeff Jackson has been automatically substituted for Joshua Stein under Rule 35.3 of the Rules of this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Respondents admit that the circuits "have taken different approaches to the question presented here." Opp. 4. Respondents also concede, as they must, that this Court recognized the split in *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 n.2 (2020). Opp. 4. Multiple circuits, including the Fourth Circuit here, have acknowledged this "entrenched circuit split." Pet. App. 6a. In short, there is no dispute that the courts of appeals are deeply divided on the question of whether dismissals under *Heck v. Humphrey*, 512 U.S. 477 (1994), categorically qualify as strikes under the PLRA. This case plainly implicates that split, and the split will not resolve without this Court's intervention.

Respondents try to minimize the split by arguing that the circuits' varying approaches to the question presented would not change the result in "many cases." Opp. 6. As this argument implicitly concedes, however, the split *is* outcome-determinative in at least some cases. Respondents also suggest that this Court need not intervene because not every circuit has addressed the question presented yet. Opp. 10. But even by Respondents' count, at least seven circuits have already weighed in, with others making "conflicting statements" related to the question presented. Opp. 10 n.2. There is no practical reason to wait for the remaining circuits to take sides. *See, e.g.*, *Lomax*, 140 S. Ct. at 1724 n.3 (addressing a 4-2 split).

Moreover, Respondents do not dispute that the question of whether 28 U.S.C. § 1915(g) applies to *Heck* dismissals is important and recurring. Congress

enacted § 1915 "to ensure that indigent litigants have meaningful access to the federal courts." *Bruce v. Samuels*, 577 U.S. 82, 85 (2016) (citation omitted). But as things stand now, indigent prisoners' access depends on the whims of geography. An inmate housed in New York would not accrue automatic strikes for prior *Heck* dismissals, but an inmate housed just across the Hudson River in New Jersey would, leaving the latter potentially barred from court because of a lack of money.

Unable to dispute the core significance of the question presented, Respondents instead contend that the question has no practical significance for Mr. Brunson because he stands only to have his filing fees returned. Opp. 12-13. Respondents dismiss those hundreds of dollars as meaningless, but that amount represents a significant sum for an indigent inmate like Mr. Brunson. And, of course, this Court's review does not have any amount-in-controversy requirement.

The petition presents a clean vehicle to address an acknowledged, entrenched circuit split, and the Court should grant it.

I. The Question Presented Is The Subject Of An Entrenched Circuit Split.

Respondents acknowledge that the circuits are split on the question presented. Opp. 4-5. Because they cannot plausibly contest the existence of the split, Respondents instead seek to whittle it down in two ways: first, by contending that the divergent approaches will not always lead to a different result, and

second, by nitpicking whether the split is really 5-2 rather than 5-3 (or even greater). Neither line of argument detracts from the widely acknowledged and "entrenched" split. Pet. App. 6a.

1. Respondents agree that five circuits, including the court below, hold that *Heck* dismissals categorically count as strikes—period, no exceptions. Opp. 5. Respondents also concede that the circuits are split on this question, with "at least two other circuits" adopting a different approach, one that evaluates whether a *Heck* dismissal is a strike on a "case-by-case" basis. Opp. 5-6; *see also* Opp. 7 (conceding that the circuits "certainly diverge[]" on their approaches); Pet. 10-13. The concession is unavoidable, given the number of courts that have recognized the conflict. *See* Pet. 9-12 (recounting explicit split acknowledgment by the Fourth, Third, Second, and Ninth Circuits).

Respondents' primary argument against certiorari is that even though the circuits are split on the analytical approach to the question presented, the "end result" in "many cases" in the Second and Ninth Circuits will be the same. Opp. 6-7. Of course, that tacitly concedes that the split will be outcome-determinative in at least *some* cases. This plays out in practice: District courts within the Ninth Circuit, for example, routinely apply the test in *Washington* to conclude that a *Heck* dismissal does not qualify as a strike. *See, e.g.*, *Talmadge v. Zwink*, No. 3:21-cv-000002, 2021 WL 900668, at *5 & n.40 (D. Alaska Mar. 9, 2021) (declining to assess strike for dismissal of case on *Heck* grounds because of *Washington*); *Garner v. Alaska*, No. 3:20-cv-00318, 2021 WL 833048, at *2 & n.23 (D. Alaska Mar. 4, 2021) (same); *Von Staich*

v. Cal. Bd. of Parole Hearings, No. 2:15-cv-1182, 2017 WL 2473147, at *5 (E.D. Cal. June 8, 2017) ("[U]nder *Washington*, the dismissal of plaintiff's complaint in [a previous case] based on *Preiser* and *Heck* does not qualify as a strike."), *report and recommendation adopted*, 2017 WL 6512135 (E.D. Cal. Dec. 20, 2017).

In any event, even if Respondents' gloss on the split were accurate, that still would not render the split illusory. The Seventh Circuit takes an even broader approach than the Second and Ninth Circuits, holding that *Heck* dismissals simply cannot be dismissals for failure to state a claim, because they "deal with timing rather than the merits of litigation." *Mejia v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013); *see* Pet. 12-13; *cf. BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1537 (2021) (granting certiorari to resolve an 8-2-1 circuit conflict, with the Seventh Circuit alone taking the most expansive position). The Seventh Circuit's approach will, without question, lead to a different result in *every case* than the approach that most circuits take.

This Court should take the courts of appeals at their word: The question presented is a "conceptual morass" on which there is "an entrenched circuit split," with meaningfully different approaches that can and do lead to conflicting results. Pet. App. 6a-7a.

2. Respondents do not deny that there is, at minimum, a 5-2 split on the question presented. Opp. 5. They quibble only over whether the split is even deeper than that.

Respondents principally argue that this Court should ignore the Seventh Circuit's decision on the question presented because it is unpublished. Opp. 8. While that makes a difference as to whether *Mejia* is controlling within the Seventh Circuit, it does not matter to this Court's assessment of the split or its certworthiness. Indeed, when this Court acknowledged the split on this question in *Lomax*, it explicitly listed *Mejia* as a relevant decision on one side of the split. *Lomax*, 140 S. Ct. at 1724 n.2. As this Court has expressly recognized, "the fact that the Court of Appeals' order … is unpublished carries no weight in [this Court's] decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987); *see also, e.g.*, *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 179 (2019) (certiorari from unpublished decision); *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 546 (2010) (same). So *Mejia*'s unpublished status does not undermine its inclusion in the split or make the split any less worthy of this Court's review.

Respondents also halfheartedly contend that *Mejia*'s analysis of the question presented was "largely dicta." Opp. 8. This Court in *Lomax* certainly did not think so when it cited *Mejia* among the cases weighing in on the split. And with good reason: *Mejia*'s holding that *Heck* dismissals do not constitute strikes was essential to the outcome of the case (and not only to that case, but also to the *Mejia* plaintiff's future ability to proceed *in forma pauperis*). 541 F. App'x at 710-11.

Respondents also say that the positions of the First and Eleventh Circuits are unclear. Opp. 9-10 & n.2. That may be true, but it hardly matters: Omitting

those circuits still leaves a 5-3 circuit split. And if anything, the intra-circuit confusion within those two circuits about the status of *Heck* only underscores the need for this Court's review to provide much-needed clarity.

***

In the end, Respondents' split arguments amount to nothing more than flyspecking. Whether the split is 5-2, 5-3, 5-4, or even 5-5 is immaterial. After all, this Court has granted certiorari to resolve far shallower splits. *See, e.g.*, *City and County of San Francisco v. EPA*, No. 23-753 (cert. granted May 28, 2024) (1-1 split). What matters, far more than the exact count, is that the split is both "entrenched," Pet. App. 6a, and ever-deepening—with four more circuits taking sides in as many years since *Lomax* acknowledged it, *see* Pet. 8-11. Respondents' attempt to downplay the split does not change that it leads to real differences in results and will not resolve without this Court's intervention.

II. Correcting The Fourth Circuit's Flawed Interpretation Of § 1915(g) Is Important.

Given the clear conflict among the circuits, only this Court's intervention can restore uniformity on a question of critical significance across the country. Respondents cannot deny that the question presented recurs often. Nor can they deny that the question presented matters because most prisoners lack the financial means to pay filing fees up front and have no realistic opportunity to earn enough money to do so while imprisoned. *See* Pet. 13-16. Indeed, the fact that

Lomax addressed a different piece of the § 1915(g) puzzle in recent years confirms that questions about § 1915(g)'s meaning are important and frequently recurring. *See* 140 S. Ct. at 1723.

Respondents argue, however, that the question presented has no practical importance for Mr. Brunson, and that this Court should wait for a different case where it can address the question presented along with a related question. But Respondents ignore both the significance to Mr. Brunson of having hundreds of dollars returned to him and this case's importance to other prisoners. And there is no reason for the Court to wait on the potential, hypothetical percolation of a related question when the question presented is ripe for this Court's review.

1. Respondents claim that this case has "no practical impact" for Mr. Brunson because he will face the three-strikes bar going forward even excluding his prior *Heck* dismissals and thus can receive only "a refund of his filing fees" here. Opp. 10-12. In Respondents' view, such "low stakes" do not deserve this Court's attention. Opp. 13. But even assuming that Respondents are right about Mr. Brunson's strike status, there is no monetary threshold for this Court's review. In fact, this Court has granted plenary review to address important legal questions even where the petitioner stood to gain just "one dollar in nominal damages." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 292 (2021). Here, if Mr. Brunson prevails on the *Heck* question, he will, at minimum, recover more than $400 that he scraped together to pay the district court's filing fee. That is an enormous sum for Mr.

Brunson, who has no assets and sees only about $80 of income per month.[1] *See* Pet. 5.

Plus, this case's impact extends far beyond Mr. Brunson. There are more than 1.2 million people in prison in the United States. Derek Mueller, *Prisons Report Series: Preliminary Data Release, 2023*, Bureau of Justice Statistics (Dec. 2024), https://tinyurl.com/5n8hz3cx. About 80% of that population is indigent—around 1 million people. *See* Pet. 14. For many of them, whether *Heck* dismissals count as strikes will determine whether they can seek redress in federal court for violations of their rights or whether they remain functionally barred from court because they lack the financial resources to pay filing fees up front. That issue warrants this Court's attention to ensure that "[o]ur legal system … remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law." *Jones v. Bock*, 549 U.S. 199, 203 (2007).

2. Respondents also contend that this Court should wait for another case to address § 1915(g)'s interpretation because a related question is "currently percolating" in the courts of appeals: whether a *Heck* dismissal "is per se frivolous" under the PLRA. Opp. 2. Yet Respondents muster only a single case from almost 30 years ago to support this claim. *See* Opp. 13 (citing *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996)). With scant analysis, *Hamilton* deemed a plaintiff's 42 U.S.C. § 1983 claims "legally frivolous"

[1] The undersigned's law firm, as Mr. Brunson's pro bono counsel, paid his filing fee in the Fourth Circuit.

because he did not show that "his convictions or sentences ha[d] been reversed, expunged, invalidated, or otherwise called into question." 74 F.3d at 103. By contrast, the 2021 decision in *Colvin v. LeBlanc* recognized that the Fifth Circuit has "routinely characterized a *Heck* dismissal as one for failure to state a claim." 2 F.4th 494, 498 (5th Cir. 2021); *see id.* at 498 n.15 (collecting cases). *Colvin* said nothing about *Hamilton* or frivolousness. So the frivolousness question is not even "currently percolating" in the Fifth Circuit, let alone elsewhere.

To be sure, as Respondents note, the Fourth Circuit observed that its opinion does not "foreclose[]" assessing strikes against Mr. Brunson on the basis that some of his prior *Heck*-barred suits were dismissed as frivolous. Pet. App. 5a n.2. But that footnote just recognizes the possibility that *Heck*-barred suits might be frivolous in some cases—say, if a plaintiff refiles the exact same claims two months after the initial *Heck* dismissal, with no change in circumstances. That is a far cry from the per se frivolousness that Respondents suggest (while admitting that they never raised the frivolousness issue before). Opp. 13. In any event, even federal courts can struggle to determine when § 1983 claims arising from prior criminal proceedings accrue. *See, e.g.*, *McDonough v. Smith*, 588 U.S. 109, 114-15 (2019). Thus, a plaintiff who accidentally brings such claims too early in an attempt to preserve his rights has not filed a "frivolous" action under § 1915(g).

III. Respondents' Merits Arguments Do Not Supply Any Reason To Deny Review.

On the merits, Respondents parrot the Fourth Circuit's reasoning and contend that this Court should deny review "because the Fourth Circuit got it right." Opp. 14-16. These merits arguments fail to provide any justification for letting an acknowledged circuit split persist, along with its attendant disparities in access to the courts. For example, Respondents maintain that *Heck* "could not have been clearer that its rule was rooted in the merits of a prisoner's claim, *not* the claim's timing." Opp. 15. But at least three circuits disagree with that position and treat *Heck* dismissals as more akin to dismissals for lack of ripeness. *See* Pet. 16-22. Respondents simply ignore those circuits' contrary reasoning.

Respondents also misread *FDIC v. Meyer* as determining that *Heck*'s reference to claims that are "not cognizable under § 1983," 512 U.S. at 487, meant claims that do not "satisf[y] the elements required 'to provide a cause of action,'" Opp. 16 (quoting *Meyer*, 510 U.S. 471, 477 (1994)). In fact, *Meyer* applied the same definition of "cognizable" as the petition here: "capable of being tried or examined before a designated tribunal," or "within the jurisdiction of a court." 510 U.S. at 476 (cleaned up); *see* Pet. 19. And *Meyer* explained that determining whether a claim is cognizable hinges "on the [court's] jurisdiction[]." 510 U.S. at 476. *Meyer* just happened to address a jurisdictional statute that defined its reach by listing the elements of claims for which the United States has waived sovereign immunity. *Id. Meyer* thus supports Mr. Brunson's view that whether a § 1983 claim is

cognizable under *Heck* goes to a court's power to reach the merits and not the merits themselves.

At minimum, legitimate arguments support the view of the courts of appeals on the opposite side of the split from the Fourth Circuit. The split will not resolve itself, so this Court should grant review to answer a critical and oft-recurring question about the proper interpretation of § 1915(g) and prisoners' access to federal courts.

CONCLUSION

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

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
jrosenkranz@orrick.com

Jennifer Franklin
WILLIAM & MARY LAW SCHOOL
Supreme Court & Appellate Litigation Clinic
P.O. Box 8795
Williamsburg, VA 23187

Nicole Ries Fox
Elizabeth A. Bixby
Lauren A. Weber
ORRICK, HERRINGTON & SUTCLIFFE LLP
355 S. Grand Avenue
Suite 2700
Los Angeles, CA 90071

January 13, 2025