No. 24-672

In The
Supreme Court of the United States

ERMA WILSON,

Petitioner,

v.

MIDLAND COUNTY, TEXAS, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

Jaba Tsitsuashvili
Counsel of Record
Robert McNamara
Michael Peña
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
jtsitsuashvili@ij.org

Counsel for Petitioner

Table of Contents

Table of Authorities

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Reply in Support of the Petition

Ms. Wilson's petition presents two independent questions. First, is § 1983 available for a person who never had access to the federal habeas process (§ 2254) to impugn the constitutionality of her state criminal proceeding? Second, does such a claim necessarily sound in malicious prosecution? Pet. i, 29–30. Respondents try to collapse those distinct issues. See Midland County BIO 9–10. But they're two different questions, and the Court should treat them so. In turn:

Question one is quintessentially cert-worthy. It presents a recognized, entrenched, closely-divided, eleven-circuit split. What's more, each side follows one of two dueling, five-Justice pronouncements. Unsurprisingly, respondents acknowledge that split. Yet they try to sidestep it, insisting this case is different because Wilson might be able to pursue a different state remedy instead of a § 1983 claim. But every noncustodial plaintiff, in every case comprising the split, could access some similar state remedy. The *relevance* of those remedies is what the circuit split is about. One side reads *Heck* v. *Humphrey* as devising a rule requiring all noncustodial plaintiffs impugning state criminal proceedings to exhaust state remedies even in the absence of any access to the federal habeas process; the other side reads *Heck* as a claim-channeling rule preventing custodial plaintiffs from using § 1983 to short-circuit the federal habeas process. Pet. 5–8. That entrenched split is squarely and cleanly presented for resolution.

Question two is also important and teed up, but the Court may wish to let it percolate. Contrary to respondents' misunderstanding, neither the en banc court below nor any other court has ever held that a procedural due process claim like Wilson's incorporates the common-law elements of malicious prosecution. That was the novel theory of the noncontrolling plurality below, so Wilson presents it. But it's not the law of any circuit, so the Court can simply resolve the existing question-one circuit split and see if courts happen to pick up the plurality's mantle. In any event, if the Court is inclined to review question two, respondents give no reason to avoid it.

Whether the Court takes one question or both, this case is an excellent vehicle for the issues presented. No respondent seriously contends otherwise.

I. The Court should grant question one.

Respondents readily acknowledge that question one concerns an entrenched, eleven-circuit split regarding the availability of § 1983 in Wilson's circumstances. With no good reason to avoid settling that split, they try to sidestep the issue by emphasizing that Wilson may have access to a different state remedy. But that makes this case no different from any other in the split. Every plaintiff in every case on both sides would have analogous state-law remedies available—yet the split persists.

A. Respondents rightly "acknowledge" the deep circuit split, which this case squarely implicates.

Respondents "recognize" and "acknowledge" the deep circuit split as to question one, including the cases that comprise it. See Midland County BIO 8–9, 13 (citing the same cases as Wilson, quibbling only with where some circuits land in the split). That split concerns the threshold question presented: § 1983's availability where the plaintiff could never access an alternative federal remedy (§ 2254) for her constitutional claim. Respondents try to distinguish this case by suggesting that the Fifth Circuit decided it on the distinct, subsequent issue presented by question two—whether Wilson pleaded a "substantive element of her [due process] claim." See Midland County BIO 6.[1] But respondents are wrong. Because the novel elements-based argument garnered only a plurality of the en banc court, it did not change Fifth Circuit law—which remains squarely on one side of the question-one split. Pet. 13–15, 24–28.

Respondents' acknowledgement of the threshold split is unsurprising, as the circuits regularly point to it—and join a side between dueling five-Justice blocs. Pet. 18–29 (six circuits guided by five Justices in *Spencer* v. *Kemna*, versus five circuits guided by five

[1] Respondents also insist this case is different because Texas has a state process that Wilson might be able to invoke for different relief. See Midland County BIO 9. But, as explained next in I.B, that point is a red herring because it's true in every state, on both sides of the circuit split—which is premised not on whether some potential state remedy *exists*, but whether § 1983 can take a backseat to it in Wilson's circumstances.

Justices in *Heck* v. *Humphrey*). Simply put, *Spencer* and *Heck* "provide[] grist for circuits on both sides of this dilemma." *Wilson* v. *Johnson*, 535 F.3d 262, 267 (CA4 2008); see Pet. 29 (Fourth and Eighth Circuits describing the split from opposing ends of it).

The Fifth Circuit rejected the *Spencer* side and joined the *Heck* side in *Randell* v. *Johnson*, 227 F.3d 300 (CA5 2000). But after the panel below dismissed Wilson's due process claim under *Randell*, the court went en banc to reconsider *Randell*. That eighteen-judge court splintered—a nine-judge plurality, a three-judge concurrence in the judgment, and a six-judge dissent. Pet. 13–17. The plurality would dismiss Wilson's due process claim by substantive analogy to malicious prosecution, with that tort's favorable-termination *element* unmet. Pet. 15. But "that part of the en banc opinion did not garner majority support," so the plurality's elements-based "analysis is not binding precedent" in the circuit. *K.P.* v. *LeBlanc*, 627 F.3d 115, 124 (CA5 2010). With no opinion garnering a majority, the en banc panel "did not disturb previous circuit precedent" (i.e., *Randell*). *United States* v. *Ferguson*, 211 F.3d 878, 885 (CA5 2000).[2]

The upshot is that the circuit split remains unchanged because *Randell* is still Fifth Circuit law and still this case's rule of decision. Pet. 14–15, 26. That means Wilson's § 1983 claim got dismissed on the threshold issue presented by question one, on which *Randell* sits squarely within the *Spencer–Heck*

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[2] See *Olivier* v. *City of Brandon*, 121 F.4th 511, 512–513 (CA5 2024) (Ho, J., dissenting from denial of rehearing en banc) (illustrating and implicitly acknowledging the nonbinding nature of the plurality opinion in Wilson's case).

split, alongside four additional circuits. Pet. 24–28. On the other hand, Wilson's case would proceed in at least four (and likely six) other circuits sitting on the other side of that split. Pet. 18–24.

In short, eleven circuits remain split almost evenly over the threshold issue presented by question one. And this case is illustrative of the divide. See Pet. App. 81a (en banc dissent) (lamenting Fifth Circuit staying "on the wrong side of this fateful split"). Accordingly, this case gives the Court a clean "occasion to settle the issue" presented by question one, which the Court has already flagged as unsettled. *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam). The Court should heed the en banc dissenters' call to "confront the persistent circuit split." Pet. App. 83a.[3]

B. Respondents' emphasis on state law is a red herring.

Unable to dispute the circuit split, respondents ask the Court to sidestep it based on a purported difference here that's no difference at all.

Respondents harp on the fact that Texas's state habeas law has unusually broad noncustodial reach. See Tex. Code Crim. Proc. art. 11.072 § 2(b) (reaching those who "have been[] on community supervision").

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[3] Respondents suggest subsequent cases *implicitly* resolved the split. See Midland County BIO 7–8; Schorre BIO 7–10. They're wrong, as detailed case-by-case by the en banc dissent. Pet. App. 70a–77a ("As none of these cases addressed the issue, I would take the justices at their word and accept their pronouncement that the issue remains unsettled.").

Because that postconviction mechanism might reach Wilson (who's long left the criminal-justice system behind), respondents insist that her case is distinct from those in the circuit split and that the existence of a state remedy forecloses Wilson's access to § 1983, even though it's undisputed that she never had access to § 2254 or any other *federal* remedy for her due process claim. See Midland County BIO 9–10. The three-judge en banc concurrence echoed such reasoning. Pet. App. 43a.

But it's a red herring. By highlighting Texas's process, respondents ask the Court to sidestep the circuit split based on a factor present in every case on both sides of the split. By whatever name, every state offers some postconviction remedial process to noncustodial individuals. Texas happened to codify in the "habeas" chapter of its code a process akin to the common-law writ of coram nobis, which is how noncustodial individuals would traditionally collaterally attack a conviction. In some states, coram nobis could still be the route.[4] In others, a statutory postconviction process governs.[5] And, of course, every state has a pardon process.[6] The point is: In states on both sides of the split, Wilson and other noncustodial individuals could invoke a postconviction process analogous to Texas's.[7]

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[4] See, e.g., *People* v. *Kim*, 45 Cal. 4th 1078, 1091–1095 (2009).

[5] See, e.g., N.Y. Crim. Proc. Law § 440.10 et seq.

[6] See Restoration of Rights Project, *50-State Comparison: Pardon Policy & Practice*, https://tinyurl.com/3trhw2df.

[7] See, e.g., Ohio Rev. Code Ann. § 2953.21 et seq. (state where the case arose in which the Sixth Circuit joined the *Spencer* side

So, simply put, nothing about Texas law or Wilson's circumstances distinguishes this case from any other in the split. The question is not whether potential state remedies exist for noncustodial plaintiffs. Of course they do, on both sides of the split. The question is whether those remedies should *matter* in assessing § 1983's presumptive availability for noncustodial individuals who never had access to § 2254 for the claim at issue (like Wilson).

The circuits on the *Spencer* side of the split say state remedies don't matter—what matters is whether § 1983 is displaced by some other *federal* remedy (§ 2254). Pet. 7, 18–24. That view finds support among *Spencer*'s five Justices and this Court's recent decisions. This Court's "precedents make clear that the *sine qua non* of a finding that Congress implicitly intended to preclude a private right of action under § 1983 is incompatibility between enforcement under § 1983 and the enforcement scheme *that Congress has enacted*." *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, 599 U.S. 166, 187 (2023) (emphasis added). As applied to § 1983 and § 2254, the circuits on the *Spencer* side of the split recognize that there's no incompatibility for claims where § 2254 never came into the picture (like Wilson's).

In other words, those circuits recognize that this Court has "adhered to [the] understanding" that "the § 1983 remedy is, in all events, supplementary to any remedy any State might have." *Talevski*, 599 U.S. at

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of the split); N.D. Cent. Code Ann. § 29-32.1-01 et seq. (state where the case arose in which the Eighth Circuit joined the *Heck* side of the split).

177 (cleaned up; citations omitted).[8] Yet the Fifth Circuit and four others read *Heck* to say otherwise. Pet. 24–29. In those circuits, the lack of access to § 2254 is irrelevant, meaning that noncustodial plaintiffs like Wilson must always win in state court or at the governor's mansion to unlock § 1983. The en banc dissent criticized such an exhaustion regime because "to consider the existence of state remedies when determining the vital reach of § 1983 is, respectfully, contrary to the historical record." Pet. App. 77a–81a. For now, though, the point isn't which side is right or wrong—it's that there are two sides, and that Wilson's access to § 1983 depends on that patchwork geographic divide.

In sum: Contrary to respondents' view, the Fifth Circuit's (and Wilson's) place in the circuit split is not the result of a Texas-law quirk. It's the result of an entrenched disagreement as to whether *every* plaintiff in *every* state must exhaust state remedies to trigger § 1983 for unconstitutional state criminal proceedings

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[8] *Edwards* v. *Balisok*, 520 U.S. 641 (1997), is not in tension with those principles. *Edwards* held that to effectuate § 2254's *federal* scheme, state *custodial* plaintiffs must channel all custody-impugning claims (regardless of their nature) through § 2254's "in custody" enforcement scheme. That just solidifies *Heck*'s federal claim-channeling function for custodial plaintiffs; it says nothing about what *non*custodial plaintiffs *without* access to § 2254 must do. So Justice Souter—who understood *Heck* as a claim-channeling rule and penned the custodial/noncustodial distinction—could join *Edwards* without walking anything back (see Midland County BIO 13) or repudiating *Edwards* in his *Spencer* concurrence reiterating the necessity of the custodial/noncustodial distinction. See *Spencer* v. *Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring) (*Edwards* "was, like *Heck* itself, a suit by a prisoner and so for present purposes left the law where it was after *Heck*").

that could never be challenged under § 2254. That's the split Wilson and the en banc dissent are asking this Court to resolve. And it's the one this Court has long recognized it needed an "occasion to settle." *Muhammad*, 540 U.S. at 752 n.2. Wilson's case presents that occasion.

II. The Court can grant question two in the interest of completeness, or it can let the issue percolate.

The petition presents question two because the en banc plurality and dissent debated it. But the plurality's novel argument that Wilson's procedural due process claim sounds in malicious prosecution and imports that tort's favorable-termination element is not the law in the Fifth Circuit. See I.A, *supra*. Nor any other circuit (as far as Wilson, respondents, the en banc plurality, and the en banc dissent could find). So while the Court may wish to hear question two (and answer it "no"[9]) for completeness, judicial economy may favor simply resolving question one's existing circuit split and seeing if the plurality's unsuccessful effort to blend procedural due process and malicious prosecution happens to resurface. See, e.g., *Manuel* v. *City of Joliet*, 580 U.S. 357, 372–373 & n.10 (2017) (reviving § 1983 claim and deferring

[9] See Pet. App. 63a–68a (en banc dissent) (explaining why collapsing the two distinct torts is wrong); accord *Edwards*, 520 U.S. at 645 (a "plaintiff's entitlement to recover at least nominal damages under § 1983 if he proves" only that "the procedures were wrong" is "clearly established in our case law") (citing *Carey* v. *Piphus*, 435 U.S. 247, 266–267 (1978)); *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 285–291 (2021) (detailing nominal damages' common-law pedigree and § 1983 vitality, including for the vindication of procedural rights).

various tort-related follow-on questions); *Chiaverini* v. *City of Napoleon*, 602 U.S. 556, 564–565 (2024) (same). In any event, respondents give no reason to dissuade the Court from hearing question two if so inclined. They merely raise an issue that's downstream of the one presented.

The en banc plurality would have held that no one can plead a § 1983 procedural due process claim in Wilson's circumstances without meeting an added favorable-termination element imported from the malicious prosecution tort. Pet. 15. By contrast, respondents oddly contend that, whether or not procedural due process claims are cognizable in Wilson's circumstances, she's failed to plead one because her complaint insists she was factually innocent. See Midland County BIO 11. That's wrong: Wilson's claim alleges the essential element of a procedural due process claim (prosecution by a conflicted system), which would entitle her to nominal damages. *Carey* v. *Piphus*, 435 U.S. 247, 266–267 (1978). The complaint's allegations about her innocence do not affect her entitlement to that relief.[10] In any event, no court below passed on the adequacy of the complaint; instead, they held that Wilson's claim is barred by *Heck*, with the en banc plurality arguing that *Carey* claims are categorically unavailable in this context. If those two legal propositions are wrong, a lower court can address the

[10] Those allegations are relevant only to whether Wilson might be entitled to anything other than nominal damages. If Wilson were factually guilty such that she would have been convicted even in a constitutionally adequate proceeding, she would be unable to recover compensatory damages. *Hill* v. *City of Pontotoc*, 993 F.2d 422, 426 (CA5 1993).

adequacy of Wilson's complaint and any related questions (including any need to amend). That means this Court can answer the question actually presented—i.e., resolve the debate between the en banc plurality and dissent—while leaving "additional questions that may be relevant on remand." *Thompson* v. *Clark*, 596 U.S. 36, 49 (2022).

III. This case is an excellent vehicle.

Respondents identify no vehicle problems as to either question presented, and there are none. Pet. 33–35. Only respondent Schorre even tries, by taking issue with some of Wilson's well-pleaded factual allegations and by insisting that he can ultimately plead immunity. See Schorre BIO 10–14. Neither effort presents a speedbump to cert.

As to Schorre's effort to smuggle in a fact dispute at the 12(b)(6) stage: None of the twenty trial and appellate judges below found reason to doubt the "egregious" due process violation Wilson suffered as a result of Schorre's hiring and staffing decisions. See Pet. App. 2a–3a (en banc plurality); Pet. App. 86a, 90a (panel opinion).

As to Schorre's eventual desire for immunity: It has no bearing on cert-worthiness because municipal respondent Midland County has no immunity defenses. Regardless, this Court regularly resolves circuit-splitting threshold issues like those presented here while remanding for immunity considerations. See, e.g., *Thompson*, 596 U.S. at 49. The courts below can decide whether Schorre's "egregious" and "utterly bonkers" decision to hire a moonlighting prosecutor to

argue to judges by day and write the same judges' orders by night warrants a judicial pass. Pet. App. 3a.

Conclusion

The petition should be granted.

Respectfully submitted,

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Jaba Tsitsuashvili
Counsel of Record
Robert McNamara
Michael Peña
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
jtsitsuashvili@ij.org

Counsel for Petitioner