No. 17-652

IN THE

Supreme Court of the United States

MARIE HENRY, as guardian, parent, next of kin, and for and on behalf of M.E. Henry-Robinson, a minor,

Petitioner,

v.

CITY OF MT. DORA, FLORIDA et al.,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE NATIONAL BAR ASSOCIATION AND BRIEF OF *AMICUS CURIAE* THE NATIONAL BAR ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE NATIONAL BAR ASSOCIATION

This matter presents this Court with the opportunity to resolve a circuit split in the application of *Heck v. Humphrey*, 512 U.S. 477 (1994), and, in the process, to preserve 42 U.S.C. § 1983 (2012) as a federal bulwark against the deprivation of federal constitutional rights. As the oldest and largest voluntary bar association of predominantly African-American attorneys and judges, the National Bar Association is deeply aware of Section 1983's origins in the Reconstruction-era violence and discrimination against former slaves, its effectiveness in dismantling Jim Crow laws during the Civil Rights movement, and its continued utility in the service of justice. Accordingly, the National Bar Association timely notified the parties of its intention to submit its *amicus* brief more than 10 days prior to filing. Petitioner provided her consent to the filing of this brief, and Respondents did not. Pursuant to Supreme Court Rule 37.2(b), the National Bar Association therefore respectfully moves the Court for leave to file the attached *amicus* brief in support of Petitioner.

The National Bar Association was founded in 1925 when the Civil War and enactment of Section 1983's predecessor as part of the Ku Klux Act of 1871 were matters of living memory. Its earliest efforts included challenges to Jim Crow laws that unconstitutionally deprived African-Americans of equal access to the ballot, education, and public accommodations. By the 1940s, the National Bar Association had established free legal clinics in 12

states, and it has continued this tradition of service into the present era.

Although the National Bar Association's members are located across the United States and have diverse backgrounds and experiences, they are part of a larger African-American community disproportionately affected by the criminal justice system. African-Americans are incarcerated at five times the rate of whites, and African-Americans represents 32% of all juvenile arrests and 42% of all juvenile detentions. *Criminal Justice Fact Sheet*, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE.[1] In 2014, African Americans constituted 2.3 million, or 34%, of the 6.8 million individuals in correctional facilities. Unsurprisingly, when African-Americans are polled about discrimination, 84% say they are treated less fairly by law enforcement and 75% say they are treated less fairly by the courts. *On Views of Race and Equality, Blacks and Whites are Worlds Apart*, PEW RES. CENTER (June 27, 2016).[2] More generally, 71% of African-Americans report they have experienced race-based discrimination, with 11% reporting it is a regular occurrence. *Id.*

The National Bar Association's members experience the effects of discrimination and the disproportionate incarceration of African-Americans personally, through their families, and through their clients. For these reasons, the National Bar Association is well-suited to provide this Court with

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[1] http://www.naacp.org/criminal-justice-fact-sheet/ (last visited Nov. 29, 2017).

[2] http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/

further insight into Section 1983's purpose as a federal remedy for the protection of constitutional rights against states' indifference, prejudice, and fear. The National Bar Association likewise is well-suited to assist this Court's consideration of the continued utility of Section 1983 as a federal remedy and the special considerations of comity and collateral attacks where *habeas* relief is unavailable. The National Bar Association therefore respectfully requests leave to file the attached *amicus* brief urging this Court to grant to the petition.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE*

The National Bar Association respectfully submits this brief as *amicus curiae* in support of Petitioner Marie Henry, as guardian, parent, next of kin, and for and on behalf of M.E. Henry-Robinson, urging that the Court grant review in No. 17-652.

INTEREST OF *AMICUS CURIAE*

The National Bar Association is the United States' oldest and largest voluntary bar association of predominantly African-American attorneys and judges.[1] It has a standing *amicus* brief committee and files *amicus* briefs in matters raising issues of concern to its members.

The National Bar Association was incorporated in 1925 after several of its founding members were denied membership to the American Bar Association, and it has been dedicated to the protection and advancement of civil rights ever since. Early efforts included challenges to Jim Crow-era restrictions that prevented African-Americans from enjoying equal voting rights, education, and access to public accommodations. In the 1940s when there were only approximately 1,000 African-American attorneys nationwide, the National Bar Association established free legal clinics in twelve states. More recently, the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission. The parties were timely notified of the National Bar Association's intention to file this brief. Petitioner gave her consent, and Respondents did not.

National Bar Association has hosted town hall meetings and panel presentations to inform African-American communities of their rights when encountering law enforcement. Through these efforts, the National Bar Association has embraced its role as the nation's legal conscience.

Where the nation has fallen short in its enforcement of constitutional rights, the National Bar Association's members have found a remedy in 42 U.S.C. § 1983 (2012). More than most Americans, the National Bar Association's members are keenly aware that Section 1983's precursor was enacted to fulfill the 14th Amendment's promise of equality in the face of Reconstruction-era discrimination and violence against African-Americans. Likewise, the National Bar Association's members have a unique appreciation as African-Americans for Section 1983's role in dismantling Jim Crow laws during the Civil Rights era.

Today, the National Bar Association retains a substantial interest in the use of Section 1983 as a federal bulwark against discrimination and injustice, and it is jealous of acts that would limit Section 1983's reach. Among several efforts, the National Bar Association advocates for juvenile and criminal justice reform and the protection of voting rights. In this regard, the National Bar Association represents the concerns of the larger African-American population regarding discrimination. 84% of African-Americans believe they are treated less fairly by law enforcement; 75% less fairly by the courts; and 43% less fairly when exercising their voting rights. *On Views of Race and Equality, Blacks and Whites are*

Worlds Apart, PEW RES. CENTER (June 27, 2016).[2] More generally, a discouraging 71% of African-Americans report they have experienced race-based discrimination, with 11% reporting it is a regular occurrence. *Id.* These anxieties and concerns are reflected on a national level in social movements like #BlackLivesMatter, demonstrations of prominent Black athletes, and debates over the appropriateness of monuments to the Confederacy.

For these reasons, the National Bar Association believes this Court should clarify or limit its decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). Like certain of its sister circuits, the Eleventh Circuit has applied *Heck* to bar a Section 1983 action where *habeas* relief was unavailable. The effect of this and similar decisions is to reserve to the states the enforcement of federal constitutional rights. The National Bar Association submits this *amicus* brief to inform the Court that such an outcome is contrary to the Congressional intent underlying Section 1983 and to urge this Court to grant the petition and resolve a circuit split by excluding such claims from *Heck*'s bar.

SUMMARY OF ARGUMENT

Section 1983 has its origins in what is commonly known as the Ku Klux Act of April 20, 1871, 17 Stat. 13. As suggested by its name, this legislation was a response to the violence and discrimination against African-Americans that plagued Reconstruction. In particular, the Ku Klux Act of 1871 targeted the prejudice, indifference, and fear that caused certain states, whether *de facto* or *de jure*, to deny protections

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[2] http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/

under the United States Constitution. A key purpose of the Ku Klux Act of 1871 therefore was to afford a federal forum for the protection of federal rights.

This Court has had several occasions to consider the relationship between the successor to Section 1 of the Ku Klux Act of 1871, 42 U.S.C. § 1983, and the federal *habeas* statute, 28 U.S.C. § 2254 (2012). In *Heck*, this Court held that a Section 1983 action is barred where it would imply the invalidity of a conviction that has not first been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by issuance of a writ of *habeas corpus*. 512 U.S. at 486-87. In a concurrence joined by Justices Blackmun, Stevens, and O'Connor, Justice Souter expressed his belief that the majority's "favorable termination" requirement would not extend to bar Section 1983 actions where *habeas* relief is unavailable. *Id.* at 500. In a footnote reply in the majority opinion, Justice Scalia suggested that it would. *Id.* at 490 n. 10.

The tension between Justices Souter and Scalia's approaches remains unresolved and has produced a circuit split on *Heck*'s application where *habeas* relief is unavailable. A slight majority of circuits regards Justice Scalia's statement as *dicta* and has followed Justice Souter's concurrence to permit Section 1983 actions to proceed.[3] A minority of circuits, like the

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[3] *Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001); *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 593 (6th Cir. 2007); *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000); *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002); *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010).

Eleventh Circuit, has applied *Heck* as an absolute bar.[4]

The better rule is the majority rule dispensing with the favorable termination requirement when *habeas* relief is unavailable and allowing Section 1983 actions to proceed. The alternative reserves to states the enforcement of constitutional rights and undermines a central purpose of Section 1983: access to a federal forum for the enforcement of federal rights.

The National Bar Association as *amicus curiae* therefore supports the petition and urges this Court to resolve the circuit split by dispensing with *Heck*'s favorable termination requirement where *habeas* relief is unavailable and, in the process, preserving Section 1983 as a vital tool for the protection of federal constitutional rights.

ARGUMENT

I. SECTION 1983 RESULTS FROM AN EXPRESS CONGRESSIONAL INTENTION TO MAKE THE FEDERAL COURTS AVAILABLE FOR THE PROTECTION OF FEDERAL CONSTITUTIONAL RIGHTS

Even when judged against the then-recent memory of the Civil War, the period in which Congress enacted the precursor to Section 1983, Section 1 of the Ku Klux Act of 1871, was particularly turbulent. A primarily local phenomenon during the

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[4] *Figuero v. Rivera*, 147 F.3d 77 (1st Cir. 1998); *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000); *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007); *Henry v. City of Mt. Dora*, 688 Fed. App'x 842 (11th Cir. 2017) (*per curiam*).

first few months of its founding in Pulaski, Tennessee, in 1866, the Ku Klux gained national attention between late 1867 and early 1868 for its attacks on African-Americans and Republicans. ELAINE FRANTZ PARSONS, KU-KLUX: THE BIRTH OF THE KLAN DURING RECONSTRUCTION 63-64 & 72 (2015). By April 1868, Hiram C. Whitley had been tasked with applying the then-nascent Secret Service to investigate the Ku Klux, and Tennessee and Alabama held public hearings in July and November 1868, respectively. *Id*. at 148-49.

By late 1870, the Ku Klux phenomenon had become a crisis. In November 1870, the aid-de-camp to Governor Robert Scott of South Carolina arrived in Washington, D.C., and reported to President Ulysses S. Grant and Secretary of War William W. Belknap that "murder and other acts of violence are constantly occurring, and that the offenders go unpunished in consequence of the inertness or want of power of the civil authorities." Letter from Unknown Correspondent to Pres. Ulysses S. Grant (Nov. 7, 1870), *in* ULYSSES S. GRANT, THE PAPERS OF ULYSSES S. GRANT, VOLUME 21: NOVEMBER 1, 1870-MAY 31, 1871 259 (John Y. Simon ed., 1998).

Only a few months later in mid-January 1871, Governor Scott wrote Brig. Gen. Alfred H. Terry that a reign of terror fueled by Ku Klux violence existed in Spartanburg and Union Counties. Letter from Gov. Robert K. Scott to Brig. Gen. Alfred H. Terry (Jan. 17, 1871), *in id.* Two weeks prior, on January 5, 1871, a Ku Klux mob had attacked the Union County jail, breaking in with axes when refused the key by the sheriff and taking five African-American prisoners from their cells. *Id.*; *see also* ELAINE FRANTZ PARSONS,

supra, at 249-53. Either two or three of the prisoners were killed in this attack, depending on the account. *Compare* Letter from Gov. Robert K. Scott to Brig. Gen. Alfred H. Terry, *supra* (three casualties), *with* ELAINE FRANTZ PARSONS, *supra*, at 251-53 (two casualties).

By February 14, 1871, conditions in South Carolina had deteriorated so significantly that Governor Scott telegraphed President Grant to request that a detachment of federal troops be sent to Union County. Telegraph from Gov. Robert K. Scott to Pres. Ulysses S. Grant (Feb. 14, 1871), *in* ULYSSES S. GRANT, supra at 259. On February 15, 1871, President Grant obliged. Telegraph from Gen. William T. Sherman to Maj. Gen. Henry W. Halleck (Feb. 15, 1871), *in id.*

Against this backdrop, President Grant wrote James G. Blaine, the Speaker of the House of Representatives, on March 9, 1871, to emphasize the "deplorable state of affairs existing in some portions of the South" and request that Congress "provid[e] means for the protection of life and property in those Sections of the Country where the present civil authority fails to secure that end." Letter from Pres. Ulysses S. Grant to Hon. James G. Blaine (Mar. 9, 1871), *in id.* at 218-19. On March 23, 1871, President Grant addressed Congress directly to again report "[a] condition of affairs now exist[ing] in some of the States of the Union, rendering life and property insecure, and the carrying of the mails, and the collection of the revenue dangerous." Letter from Pres. Ulysses S. Grant to Congress (Mar. 23, 1871), *in id.* at 246. Because "the power to correct these evils is beyond the control of the State authorities," President

Grant urged Congress to pass legislation that would "effectually secure life liberty and property, and the enforcement of law, in all parts of the United States." *Id.*

Although the Ku Klux Act of 1871 had been introduced in draft form in the latter days of the 41st Congress, President Grant's March 23rd message spurred the newly-seated 42nd Congress into action. David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law,* 1999 UTAH L. REV. 1, 7-9 & 44-46. With President Grant's urging, the Ku Klux Act of 1871 was passed by Congress on April 20, 1871, and included in Section 1 what is now codified as amended at 42 U.S.C. § 1983:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage, of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States …"

Ku Klux Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2012)).

Supporters and opponents of the Ku Klux Act of 1871 understood that a primary purpose was to establish a federal bulwark against the deprivation of constitutional rights. Congressman Aaron F. Perry of Ohio spoke eloquently of the problem the legislation intended to address:

> "Where these gangs of assassins show themselves, the rest of the people look on, if not with sympathy, at least with forbearance. … Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection."

Hon. Aaron F. Perry, Remarks on the Floor of the House of Representatives (Mar. 31, 1871), *in Cong. Globe*, 42d Cong., 1st Sess. app. 78 (1871). These injustices fell mostly upon "blacks and against white people who by any means attract attention as earnest friends of the blacks." *Id.*

Congressman David Perley Lowe of Kansas expressed similar concerns on the floor of the House of Representatives:

> "Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress. If there is no remedy for this, if the rights of citizenship may

> be denied without redress, if the Constitution may not be enforced, if life and liberty may not be effectively protected, then, indeed, is our civil Government a failure, and instead of enjoying liberty regulated by law, its subjects may live only by the sufferance of lawless and exasperated conspirators."

Hon. David Perley Lowe, Remarks on the Floor of the House of Representatives (Mar. 31, 1871), *in Cong. Globe*, 42d Cong., 1st Sess. 374.

And, Congressman John Beatty of Ohio succinctly summarized the problem Congress sought to address where he argued that "[t]he State, from lack of power or inclination, practically denied the equal protection of the law …" Hon. John Beatty, Remarks on the Floor of the House of Representatives (Apr. 3, 1871), *in Cong. Globe*, 42d Cong., 1st Sess. 428.

Opponents of the Ku Klux Act of 1871 recognized the legislation would address discrimination and violence through the creation of a federal remedy. Referring to the precursor to Section 1983, Congressman Michael Kerr of Indiana complained:

> It "gives to any person who may have been injured in any of his rights, privileges or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts. … It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to

> which it of right belongs, to those of the United States."

Hon. Michael Kerr, Remarks on the Floor of the House of Representatives (Mar. 28, 1871), *in Cong. Globe*, 42d Cong., 1st Sess., app. 50.

In consideration of these and other remarks from the 42nd Congress, this Court has held:

> "It is abundantly clear that one reason the [Ku Klux Act of 1871] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."

Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). A "powerful impulse behind the creation of [Section 1983] was the purpose that it be available in, and shaped through, original federal tribunals." *Id.* at 252 (Frankfurter, J., dissenting).

The fact that Section 1983 opened access to the federal courts for constitutional claims was significant. "In a suit to enforce fundamental constitutional rights, the plaintiff's choice of a federal forum has singular urgency." *Preiser v. Rodriguez*, 411 U.S. 475, 515 (1973) (Brennan, J., dissenting). Indeed, as this Court held in *Patsy v. Board of Regents*:

> "A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the [Ku Klux Act of 1871] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated those rights. … This Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of the state courts."

457 U.S. 496, 505-06 (1982).

Section 1983 therefore is traceable to a clear Congressional intent to provide Americans, and particularly African-Americans, access to a federal forum for the protection of federal constitutional rights.

II. APPLICATION OF A FAVORABLE TERMINATION REQUIREMENT TO SECTION 1983 ACTIONS WHERE *HABEAS* RELIEF IS UNAVAILABLE REMOVES ACCESS TO THE FEDERAL COURTS AND IS CONTRARY TO CONGRESSIONAL INTENT

In *Heck*, this Court held that an inmate's Section 1983 action was barred because it would imply the invalidity of a conviction that had not previously 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."

512 U.S. at 486-87. The effect of this holding was to import a favorable termination requirement into Section 1983 jurisprudence. *See id.* at 484.

In a concurrence joined by Justices Blackmun, Stevens, and O'Connor, Justice Souter read *Heck* as applying only to individuals in custody; that is, those eligible for federal *habeas* relief. *Id.* at 500 (Souter, J., concurring). Extending *Heck* to *habeas*-ineligible plaintiffs would "deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling." *Id.* Writing for the majority in reply, however, Justice Scalia suggested in *dicta* that "the principle barring collateral attacks … is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 490 n. 10. Justice Ginsburg, who had joined the majority in *Heck*, subsequently wrote in concurrence in *Spencer v. Kemna* that she had come to agree with Justice Souter: *Heck*'s favorable termination requirement does not extend to *habeas*-ineligible Section 1983 plaintiffs. 523 U.S. 1, 21-22 (1998).

The tension between Justices Souter and Scalia's approaches has produced a circuit split begging for resolution by this Court. And, the only resolution consistent with Section 1983's fundamental purpose is one that preserves access to the federal courts by dispensing with *Heck*'s favorable termination requirement for *habeas*-ineligible plaintiffs. The alternative is to create a class of individuals for whom the States have final and exclusive review of federal constitutional violations. Such a result would have been intolerable to the 42nd Congress, which believed that access to a federal forum was necessary to

provide a bulwark against states' prejudice, indifference, or fear in the enforcement of federal constitutional rights. *Monroe*, 365 U.S. at 180.

Section 1983 and the federal *habeas* statute, 28 U.S.C. § 2254, are twin pillars for the protection of federal constitutional rights. *Muhammad v. Close*, 540 U.S. 749, 750 (2004). "It is futile to contend that the [Ku Klux] Act of 1871 has less importance in our constitutional scheme than does the Great Writ [of *habeas corpus*]." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). If an individual lacks access to the federal courts because *habeas* relief is unavailable, it is not grounds for barring a Section 1983 action, as well, but rather an argument for its very necessity. This Court accordingly should resolve the circuit split by clarifying or limiting its holding in *Heck* to dispense with the favorable termination requirement for *habeas*-ineligible Section 1983 plaintiffs.

III. THE NEED FOR ACCESS TO THE FEDERAL COURTS SURVIVED RECONSTRUCTION

In his concurrence in *Heck*, Justice Souter considered the Reconstruction-era case of a freedman framed for raping a white woman by Ku-Klux-controlled state law enforcement and subsequently convicted by a Ku-Klux-controlled state court. 512 U.S. at 501. If the unjustly arrested and convicted freedman only discovered proof of unconstitutionality after his release from custody, he would lack recourse to the federal courts not only through federal *habeas* relief but also through Section 1983. *Id.* at 501-02. Justice Souter found such a result to be irreconcilable with the purpose of Section 1983 or the origins of the Ku Klux Act of 1871. *Id.* at 502.

Although presented as a hypothetical, Justice Souter could have found a more egregious real-life example in his colleague Justice Thurgood Marshall's case of the "Groveland Four." When Norma Lee Padgett falsely accused four African-American men of raping her on a summer night in 1949, she struck the first in an escalating series of blows against justice. *See* S. Con. Res. CS/SCR 920: Groveland Four, 2017 Sess. (Fla.). One of the men, Earl Thomas, was killed by a mob before he could be arrested. *Id.* Two others, Samuel Shepherd and Walter Irvin, were convicted in a sham trial reversed by this Court as "one of the best examples of one of the worst menaces to American justice." *Shepherd v. Florida*, 341 U.S. 50, 55 (1951) (*per curiam*) (Jackson, J., concurring).[5]

Then, before he could be retried, Shepherd was murdered by Lake County Sheriff Willis McCall. S. Con. Res. CS/SCR 920. Shepherd's co-defendant Walter Irvin, however, was retried and again convicted by an all-white jury. *Id.*; Jacey Fortin, *Florida Apologizes for 'Gross Injustices' to Four Black Men, Decades Later*, N.Y. TIMES (Apr. 27, 2017).[6] Only the commutation of his sentence by Florida Governor LeRoy Collins - prompted, in part, by an extraordinary letter from Prosecutor Jesse Hunter questioning the jury's verdict - saved Irvin from

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[5] The third man, Charles Greenlee, was sentenced to life imprisonment. S. Con. Res. CS/SCR 920.

[6] https://www.nytimes.com/2017/04/27/us/groveland-four-apology-florida.html

execution by the State. Gilbert King, *An Apology in Lake County*, ATLANTIC (May 15, 2017).[7]

In a Concurrent Resolution adopted on April 27, 2017, the Florida Senate and House of Representatives formally apologized to the Groveland Four for the State's miscarriages of justice "fueled by racial hatred." S. Con. Res. CS/SCR 920. Under the 11th Circuit's application of *Heck*, however, Irvin would have been barred from ever accessing a federal forum for the protection of his federal constitutional rights. Irvin was commuted, not pardoned, and he therefore could neither have sought federal *habeas* relief (because he was not in custody) nor filed a Section 1983 action (because the underlying conviction had not been invalidated).

A more recent case is attributable to greed rather than racial prejudice. As judges on the Court of Common Pleas of Luzerne County, Pennsylvania, Mark Ciavarella and Michael T. Conahan sentenced thousands of juveniles to a private detention facility in exchange for millions of dollars in kickbacks. INTERBRANCH COMMISSION ON JUV. JUST., REPORT 8-9 (2010). M.K., then 13 years old, was sentenced by Judge Ciavarella to 48 days of detention after a cursory hearing; his offense was having thrown a piece of steak at his mother's boyfriend during an argument. *Hundreds of Pa. Juvenile Convictions Reversed*, ASSOCIATED PRESS (Mar. 26, 2009).[8]

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[7] https://www.theatlantic.com/politics/archive/2017/05/florida-apologizes-to-family-of-groveland-boys/526680/

[8] http://www.nbcnews.com/id/29900818/ns/us_news-crime_and_courts/t/hundreds-pa-juvenile-convictions-reversed/

Although less than six percent of Luzerne County's approximately 320,000 residents are African-American, they would have been disproportionately affected by what has become known as the "Cash for Kids" scandal. *See Quick Facts: Luzerne County, Pennsylvania*, U.S. CENSUS BUREAU.[9] In 2006, the respective arrest and detention rates in Luzerne County per 1,000 youth were 204 and 67 for African-American children and 48 and 10 for white children. Arrest and Detention Rates for Luzerne County, Pennsylvania, Youth, THE W. HAYWOOD BURNS INST. FOR JUST., FAIRNESS, AND EQUITY.[10] These disparities are comparable to the nearly six-fold disparity between African-American and white juvenile detentions nationally. *See Juvenile Detention Rates by Race/Ethnicity, 1997-2015*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION (Aug. 7, 2017).[11]

Upon discovering the dismal state of juvenile justice in Luzerne County, the Juvenile Law Center attempted in April and December 2008 to bring Judges Ciavarella and Conahan's actions to the attention of the Supreme Court of Pennsylvania in a "King's Bench" petition. Application for Exercise of King's Bench Power or Extraordinary Jurisdiction, *In*

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[9] https://www.census.gov/quickfacts/fact/map/luzernecounty pennsylvania/INC110215 (last visited Nov. 29, 2017)

[10] http://data.burnsinstitute.org/decision-points/39/Pennsylvania (Customize "Case flow diagram" for "Annual decision points" to show "Youth arrests / youth population" and "Detained / youth population" and limit selection to "Luzerne County") (last visited Nov. 29, 2017)

[11] https://www.ojjdp.gov/ojstatbb/special_topics /qa11802.asp?qaDate=2015

re J.V.R., No. 81 MM 2008 (Pa. filed Apr. 29, 2008); Application for Post-Submission Communication, *In re J.V.R.*, No. 81 MM 2008 (Pa. filed Dec. 23, 2008). On January 8, 2009, however, the petition was denied by *per curiam* order. Order Denying Application for Extraordinary Relief, *In re J.V.R.*, No. 81 MM 2008 (Pa. Jan. 8, 2009). Nevertheless, only a month later, and only after details of federal criminal charges against Judges Ciavarella and Conahan had become public, the Supreme Court of Pennsylvania reversed its earlier dismissal of the petition and appointed a special master to investigate the allegations. Order Granting Motion for Reconsideration of Denial of Application for the Exercise of King's Bench Power, *In re J.V.R.*, No. 81 MM 2008 (Pa. Feb. 11, 2009). Following months of investigation, the Supreme Court of Pennsylvania subsequently vacated and expunged thousands of juvenile convictions. Order, *In re J.V.R.*, No. 81 MM 2008 (Pa. Mar. 26, 2009); Order, *In re J.V.R.*, No. 81 MM 2008 (Pa. Oct. 29, 2009); and Order, *In re J.V.R.*, No. 81 MM 2008 (Pa. Mar. 29, 2010).

Several class actions raising Section 1983 claims were filed as a result of the "Cash for Kids" scandal. *See, e.g.,* Complaint, *Wallace v. Powell*, 288 F.R.D. 347 (M.D. Pa. 2012) (No. 3:09-cv-286-ARC); Complaint, *H.T. v. Ciavarella*, No. 3:09-cv-357-ARC (M.D. Pa. filed Feb. 26, 2009), *consolidated with Wallace*, 288 F.R.D. 347 (No. 3:09-cv-286-ARC). And, several settlements have been approved. *See, e.g.,* Final Order and Judgment, *Wallace*, 288 F.R.D. 347 (No. 3:09-cv-286-ARC).

Yet, the fact that the "Cash for Kids" victims could assert claims in federal court is due, at least in part,

to the Supreme Court of Pennsylvania's vacatur and expungement of thousands of convictions. Under the broad reading of *Heck* endorsed by the Third Circuit, *see Gilles v. Davis*, 427 F.3d 197, many of the victims otherwise would have been barred from the federal courts for the protection of their federal constitutional rights. M.K., for example, who was detained for only 48 days, would have been functionally prohibited by state exhaustion requirements from seeking federal *habeas* relief. M.K.'s access to the federal courts in a Section 1983 action therefore would have been predicated upon his ability to satisfy the favorable termination requirement in state proceedings tainted by corruption.

It is tempting to view the commutation of Irvin's sentence by Florida Governor Collins and the vacatur and expungement of juvenile sentences by the Supreme Court of Pennsylvania as evidence of the strength of state proceedings and the gratuitousness of Section 1983 as a federal bulwark. Nonetheless, this temptation should not be indulged.

Before Irvin's sentence was commuted, he was twice-convicted in sham trials of a rape he did not commit, and his co-defendant was murdered by the sheriff sworn to uphold and protect the law. And, while Governor Collins' commutation saved Irvin's life, it did not remove the stain of an unjust arrest and conviction. Similarly, before the Supreme Court of Pennsylvania appointed a special master to investigate juvenile proceedings in Luzerne County, it denied two "King's Bench" petitions imploring it to act. Only federal criminal proceedings against Judges Ciavarella and Conahan convinced the Supreme

Court of Pennsylvania that the matter required its attention.

If the Groveland Four and the victims of "Cash for Kids" obtained justice, it was in part *despite* rather than *because* of the state actors involved. The accident of their vindication should not be cause to ignore others whose constitutional deprivations go unremedied in state proceedings. The hidden counterparts of the Groveland Four and "Cash for Kids" demand a federal remedy in Section 1983 to bring injustice to the light.

IV. CONSIDERATIONS OF COLLATERAL ATTACKS AND COMITY ARE SIGNIFICANTLY DIFFERENT WHERE *HABEAS* RELIEF IS UNAVAILABLE

Heck's favorable termination requirement has its origins in an aversion to collateral attacks, which might result in parallel proceedings and potentially conflicting judgments. 512 U.S. at 484-86. Moreover, as this Court explained in *Muhammad*, "conditioning the right to bring a § 1983 action on a favorable result in state litigation or federal habeas served the practical objective of preserving limitations on the availability of habeas remedies." 540 U.S. at 751. In the absence of a favorable termination requirement, this Court feared that Section 1983 actions would swallow federal *habeas* actions due to the absence of exhaustion requirements and the generally smoother path to the courts. *Id.* at 751-52.

Where *habeas* relief is unavailable, however, the circumstances giving rise to these concerns are significantly different. First, rather than replacing one of the twin pillars for the protection of federal

constitutional rights, Section 1983 stands alone as the sole means of access to the federal courts. Second, because the individual is not in custody, the practical effect of collateral attacks is less salient.

If an individual is in custody, a favorable Section 1983 decision calling the underlying conviction into question might be used in post-conviction proceedings to secure his release. At a minimum, however, the favorable Section 1983 decision creates a Catch-22 for the state official charged with the individual's incarceration: his custody has been held unlawful by a federal court but remains required pursuant to the state conviction. Actions directed toward either release or continued confinement place the state official at risk.

By contrast, if the individual is not in custody, a favorable Section 1983 decision calling the underlying conviction into question cannot be used to attack his incarceration or place a state official at risk of inconsistent obligations. The individual's sentence either will have been non-custodial or completed.

The remaining consideration is the respect for state court judgments inherent to our federal system of government. Yet, a Section 1983 action does not invalidate the underlying conviction, and the principle of comity is not absolute. Congress can disregard it, as when Congress enacted Section 1983 and the federal *habeas* statute to provide federal recourse for state violations of federal constitutional rights. Moreover, this Court has held that "[i]n appropriate cases those principles [of comity and finality] must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*,

456 U.S. 107, 135 (1982). As this Court stated in the context of *habeas* relief:

> It "always has been a *collateral remedy* … The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect …"

Teague v. Lane, 489 U.S. 288, 306 (1989) (emphasis in original). Simply, "[t]he State court cannot have the last say when it … may have misconceived a federal constitutional right." *Daniels v. Allen*, 344 U.S. 443, 508 (1953), *overruled in part on other grounds by Townsend v. Sain*, 372 U.S. 293 (1963).

The collateral consequences and social opprobrium accompanying a criminal conviction are not felt less intensely simply because the individual is not in custody and therefore ineligible for *habeas* relief. The National Inventory of Collateral Consequences of Conviction is a federally-mandated and -funded study tracking the collateral consequences of conviction across jurisdictions. *National Inventory of the Collateral Consequences of Conviction*, COUNCIL OF STATE GOV'TS JUST. CENTER[12]; Court Security Improvement Act of 2007, Publ. L. 110-

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[12] www.niccc.csgjusticecenter.org (last visited Nov. 24, 2017)

177, § 510, 121 Stat. 2534 (2008). For Florida, where this petition originates, the National Inventory identifies 53 mandatory or automatic collateral consequences originating from misdemeanors alone. *National Inventory*, *supra*.

A Section 1983 action cannot invalidate the underlying conviction and therefore preclude these collateral consequences, but it can provide justice where it would otherwise be denied. An aversion to collateral attacks and a support for comity should not be elevated above federal constitutional rights, and where the states will not act due to prejudice, indifference, or fear, Section 1983 must remain available as a federal bulwark against injustice regardless of the availability of *habeas* relief.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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