No. 19-266

In the Supreme Court of the United States

SEANTREY MORRIS,

Petitioner,

v.

JOSEPH MEKDESSIE, BRANDON LEBLANC; DANIEL SWEARS; ARTHUR S. LAWSON, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE, CITY OF GRETNA POLICE DEPARTMENT; GRETNA CITY

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF TASC, INC. (TREATMENT ALTERNATIVES FOR SAFE COMMUNITIES) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF TASC, INC. (TREATMENT ALTERNATIVES FOR SAFE COMMUNITIES) IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37.2, TASC, Inc. (Treatment Alternatives for Safe Communities, "TASC"), respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of petitioner. The parties were given timely notice, and counsel for petitioner has consented to the filing of the *amicus curiae* brief; however, counsel for respondents have not responded to requests seeking consent to this filing.

Founded in 1976, TASC is a nonprofit organization that established one of the nation's first diversion programs. TASC supports the operation of pretrial diversion programs in Illinois by screening individuals for program eligibility, conducting clinical assessments, facilitating referrals to appropriate services, providing ongoing monitoring, and communicating regularly with all stakeholders. Through this and other programming, TASC reaches 40,000 people in Illinois alone each year. On the local, statewide, federal, and international levels, TASC also engages in public policy, training, and consulting initiatives with law enforcement, courts, treatment providers, and policymakers that address the benefits and consequences of pretrial diversion.

Accordingly, TASC has a direct and substantial interest in the question presented in this case: *i.e.*, whether individuals who successfully complete a pretrial diversion program that never results in a criminal conviction or sentence may nonetheless be barred from bringing a civil rights claim under 42 U.S.C. § 1983, pursuant to *Heck* v. *Humphrey*, 512 U.S. 477

(1994). The answer to that question affects not only the individuals directly served by TASC, but the hundreds of thousands of participants in such pretrial diversion programs nationwide.

Through the attached *amicus curiae* brief, TASC seeks to provide the Court a broader perspective on the important role that pretrial diversion programs play in the U.S. criminal justice system today. TASC also seeks to explain why this Court's prompt review of the question presented in this case is critical for the successful operation and expansion of such programs.

For these reasons, TASC respectfully requests that the motion for leave to file the attached *amicus curiae* brief be granted.

Respectfully submitted.

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INTEREST OF *AMICUS CURIAE*[1]

TASC, Inc. (Treatment Alternatives for Safe Communities, "TASC"), is a nonprofit organization headquartered in Chicago, Illinois. Founded in 1976, TASC created one of the nation's first diversion programs offering treatment-based alternatives to traditional criminal case processing for individuals with substance use disorders. Today, it operates the largest program of this kind nationwide, and through all of its programming reaches over 40,000 people in Illinois alone each year. Now in its fifth decade of operation, TASC is at the forefront of local, state, national, and global initiatives to ensure just and safe communities.

Through its work with alternatives to traditional criminal case processing, TASC has developed particular experience with pretrial diversion programs. The phrase "pretrial diversion" describes a range of criminal justice programs that afford alternatives to traditional case processing and disposition, from initial police encounters through the courts and community supervision. Diversion programs exist in all 50 states and the District of Columbia, and in the federal criminal justice system. While programs are tailored to local priorities, needs, and resources, common goals include addressing substance use disorders or mental health problems; reducing recidivism; minimizing collateral consequences of criminal convictions; relieving overburdened court dockets; prioritizing more serious cases over lesser ones; and reducing criminal justice

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties were given timely notice of this filing.

system costs. Components of successful pretrial diversion participation may include substance use or mental health services, toxicology screening, education, employment, restitution, community service, or payment of fees.

TASC supports the operation of pretrial diversion programs in Illinois by screening individuals for program eligibility, conducting clinical assessments, facilitating referrals to appropriate services, providing ongoing monitoring, and communicating regularly with all stakeholders. Over the past five years, TASC provided services that diverted more than 11,000 adults from traditional criminal case processing. On the local, statewide, federal, and international levels, TASC engages in public policy, training, and consulting initiatives with law enforcement, courts, treatment providers, and policymakers that address the benefits and consequences of pretrial diversion.

Accordingly, TASC has a direct interest in the question presented here: whether a person who successfully completes a pretrial diversion program that never results in a criminal conviction or sentence may be barred from bringing a civil rights claim under 42 U.S.C. § 1983. The answer to that question affects not only the individuals directly served by TASC, but the hundreds of thousands of participants in such pretrial diversion programs nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

Pretrial diversion programs were first adopted in the United States in the 1960s as an alternative to traditional criminal justice proceedings. Today, thou-

sands of formally documented pretrial diversion programs exist at the local, state, and federal levels, in all 50 states and the District of Columbia. Pretrial diversion programs direct individuals out of the criminal justice system as part of a broad effort to achieve one or more of several goals, including: addressing the root causes of behavior that affects community safety or health, like substance use and mental health problems; reducing recidivism; reducing convictions and their collateral consequences; and conserving resources of prosecutors and courts alike. Every year, hundreds of thousands of individuals nationwide enter into pretrial diversion programs, typically agreeing with prosecutors to follow certain requirements in exchange for criminal charges being dismissed or never filed.

This case presents an important and recurring question that affects the operation of, and participants in, pretrial diversion programs nationwide: *i.e.*, whether pretrial diversion participants who have not received a criminal conviction or sentence are nonetheless barred from bringing a subsequent civil rights action under § 1983. As such, this brief focuses on those pretrial diversion programs that do not result in a conviction.

In *Heck* v. *Humphrey*, 512 U.S. 477, 486-487 (1994), this Court held that claims for damages that challenge the validity of a criminal "conviction or sentence" are not cognizable under § 1983 unless the conviction or sentence has already been invalidated. Central to that holding is the view that the federal habeas corpus statute, not § 1983, is the proper mechanism for challenging the "fact or duration of * * * physical imprisonment," *Preiser* v. *Rodriguez*, 411 U.S. 475,

500 (1973), and that a plaintiff must not be permitted to collaterally attack a conviction "through the vehicle of a civil suit," *Heck*, 512 U.S. at 484 (quoting 8 S. Speiser et al., American Law of Torts § 28:5, at 24 (1991)). But when a § 1983 plaintiff's action would "not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff"—for example, where the criminal charges were previously dismissed—"the action should be allowed to proceed." *Id.* at 487.

Although *Heck* clearly bars using § 1983 to collaterally attack extant criminal judgments, the courts of appeals are squarely split on whether *Heck* applies where a § 1983 plaintiff successfully completed a pretrial diversion program and thus did not receive a criminal conviction. While three circuits correctly conclude that *Heck* does not apply absent an underlying conviction, three other circuits hold that a § 1983 plaintiff who has successfully completed a pretrial diversion program must demonstrate that he was exonerated of the underlying charges. See Pet. 1. The latter circuits improperly treat participation in a pretrial diversion program as barring plaintiffs from seeking relief under § 1983, even absent a conviction or sentence—indeed, in circumstances where a prosecutor agreed that no conviction would occur. The circuit conflict thus turns on a threshold legal question of whether *Heck* bars the claims of a plaintiff who was never convicted or sentenced because the criminal charges were dismissed through a pretrial diversion program.

Given the ubiquity of local, state, and federal pretrial diversion programs throughout the country, this

case raises an important, recurring question that affects hundreds of thousands of people every year. This Court's intervention is urgently warranted to settle the intractable disagreement among the circuits and establish a rule that furthers the underlying purpose of pretrial diversion programs, while ensuring uniformity in the availability of § 1983 relief for individuals who are not convicted of a criminal offense.

ARGUMENT

I. This Court Established The *Heck* Rule To Bar Collateral Attacks Under Section 1983 On Extant Criminal Judgments

In *Heck* v. *Humphrey*, 512 U.S. 477, 486-487 (1994), this Court held that claims for damages that challenge the validity of a "conviction or sentence" are not cognizable under 42 U.S.C. § 1983 unless the conviction or sentence has already been invalidated. The *Heck* rule has its origins in *Preiser* v. *Rodriquez*, 411 U.S. 475 (1973). There, plaintiffs sought equitable relief under § 1983, alleging that they had been unconstitutionally deprived of good-time credits by prison officials as punishment for disciplinary violations. *Preiser*, 411 U.S. at 476. If the plaintiffs' claims were successful, the restoration of good-time credits would have resulted in their immediate release from prison. *Id.* at 487. The plaintiffs were therefore employing § 1983 to attack the lawfulness of their continued confinement, a challenge falling within "the traditional scope of habeas corpus." *Ibid.*; see also *id.* at 484 ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and * * * the traditional function of the writ is to secure release from illegal custody.").

Although the claims in *Heck* ostensibly came within the broad language of § 1983, the Court reasoned that the more specific habeas corpus statute, 28 U.S.C. § 2254, "must override the general terms of § 1983." *Preiser*, 411 U.S. at 490. Otherwise, plaintiffs could relabel habeas claims under § 1983 and evade statutory conditions for seeking federal habeas relief, including the exhaustion of adequate state court remedies. *Id.* at 489-490. Moreover, the Court concluded it would better serve "federal-state comity" to afford states an opportunity to correct their own constitutional errors. *Id.* at 490-491. Based on these concerns, *Preiser* concluded that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500.

Preiser thus established a clear bar against injunctive relief claims under § 1983 challenging the fact or duration of an individual's confinement. In *Heck*, the Court addressed the question left open in *Preiser*—*i.e.*, "whether a state prisoner may challenge the constitutionality of his conviction in a suit for *damages* under 42 U.S.C. § 1983." *Heck*, 512 U.S. at 478 (emphasis added). In *Heck*, the plaintiff alleged that officials had unconstitutionally caused his conviction by engaging in an unlawful investigation, destroying exculpatory evidence, and causing an unlawful voice-identification procedure to be used at trial. *Id.* at 479. By the time the § 1983 case reached this Court, the conviction had already been affirmed on direct appeal, and two federal habeas corpus petitions had been dismissed or de-

nied. *Ibid.* Even though monetary relief is not available through habeas, the Court found that the damages claim arose at the "intersection" of § 1983 and habeas. *Id.* at 480. The Court reasoned that, in certain circumstances, a plaintiff seeking damages "*can* be said to be 'attacking . . . the fact or length of . . . confinement,'" particularly "when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction." *Id.* at 481-482 (quoting *Preiser*, 411 U.S. at 490). The *Heck* Court therefore faced the question whether "damages claims that * * * call into question the lawfulness of conviction or confinement," and thus raise the same concerns addressed in *Preiser*, are cognizable under § 1983. *Id.* at 483.

In addressing that question, the Court drew an analogy to the common law cause of action of malicious prosecution, which requires proof of "termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. This requirement "avoids parallel litigation over the issues of probable cause and guilt"; precludes a plaintiff from "succeeding in the tort action after having been convicted in the underlying criminal prosecution"; and prevents "a collateral attack on the conviction through the vehicle of a civil suit." *Ibid.* (quoting 8 S. Speiser et al., American Law of Torts § 28:5, at 24 (1991)). Explaining that § 1983 "borrowed general tort principles," *id.* at 485 n.4, the Court concluded that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his con-

viction or confinement." *Id.* at 486. From this conclusion, the Court derived what is now referred to as the *Heck* rule:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by action whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has 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. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

Id. at 486-487 (footnote and citation omitted).

The central inquiry under *Heck* is thus "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. "[I]f the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Ibid.* (footnote omitted).

Viewed in light of its roots in *Preiser*, the *Heck* rule preserves the traditional function of habeas relief by barring the use of § 1983 to collaterally attack an outstanding "conviction," "sentence," "imprisonment," or "confinement"—*i.e.*, an extant criminal judgment.

Subsequent decisions by this Court confirm this reading of *Heck*. This Court has never applied *Heck* to preclude a § 1983 claim that does not require proof of the unlawfulness of an outstanding criminal conviction or imprisonment, and has repeatedly refused to extend the *Heck* bar to such claims.[2] In sum, *Heck* "is called into play only when there exists 'a conviction or sentence that has *not* been . . . invalidated,' that is to say, an 'outstanding criminal judgment.'" *Wallace*, 549 U.S. at 393 (quoting *Heck*, 512 U.S. at 487).

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[2] See, *e.g.*, *Skinner* v. *Switzer*, 562 U.S. 521, 525 (2011) (*Heck* inapplicable to postconviction claim for DNA testing, because access to potentially "exculpatory, inculpatory, or inconclusive" DNA evidence would not "necessarily impl[y] the unlawfulness of the State's custody" (citation omitted)); *Hill* v. *McDonough*, 547 U.S. 573, 580 (2006) (*Heck* inapplicable to § 1983 challenge to method of execution, rather than sentence); *Wilkinson* v. *Dotson*, 544 U.S. 74, 82 (2005) (*Heck* does not bar § 1983 challenge to state parole procedures because availability of new parole hearings would not "necessarily imply the invalidity of [plaintiffs'] conviction[s] or sentence[s]" (citation omitted)); *Muhammad* v. *Close*, 540 U.S. 749, 751 (2004) (damages claim regarding retaliatory punishment was cognizable under § 1983 because *Heck* is not "implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence"); *Edwards* v. *Balisok*, 520 U.S. 641, 646-647 (1997) (*Heck* bars § 1983 claim challenging disciplinary procedures used to deprive plaintiff of good-time credits, because claim necessarily raised question as to lawfulness of length of confinement); cf. *McDonough* v. *Smith*, 139 S. Ct. 2149, 2156-2158 (2019) (invoking reasoning of *Heck* to address statute of limitations question in § 1983 suit by plaintiff acquitted of underlying criminal charges); *Wallace* v. *Kato*, 549 U.S. 384, 393 (2007) (rejecting applicability of *Heck* to statute of limitations question in § 1983 suit by plaintiff whose criminal conviction was previously set aside on direct appeal).

II. Pretrial Diversion Programs Divert Individuals Out Of The Criminal Justice System

A. Diversion Programs Provide A Voluntary Alternative To Traditional Case Proceedings And Often Result In Dismissal Of Charges

Pretrial diversion programs provide a voluntary alternative to traditional criminal case proceedings, whereby an individual enters into an agreement with prosecutors to comply with certain requirements and conditions, typically in exchange for criminal charges being dismissed or never filed in the first place. See Nat'l Ass'n of Pretrial Servs. Agencies, *Performance Standards and Goals for Pretrial Diversion/Intervention* 1 (2008), https://bit.ly/2kVuI1N (NAPSA Performance Standards); see also TASC, *Diversion and Alternatives to Incarceration* (2018), https://bit.ly/2ksN4a7; Center for Health and Justice at TASC, *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives* 2 (2013), http://bit.ly/2nuWAee (CHJ Survey) (surveying pretrial diversion programs meeting this definitional standard).

In general, a key goal of pretrial diversion programs is to prevent continued involvement in the criminal justice system, often by avoiding convictions, and directing individuals to services that address the underlying causes of behavior that may threaten community safety or health. See U.S. Dep't of Justice, *Justice Manual* 9-22.010 (2018); NAPSA Performance Standards 2. By diverting individuals out of the justice system and into care in the community, pretrial diversion

programs also work to reduce recidivism, achieve public safety, and cut criminal justice costs. See, *e.g.*, CHJ Survey 11; NAPSA Performance Standards 2.

Pretrial diversion programs vary in scope, duration, and target population, but this brief focuses on diversion programs that: (1) are an alternative to traditional criminal justice proceedings, (2) are voluntary, (3) occur prior to any adjudication of guilt, and (4) result in criminal charges being dismissed or never filed for individuals who successfully complete the program requirements. See Nat'l Ass'n of Pretrial Servs. Agencies, *Pretrial Diversion in the 21st Century: A National Survey of Pretrial Diversion Programs and Practices* 7 (2009), https://bit.ly/2kWfyJG (NAPSA Survey); see also Bureau of Justice Assistance, U.S. Dep't of Justice, *Pretrial Diversion Programs* 1 (2010), https://bit.ly/2kVuF67.

Pretrial diversion programs usually involve a formal written agreement, or contract, between the participant and the government, which includes "a written description of the diversion program and statement of program conditions, requirements, and services."[3] NAPSA Survey 17. While some pretrial diversion programs may require a participant to admit guilt or enter a formal guilty plea which is later expunged (neither of which were required of the petitioner here), successful completion of a pretrial diversion program most often results in the complete dismissal of

[3] See also, *e.g.*, *United States* v. *Hicks*, 693 F.2d 32, 33 (5th Cir. 1982) ("The diversion agreement is a contract."); Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, 66 Fed. Prob. 30, 30 (2002), http://bit.ly/2lXwZtN ("The offender who is selected for pretrial diversion enters into a contract with the U.S. attorney's office.").

charges, with no criminal conviction or sentence. See *Justice Manual* 9-22.010; NAPSA Survey 7.

Today, pretrial diversion programs exist in all 50 states and the District of Columbia. They are authorized by state statute in 49 states, and at the federal level, are contemplated by the Pretrial Services Act of 1982, 18 U.S.C. § 3152. See Nat'l Conference of State Legislatures, *Pretrial Diversion* (2017), https://bit.ly/2xHDnXx (NCSL Survey) (collecting pretrial diversion laws of 48 states and the District of Columbia); N.D. R. Crim. P. Rule 32.2.[4] Pretrial diversion programs are administered at the local, state, and federals levels by courts, prosecutor's offices, pretrial services agencies, probation departments, and nonprofit agencies. See NAPSA Survey 10.

One important genre of pretrial diversion programs focuses on the needs of specific populations through "specialized dockets within the criminal justice system that seek to address the underlying problem(s) contributing to certain criminal offenses." Nat'l Ctr. for State Courts, *Problem-Solving Courts Guide*, https://bit.ly/2kVHQ6Y (last visited Sept. 28, 2019); see also NAPSA Performance Standards 1 (discussing rise of problem-solving courts). Pretrial diversion programs within these specialty courts are open to specific populations and address their distinct needs

[4] South Dakota, the only state without a state-wide pretrial diversion statute, encourages diversion at the county and local level. See, *e.g.*, S.D. Codified Laws § 26-8D-2 (2015) (Department of Corrections must "develop a fiscal incentive program to incentivize county use of diversion opportunities" for juveniles); see also Pennington County South Dakota, Young Adult Diversion, https://bit.ly/2lYtP8R (describing county program which can result in dismissed charges).

through monitoring by the court, clinical treatment, and educational or vocational counseling. See generally NCSL Survey.

For example, drug courts offer individuals with substance use disorders the opportunity to undergo long-term treatment and court supervision in lieu of a criminal conviction and sentence. Nat'l Drug Court Resource Ctr., *What Are Drug Courts?*, https://ndcrc.org/what-are-drug-courts-2/ (last visited Sept. 28, 2019). The Illinois Drug Court Treatment Act, for instance, requires the chief judge of each judicial circuit to establish a drug court in recognition of "a critical need for a criminal justice system program that will reduce the incidence of drug use, drug addiction, and crimes committed as a result of drug use and drug addiction." 730 Ill. Comp. Stat. 166/5 (2002). In those drug court programs, eligible individuals sign a written agreement to complete requirements such as therapy, drug testing, and counseling, and can have their charges dismissed upon successful completion of the program. *Id.* 166/25(c)-(e), 166/35(b). Illinois is no exception; courts and law enforcement nationwide have recognized the value of a therapeutic response to substance use disorders. Today, there are over 3,000 drug court programs operating in all 50 states and some federal districts. See *What Are Drug Courts?*. Additional examples of specialty courts using pretrial diversion programs include mental health courts, veterans courts, human trafficking courts, and homeless courts. See NCSL Survey.

Other pretrial diversion programs are open to the general population. Thirty-seven states have authorized such programs, with state laws generally delegating responsibility for creating or administering the

programs to a "specific individual or office such as prosecuting attorneys, local courts, or other local government agency." NCSL Survey. In other states, courts and prosecutors implement diversion programs locally. Such programs often are open more broadly to individuals who meet program-specific eligibility criteria. *Ibid.* Those criteria can include factors such as the nature of the offense, prior criminal history, and factors leading to the conduct in question, such as substance use or mental health history. *Ibid.* Program requirements vary, but may include conditions such as avoidance of new criminal charges, attendance at education sessions, drug testing, or engagement or completion of treatment and recovery services.

For example, Ohio has authorized prosecuting attorneys to "establish pre-trial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes will not offend again." Ohio Rev. Code Ann. § 2935.36(A) (2018). Individuals designated as repeat or dangerous offenders are not eligible for participation. *Id.* § 2935.36(A)(1)-(2). The programs must operate according to standards approved by a presiding judge, and upon successful completion, individuals may have their charges dismissed. *Id.* § 2935.36(A), (D). For instance, Ohio's Wayne and Lucas Counties operate diversion programs that give individuals an opportunity to have misdemeanor and felony offenses dismissed. CHJ Survey, App. A 58-59.

In New Jersey, a state law dating from 1978 authorizes Pretrial Intervention Programs through which a person who has not previously been charged with a criminal offense may undergo "supervisory treatment" and avoid traditional prosecution. N.J.

Stat. Ann. § 2c:43-12 *et. seq*. (2017). Under that program, prosecutors must recommend an individual for participation after considering numerous criteria, such as age, the nature of the offense, and the facts of the case. *Id.* § 2c:43-12(e). Upon successful completion of program requirements, and with the prosecutor's consent, "the complaint, indictment or accusation against the participant may be dismissed with prejudice." *Id.* § 2c:43-13(d).

As these examples demonstrate, pretrial diversion programs may be implemented through specialty courts or as state-wide or local programs open to a broader range of individuals facing criminal charges. This variation notwithstanding, pretrial diversion programs provide a voluntary alternative to traditional criminal justice proceedings that seeks to make communities safer, generally by directing individuals to rehabilitative services, and typically results in the dismissal of criminal charges.

B. One Important Purpose Of Pretrial Diversion Programs Is To Reduce Collateral Consequences

A criminal conviction can "trigger[] a cascade of collateral consequences that often severely hamper an individual's ability to become a productive member of the community." CHJ Survey 2. According to the National Institute of Justice, over 44,000 collateral consequences exist nationwide. U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* 1 (2019), https://bit.ly/2IE3SDi. These include "barriers to voting, serving on a jury, holding public

office, securing employment, obtaining housing, receiving public assistance, owning a firearm, getting a driver's license, qualifying for financial aid and college admission, qualifying for military service, and deportation." *Id.* at 1-2 (footnotes omitted). Indeed, courts have "long presumed" that criminal convictions have adverse "collateral consequences." *United States* v. *Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam); see also *Sibron* v. *New York*, 392 U.S. 40, 55-58 (1968).

Given these realities, pretrial diversion programs frequently seek to address particular conduct "without resulting in a conviction on an individual's record." CHJ Survey 8. As the Colorado legislature explained in providing for pretrial diversion programs in that state, "[d]iversion should ensure defendant accountability while allowing defendants to avoid the collateral consequences associated with criminal charges and convictions." Colo. Rev. Stat. § 18-1.3-101(1) (2019). In a majority of pretrial diversion programs—including federal pretrial diversion—individuals are eligible for enrollment at arraignment or the pre-charge stage, and successful program completion means that the participant is not convicted of a criminal offense. See NAPSA Survey 13; *Justice Manual* 9-22.010.

Many pretrial diversion programs do not require a formal guilty plea or other admission of guilt. The National Association of Pretrial Services Agencies, which promulgates pretrial diversion best practices and standards, explains that "[e]nrollment in the pretrial diversion/intervention program *should not* be conditioned on a formal plea of guilty"—a position it has taken since 1978. NAPSA Performance Standards 12 (emphasis added); accord Nat'l Ass'n of Pretrial Servs.

Agencies, *Performance Standards and Goals for Pretrial Release and Diversion: Diversion* 49 (1978), https://bit.ly/2m3dzDx. Some state laws expressly *prohibit* the entry of a guilty plea as a condition to participation in pretrial diversion programs. See, *e.g.*, Colo. Rev. Stat. § 18-1.3-101(9)(e) ("A defendant shall not be required to enter any plea to a criminal charge as a condition of pretrial diversion."); N.J. Stat. Ann. § 2c:43-12(g)(2) ("[S]upervisory treatment, as provided herein, shall be available to a defendant irrespective of whether the defendant contests his guilt of the charge or charges against him."). Although some programs require participants to enter conditional guilty pleas, which can be removed and replaced with dismissals upon successful program completion, most do not require guilty pleas or any other admission of legal culpability. See NAPSA Survey 13, 15. This feature of pretrial diversion programs reflects the fact that even innocent individuals may elect to participate in pretrial diversion programs. Pretrial diversion can result in immediate benefits, such as release from detention and clinical treatment, and avoids not only a potential criminal trial, but the threat of a criminal conviction. Cf. U.S. Dep't of Justice, Bureau of Justice Assistance, *Plea and Charge Bargaining: Research Summary* 1 (2011), https://bit.ly/1i5mtlM ("While being found innocent or being acquitted is, of course, the best way for defendants to avoid jail time and other penalties, going to trial is perceived as risky[.] * * * As a result, many defendants enter pleas.").

Pretrial diversion programs "reflect a policy and political context that is increasingly receptive to the benefits of safely diverting individuals * * * away from conviction and its lifelong collateral consequences."

CHJ Survey 1. Accordingly, the majority of individuals who successfully complete pretrial diversion programs—like petitioner here—are not convicted of, and do not receive a sentence related to, the alleged offense. Despite the absence of a conviction, however, the Second, Third, and Fifth Circuits improperly treat participation in a pretrial diversion program as "not consistent with innocence," Pet. App. 6a (quoting *Gilles* v. *Davis*, 427 F.3d 197, 211 (3d Cir. 2005))—and thus bar participants from seeking relief under § 1983—even absent any formal finding of guilt or judgment about the merits (or lack thereof) of criminal charges. In other words, in these circuits, individuals who agreed to participate in such programs, and whose charges were dismissed or never even filed pursuant to successful completion of pretrial diversion, are wrongly subjected to the consequences of a conviction the prosecutor agreed would not occur.

C. Pretrial Diversion Programs Are Growing In Importance Nationwide

Underscoring the importance of the question presented, pretrial diversion programs continue to grow in importance for local and state communities. "As the numbers of people entering courts and correctional institutions have swelled and public resources have tightened, many jurisdictions are exploring diversion alternatives out of necessity." CHJ Survey 29. Communities nationwide have increasingly turned to pretrial diversion programs to relieve pressure on busy criminal court dockets, conserve legal resources, and decrease costs.

Pretrial diversion programs also benefit individuals and society. For example, by choosing pretrial diversion over traditional case proceedings, an individual may more quickly rehabilitate, return to work, and provide for family members. As noted, participants also avoid the threat of a criminal conviction and its collateral consequences, allowing them to remain productive members of society. This in turn reduces recidivism, and promotes safe and healthy communities.

The growing importance of pretrial diversion programs is evidenced by their steady proliferation over the past six decades. Nat'l Ass'n of Pretrial Servs. Agencies, *Promising Practices in Pretrial Diversion* 9 (2010), https://bit.ly/2kYeR2m (Promising Practices). By 1976 (*i.e.*, merely a decade after their inception in 1965), pretrial diversion programs had spread to 42 states, with 148 programs nationwide. *Ibid.* In 2008, NAPSA identified 253 separate diversion programs. See NAPSA Survey 8. By 2013, TASC identified at least 298 formal pretrial diversion programs. CHJ Survey 7 (citing Promising Practices 9, and excluding drug courts, undocumented or uncounted programs, and diversionary practices outside formal programs). Another leading report identified 3,057 known drug courts nationwide as of December 2014, an increase of 24% from five years earlier. Nat'l Drug Court Inst., *Painting the Current Picture* 7 (2016), https://bit.ly/2omML2t. Even these studies undercount the total number of such programs operating today, which easily number in the thousands, and perhaps in the tens of thousands. Bipartisan support and significant investment of government resources suggest that this upward trend will continue. See, *e.g.*, CHJ Survey 5.

Highlighting the value that lawmakers and courts alike place on pretrial diversion programs, federal, state, and local governments are investing hundreds of millions of dollars in pretrial diversion programs every year. See, *e.g.*, CHJ Survey, App. A 9, 13, 22, 69 (budget figures in the millions for select pretrial diversion programs). Drug courts alone received over $100 million in federal funding in 2017. Lisa N. Sacco, Cong. Res. Serv., R44467, *Federal Support for Drug Courts: In Brief*, Summary (2018), https://bit.ly/2mnXnNf. To take two other examples at the federal level: In 2018, the Office of Juvenile Justice and Delinquency Prevention awarded $13.2 million[5] in grants for diversion and related programs. U.S. Dep't of Just., Off. of Just. Programs, FY 2020 Program Summaries, 123-125 (2019) (DOJ Program Summaries). And last year, the Substance Abuse and Mental Health Services Administration (SAMHSA) dedicated up to $13.4 million in Early Diversion grants. Press Release (Jan. 25, 2018), https://bit.ly/2BsOCUc. The SAMHSA grant program is to "establish or expand programs that divert adults with a serious mental illness * * * from the criminal justice system to community-based services prior to arrest and booking." *Id.*

State and local governments also invest significantly in diversion programs. See, *e.g.*, CHJ Survey, App. A, 9, 13 (providing examples of Maricopa County's Pretrial Services budget and San Diego's Psychiatric Urban Response Team, which collectively receive $5.6 million); *id.* at 37 (Kentucky's Pretrial Services program, which diverts 10,000 individuals

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[5] This figure represents 22% of the Office's $60 million budget in 2018. DOJ Program Summaries 123-124.

per year, is funded by state revenue and court fees). Notwithstanding some program-to-program variation in funding (see NAPSA Survey 11), this much is clear: federal, state, and local governments vigorously support, and are consistently investing in, pretrial diversion programs, to the tune of hundreds of millions of dollars every year.

Perhaps nothing more clearly illustrates the important role that pretrial diversion plays in the modern criminal justice system than the sheer number of participants. For example, Pennsylvania's Accelerated Rehabilitative Disposition program, which offers participants the ability to secure both dismissal of charges and an expungement of their arrest record, Pa. R. Crim. P. Rule 320, handled a staggering 39,568 cases in 2007 alone—*i.e.*, more than 750 per week. See Promising Practices 11. And one municipal diversion program, San Diego's Psychiatric Emergency Response Team, prevents an estimated 15,000 individuals from involvement in the criminal justice system every year. CHJ Survey, App. A 13. While a lack of uniform reporting makes it difficult to quantify precisely the number of individuals who successfully complete pretrial diversion programs, it is safe to conclude that hundreds of thousands of people participate and successfully complete such programs each year. See, *e.g.*, CHJ Survey, App. A (collecting data from individual programs); Promising Practices 10-11 (same); NAPSA Survey 22 (providing estimated averages for pretrial diversion placements per program).

This investment and participation has generated demonstrated success. One 2008 survey, for instance, reported a median success rate of 85%, with some programs as high as 98%. NAPSA Survey 19. It is little

mystery, then, why diversion programs continue to draw significant attention and funding: they are successful tools to make communities safer, help individuals avoid the collateral consequences that attend a criminal conviction, and positively affect hundreds of thousands of individuals every year.

III. The Circuits Are Squarely Split Over Whether *Heck* Applies Where Criminal Charges Were Dismissed Pursuant To Pretrial Diversion

The courts of appeals are intractably split over whether *Heck* bars § 1983 claims where criminal charges were dismissed pursuant to pretrial diversion. The Sixth Circuit, Tenth Circuit, and Eleventh Circuit have held that *Heck* does not apply because there is no conviction. See Pet. 11-12. Three other courts of appeals—the Second Circuit, Third Circuit, and Fifth Circuit—have held directly to the contrary, concluding that *Heck* bars these claims because, even in the absence of a conviction, pretrial diversion is not a termination "in favor of the accused." *Heck*, 512 U.S. at 484; see Pet. 13-15. The split is grounded in sharp disagreement over a threshold legal question: Does *Heck* bar § 1983 claims where the plaintiff was never convicted or sentenced because charges were dismissed through pretrial diversion? That disagreement stems from a fundamental legal question, not differences in the relevant pretrial diversion programs.[6] Accordingly, these contrary holdings cannot be reconciled.

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[6] Compare, *e.g.*, *Vasquez Arroyo* v. *Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) ("[T]he *Heck* bar comes into play only when there is an actual conviction."), with *Gilles*, 427 F.3d at 210 ("Because

Either *Heck* bars these claims, or it is inapplicable. Because the split is deep and intractable, only this Court can answer this important and recurring question, which is now ripe for review.

The ubiquity and importance of pretrial diversion programs further heightens the need for a single answer to the question presented in this case. National uniformity would provide stakeholders with clarity and predictability on this issue, allowing them to foster growth of these successful programs. The existing confusion, however, may chill the funding, administration, and participation in pretrial diversion programs, and impede the development of information-sharing or best practices across jurisdictions. Potential civil rights plaintiffs may have no inkling of whether entering a pretrial diversion program would later prevent them from bringing meritorious civil rights claims. And police, prosecutors, courts, and communities may face opposing incentives to participate in pretrial diversion without a uniform answer to this question. This uncertainty threatens the growth and improvement of pretrial diversion programs nationwide.

The lack of a uniform rule also undermines the "chief goals of compensation and deterrence" embodied in § 1983 and its "subsidiary goals of uniformity and federalism." *Hardin* v. *Straub*, 490 U.S. 536, 539 (1989) (citing *Board of Regents, Univ. of New York* v. *Tomanio* 446 U.S. 478, 488-492 (1980)). Today, state officers in certain jurisdictions externalize the costs of

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the holding of *Heck* applies, [the plaintiff] cannot maintain a § 1983 claim unless successful completion of the [pretrial diversion] program constitutes 'termination of the prior criminal proceeding in favor of the accused.'" (quoting *Heck*, 512 U.S. at 484)).

these constitutional violations, yet in other jurisdictions, those costs are internalized through the availability of a § 1983 remedy. This disparity diminishes the efficacy of § 1983 as a "uniquely federal remedy," *Hardin*, 490 U.S. at 539 n.5 (quoting *Mitchum* v. *Foster*, 407 U. S. 225, 239 (1972)), by perpetuating opposing and uneven incentive structures solely based on jurisdiction. Without a uniform rule, § 1983 cannot achieve optimal levels of compensation and deterrence that safeguard federal constitutional rights.

The availability of relief under § 1983 should not turn on the happenstance of where a case is filed, but rather on the merits of the claims. Currently, a plaintiff's ability to bring a civil rights claim might entirely depend on where the conduct allegedly occurred or the defendant in the § 1983 action resides. Take this case: Petitioner would not have faced the *Heck* bar to vindicating his constitutional rights if his traffic stop had occurred in the Sixth, Tenth, or Eleventh Circuit. This Court should grant review to establish a uniform rule on this important question.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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