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,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Under *Heck v. Humphrey*, 512 U.S. 477 (1994), a plaintiff who seeks to pursue a §1983 claim implying that ongoing or completed criminal proceedings are or were invalid must first prove that those criminal proceedings terminated in favor of the plaintiff. The question presented is whether the favorable termination requirement of *Heck* must be satisfied if the criminal charges against the §1983 plaintiff were resolved by the plaintiff's participation in the pretrial diversion program enacted and operated by the City of Gretna, Louisiana.

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INTRODUCTION

The Fifth Circuit affirmed summary judgment of Petitioner's §1983 claims of malicious prosecution, unlawful arrest, and false imprisonment, because allowing these claims to proceed would fly in the face of this Court's requirement, under *Heck v. Humphrey*, that §1983 actions implying the invalidity of an ongoing or prior criminal proceeding and judgment cannot proceed unless that proceeding reached a "favorable termination" for the plaintiff. Consistent with bedrock law regarding the favorable termination requirement of common-law malicious prosecution, which formed the basis of this Court's decision in *Heck*, Petitioner cannot make that showing. This is so because he bargained for the dismissal of the charges against him in exchange for his participation in a local pretrial diversion program.

Petitioner urges this Court to review the Fifth Circuit's decision because it purportedly conflicts with the decisions of other federal courts of appeals. But the split Petitioner identifies is largely illusory. There is less variation in the way courts apply *Heck* than in the way jurisdictions structure their pretrial diversion programs. Some programs require admissions of guilt, some require acceptance of responsibility, some require that the defendant admit certain facts, and others require no admissions at all. Similarly, some pretrial diversion programs impose extensive and invasive probation, others impose fines, while others do not impose sanctions at all. And participation in some programs is considered part of an individual's criminal history, while in some programs all records of participation are sealed. Courts emphasize these factors,

and others, in resolving whether participation in a *particular* pretrial diversion program triggers the favorable termination requirement of *Heck*.

Yet even if there were no material distinctions to be drawn among the numerous pretrial diversion programs across the nation, this case is not the proper vehicle to resolve any alleged conflict among the circuits. Settled law resolves that each of the three §1983 claims Petitioner seeks to litigate—for malicious prosecution, unlawful arrest, and false imprisonment—are futile. First, both *Heck* and a claim for malicious prosecution require him to prove that the criminal proceedings initiated against him were terminated in his favor. If Petitioner could satisfy that element of his malicious prosecution claim, then *Heck* would not be a barrier to him and the question presented would not be implicated by this case. Second, Petitioner's §1983 claims for unlawful arrest and false imprisonment require him to prove that Respondents lacked probable cause to arrest him. By Petitioner's own admissions, he cannot do so.

The Fifth Circuit's decision also is correct. What the Court recognized in *Heck* is that §1983 should not be a vehicle for mounting collateral attacks on criminal matters fully adjudicated through the criminal justice system that do not end "favorably" for the defendant. That is just what Petitioner seeks to do. In Petitioner's telling, he should never have entered a pretrial diversion program because he did nothing to warrant being forced to choose between entering the program or proceeding to trial. In addition, Petitioner claims he never should have been compelled to pay any amount of money to the City of Gretna because he did nothing unlawful. Put

simply, there is no way for Petitioner to prevail on the merits of his claims without a federal court adjudication that irreconcilably conflicts with the way the City of Gretna resolved the criminal charges against him. That is why the Fifth Circuit correctly held that the favorable termination requirement of *Heck* applies.

STATEMENT

1. Petitioner, Seantrey Morris, filed suit against various Gretna City Police Officers, the Gretna City Chief of Police, the Gretna City Police Department, and the City of Gretna, asserting a range of claims under both the United States Constitution, pursuant to 42 U.S.C. §1983, and under Louisiana state law. D. Ct. Doc. 1.[1] Of particular relevance here are Petitioner's §1983 claims for unlawful arrest, false imprisonment, and malicious prosecution.[2]

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[1] All citations to the district court record are to the docket in *Morris v. Mekdessie et al.*, No. 2:14-cv-01741-KDE-KWR (E.D. La.).

[2] Notwithstanding this Court's longstanding admonishment that "[t]he first inquiry in any §1983 suit is to isolate the precise constitutional violation with which [the defendant] is charged, *Baker v. McCollan*, 443 U.S. 137, 140 (1979), Petitioner did not specify what constitutional provision gave rise to each of his claims, see D. Ct. Doc. 1. It generally is understood that constitutional claims with the same elements as common-law unlawful arrest and common-law false imprisonment are cognizable under the Fourth Amendment. See *Nieves v. Bartlett*, 139 S. Ct. 1715, 1731 (2019) (Gorsuch, J., concurring in part and dissenting in part). Unresolved, however, is the constitutional source for a claim with the elements of common-law malicious prosecution. To the extent Petitioner grounds his malicious prosecution theory in the Fourth Amendment, the Court has not yet resolved whether such a claim is cognizable. See *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir.

Petitioner's claims arise from a traffic stop initiated by Respondent Police Officer Joseph Mekdessie on July 31, 2013. Pet. App. 10a. Officer Mekdessie had paced/clocked Petitioner traveling over the posted speed limit and also had observed, when Petitioner's car was at a red light, that the car displayed an expired vehicle inspection tag ("brake tag"). *Ibid.*; see Gretna, La. Code of Ordinances § 90-2(1); see also La. Stat. Ann. § 32:53(D). Having observed these traffic violations, Officer Mekdessie signaled for Petitioner to pull his car over to the side of the road. Pet. App. 10a.

Once Petitioner pulled over, Officer Mekdessie approached Petitioner and asked Petitioner for his driver's license, proof of insurance, and vehicle registration. See Pet. App. 10a. Petitioner provided Officer Mekdessie with expired insurance documentation and registration for a different car. *Ibid.* After being given this documentation, Officer Mekdessie returned to his police vehicle. D. Ct. Doc. 49 at 2-3. Respondent Police Officer Daniel Swears, who was in the vicinity and received an alert regarding the stop,

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2018), *cert. denied*, 139 S. Ct. 2777 (2019). To the extent Petitioner grounds his malicious prosecution theory in procedural due process under the Fourteenth Amendment, that claim implicates the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981) because of the availability of an analogous tort law remedy. See *Lemoine v. Wolfe*, 168 So. 3d 362, 367-68 (La. 2015) (discussing availability of malicious prosecution tort under Louisiana state law); see also *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (plurality opinion) (rejecting argument that malicious prosecution is cognizable as a claim for substantive due process).

arrived at the scene.[3] See D. Ct. Doc. 49-3 at 4-5. Officer Swears departed soon thereafter. *Id.* at 6.

Petitioner eventually located the proper vehicle registration, but not his insurance documents, and contacted his fiancé to ask her to send him a picture of the current insurance paperwork via text message. *Id.* at 2-3. Once Petitioner received the text message and found the proper registration, he exited his vehicle and approached Officer Mekdessie's patrol car. Pet. App. 10a. Officer Mekdessie ordered Petitioner to return to his vehicle. *Ibid.* Petitioner complied. *Ibid.*

Officer Mekdessie then returned to Petitioner's car with two traffic citations—one for driving with an expired brake tag, *ibid.*, and another for speeding not more than 10 miles over the speed limit, see D. Ct. Doc. 42-2 at 15. Officer Mekdessie asked Petitioner to sign the citations, explaining that his signature did not constitute an admission of guilt, but a promise to appear in court for the charges against him. Pet. App. 11a. Petitioner responded that he would not sign the citations without having the charges verbally explained to him, *ibid.*, and declared he would rather be taken to jail than sign the citations without an explanation of the charges. D. Ct. Doc. 42-2 at 4.[4]

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[3] Although documents in the record are inconsistent in the spelling of Officer Swears's name, following the direction of both the district court and the Fifth Circuit, "Swears" will be used throughout.

[4] Although Petitioner now disputes that he never knew what the citations were for, he stated in his complaint that Officer Mekdessie told Petitioner that he caught him speeding. D. Ct. Doc. 1 ¶ 12. Petitioner also admitted in his deposition that Officer Mekdessie

Officer Mekdessie made several further attempts to persuade Petitioner to sign the citations. D. Ct. Doc. 42-2 at 6. Petitioner continued to refuse. *Ibid.* Consequently, and consistent with several warnings he had made to Petitioner, Officer Mekdessie informed Petitioner he was under arrest. *Id.* at 6-7. Officer Mekdessie asked Petitioner to place his hands behind his back, but Petitioner refused. Pet. App. 11a. Instead, Petitioner continued to press Officer Mekdessie to disclose the content of the citations. *Ibid.* A physical altercation ensued and, in fear for his safety, Officer Mekdessie called for emergency backup. D. Ct. Doc. 42-1 at 10.

Respondent Police Officer Brandon LeBlanc answered Officer Mekdessie's call. *Ibid.* When he arrived at the scene, Officer LeBlanc witnessed the physical altercation between Petitioner and Officer Mekdessie. D. Ct. Doc. 49 at 8-9. After tackling Petitioner to relieve Officer Mekdessie, and following Petitioner's continued resistance, Officer LeBlanc deployed his taser. D. Ct. Doc. 42-2 at 34. In all events, Petitioner eventually was subdued. Pet. App. 11a. Officer Swears then returned to the scene, also in response to Officer Mekdessie's call, and drove Petitioner to the Jefferson Parish Correctional Center. D. Ct. Doc. 49-3 at 7-8.

In addition to the two traffic citations—one for speeding and the other for an expired brake tag—Petitioner was charged with resisting an officer and

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informed him of the citation for an expired brake tag. See D. Ct. Doc. 42-1 at 2; 42-2 at 8.

battery on a police officer. *Ibid.*; D. Ct. Doc. 42-2 at 39; see also Gretna, La. Code of Ordinances § 16-65–16-65.5. Petitioner's arraignment date was set for September 9, 2013, in Gretna Mayor's Court, at which time Petitioner pleaded not guilty to all of the charges. D. Ct. Doc. 42-1 at 13; 42-2 at 39. Several weeks later, on October 23, 2013, Petitioner agreed to enter the Gretna Pretrial Diversion Program. *Ibid.* Thereafter, Petitioner completed the program and the City prosecutor dismissed the charges. *Ibid.*

Pretrial diversion in Louisiana is unique.[5] In Louisiana, unlike in many states, there is no statewide pretrial diversion program. Instead, operating authority is conferred on each municipality. See La. Stat. Ann. § 33:441.20. The record does not contain any factual detail regarding the Gretna Pretrial Diversion Program. Petitioner has maintained that the Gretna Pretrial Diversion Program "simply required [him] to pay $350 (plus another $200 in fees)." See Pet. 6. But this is an incomplete description of the Gretna Pretrial Diversion Program. It fails to identify the criteria for eligibility, the nature of the probationary sanctions that can be imposed through the Program (beyond the payment),

[5] Municipalities in Louisiana are authorized to operate as independent entities. See La. Stat. Ann. § 33:361. Included in this authority is the power to establish municipal "Mayor's Courts." See La. Stat. Ann. § 441.20. These courts are not courts of record, but rather, have jurisdiction over local criminal ordinances, with appeals from those courts being to higher courts that conduct trial *de novo*, without any deference for the prior adjudication. Consequently, the Gretna Mayor's Court and the appointed prosecutor for the Gretna Mayor's Court created and operate the Gretna Pretrial Diversion Program.

the records created through the Program and their accessibility to other law enforcement agencies, and the nature of the admissions a participant must make to participate.[6]

2. On July 31, 2014—one year to the date from the incident—Petitioner filed his complaint in the United States District Court for the Eastern District of Louisiana. Named as defendants were Officer Mekdessie, Officer LeBlanc, Officer Swears, the City of Gretna, the City of Gretna Police Department and the Chief of Police for the City of Gretna Police Department, Arthur Lawson, on claims of: (1) "unreasonable, unlawful and excessive force" against Officers Mekdessie, LeBlanc, and Swears (together

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[6] Although Petitioner has maintained that the Gretna Pretrial Diversion Program did not require him to admit guilt for the offenses, Petitioner now asserts for the first time in this Court that he did not admit "any of the facts underlying the charges." Pet. 22. Respondents disagree with Petitioner's uncorroborated statement. Cf. *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994), *overruled on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc) (observing under the federal pretrial diversion program "offenders must acknowledge responsibility for their actions, but need not admit guilt"). Similarly, although Petitioner notes that "the charges against him were dismissed," Pet. 22, he does not address the degree to which the records of his arrest and the arrest are maintained, available for review by other law enforcement agencies, and potentially considered as part of his criminal history. These unanswered questions about the record cannot be easily resolved in this Court because the various components of the Gretna Pretrial Diversion Program are not listed in a comprehensive list of local ordinances or regulations. Rather, the Program is administered under the discretion of the local prosecutor, consistent with the very broad parameters established by applicable law.

"Respondents"); (2) false imprisonment against Respondents; (3) unlawful arrest against Respondents; (4) false prosecution against Respondents; (5) battery under Louisiana state law against Respondents; and (6) failing "to properly train, supervise and monitor" police officers against the City of Gretna, Chief of Police Lawson, and the City of Gretna Police Department.[7] D. Ct. Doc. 1 ¶¶24-30.

The defendants moved for summary judgment, asserting qualified immunity on the excessive force, false imprisonment, unlawful arrest, and malicious prosecution claims and arguing that the favorable termination requirement of *Heck v. Humphrey* otherwise barred each of those claims.[8] D. Ct. Doc. 42-1 at 13-25. The district court granted the defendants' motion in part and denied it in part. See Pet. App. 9a-22a. It first held that Petitioner's "claims of false arrest, unlawful seizure, false imprisonment, and malicious prosecution [were] barred under *Heck*." Pet. App. 17a. The district court reasoned that these §1983 claims amounted to a collateral attack on Petitioner's entry into the Gretna Pretrial Diversion Program, which "would necessarily imply the invalidity of the convictions on the

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[7] The claims against the City of Gretna Police Department were voluntarily dismissed on February 2, 2015. D. Ct. Doc. 23.

[8] The defendants also sought summary judgment on Petitioner's claims for municipal liability, failure to supervise, and failure to train against the City of Gretna and Chief of Police Lawson. The district court granted summary judgment on those claims. Pet. App. 21a-22a.

charges of speeding, [expired] brake tag, resisting an officer, and battery of a police officer." *Ibid.*

As for the excessive force claims, the district court determined that *Heck* did not apply "because a §1983 claim of excessive force does not necessarily call into question the validity of [Petitioner's] 'resisting arrest' conviction," *ibid.*, and that the murky facts surrounding Officer LeBlanc's use of the taser foreclosed a finding of qualified immunity, *id.* at 19a. As a result, Petitioner's excessive force claims against Officer LeBlanc proceeded to trial on April 9, 2018. D. Ct. Doc. 179. The trial lasted two days. D. Ct. Doc. 180. The jury found for Officer LeBlanc. D. Ct. Doc. 180; 181.

3. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. His appeal asserted that "the jury failed to get the facts right" on the excessive force claims, C.A. Br. 35, and that the *Heck* favorable termination requirement did not apply to the §1983 false imprisonment, unlawful arrest, and malicious prosecution claims because he was not convicted of any of the four charges, C.A. Br. 18. The Fifth Circuit affirmed. Pet. App. 1a-8a.

With respect to the excessive force jury verdict, the Fifth Circuit held that Petitioner fell short of showing he should have been granted a directed verdict. Pet. App. 5a-6a. As for Petitioner's claims for false imprisonment, unlawful arrest, and malicious prosecution, the Fifth Circuit explained "*Heck* does not allow a civil rights lawsuit to be an alternative vehicle * * * for challenging law enforcement decisions that resulted in arrest or prosecution unless the criminal case was resolved 'in favor of the accused.'" Pet. App. 6a (quoting *Heck*, 512

U.S. 477 at 484). Describing a diversion program as "a middle ground between conviction and exoneration," Pet. App. 6a, the Fifth Circuit drew from its own precedent to hold that Petitioner's claims amounted to just such a collateral attack. Under that precedent, entry into a pretrial diversion program requires an admission of responsibility for the actions that led to the charges. Pet. App. 6a-7a.

REASONS FOR DENYING THE PETITION

In *Heck v. Humphrey*, this Court held that a §1983 claim in which the plaintiff alleged that his conviction for voluntary manslaughter was the product of an arbitrary and fabricated investigation presented a "close[] analogy" to common-law claims for malicious prosecution. The Court thus took guidance from that tort's common-law requirement that a plaintiff show "termination of the prior criminal proceeding in favor of the accused." 512 U.S. 477, 484 (1994). The Court explained 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 conviction or confinement, just as it has always applied to actions for malicious prosecution." *Id.* at 486.

Petitioner insists that this case raises a deep and unresolvable split of authority over whether *Heck*'s favorable termination requirement applies when charges against a criminal defendant are resolved via a pretrial diversion program. But any inconsistency in the results reached by the authorities Petitioner cites can be explained largely by the significant variations among

pretrial diversion programs in jurisdictions across the Nation.

Yet even accepting that there is some inconsistency in the decisional law, this case presents a poor vehicle for resolving that tension. Regardless of how the Court resolves the question presented, resolution of the conflict would have no bearing on Petitioner's three §1983 claims—malicious prosecution, unlawful arrest, and false imprisonment—because he cannot meaningfully dispute that each fails as a matter of black letter law. That is significant, as this Court long has emphasized that it only decides questions of public importance "in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In all events, the Fifth Circuit correctly decided that *Heck*'s favorable termination requirement applies to §1983 claims that would impugn the legitimacy of a defendant's participation in a pretrial diversion program. To the extent the Fifth Circuit's decision has broad application, it is a logical extension of *Heck* and its progeny. Allowing Petitioner's §1983 claims to proceed would collaterally attack Petitioner's admission to the Gretna Pretrial Diversion Program and the conditions imposed as a result.

I. The Authorities Petitioner Cites Emphasize Variations In The Way States Structure Their Pretrial Diversion Programs.

Petitioner argues that review is warranted because "the courts of appeals are expressly and persistently divided," with three federal circuits agreeing that

Heck's favorable termination requirement applies if a criminal defendant resolves criminal charges by entering a pretrial diversion program and three other circuits holding that it does not. Pet. 1.

Petitioner overstates matters. Any arguable inconsistency between the circuits is largely attributable to factual distinctions in the way different jurisdictions structure their various pretrial diversion programs. To be sure, Petitioner appears to take the sweeping view that no pretrial diversion program ever triggers the favorable termination requirement of *Heck*—no matter what probationary sanctions the program imposes, no matter what factual admissions the program requires, and no matter what records regarding the underlying incident are created. But having failed to create a record regarding the Gretna Pretrial Diversion Program itself, the Petition asks the Court to resolve an abstract question of law, unmoored from facts that might impact and aid in the Court's review.

1. In this case, the Fifth Circuit held that Petitioner could not assert his §1983 claims for malicious prosecution, unlawful arrest, and false imprisonment because Petitioner could not satisfy the favorable termination requirement of *Heck v. Humphrey*. See Pet. App. 6a-7a. In doing so, the Fifth Circuit primarily emphasized *Gilles v. Davis*, a Third Circuit decision that Petitioner identifies as part of a "[p]ersistent, [s]quare,

[a]nd [a]cknowledged [c]ircuit [s]plit." Pet. 11, 13-14; see 427 F.3d 197 (3d Cir. 2005).[9]

In *Gilles*, the Third Circuit barred a §1983 claim that would have implied the invalidity of the plaintiff's admission to Pennsylvania's pretrial diversion program, concluding that allowing the claim to proceed could result in "two conflicting resolutions." 427 F.3d at 209. The Third Circuit emphasized that to enter the Pennsylvania program, an individual must submit to a probationary period, numerous financial burdens (restitution and program fees), and other conditions that could be set by the specific parties. *Id.* at 211 (citing Pa. R. Crim. P. 316). Further, the court highlighted that under the Pennsylvania program, although an individual's record would be expunged after completing the program, there were consequences still, including that his admission to the program "may be statutorily construed as a conviction for purposes" of computing subsequent sentences. *Id.* at 209 (citation omitted).

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[9] The other authority the Fifth Circuit relied upon substantively was *Taylor v. Gregg*, in which the court addressed the element in the tort of malicious prosecution under Texas state law requiring a plaintiff to prove as an element of that claim that the criminal proceedings "terminated in the plaintiff's favor." See 36 F.3d at 455. The Fifth Circuit in *Taylor* held that entry into a pretrial diversion program is not a favorable termination of a criminal proceeding, which the Fifth Circuit relied upon in this case to explain why Petitioner could not overcome the favorable termination requirement of *Heck v. Humphrey*. As discussed *infra*, Petitioner has never argued that entry into the Gretna Pretrial Diversion Program is a favorable termination of a criminal proceeding. There is good reason for that, because such a resolution does not indicate that the accused is not guilty of the charged offenses. See Restatement (Second) of Torts § 660, cmts. a & b (1977).

Similar is the line of Second Circuit precedent emphasized by the Third Circuit in *Gilles*. In *Singleton v. City of New York*, the Second Circuit extensively analyzed the New York pretrial diversion program comparable to the one in *Gilles*, before concluding that entry into that program was not a favorable termination. 632 F.2d 185, 193-95 (2d Cir. 1980). Then, in *Roesch v. Otarola*, which Petitioner identifies as part of the split of authority implicated by the question presented, the Second Circuit began by recognizing that "[t]he Connecticut program is in all material respects the same as the New York procedure." 980 F.2d 850, 852 (2d Cir. 1992). Having reached that conclusion, the court in *Roesch* held that the favorable termination element of malicious prosecution would apply to any §1983 action that would impliedly invalidate probationary sanctions imposed as part of the Connecticut pretrial diversion program. *Id.* at 853-54.[10]

2. Petitioner contrasts these decisions with cases from the Sixth, Tenth, and Eleventh Circuits. These authorities do not, however, establish the deep split of authority Petitioner depicts.

For example, although the Tenth Circuit held in *Vasquez Arroyo v. Starks* that *Heck*'s favorable termination requirement did not apply to a §1983 suit implying the invalidity of the plaintiff's participation in

[10] Petitioner also cites *Miles v. City of Hartford*, in which the Second Circuit reached a similar conclusion regarding §1983 claims for malicious prosecution and false arrest under Connecticut law, citing the *Roesch* decision as controlling. 445 F. App'x 379, 382-83 (2d Cir. 2011).

the Kansas pretrial diversion program, the court did so because pretrial diversion "under Kansas law" differs greatly from pretrial diversion in the New York, Connecticut, and Pennsylvania programs. See 589 F.3d 1091, 1095 (10th Cir. 2009). In Kansas, "[n]o defendant shall be required to enter any plea to a criminal charge as a condition for diversion," Kan. Stat. Ann. § 22-2910, and "[d]iversions are not counted as part of a defendant's criminal history." *State v. Chamberlain*, 120 P.3d 319, 323 (Kan. 2005); *State v. Macias*, 39 P.3d 85, 87 (Kan. Ct. App. 2002). Faced with a program readily distinguishable from the ones reviewed by the Second and Third Circuits, the Tenth Circuit concluded that *Heck*'s favorable termination requirement did not apply because "under Kansas law there are no outstanding judgments, or convictions or sentences against" an individual who successfully completes the Kansas program, nor were there probationary components similar to the ones highlighted by the court in *Gilles*. *Vasquez Arroyo*, 589 F.3d at 1095 (internal quotation marks omitted).

Similarly, although the Sixth Circuit in *S.E. v. Grant County Board of Education* concluded that a pretrial diversion program did not implicate *Heck*'s favorable termination requirement, it did so while highlighting the specific aspects of a particular pretrial diversion program: the Kentucky juvenile pretrial detention program, which seeks to "divert youth * * * from formal court proceedings to alternative community resources," Kentucky's Pre-Court Diversion, National Center for Mental Health and Juvenile Justice, https://www.ncmhjj.com/wp-content/uploads/2014/12/

Kentucky.pdf (last visited Dec. 10, 2019). See 544 F.3d 633, 636 (6th Cir. 2008). Indeed, the Sixth Circuit explained that its decision stemmed from "the facts of this case," and expressly distinguished its decision from *Gilles*, indicating that the differences between the programs were so great that *Gilles* had no bearing on the issue the Sixth Circuit was resolving. See *id.* at 637-39.

The lone example of a court arguably declaring that participation in a pretrial diversion program can never trigger the favorable termination requirement of *Heck*, regardless of the program's characteristics, is the Eleventh Circuit's decision addressing the Florida program in *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007). There, deputies arrested an individual in his trailer without a warrant after deciding that they had probable cause to arrest him on a charge of aggravated assault. *Id.* at 1234-35. Those charges were later dropped. The individual's trailer-mate also was arrested, but his arrest was for resisting a police officer without violence and was resolved through Florida's pretrial diversion program. *Id.* at 1236. The district court dismissed the trailer-mate's false arrest claim pursuant to *Heck*'s favorable termination requirement, but the Eleventh Circuit concluded that although "dismissal of the charge against [the trailer-mate] pursuant to [the Florida pretrial diversion program] was not a favorable termination on the merits * * * neither was it a conviction or sentence." *Id.* at 1251. Consequently, the "§1983 suit does not represent the sort of collateral attack foreclosed by *Heck*" because "there was never a conviction in the first place." *Ibid.*

3. The authorities Petitioner cites reveal little difference in the legal framework employed by each of the circuits regarding the question presented.[11] For the most part, courts consider how individual pretrial diversion programs operate to determine whether *Heck*'s favorable termination requirement applies.

A report cited in the brief of the *amicus curiae* confirms that these variations can be significant. See *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives* Center for Health and Justice at TASC (Dec. 2013), Appendix A. http://www2.centerforhealthandjustice.org/content/pub/no-entry-national-survey-criminal-justice-diversion-programs-and-initiatives. For example, as a condition of probation, some programs may enroll the individual in substance abuse treatment and job training courses (Alabama), or community service (Rhode Island); others require up to two years of court supervision (Connecticut). Participants in some programs must accept responsibility for their offense (Rock County, Wisconsin), or even enter a conditional guilty plea

[11] Petitioner also cites a series of district court authorities, but many of them reinforce the fact-bound approach courts apply to the question presented. See, *e.g.*, *Kennedy v. Town of Billerica*, No. 10-cv-11457-GAO, 2014 WL 4926348, at *2-3 (D. Mass. Sept. 30, 2014) (recognizing the contrasting approaches of various circuits and grounding its conclusion in "the circumstances of this case"); *Medeiros v. Clark*, 713 F. Supp. 2d 1043, 1051-56 (E.D. Cal. 2010) (analyzing the California deferred prosecution statute which prohibits any admission of guilt and offers immediate expungement of arrest record following program, before comparing the circuits' approaches and concluding the California program did not amount to a conviction).

(Kings County, New York); others forbid such a concession (Kansas). In some programs, following successful completion, the record is sealed (Vermont); others must affirmatively seek to have the record expunged (Rhode Island).

Below, Petitioner did not develop a record regarding the Gretna Pretrial Diversion Program.[12] Instead, apparently taking the position that it is impossible for *any* pretrial diversion program, no matter what it requires, to trigger the favorable termination requirement of *Heck*, Petitioner argues that this case presents "an ideal vehicle," Pet. 10, to establish a nationwide standard for the application of *Heck*'s favorable termination requirement to pretrial diversion programs because, according to Petitioner, he "never admitted guilt in any fashion, or any of the facts underlying the charges" and that the Gretna Program "involved no probation, supervision, or rehabilitation," aside from the sum of money he was required to pay, Pet. 22. Initially, there is nothing to suggest that these characteristics are typical of pretrial diversion programs. Moreover, setting aside that Petitioner's description of the Program is incomplete, at best, his Petition seeks error correction. In theory, Petitioner could be correct that given the characteristics of the Program, the Fifth Circuit erred in equating that program with the Pennsylvania, New York, and Connecticut programs rather than the Kansas program

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[12] As discussed *supra*, the various components of the Gretna Pretrial Diversion Program are not described in a comprehensive slate of local ordinances or regulations, making this omission uniquely challenging to resolve on appeal.

or the Kentucky juvenile program—although Petitioner is wrong. But that does not mean Petitioner has established the deep and irreconcilable conflict of authority the Petition outlines.

II. Because Granting Review Is Not Likely To Alter The Judgment Below, This Case Is A Poor Vehicle To Decide The Question Presented.

Even if the arguable inconsistency between the circuits is worthy of this Court's review, this case is not a proper vehicle for deciding the question. In addition to the record's complete lack of detail regarding the Gretna Pretrial Diversion Program, this case presents a poor vehicle for addressing the question presented for another reason: the Court's resolution of the question presented will not alter the judgment in this case because the three claims Petitioner seeks to pursue—malicious prosecution, unlawful arrest, and false imprisonment—are futile.

1. Petitioner cannot prevail on his §1983 malicious prosecution claim for a simple reason: it requires Petitioner to prove as an element of his claim the same requirement of *Heck* he complains is insurmountable for him—favorable termination of the prosecution.

The tort of malicious prosecution is a common-law tort with defined elements. At common law, its demanding slate of elements required a plaintiff to prove "1. A criminal proceeding instituted or continued by the defendant against the plaintiff[;] 2. Termination of the proceeding in favor of the accused[;] 3. Absence of probable cause for the proceeding[;] [and] 4. 'Malice,' or

a primary purpose other than that of bringing an offender to justice." W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* § 119 at 871 (5th ed. 1984); see also Restatement (Second) of Torts § 653 (1977). Accordingly, central to any claim properly characterized as one for malicious prosecution is the requirement that the plaintiff prove favorable termination.

Petitioner has not, and cannot, argue that completing the Gretna Pretrial Diversion Program is a favorable termination of the charges brought against him.[13] A favorable termination requires that the disposition indicates that the accused is not guilty. See Restatement (Second) of Torts § 660, cmts. a & b (1977); W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* § 119 at 874 (5th ed. 1984) (termination is favorable if it "reflect[s] the merits and [is] not merely a procedural victory"); see *Donahue v. Gavin*, 280 F.3d 371, 383 (3d Cir. 2002); *Singleton*, 632 F.2d at 193. Courts thus have held that the wholesale dismissal of criminal charges through entry of a *nolle prosequi* are not favorable to the defendant if the charges are dismissed in exchange for consideration. See, *e.g.*, *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 925 (7th Cir. 2001) ("A *nolle prosequi* entered as the result of an agreement or compromise with the accused is not considered indicative of a plaintiff's innocence."); *Spak v. Phillips*, 857 F.3d 458, 464 (2d Cir. 2017) (noting that while some entries of *nolle prosequi* are favorable, those that are unfavorable "include[] any *nolle* entered in exchange for consideration offered by

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[13] Because Petitioner has never argued that his admission to the Gretna Pretrial Diversion Program was a favorable termination, he has forfeited any opportunity to do so now.

the defendant"); *Lemoine*, 168 So. 3d at 370 (explaining that a plaintiff cannot show that criminal proceedings were favorably terminated when charges were dismissed "as a result of a compromise").

When a defendant enters into a pretrial diversion program, a prosecutor dismisses the charges in exchange for consideration. That is what occurred here—the city prosecutor of Gretna dismissed the charges against Petitioner in exchange for consideration (his participation in the Gretna Pretrial Diversion Program, including the payment of money). That is not a favorable termination. See *Taylor*, 36 F.3d at 456 ("Entering a pre-trial diversion agreement does not terminate the criminal action in favor of the criminal defendant for purposes of bringing a malicious prosecution claim."); *Singleton*, 632 F.2d at 193.

As a result, for the same reason the favorable termination requirement of *Heck* prevents Petitioner from asserting a claim for malicious prosecution, Petitioner cannot satisfy the favorable termination *element* of malicious prosecution. Petitioner thus cannot proceed on a claim for malicious prosecution no matter how the question presented is resolved.

2. Petitioner's Fourth Amendment theories—unlawful arrest and false imprisonment—fare no better. See *Wallace v. Kato*, 549 U.S. 384, 388 (2007) ("False arrest and false imprisonment overlap; the former is a species of the latter.").[14] The critical element of each

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[14] In *Wallace*, the Court noted that the favorable termination requirement of *Heck* ordinarily does not apply to Fourth Amendment claims for false arrest and false imprisonment. 549 U.S.

claim is the same: Petitioner must show that Respondents lacked probable cause to arrest him for *any* offense; it is not enough for him to show that probable cause was lacking for *some* of the offenses that formed the basis for Petitioner's arrest. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Rutigliano v. City of N.Y.*, 326 F. App'x 5, 8 (2d Cir. 2009). "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). Petitioner cannot carry his burden.

Petitioner has never denied that when Officer Mekdessie initiated the traffic stop, his car displayed an expired brake tag. See D. Ct. Doc. 49 at 5. That is an offense under the Gretna Code of Ordinances, as well as Louisiana law, giving Officer Mekdessie reason to believe that Petitioner had committed a traffic offense. See Gretna, La. Code of Ordinances § 90-2(1); see also

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at 393. Petitioner has not invoked this aspect of *Wallace*, likely because *Heck* confirms that there is an exception to this general rule—when the underlying crime is for resisting arrest, which requires proof as an element that the criminal defendant was "intentionally preventing a peace officer from effecting a *lawful* arrest." 512 U.S. at 486 n.6 (noting that a §1983 false arrest claim would imply that a conviction for resisting that arrest "was wrongful"). That applies here. Petitioner was charged with battery of a police officer and resisting an officer. See Gretna, La. Code of Ordinances § 16-65 (defining "[r]esisting an officer" as "resistance to, or obstruction of an individual acting in an official capacity and *authorized by law* to make a *lawful arrest*) (emphasis added); see also *id.* at § 16-65.5 (defining battery on a police officer); *State v. Ceaser*, 859 So. 2d 639, 643 (La. 2003) (recognizing that Louisiana law permits as an affirmative defense to such statutes that the underlying arrest was unlawful).

La. Stat. Ann. § 32:53(D). Further, Officer Mekdessie initiated the traffic stop after observing Petitioner speeding.[15] That too is an offense. See Gretna, La. Code of Ordinances § 90-126; see also La. Stat. Ann. § 32:61(A). These facts likely explain why Petitioner has acknowledged that "[t]he traffic stop may have been lawful at the outset." D. Ct. Doc. 49 at 16-17.

Petitioner nonetheless maintained below that Respondents lacked probable cause to arrest him for a single reason: he was not given an opportunity to read the citations Officer Mekdessie asked him to sign or to otherwise have the assertions in those citations explained to him. *Ibid.* But that is not the law. Under Louisiana law, a police officer has statutory authority to arrest an individual who refuses to sign any validly-issued traffic citation. La. Stat. Ann. § 32:391. That authority is not contingent on the individual's opportunity to evaluate the citation or to have its contents orally explained. See *id.* As Louisiana courts have explained, an officer has "the authority and the duty" to arrest a person who refuses to sign a ticket. *Moss v. Maryland Cas. Co.*, 392 So. 2d 772, 773-74 (La. Ct. App. 1980) (affirming trial court's dismissal of false arrest claim because officer had legal authority to arrest

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[15] Although Petitioner alleged in his complaint that he had been driving at the proper speed, see D. Ct. Doc. 1 ¶¶ 5-6, during his deposition, and his testimony at trial, he did not dispute that he had been speeding. See generally, D. Ct. Doc. 42-2 at 8-11. Rather, Petitioner's primary complaint was that he did not know he had been cited for speeding. *Ibid.* But that statement, too, was undermined by Petitioner's own admissions. See *supra* section 1.

plaintiff who did not sign ticket, though plaintiff claims she never saw the ticket).[16]

By not disputing that the brake tag was expired while driving—which is a traffic offense under both the Gretna Code of Ordinances and Louisiana law—Petitioner has conceded that there was probable cause to arrest him for that offense. Further, by failing to adduce any evidence to contest the allegation that he was speeding, Petitioner has surrendered any argument that Officer Mekdessie did not have probable cause to arrest him for speeding. In sum, probable cause was present for Petitioner's arrest. That is why Petitioner's Fourth Amendment claims contesting the lawfulness of the ensuing detention are just as unsustainable as Petitioner's malicious prosecution claim.

III. The Fifth Circuit's Decision Is Correct.

Finally, the Fifth Circuit is correct: the favorable termination requirement of *Heck v. Humphrey* applies to §1983 claims that would imply that a plaintiff's participation in a pretrial diversion program, along with any probationary sanctions imposed by that program, was invalid.

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[16] With respect to battery on a police officer and resisting a police officer, Louisiana law holds that because "an individual has a time-honored right to resist an illegal arrest," *State v. Trepagnier*, 982 So. 2d 185, 193 (La. Ct. App. 2008), the unlawfulness of the arrest is a complete defense to those offenses, see *Ceaser*, 859 So. 2d at 643. This means Respondents had probable cause to arrest Petitioner on those charges because they had probable cause to arrest Petitioner for his traffic offenses.

The gravamen of Petitioner's argument on the merits is that the favorable termination requirement of *Heck* applies only to §1983 claims that would imply the invalidity of a "criminal conviction." *E.g.*, Pet. 1. Petitioner is wrong. Although the Court in *Heck* expressed concern regarding collateral attacks on a "conviction or sentence," the Court more broadly explained that §1983 suits are not appropriate vehicles to challenge all types of criminal "judgments." See *Heck*, 512 U.S. at 486-87; accord *Edwards v. Balisok*, 520 U.S. 641, 645 (1997) (considering that "the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the *judgment*" (emphasis added)); *Wilkinson v. Dotson*, 544 U.S. 74, 80 (2005) (quoting *Heck*, 512 U.S. at 487) (explaining that §1983 actions may proceed when success in the suit "will *not* demonstrate the invalidity of any outstanding criminal judgment"). The Court recently reaffirmed this principle in *McDonough v. Smith*, noting that the favorable termination requirement applied if a §1983 claim "questions the validity of a state *proceeding*." 139 S. Ct. 2149, 2158 (2019) (emphasis added).

The essential point of *Heck* and its progeny, therefore, is not just that a §1983 claim should not be used to cast doubt on final criminal convictions or the resulting sentences. It is that a §1983 claim should not be used to collaterally attack any disposition properly resolved through the criminal justice system that does not end in a favorable termination for the accused. Of course, that is consistent with the common-law cause of action for malicious prosecution that this Court analogized to in *Heck*. *Heck*, 512 U.S. at 484; see also

Washington v. Summerville, 127 F.3d 552, 558 (7th Cir. 1997) (holding that a "bare nolle prosse without more is not indicative of innocence").

In addition, permitting litigants to use §1983 to mount *post hoc* collateral attacks on resolutions achieved through pretrial diversion programs necessarily implies that admission to the program, and the burdens imposed as a result, were invalid. As this Court recognized in *Heck*, the "parallel litigation" that would result if criminal defendants later sought to undermine sanctions through federal litigation would undermine consistency, finality, and comity. *Heck*, 512 U.S. at 484-85 (citation omitted). This case illustrates the problem. Petitioner's participation in the Gretna Pretrial Diversion Program required him to pay money. In addition, the fact of those charges and the reports regarding the underlying incident remain accessible to law enforcement. Petitioner's lawsuit is a collateral attack on that resolution. Petitioner's unlawful arrest, false imprisonment, and malicious prosecution claims all assert that the basis for his entry into the Program itself was flawed from the start. The logical implication of Petitioner's claim is that he should never have been compelled to enter the Program and that he should never have had to pay any money to the City.

This is the very scenario *Heck*, and the common-law favorable termination requirement, sought to avoid. The Fifth Circuit thus correctly held that Petitioner's claims are not viable because he cannot meet the favorable termination requirement of *Heck*.

CONCLUSION

The petition for a writ of certiorari should be denied.

December 11, 2019 Respectfully submitted,

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