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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

I. There Is A Persistent, Square, And Acknowledged Split Over The Question Presented.

A. The Brief in Opposition (BIO) argues at length about the merits and about whether this case is quite the right vehicle for resolving the question presented. Tellingly, however, it never disputes that there is an acknowledged circuit split. Nor could it: Courts at every level have recognized that, as the Tenth Circuit put it, "[c]ourts disagree." *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009). The Sixth and Eleventh Circuits have likewise made clear that they reject the rule embraced in the Second, Third, and Fifth Circuits. *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 638 (6th Cir. 2008); *McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007); *see* Pet. 11-12. If that were not enough, both federal district courts[1] and state courts[2] recognize this same division of authority.

Instead, therefore, Respondents ("Defendants," for ease of reference) quibble over how deep the circuit split is. BIO 13 (asserting that the Petition "overstates" the conflict); *see also, e.g.*, BIO 1 (circuit split

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[1] Pet. 19-20; *e.g.*, *Cabot v. Lewis*, 241 F. Supp. 3d 239, 250-51 (D. Mass. 2017) ("Courts are divided as to whether imposition of a pretrial probation (or an analogous disposition, such as pretrial diversion) constitutes a 'conviction' for purposes of the *Heck* rule.").

[2] Pet. 20; *e.g.*, *Bustamante v. Borough of Paramus*, 994 A.2d 573, 580 (N.J. Super. Ct. App. Div. 2010) (recognizing "a split among the circuit courts").

is "*largely* illusory").[3] Whereas three federal courts of appeals have stated unambiguously that they reject the rule of three other appellate courts, Defendants think those courts are confused—that, in fact, those courts don't disagree as much as they think they do. Rather, Defendants argue, this disagreement is "largely attributable to factual distinctions in the way different jurisdictions structure their various pretrial diversion programs." BIO 13.

Not so. The courts of appeals have divided over the simple legal question of whether *Heck* bars a lawsuit even when, as here, there has been no actual conviction. And the holdings of those cases do not turn on the "factual distinctions" that Defendants describe at length. Take, for instance, *Vasquez Arroyo*. There, the Tenth Circuit held that the plaintiff's claims were not barred by *Heck* because there was "not [an] outstanding conviction[]" against the plaintiff. 589 F.3d at 1096. Nothing turned on the fact that, as Defendants would have it, "pretrial diversion under Kansas law differs greatly from pretrial diversion in the New York, Connecticut, and Pennsylvania programs." BIO 16 (internal quotation marks omitted); *see also Lessard v. Cravitz*, 686 F. App'x 581, 587 (10th Cir. 2017) (applying this rule to a Colorado program).

The same is true of *S.E. v. Grant County Board of Education*. Defendants assert that the Sixth Circuit based its decision on "the facts of th[e] case." BIO 17 (quoting 544 F.3d at 639). That's not quite complete. *Heck* was "inapplicable," the court said, "[g]iven the

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[3] Emphases are added throughout except where noted.

facts of this case, *where the plaintiff was neither convicted nor sentenced*." *Id.* The court did not engage in a fact-specific inquiry; it drew a line based on whether there had been a conviction—the same line rejected by the decision below.

Defendants do not even try to distinguish the Eleventh Circuit's decision. Defendants recite at length the facts of *McClish v. Nugent*, but ultimately they grudgingly concede that the Eleventh Circuit has "arguably declar[ed] that participation in a pretrial diversion program" does not foreclose a claim pursuant to *Heck*. BIO 17. And correctly so: *McClish* held that the plaintiff's "§ 1983 suit does not represent the sort of collateral attack foreclosed by *Heck*" because "there was never a conviction in the first place." 483 F.3d at 1251.

The courts on the other side of the ledger embrace a contrary legal rule: that *Heck* applies even in the absence of a conviction. Those decisions did describe the underlying facts—as most decisions do—but nothing turned on those supposed "factual distinctions." BIO 13. Thus, in *Roesch v. Otarola*, the Second Circuit ruled against the plaintiff, not because of the precise contours of his diversion program, but because the Second Circuit has a blanket rule that "[a] person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal, or else waive his section 1983 claim." 980 F.2d 850, 853 (2d Cir. 1992). Yes, the Second Circuit analogized Connecticut's program to a New York program that the court had previously analyzed, BIO

15; *see* 980 F.2d at 853, but nothing turned on the particulars of the program.

The same is true of the Third Circuit's decision in *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005). Defendants emphasize *Gilles*' background description of Pennsylvania's diversion program. BIO 14. But the Third Circuit's *rule* is that *Heck* applies even in the absence of a conviction. 427 F.3d at 210. *Gilles* relied on *Roesch*, which articulated that same rule, and on *Taylor v. Gregg*, 36 F.3d 453 (5th Cir. 1994), the same precedent relied on by the decision below to support its broad rule, *see* Pet. App. 7a. And that is how the Third Circuit understands its own rule, even when applied to programs besides Pennsylvania's. *See Fernandez v. City of Elizabeth*, 468 F. App'x 150, 154-55 (3d Cir. 2012) (*Gilles* means "[c]onvictions are not the critical prerequisite" to the *Heck* bar).

In the decision below, likewise, the Fifth Circuit felt no need to articulate the details of the diversion program because such details *did not matter* to its decision. What was relevant to the court was that "Morris completed a pretrial diversion program." Pet. App. 6a. Because "[e]ntering a pre-trial diversion agreement does not terminate the criminal action in favor of the criminal defendant," the court held that "*Heck* … applies and dismissal was appropriate." Pet. App. 7a.[4]

[4] Defendants call Louisiana "unique" because, unlike in "many" states, "there is no statewide pretrial diversion program." BIO 7. They do not explain why this matters. In the Fifth

What matters is whether there was a conviction or if charges were dismissed. Each of the cited cases looks at that critical fact.[5] But the courts give radically different legal treatment to it. There is, in short, a deep, persistent, acknowledged conflict of authority that only the Court can resolve.[6]

B. Relatedly, Defendants fault Morris for "not develop[ing] a record regarding the Gretna Pretrial Diversion Program." BIO 19. This argument is misplaced for multiple reasons. First and foremost, the only fact that mattered to the Fifth Circuit is in the record: Morris went through a pretrial diversion program. Pet. App. 7a. So is the fact that matters to courts on the other side of the divide: Morris was not

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Circuit, any criminal defendant who enters pretrial diversion is barred from pursuing a § 1983 claim.

[5] Pet. App. 4a (Fifth Circuit noting that charges against Morris "were dismissed"); *Gilles*, 427 F.3d at 209 (in Pennsylvania, "acceptance into an ARD program is not intended to constitute a conviction") (internal quotation marks omitted); *Roesch*, 980 F.2d at 852 ("the State Court dismissed the charges against" the plaintiff after he completed a diversion program); *McClish*, 483 F.3d at 1236 ("Holmberg entered into pretrial intervention, completed the program, and the charge against him was also dismissed."); *S.E.*, 544 F.3d at 636 (charges against plaintiff were "dismissed after [she] satisfied her diversion contract"); *Vasquez Arroyo*, 589 F.3d at 1095 & n.4 (plaintiff had no "conviction" and his charge for disorderly conduct "was dismissed" following pretrial diversion).

[6] Defendants incorrectly describe Morris as "tak[ing] the sweeping view that no pretrial diversion program ever triggers … *Heck*." BIO 13; *id.* at 19. The key question is whether there has been a conviction. If so, *Heck* applies.

convicted. ROA.242 (court record stamped "DIVERSION COMPLETED CASE DISMISSED").

Furthermore, this concern appears to be purely hypothetical. If Defendants—who include the city, the police department, and the police chief—thought some *other* aspect of this pretrial diversion program implicated *Heck*, they are uniquely well-positioned to say what it is. Moreover, as the moving party at summary judgment on this affirmative defense, it was doubly their burden to establish any such facts.[7] Defendants never did so because their position all along has been that such details do not matter. Defendants argued that *Heck* applies to all manner of pretrial diversion programs[8]—a broad position that they had to take because Gretna's pretrial diversion program is merely a check-writing exercise with no other identifiable consequence. Pet. 6.

In short, Defendants got precisely the sweeping rule they sought, the same one embraced by the Second and Third Circuits: that *Heck* bars § 1983 claims even without an underlying conviction. That is the

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[7] *Topa v. Melendez*, 739 F. App'x 516, 518 (11th Cir. 2018) (collecting cases; *Heck* is an affirmative defense); *Garrick v. Thibodeaux*, 174 F.3d 198, *1 (5th Cir. 1999) (unpublished) (it is the defendant's "burden [to] show[] that … claims are barred under *Heck*").

[8] *E.g.*, Original Br. of Appellees at 9, 12, *Morris v. Mekdessie*, No. 18-30705 (5th Cir. Dec. 28, 2018) (asserting that Morris's "voluntary entry and completion of the" pretrial diversion program triggered *Heck* because the Fifth Circuit has broadly "bar[red] § 1983 claims … based upon the plaintiff's participation in 'deferred adjudication' programs" from other jurisdictions).

rule and the judgment Defendants must defend, and their failure to identify some other factor, or articulate its relevance, is no impediment to this Court's review.

II. The Decision Below Is Contrary To *Heck*.

As the Petition explains (at 15-18), review also is warranted because the decision below is wrong. By its plain terms, *Heck* prevents plaintiffs from "recover[ing] damages for … harm caused by actions whose unlawfulness *would render [their] conviction or sentence invalid*." *Heck v. Humphrey*, 512 U.S. 477, 486 (1994). Here, there was no conviction, so there is nothing to invalidate. *Heck* does not preclude a plaintiff like Morris from proceeding with a claim for damages after having completed pretrial diversion.

Defendants' defense of the decision below (BIO 25-27) only highlights its problems. At times, their arguments effectively *agree* with ours. They argue, for instance, that "[a]lthough 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*.'" BIO 26. But there is no "criminal judgment" against Morris; his case was dismissed. ROA.242. And nothing about Morris's § 1983 suit calls this disposition into question.

Elsewhere, Defendants take a radically broader position. For instance, they assert that "the essential point of *Heck* … 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." BIO 26. Leave aside that Morris is not collaterally attacking any criminal disposition. (After all, he is not challenging the dismissal of the charges against him.) The breadth of Defendants' proposed rule is flatly at odds with *Heck*. As noted above, *Heck* does not create a general "favorable termination" requirement for all civil claims—it bars only those "§ 1983 action[s] … whose successful prosecution would necessarily imply that the plaintiff's *criminal conviction* was wrongful." 512 U.S. at 486 n.6. To make that determination, *Heck* instructs courts to ask whether, "to prevail in []his § 1983 action," a plaintiff would have to "negate an element of the offense of which he has been *convicted*." *Id.* If not—if the "court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff"—then "the action should be allowed to proceed." *Id.* at 487. *Heck* itself demonstrates that Defendants' rule is wrong.

Defendants also place weight on a single word in *McDonough v. Smith*, 139 S. Ct. 2149 (2019). BIO 26. Specifically, they rely on the statement that a § 1983 claim cannot "question the validity of a state *proceeding*." *Id.* (quoting 139 S. Ct. at 2158 (emphasis in BIO)). But *McDonough* makes clear that its rule is not so broad: A plaintiff like Morris must "prove that *his conviction* ha[s] been invalidated in some way." 139 S. Ct. at 2157.

Finally, Defendants conclude with a policy argument: that "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." BIO 27. This, they say, "is the very scenario *Heck* … sought to avoid." *Id.*

On the contrary, nothing about Morris's claims implies that his diversion program was invalid. This resolution was akin to a settlement—a "middle ground between conviction and exoneration," Pet. App. 6a, that resulted in no judgment on the merits. There is thus nothing for him to "invalid[ate]." Moreover, *Heck* does not broadly protect extrajudicial "resolutions." Rather, *Heck* vindicates "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity *of outstanding criminal judgments*." 512 U.S. at 486. The "parallel litigation" that *Heck* seeks to prevent is disputes over "probable cause and guilt." *Heck*, 512 U.S. at 484. In this pretrial diversion program, there was no litigation over those issues, so the § 1983 suit creates none of the concerns that Defendants identify. The decision below simply does not "further any of the policy concerns upon which *Heck* was premised." Pet. 18; *see* Br. of Amicus Curiae TASC at 8-9 (*Heck*'s underpinnings show that its rule is meant to bar a "collateral[] attack" on "an extant criminal judgment").

Because the decision below was incorrect, the Court should intervene now to resolve the persistent division of authority.

III. This Case Presents A Suitable Vehicle For Addressing The Question Presented.

Defendants do not deny the importance of the issue or the prevalence of pretrial diversion programs. Pet. 18-21; Br. of Amicus Curiae TASC 4-5 ("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."); *id.* at 23-24. Defendants also cannot dispute that *Heck* was the sole basis for both decisions below dismissing the bulk of Morris's claims. Pet. 22-23.

Instead, Defendants say this case is a poor vehicle for resolving these questions because they believe they eventually will win the case for reasons other than the question presented. That is not a reason to deny certiorari, and it is wrong in any event. Respondents often think there are multiple bases on which they ultimately may prevail—or, at a minimum, they assert as much. *E.g.*, Brief In Opposition at 9, *Lozman v. City of Riviera Beach, Fla.*, No. 17-21 (U.S. Oct. 11, 2017) (asserting "an alternative[] statutory basis for affirming" a decision rejecting Petitioner's § 1983 claim). And it is equally commonplace for the Court to grant review nonetheless. *E.g*, *Lozman*, 138 S. Ct. 1945, 1955 (2018) (holding for Petitioner; noting that, "[o]n remand, the Court of Appeals … may consider any arguments in support of the District Court's judgment that have been preserved"); *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (certiorari granted on search question, notwithstanding invocation of good-faith exception); *Byrd v. United States*, 138 S. Ct.

1518 (2018) (cert. granted on search question, notwithstanding invocation of consent and probable-cause issues).

The Court should follow that ordinary course here. Because the *Heck* bar was the sole rationale below, neither the district court nor the Fifth Circuit has considered the merits of Morris's claims. Pet. App. 7a; Pet. App. 17a. Defendants' assertion that a victory for Petitioner would not "alter the judgment," BIO 20, is thus incorrect. There was no alternative holding below, so a win for Petitioner would mean that the parties can litigate the merits of his claims for the first time on remand.

Defendants also are wrong to assume they ultimately will prevail. Leave aside that they rely on a one-sided factual recitation, *e.g.*, BIO 4-7, 23-25—even though Morris has disputed the events surrounding his arrest, which left him with a broken jaw after he was tased while handcuffed, Pet. 5, and notwithstanding that Morris's version of the facts (as well as all reasonable inferences) controls in a case arising from summary judgment. Their theory is also wrong. As the Fifth Circuit explained, Morris argued that "he was stopped without probable cause and should not have been arrested." Pet. App. 8a n.2. Defendants ignore that Morris made a claim for "unlawful seizure." Pet. App. 6a; *contra* BIO 22. Morris has always contended that he was stuck in traffic and *not* speeding before he was pulled over, ROA.252, 256, nor was there any radar evidence that he was, ROA.308. And he argued that his stop resulted instead from a police department policy establishing "ticket and arrest quotas for its patrol officers," which one officer

testified he was "ordered by a supervisor to fulfill." Pet. App. 20a-21a. The only other basis for the stop asserted by Defendants is that Morris "displayed an expired vehicle inspection tag ('brake tag')." BIO 4; *id.* 24-25. But Mekdessie testified the expired brake tag was affixed to the front windshield of Morris's car, and Mekdessie noticed it only *after* the stop, which he initiated after "follow[ing]" Morris from behind. ROA.223. Thus, to take just this one example, whether Mekdessie's initial stop of Morris was lawful remains unresolved, as does the propriety of the subsequent arrest. The Fifth Circuit held only that "[b]ecause this chain of causation relies on a false arrest, *Heck* bars the argument." Pet. App. 8a n.2. Once the *Heck* hurdle has been removed, Morris may proceed with his claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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