22-50998

In The
United States Court of Appeals
For The Fifth Circuit

ERMA WILSON,

Plaintiff-Appellant,

v.

MIDLAND COUNTY, TEXAS;
WELDON (RALPH) PETTY, JR., sued in his individual capacity; ALBERT SCHORRE, JR., sued in his individual capacity,

Defendants-Appellees.

On appeal from the United States District Court
for the Western District of Texas,
7:22-cv-85, Hon. David Counts, District Judge, presiding.

APPELLANT'S EN BANC BRIEF

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Certificate of Interested Persons

(1) Case no. 22-50998, *Wilson v. Midland County, Texas et al.*

(2) The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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Statement of Jurisdiction

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. ROA.9–10. This Court has jurisdiction under 28 U.S.C. § 1291. ROA.374–382.

Statement of the Issue

The sole issue is the scope of *Heck v. Humphrey*'s "favorable termination" "prerequisite" for a § 1983 claim impugning the constitutionality of a state court conviction or sentence. *See* 512 U.S. 477 (1994). *Heck* held that such a claim has a favorable-termination prerequisite if the claim (1) is covered by the federal habeas statute, 28 U.S.C. § 2254 (the habeas-collision holding) *or* (2) is analogous to the tort of malicious prosecution (the elements-based holding). The question is whether this Court should extend the favorable-termination prerequisite to a claim that (1) never could and never can be brought via § 2254 (thus never *colliding* with § 2254) *and* (2) is unlike malicious prosecution (thus having no favorable-termination *element*). The answer should be no. In the panel's words, extending the prerequisite to such claims "subverts § 1983's broad textual command." *Wilson v. Midland County*, 89 F.4th 446, 459 (5th Cir. 2023). But the panel held that it was bound to an expansive reading of *Heck* by circuit precedent, which the en banc Court is not. The Court should join the majority of circuits and hold that the favorable-termination prerequisite does not extend beyond *Heck*'s habeas-collision or malicious-prosecution circumstances.

Statement of the Case

I. Factual history[1]

"The facts are easy to lay out—though hard to take in." *Wilson*, 89 F.4th at 450. Erma Wilson's childhood dream of becoming a registered nurse was derailed by a drug-possession conviction in Midland County, Texas. ROA.15–17. "Wilson doggedly maintained her innocence (and does to this day)—insisting that the cocaine found on the ground was not hers—and she rejected multiple plea deals, a rare choice in today's plea-bargain age." 89 F.4th at 448; ROA.12–13. She "placed her faith in the justice system, trusting she would get due process and a fair trial." But her "faith was misplaced." 89 F.4th at 448.

"Unbeknownst to Wilson, a Midland County assistant district attorney, Ralph Petty, had been moonlighting, acting as both accuser and adjudicator. For nearly 20 years, the multitasking Petty had worn two hats: (1) by day, a prosecutor in the public courtrooms of Midland County judges; and (2) by night, a law clerk in the private chambers of Midland County judges. Disturbingly, Petty was working both sides of the bench, seeking favorable rulings while also writing them." *Id.*; ROA.17–23. Incredibly, this "utterly bonkers" arrangement was expressly blessed by Midland

[1] These are the facts pertinent to the sole issue on appeal, as recounted by the panel and accompanied by record citations. Wilson's panel opening brief provides all the facts surrounding her procedural due process claim against all three defendants.

County's top policymakers, including the participating judges and the county's head prosecutor (defendant Schorre), even though it so obviously "offended the gravest notions of fundamental fairness." 89 F.4th at 459; ROA.17–23.

Petty's dual role—which resulted in disbarment, but only after he retired—infected hundreds of cases, including Wilson's conviction and at least one death sentence. 89 F.4th at 451; ROA.23–25. Petty "advised fellow prosecutors regarding [Wilson's] case while also advising the judge presiding over it and surreptitiously drafting important rulings adverse to Wilson," as reflected by court documents and invoices. 89 F.4th at 449 & n.2; ROA.25–28. In short, "Petty's conflict of interest was undeniable, and it flattened Wilson's constitutional guarantee of a fair trial." 89 F.4th at 449.

But when "Petty's dodgy side hustle belatedly came to light," Wilson's eight-year suspended sentence had expired, "making federal habeas a non-option." 89 F.4th at 448–50; ROA.25–27.

II. Procedural history

With no other federal remedy for a conviction that "resulted from a tainted process offensive to the Constitution," Wilson sued for damages under § 1983. 89 F.4th at 451 n.8. She claimed that Petty's dual role infected her conviction with an obvious conflict of interest amounting to a structural procedural due process

violation under the Fourteenth Amendment, as recognized by the Texas Court of Criminal Appeals in the case of another victim of Midland County's double-dealing scheme. ROA.25, 31–38; *see Ex parte Young*, 2021 WL 4302528 (Tex. Crim. App. Sept. 22, 2021).

The defendants moved to dismiss. They argued that Wilson's claim is barred by this Court's interpretation of *Heck v. Humphrey* in *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000) (per curiam). The district court agreed, holding that *Randell* remains binding and that it imposes a favorable-termination prerequisite on Wilson's federal § 1983 claim, even though she could never bring it via § 2254. ROA.325–332, 374–380.

The panel affirmed because, under *Randell*, "noncustodial plaintiffs [like Wilson] must meet the favorable-termination requirement" before invoking § 1983—"even if it's practically impossible for them to do so," and even though the panel was "unconvinced by *Randell*'s reasoning," which the Supreme Court subsequently called into question. 89 F.4th at 450, 455. The panel recognized that its "result is difficult to explain. What allegedly happened here (and in hundreds of other criminal cases in Midland County) is utterly bonkers: the presiding judge employed a member of the prosecution team as a right-hand adviser. . . . [Wilson] has suffered the fallout of a criminal justice system that offended the gravest notions of

fundamental fairness . . . [and] upended her life. However, our 2000 decision in *Randell* not to relax *Heck*'s favorable-termination requirement for noncustodial plaintiffs has not been overruled—at least not yet." *Id.* at 459.

So Wilson petitioned for rehearing en banc, noting the panel's observation that it was "tied" to one side of an active circuit split, *id.* at 450, 457–58, by a short per curiam opinion since called into question, and asking the full Court to engage in the statutory analysis at the heart of this case on a clean slate. The Court granted Wilson's petition and ordered this supplemental brief.

Standard of Review

This Court reviews de novo the district court's dismissal of a complaint under Rule 12(b)(6). *Hines v. Quillivan*, 982 F.3d 266, 270–71 (5th Cir. 2020). The Court accepts all facts in the complaint as true and construes them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Summary of the Argument

This brief explains in three parts why Wilson's § 1983 procedural due process claim is not foreclosed by *Heck v. Humphrey*.

Part I explains that *Heck* recognized two independent bases for imposing a "favorable termination" "prerequisite" on certain § 1983 claims impugning the constitutionality of a state court conviction or sentence. First, *Heck* held that

favorable termination is a prerequisite if the § 1983 claim is in the core of habeas and therefore covered by 28 U.S.C. § 2254 (*Heck*'s habeas-collision holding). Second, *Heck* held that favorable termination is a prerequisite if the § 1983 claim is akin to malicious prosecution and therefore has a favorable-termination element, regardless of collision with § 2254 (*Heck*'s elements-based holding). But it remains an open question—on which the circuits actively disagree—whether *Heck also* bars a plaintiff who is categorically ineligible for relief under § 2254 *and* whose claim does not sound in malicious prosecution (thus implicating neither of *Heck*'s holdings).

Part II explains that Wilson's procedural due process claim implicates neither *Heck*'s habeas-collision holding nor its elements-based holding, so—under Congress's statutory scheme—the claim has no favorable-termination prerequisite. First, *Heck*'s habeas-collision holding does not apply because Wilson's claim never could and never can be brought via § 2254, meaning § 2254 never collided with and does not supplant § 1983 in these circumstances. Second, *Heck*'s elements-based holding does not apply because Wilson's claim is unlike malicious prosecution—sharing none of its elements, including favorable termination. With neither hurdle in the way, § 1983's broad textual command and presumption of enforceability must control.

Finally, part III explains that concerns about other cases—such as plaintiffs who strategically sleep on their § 2254 rights or try to relitigate issues settled by state criminal proceedings—do not justify an atextual expansion of *Heck*. None of those concerns are implicated by Wilson's claim, so they provide no reason to get the statutory questions that *are* presented here disastrously wrong. And as those concerns arise in other cases, they too are best addressed by existing statutory doctrines, not by altering Congress's careful scheme of constitutional remedies.

Argument

I. *Heck v. Humphrey* recognized two independent bases for imposing a "favorable termination" "prerequisite" on certain § 1983 claims; it is an open question whether and when the prerequisite extends to claims that do not implicate those bases.

Heck v. Humphrey had two holdings, both grounded in statutory text and construction. First, it held that a § 1983 plaintiff who is in state custody and whose claim impugns an extant state conviction or sentence is subject to a "favorable termination" "prerequisite" to avoid § 1983's collision with the federal habeas statute, § 2254 (the habeas-collision holding). Second, it held that a § 1983 claim that is analogous to malicious prosecution has a favorable-termination element, based on the statute's importation of some common-law tort elements (the elements-based holding). That second, independent holding is a function of § 1983 itself, not its intersection with § 2254 or a plaintiff's custody status. The circuit courts have

disagreed on the open question of whether the favorable-termination prerequisite extends beyond *Heck*'s two holdings to claims like Wilson's, which neither conflicts with § 2254 nor incorporates the elements of malicious prosecution.

A. *Heck* held that favorable termination is a prerequisite to a § 1983 claim that is covered by the federal habeas statute (§ 2254) or is analogous to malicious prosecution.

Under a plain reading of statutory text, a person may invoke federal jurisdiction to challenge the constitutionality of an extant state conviction, sentence, or confinement in two ways: (1) the federal civil rights statute (42 U.S.C. § 1983) and (2) the federal habeas statute (28 U.S.C. § 2254). Section 1983 provides "[e]very person" an unqualified federal cause of action for injunctive or monetary relief for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Section 2254 provides "a person in custody pursuant to the judgment of a State court" a stricter avenue to invalidate an extant conviction, sentence, or confinement, subject to various substantive and procedural requirements (including custodial status and exhaustion of state remedies).

Because the statutes have some overlapping remedial reach, the Supreme Court has long held that § 1983 is not the avenue for an injunction invalidating an extant state conviction, sentence, or confinement where the claim necessarily collides with the stricter § 2254 avenue (i.e., where the plaintiff is in custody):

"Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983." *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973).

Yet the Court had to grapple with the "intersection of the two" federal statutes again in *Heck v. Humphrey*, where the plaintiff sought damages instead of an injunction. 512 U.S. at 480–81. The same rule of statutory conciliation prevailed: Whether a person in state custody seeks an injunction or damages that would "necessarily imply the invalidity of his conviction or sentence," the claim is not "cognizable under § 1983" until otherwise favorably terminated—because Congress requires individuals in state custody to bring their conviction-invalidating constitutional claims via § 2254's procedures, which include exhausting state remedies. *Id.* at 483, 487. That habeas-collision holding, which extended *Preiser* to damages claims, was the "classic judicial task of reconciling [multiple] laws enacted over time, and getting them to 'make sense' in combination." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (citation omitted). It was one of *Heck*'s two independent holdings, and it was tied up with the plaintiff's custody status.

Heck's second holding—which, like the first, broke little new ground—said that favorable termination was an "element" of the plaintiff's claim alleging fabrication of evidence because the "common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here." *Id.* at 484. Accordingly, any § 1983 claim that is sufficiently analogous to malicious prosecution carries that tort's favorable-termination element out of concerns about "parallel litigation," "finality and consistency," and the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 484–85. That second, elements-based holding had nothing to do with § 2254 or the plaintiff's custody status; it was based on the long-held, general understanding that "§ 1983 creates a species of tort liability" often carrying common-law tort elements as a function of the statute itself for custodial and noncustodial plaintiffs alike—for both of whom a malicious prosecution-type claim "does not accrue" until its favorable-termination element is satisfied. *Id.* at 483, 489–90 & n.10.

B. The circuits are split as to whether *Heck*'s favorable-termination prerequisite extends to claims that do not implicate either of *Heck*'s holdings.

1. *Heck*'s habeas-collision holding and its elements-based holding were both grounded in statutory text and construction—the former, reconciling two

overlapping statutes; the latter, reflecting § 1983's adoption of certain common-law tort elements. Four justices in *Heck* and five in *Spencer v. Kemna*, 523 U.S. 1 (1998), insisted that the case extended no further than scenarios implicating *both* of those bases—that it was a "simple way to avoid collisions at the intersection of habeas and § 1983," a rationale inapplicable to noncustodial plaintiffs, whom § 2254 does not reach, and for whom *Heck*'s elements-based holding should fall away *even when a claim sounds in malicious prosecution*, at least in some circumstances. *Spencer*, 523 U.S. at 20–21 (Souter, J., concurring) (citing *Heck*, 512 U.S. at 497–500 (Souter, J., concurring in the judgment)).

Those justices insisted that the federal claim-channeling rule for custodial plaintiffs embodied in *Heck*'s habeas-collision holding could not "needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for habeas purposes." *Heck*, 512 U.S. at 500 (Souter, J., concurring in the judgment). It would be unjust and illogical "[i]f these individuals (people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences) . . . were required to show the prior invalidation of their convictions or sentences in order to obtain § 1983 damages for unconstitutional conviction or imprisonment." *Id.* "After a prisoner's

release from custody, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief." *Spencer*, 523 U.S. at 21 (Souter, J., concurring). Or, succinctly put: If a person "does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25 n.8 (Stevens, J., dissenting).

All these writings had some common ground. First, *Heck*'s habeas-collision holding found unanimous acceptance, as everyone agreed across both *Heck* and *Spencer* that claims covered by § 2254 (i.e., those by a custodial plaintiff, impugning a conviction or sentence) had to be channeled there. *See Heck*, 512 U.S. at 497 (Souter, J., concurring in the judgment). Second, everyone agreed that common law provides the starting point for determining a § 1983 claim's elements, and that *Heck*'s elements-based holding made sense for custodial plaintiffs bringing malicious prosecution-type claims. *See id.* at 491–92 (Souter, J., concurring in the judgment).

The justices parted ways, however, as to whether custodial status should serve as a dividing line dictating whether a malicious prosecution-type claim ever *sheds* its favorable-termination element. The concurring and dissenting justices in *Heck* and *Spencer* said yes, in at least some circumstances. *See id.* at 501–03 (Souter, J., concurring in the judgment). Footnote 10 of the *Heck* majority disagreed, unable to see why a "cause of action for malicious prosecution" (or one akin to it) should shed

its favorable-termination element "by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 489–90 & n.10. Because "§ 1983 creates a species of tort liability" often carrying common-law tort elements *as a function of the statute itself*, the *Heck* majority did not understand the custody line as a meaningful basis to discard favorable termination as "[o]ne element that must be alleged and proved *in a malicious prosecution action*," given the finality, consistency, and estoppel considerations undergirding that tort's favorable-termination element. *Id.* at 483–85 (emphasis added).

Subsequently, the Court said it had "no occasion to settle" whether the "unavailability of habeas . . . may . . . dispense with the *Heck* requirement." *Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam). In saying so, the Court cited Justice Souter's *Heck* concurrence, suggesting that his view that a malicious prosecution claim sheds its favorable-termination element for noncustodial plaintiffs might someday win out, in at least some circumstances.

2. Unsurprisingly, those separate writings and the Court's subsequent recognition that the issue is unsettled have led to disagreement as to whether and when a plaintiff's noncustodial status affects the cognizability of his § 1983 claim.

Five circuits, including this one in *Randell v. Johnson*, have held that *Heck*'s footnote 10 compels extending *Heck*'s habeas-collision holding to any noncustodial

plaintiff impugning the constitutionality of a conviction or sentence, full stop. Unlike footnote 10 itself though, these circuits do not tie that rule to whether the claim sounds in malicious prosecution and carries a favorable-termination *element* independent of custodial status. *See Wilson*, 89 F.4th at 458 nn.67–71 (summarizing rationale of each circuit on this minority side of the split).[2]

Six circuits, meanwhile, do not treat footnote 10 as conclusive when applying *Heck*'s habeas-collision holding. Before relying on that holding to impose a favorable-termination prerequisite, they ask whether a § 1983 claim actually conflicts with § 2254 (though they disagree among themselves as to what constitutes such a conflict). *See id.* at 457 nn.61–66 (summarizing rationale of each circuit on this majority side of the split). The Second Circuit takes a textual approach: If the § 1983 plaintiff is not in custody, there is no conflict with § 2254 and his claim is cognizable because "where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be." *Huang v. Johnson*, 251 F.3d 65, 73–75 (2d Cir. 2001). The Fourth, Sixth, and Tenth Circuits take a pragmatic approach to the interplay between the two statutes, asking whether the plaintiff could realistically have

[2] *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998); *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000) (per curiam); *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020) (en banc); *Entzi v. Redmann*, 485 F.3d 998 (8th Cir. 2007).

pursued § 2254 relief while in custody but failed to do so.[3] The Ninth Circuit adopts a similar diligence approach, but only as to claims challenging the revocation of good-time credits or parole, not those challenging the underlying conviction or sentence.[4] And the Eleventh Circuit also holds that *Heck* does not extend to noncustodial plaintiffs in at least some circumstances, while suggesting that it would join the diligence side of the divide between the Second Circuit and the four others on this majority side of the split.[5] *Cf.* parts II & III, *infra* (explaining that the Court can leave for another day whether to join the diligence faction of the split because Wilson's claim—which the defendants concealed from her until years after she was out of custody—was *never* covered by § 2254, so it does not implicate any conception of *Heck*'s habeas-collision holding).

Of course, in all six of these circuits, even a claim that is not barred by *Heck*'s habeas-collision holding may still be subject to its elements-based holding *if* the claim sounds in malicious prosecution (either in all scenarios or some, depending on the

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[3] *Wilson v. Johnson*, 535 F.3d 262, 265–68 (4th Cir. 2008) ("could not, as a practical matter, seek habeas relief"); *Powers v. Hamilton County Pub. Def. Comm'n*, 501 F.3d 592, 599–603 (6th Cir. 2007) ("precluded 'as a matter of law' from seeking habeas redress" or "no way that [he] could have obtained habeas review" due to duration of incarceration) (citation omitted); *Cohen v. Longshore*, 621 F.3d 1311, 1315–17 (10th Cir. 2010) ("through no lack of diligence on his part").

[4] *Martin v. City of Boise*, 920 F.3d 584, 613 (9th Cir. 2019).

[5] *Harden v. Pataki*, 320 F.3d 1289, 1299 (11th Cir. 2003); *Morrow v. BOP*, 610 F.3d 1271, 1272 n.* (11th Cir. 2010); *Reilly v. Herrera*, 622 F. App'x 832, 834 (11th Cir. 2015).

ultimate resolution of the debate between footnote 10 and Justice Souter about the shedding of that element). *Cf.* parts II & III, *infra* (explaining that the Court need not resolve that debate here because Wilson's claim does not sound in malicious prosecution, so it lacks a favorable-termination element to begin with and does not require deciding whether or when noncustodial status might shed that element).

II. Neither *Heck*'s habeas-collision holding nor its elements-based holding applies to Wilson's § 1983 procedural due process claim.

Turning to Wilson's claim. To start, there is no dispute about *Heck*'s threshold inquiry: whether Wilson's claim implies the unconstitutionality of her conviction and sentence. It does. A conviction or sentence imposed with a prosecutor surreptitiously on both sides of the bench is, in the panel's words, an "utterly bonkers" procedural due process violation, as recognized by the Texas Court of Criminal Appeals. *Wilson*, 89 F.4th at 459; *Ex parte Young*, 2021 WL 4302528 (holding that the very system challenged here violated procedural due process).[6]

The question, then, is not whether Wilson's conviction and sentence violated the Constitution—of course they did (at least on the well-pleaded facts of her

[6] *See Edwards v. Balisok*, 520 U.S. 641, 647 (1997) ("A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him."); *In re Murchison*, 349 U.S. 133, 136–37 (1955) ("Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge.").

complaint). *See Wilson*, 89 F.4th at 449 n.2. The question is only whether Wilson can impugn that unconstitutional conviction and sentence via § 1983 under the circumstances of this case. Under Congress's statutory scheme, the answer is yes because Wilson's procedural due process claim implicates neither *Heck*'s habeas-collision holding nor its elements-based holding justifying the imposition of a favorable-termination prerequisite.

First, § 2254 has never collided with and does not supplant Wilson's claim because she never could and never can invoke it—thanks to the defendants' concealment of their due process violation until well after Wilson was out of custody (taking *Heck*'s habeas-collision holding off the table). Second, Wilson's procedural due process claim—which has nothing to do with guilt, innocence, or malice; everything to do with the structure of the proceeding itself; and could not be litigated at trial because it was concealed—bears no analogy to malicious prosecution or the justifications undergirding that tort's favorable-termination element (taking *Heck*'s elements-based holding off the table). In short, both of *Heck*'s bases for foreclosing Wilson's § 1983 claim are unimplicated here. The district court's ruling should therefore be reversed, and Wilson's claim must proceed.

A. *Heck*'s habeas-collision holding does not apply because § 2254 has never collided with and does not supplant Wilson's § 1983 claim, which the defendants concealed until post-custody.

The first question is whether Wilson has a § 1983 cause of action under the facts presented, or whether § 2254 covers it instead, per *Heck*'s habeas-collision holding. "No matter how the cause-of-action inquiry proceeds—explicitly or implicitly—the Congressionally-enacted text remains the lodestar." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 498 (5th Cir. 2020) (Oldham, J., concurring). So statutory text is the starting point, and as to the interplay between federal statutes, it follows "traditional principles" the Supreme Court recently reinforced in *Talevski. Landor v. La. Dep't of Corr. & Pub. Safety*, 93 F.4th 259, 267 (5th Cir. 2024) (Oldham, J., with Smith, Elrod, Willett, Ho, and Duncan, JJ., dissenting from denial of rehearing en banc) (citing *Health & Hosp. Corp. of Marion County v. Talevski*, 599 U.S. 166, 180–92 (2023)).

1. Under those principles, *Heck*'s habeas-collision holding is unimplicated here because Wilson's procedural due process claim never could and never can collide with or be supplanted by § 2254—given the defendants' concealment of the violation until long after Wilson's term of custody. ROA.25–27. Section 1983 is "presumptively" available "to enforce unambiguously conferred federal individual rights," such as the Fourteenth Amendment right to procedural due process the

defendants surreptitiously deprived Wilson of here. *Talevski*, 599 U.S. at 172. Unless the defendants show that Congress intended another, "incompatible" remedial scheme to "supplant" § 1983 under these circumstances, the presumption of § 1983 enforceability controls. *Id.* at 189–90. Rebutting that presumption requires "showing that Congress specifically foreclosed a remedy under § 1983." *Gonzaga v. Doe*, 536 U.S. 273, 284 n.4 (2002) (citation and quotation marks omitted).

The defendants cannot meet that high bar. They cannot show that § 2254 supplants Wilson's § 1983 claim, for the simple reason that § 2254 is limited to the custodial or "prisoner context." *Nance v. Ward*, 597 U.S. 159, 167 (2022). Under *Talevski* and the tradition of federal statutory conciliation it builds upon, "where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be," at least where that § 2254 unavailability was no fault of the plaintiff. *Huang*, 251 F.3d at 73–75. Here, § 2254 never was and never can be available to address Wilson's constitutional harm *because the defendants concealed the harm from her until well after she was in custody*—meaning her procedural due process claim *accrued* only after § 2254 was indisputably forever off the table, by no fault of hers.

Accordingly, this is not a case where § 1983 would "swamp[] the habeas statute's coverage of claims . . . that lie 'within the core of habeas corpus.'" *Nance*, 597 U.S. at 167 (citations omitted). *Heck*'s habeas-collision holding "is simply not

implicated when the [§ 1983] plaintiff is not incarcerated. There is no risk of a collision between § 1983 and § 2254 if the latter never enters the *Heck* intersection." *Wilson*, 89 F.4th at 458. The presumption of § 1983's availability in the face of a potential alternative federal remedial statute must control, because in this case the two were *never* on a collision course. *Cf.* part III, *infra* (questions raised by cases where § 2254 was actually or theoretically available at some past time must be left for another day).

2. The defendants' only response is to ask this Court to impose an exhaustion requirement on Wilson's § 1983 claim. They argue that Wilson must either secure a gubernatorial pardon or else invoke (and win under) Texas's state habeas process—which, unlike federal habeas, extends to noncustodial individuals. They do not contend—nor could they—that at any time Wilson could avail herself of § 2254 or any other federal statute. They just argue that successful state proceedings are a prerequisite to invoking the cause of action Congress gave Wilson in § 1983 (regardless of the elements of her claim). This argument fails. It contravenes one of § 1983's most fundamental (and uncontroversial) text-based principles: no exhaustion requirement. *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496 (1982).

The defendants' view places state authorities (political or judicial) in charge of whether a person has access to federal court. If a prisoner seeks state habeas relief

and loses, he can resort to § 2254. If a noncustodial plaintiff like Wilson seeks state habeas relief and loses, the defendants say she is simply out of luck—no federal claim, ever. That cannot be what Congress meant. Forcing Wilson to invoke state procedures where her constitutional claim accrued post-custody and is indisputably outside the core of habeas and therefore *never* cognizable under § 2254 is an unlawful § 1983 exhaustion requirement, not a federal statutory channeling or conciliation device within *Heck*'s habeas-collision holding.

Nance v. Ward explains why. First, *Nance* reiterated that § 1983 applies as long as a claim is not "within the core of habeas corpus"—i.e., not within § 2254's domain. 597 U.S. at 167 (citation omitted). Second, it defined that core and that domain as "in the prisoner context." *Id.* And finally, it made clear that in determining the proper "federal vehicle for bringing a federal claim—and with that, the viability of the claim," "the vagaries of state law" cannot dictate the relative domains of § 1983 and § 2254. *Id.* at 172. So, the fact that Texas happens to extend state habeas to noncustodial individuals—whom § 2254 does not reach—cannot dictate whether those individuals can invoke § 1983. "It would be strange to read such state-by-state discrepancies into our understanding of how § 1983 and the habeas statute apply to federal constitutional claims." *Id.* at 173. And here, beyond strange: It would

unlawfully "engraft an exhaustion requirement upon § 1983," which *Heck* unequivocally disclaimed the judiciary's power to do. 512 U.S. at 489.

In short, under *Talevski*'s and *Nance*'s traditional principles of text-based statutory construction and conciliation, *Heck*'s habeas-collision holding is obviously off the table because § 2254 never has and never will collide with or supplant Wilson's § 1983 claim. The next (and final) question is whether *Heck*'s elements-based holding stands in the way.

B. *Heck*'s elements-based holding does not apply because Wilson's § 1983 procedural due process claim is not analogous to a malicious prosecution claim.

Of course, conciliation with another federal statute is just one of two ways that statutory text guides the § 1983 cause-of-action inquiry. The other is § 1983's own text and background principles. That analysis dictates whether Wilson's procedural due process claim is analogous to malicious prosecution, takes on that tort's favorable-termination element, and is subject to *Heck*'s elements-based imposition of that prerequisite on malicious prosecution claims. The answer is no: *Heck*'s elements-based holding presents no barrier to Wilson's procedural due process claim because it is not undergirded by any of the same considerations as a malicious prosecution claim, so imposing any of malicious prosecution's elements—including favorable termination—would make no sense.

1. *Heck*'s elements-based imposition of a favorable-termination prerequisite on § 1983 claims sounding in malicious prosecution does not extend to Wilson's procedural due process claim. Analysis of a constitutional tort claim under § 1983 begins with "common law . . . rules, defining the elements of damages and the prerequisites for their recovery." *Heck*, 512 U.S. at 483 (quoting *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978)).[7] And the claim in *Heck*, which alleged that the defendants destroyed exculpatory evidence and introduced unlawful evidence at trial, was most analogous to "[t]he common law cause of action for malicious prosecution." *Id.* at 484. But, as *Carey v. Piphus* explained, the common law is not a straitjacket that imposes elements or requirements that thwart rather than advance constitutional principles: "The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." 435 U.S. at 258. The common law, of course, did not recognize something called a *procedural due process tort*, but, as *Carey* makes clear, § 1983 does. *Id.* at 266. And Wilson's claim, which alleges that the defendants deprived her of liberty using a constitutionally deficient

[7] As members of this Court have noted, it seems Congress "explicitly negated all-state law defenses, making clear that § 1983 claims are viable notwithstanding 'any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary.'" *Villarreal v. City of Laredo*, 2024 WL 244359, at *23 n.14 (5th Cir. Jan. 23, 2024) (Willett, J., with Elrod, Graves, Higginson, Ho, and Douglas, JJ., dissenting) (citing Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023)).

procedure, is much more like the procedural due process claim recognized in *Carey* than it is a malicious prosecution tort.

Simply put, none of the elements of malicious prosecution fits the constitutional claim recognized in *Carey*. As the Supreme Court has explained, malicious prosecution claims had three elements at common law: that the challenged proceeding was instituted without probable cause, that it was instituted for malicious reasons, and that it terminated in the plaintiff's favor. *Thompson v. Clark*, 596 U.S. 36, 44 (2022). Not one makes sense applied to a procedural due process claim.

First, a malicious prosecution plaintiff has to show that "the suit or proceeding was instituted without any probable cause." *Id.* (quotation marks omitted). But a procedural due process claim like Wilson's is unconcerned with "what the evidence was." *Tumey*, 273 U.S. at 535. Instead, the claim is "'absolute' in the sense that it does not depend on the merits of [her] substantive assertions." *Carey*, 435 U.S. at 266. That is why *Carey* made clear that even if the plaintiff students' "suspensions were justified, and even if they did not suffer any other actual injury," they would still be entitled to nominal damages for the deprivation of their procedural rights. *Id.* So too here. Wilson was prosecuted by and adjudicated by the same lawyer. If a factfinder determines that this obvious constitutional violation caused her actual harm, she is entitled to compensatory damages. *Hill v. City of Pontotoc*, 993 F.2d 422,

425–26 (5th Cir. 1993). But even if not, she is entitled to nominal damages under *Carey*, with no obligation to prove that the underlying prosecution was in any way meritless, unlike a malicious prosecution plaintiff.

Similarly, malicious prosecution's requirement that "the motive in instituting the suit was malicious" does not fit here (assuming it applies to constitutional malicious prosecution claims at all). *Thompson*, 596 U.S. at 44 & n.3 (quotation marks omitted). The defendants' decision to employ the same person as both prosecutor and judicial clerk predated Wilson's arrest or prosecution, and it continued long after. ROA.17–20. Whatever motive the defendants may have had for their courtrooms' dual-staffing structure, no one thinks they were out to get Wilson personally. And no one thinks the constitutionality of that *structure* turns on malice or even hostility to Wilson or any other victim. *Cf. Carey*, 435 U.S. at 250–52 & n.1 (describing school procedures); *see Ex parte Young*, 2021 WL 4302528, at *5 (explaining that the relationship between Midland County's judge and its prosecutor—not anything specific to the particular criminal defendant—formed the basis of the procedural due process violation).

With malicious prosecution's first two elements inapplicable to Wilson's procedural due process claim, it makes no sense to import only the third—favorable termination—unless doing so would "closely attend to the values and purposes of

the constitutional right at issue." *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017). It would not. Indeed, quite the opposite, given that procedural due process claims and malicious prosecution claims serve different constitutional purposes. Procedural due process claims like Wilson's and the one recognized in *Carey* can succeed even if the underlying deprivation was "justified," 435 U.S. at 266, while malicious prosecution is about accountability for wholly *unjustified* proceedings (those lacking even probable cause). With procedural due process and malicious prosecution undergirded by distinct concerns and serving distinct ends, *Heck*'s elements-based holding for malicious prosecution-type claims cannot impose a favorable-termination prerequisite on Wilson's procedural due process claim.

2. The defendants' only response is a misreading of *Heck*'s footnote 10 that ignores how § 1983 interacts with the common law. They argue that the common-law principle against collaterally attacking a criminal judgment invoked in footnote 10 necessarily bars *all* § 1983 claims that impugn a conviction, regardless of custodial status and regardless of the claim's elements. Not so—because that is simply not how the § 1983 elements-based analysis works. "Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving more as a source of inspired examples than of prefabricated components. In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the

values and purposes of the constitutional right at issue." *Manuel*, 580 U.S. at 370 (citations and quotation marks omitted). Therefore, the applicability of the principle footnote 10 invoked must be assessed in context, including the constitutional claim at issue and the concerns undergirding it.

All footnote 10 did was explain the majority's position that *Heck*'s elements-based imposition of a favorable-termination prerequisite on the prisoner's *malicious prosecution claim* would not *dissipate* simply upon release from custody. *See* part I, *supra* (explaining the context). The majority did not understand the custody line as a meaningful basis to discard favorable termination as "[o]ne element that must be alleged and proved *in a malicious prosecution action*." *Heck*, 512 U.S. at 484 (emphasis added). And it was *in that malicious prosecution context* that the Court stressed concerns about "parallel litigation," "finality and consistency," and the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.* at 484–85; *see McDonough v. Smith*, 139 S. Ct. 2149, 2156–57 (2019) (again tying those concerns expressly to "*malicious prosecution's* favorable-termination requirement") (emphasis added).[8]

[8] In *Savory v. Cannon*, the Seventh Circuit misread footnote 10's and *McDonough*'s invocation of those concerns as indeed speaking in the abstract and imposing a favorable-termination prerequisite on *all* § 1983 claims impugning a conviction or sentence. 947 F.3d at 421–22, 430–31. In fact, as the quoted language above makes clear, both *Heck* and *McDonough* were expressly explaining why those concerns impose a favorable-termination element *on malicious prosecution claims*, not opining on anything more. Moreover, the Seventh Circuit did not need to

In short, as the context makes clear, *Heck* (including footnote 10) did not purport to speak in the abstract, but rather to explain how and why a favorable-termination element "has always applied *to actions for malicious prosecution*," regardless of custodial status. 512 U.S. at 486 (emphasis added). As already discussed, that is not Wilson's claim. Moreover, this Court has described the "hoary principle" invoked in *Heck* as "another manifestation of the doctrine of issue preclusion or collateral estoppel, i.e., the policy of finality that prevents the collateral attack of a criminal conviction once the matter has been litigated." *Ballard v. Burton*, 444 F.3d 391, 397 (5th Cir. 2006). So defined, the hoary principle gets the defendants nowhere in any event: Their concealment of Ralph Petty's dual role as prosecutor and judicial clerk *kept* the matter at issue here from being litigated. *Cf.* part III, *infra* (questions raised by cases where one or more elements of a claim were or could have been litigated in the plaintiff's criminal proceeding must be left for another day).

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expand *Heck* or *McDonough* beyond what they said, based on that court's concern that tying accrual of Savory's claim to his release would have prematurely doomed it (i.e., required him to bring it when it would be "dead on arrival"). *See* 947 F.3d at 418–19, 427–28. Because Savory's claim *sounded in malicious prosecution*, it actually did not accrue until that claim's favorable-termination element was satisfied, *regardless of his custodial status*. So the Seventh Circuit reached the right result (Savory's claim was timely), but for the wrong reason—it should have been based on § 1983's elements-based imposition of a favorable-termination prerequisite on his malicious prosecution claim and the claim's attendant post-pardon accrual, not based on an overreading of *Heck* or *McDonough*. *Cf. Savory*, 947 F.3d at 434 (Easterbrook, J., dissenting) ("if a state claim does not accrue as a matter of state law—if, for example, exoneration is an element of a malicious-prosecution claim—a federal court should honor that rule").

* * *

No statutory doctrine or judicial precedent supports imposing malicious prosecution's favorable-termination element on Wilson's procedural due process claim because the "gravamen" of the claims is not the same. *Thompson*, 596 U.S. at 43. Wilson does not "challenge the validity of the criminal proceedings against [her] in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction." *McDonough*, 139 S. Ct. at 2158. And Wilson's claim does not require her to "negate an element of the offense of which [she] has been convicted" to succeed. *Heck*, 512 U.S. at 486 n.6; *see McDonough*, 139 S. Ct. at 2161 (Thomas, J., dissenting) ("[T]he analysis under [*Preiser* and *Heck*] depends on what facts a § 1983 plaintiff would need to prove to prevail on his claim."). Accordingly, imposing a favorable-termination element here would violate § 1983 by undermining, rather than vindicating, the "values and purposes of the constitutional right at issue" (the unqualified and absolute right to judicial proceedings free from the appearance of conflict or bias). *Manuel*, 580 U.S. at 370; *see Carey*, 435 U.S. at 266. Nothing in *Heck* or any other case suggests that untoward "subver[sion]" of "§ 1983's broad textual command." *Wilson*, 89 F.4th at 459. Wilson's claim must proceed.

III. Concerns unimplicated by this case should be left for another day.

For all the reasons discussed above, statutory text and Supreme Court precedent interpreting it resolve this appeal in Wilson's favor. The Court need not go any further. Other cases may present concerns about plaintiffs sleeping on their § 2254 rights to later invoke § 1983; separating viable § 1983 claims from bad ones; or relitigation of issues already decided in state criminal proceedings. Those concerns can and should be addressed in cases that actually present them, which Wilson's does not. And, in those cases as much as this one, Congress's comprehensive statutory scheme must be the lodestar.

1. Concerns raised by other cases should be left for another day, and then assessed pursuant to established statutory doctrines. Members of this Court have expressed concerns that a less expansive reading of *Heck* might allow state prisoners to strategically sleep on their § 2254 rights to invoke § 1983 instead. *McNeal v. LeBlanc*, 2024 WL 695452, at *3–4 (5th Cir. Feb. 21, 2024) (Oldham, J., with Jones, Smith, Ho, Duncan, Engelhardt, and Wilson, JJ., dissenting from denial of rehearing en banc). And in *Savory v. Cannon*, the Seventh Circuit majority and dissent grappled with how the *Heck* analysis should help separate viable § 1983 claims from meritless ones, as well as concerns about relitigation of issues decided in state criminal proceedings. *See* 947 F.3d at 418–19, 427–28 (majority opinion); *id.* at 434

(Easterbrook, J., dissenting). Of course, none of those concerns are present here: Wilson is suing about an obvious procedural due process violation that has no favorable-termination element and was concealed from her until after she was out of custody, meaning she did not sleep on any rights, has a clearly viable claim, and could not have litigated any relevant issue in her state criminal proceeding. *See* part II, *supra*. In cases that do present those concerns, however, it is worth noting that Congress has already provided a framework for addressing each of them. That framework controls because the judicial role is to "implement Congress's choices rather than remake them." *Talevski*, 599 U.S. at 178. Taking the expressed concerns in turn, that means:

(1) Concerns about delay or gamesmanship to invoke § 1983 instead of the more onerous § 2254 procedures must be assessed by the actual interplay between those two statutes, as dictated by *Talevski*, *Nance*, and *Heck* itself. *See* part II, *supra*. Accordingly, the question must be whether § 2254 "supplants" and is "incompatible" with § 1983 under the circumstances presented. *Talevski*, 599 U.S. at 189–90. As discussed, jurists disagree on the application of that standard. The Second Circuit (like Justice Souter) focuses on the text of § 2254, asking only whether § 2254 relief is available at the time a § 1983 claim is filed. Other circuits impose a diligence requirement, asking whether § 2254 relief was ever realistically

available and imposing *Heck*'s habeas-collision holding on § 1983 claims by plaintiffs who slept on their § 2254 rights. *See* part I, *supra*. In an appropriate case, this Court can decide which of those approaches it finds more persuasive. But in this case—where it is undisputed that § 2254 never was and never will be available for Wilson's claim—the Court need not and should not opine in dicta on the ultimate contours of the habeas-collision holding.

(2) Similarly, concerns about separating viable § 1983 claims from meritless ones, including attempts to relitigate issues decided in criminal proceedings, are also accounted for by Congress's statutory scheme. First, regardless of custodial status, claims that sound in malicious prosecution will have a favorable-termination element as a function of § 1983 itself, meaning they do not accrue until that element is satisfied. *See* note 8, *supra*. Wilson's procedural due process claim does not have that element because of its structural nature, but most claims attacking a conviction are case-specific and therefore likely to carry the elements-based prerequisite. Second, claims that lack a favorable-termination element yet seek to relitigate issues already decided in state criminal proceedings are already accounted for by the federal preclusion statute, 28 U.S.C. § 1738, which bars federal relitigation of issues that would be estopped if relitigated in state court. *See Savory*, 947 F.3d at 434 (Easterbrook, J., dissenting) (explaining the statute's relevance to such

circumstances, and why it obviates the need for judicial policymaking). Here, the defendants' concealment of their procedural due process violation meant Wilson could not litigate it in her criminal proceeding and is not precluded from litigating it now. *Reynolds v. Quantlab Trading Partners US, LP*, 608 S.W.3d 549, 559 (Tex. App. 2020) ("[R]es judicata does not bar a claim of which the plaintiff was unaware and which could not have discovered through the exercise of due diligence in the first action."). Other cases may present harder questions on that front, but those determinations must be made in those cases—and according to § 1738, as prescribed by Congress, not judicial policymaking or imposition of state exhaustion requirements.

In short, this case does not present an opportunity for the Court to explain (except in dicta) how every disputed *Heck*-related question should resolve. But in cases where those disputes are implicated, Congress's statutory scheme accounts for them. They should not be addressed through an expansive reading of *Heck* unmoored from its statutory underpinnings, which would add nothing to the Court's (substantial) power to bar bad-faith or meritless litigation but would "come[] at a terrible price—the extinguishment of many substantively valid constitutional claims." *Savory*, 947 F.3d at 434 (Easterbrook, J., dissenting).

2. Finally, just as the judicial role is to "implement Congress's choices rather than remake them" in deciding those future cases, so too in deciding Wilson's. *Talevski*, 599 U.S. at 178. The defendants may wish § 2254 and its procedural hurdles reached Wilson's circumstances, but it is the Court's "function to give the statute the effect its language suggests, however modest that may be." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). Here, that function is easy because § 2254 *never* covered Wilson's claim, which—thanks to the defendants' concealment of their violation—accrued only when § 2254 was indisputably forever off the table. And the defendants "no doubt . . . wish[] § 1983 said something else [about the lack of a favorable-termination element for Wilson's procedural due process claim, or that the statute imposed an exhaustion requirement on her claim]. But that is 'an appeal better directed at Congress.'" *Talevski*, 599 U.S. at 180 (citation omitted).[9]

[9] As they did before the panel, the defendants may lean on non-*Heck* arguments the district court avoided but that they think dispose of Wilson's claim on the merits. This Court lacks jurisdiction to reach those arguments, which "without cross-appeal, seek to avoid all liability . . . or to convert [the district court's] dismissal without prejudice into a dismissal with prejudice." Wright & Miller, Fed. Prac. & Proc. § 3904 (3d ed.); *Arvie v. Broussard*, 42 F.3d 249, 250 (5th Cir. 1994) (per curiam). Wilson's panel reply brief explained why those arguments will fail on remand anyway. But the only issue on appeal is "dismissal of the whole § 1983 action *ab initio* for violating the doctrine of *Heck v. Humphrey*." *Poventud v. City of New York*, 750 F.3d 121, 137 n.21 (2d Cir. 2014) (en banc). No reason exists for such dismissal because neither of *Heck*'s bases for imposing a favorable-termination prerequisite applies to Wilson's procedural due process claim.

Conclusion

The Court should reverse the district court's dismissal with respect to all claims against all defendants and remand for further proceedings on the merits.

March 15, 2024

Respectfully submitted,

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Certificate of Service

I certify that on March 15, 2024 an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished on all counsel of record by the appellate CM/ECF system.

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Certificate of Compliance

1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 35(b)(2) and Fifth Circuit Rule 35.5 because this brief contains 8,227 words, as determined by the word-count function of Microsoft Word, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

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