No. _____

In The
Supreme Court of the United States

ERMA WILSON,

Petitioner,

v.

MIDLAND COUNTY, TEXAS, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Respondent Midland County prosecuted petitioner Erma Wilson with an active county prosecutor secretly working on her trial as the presiding judge's law clerk. If Wilson had learned of that due process violation while in state custody, she could have sought relief pursuant to 28 U.S.C. 2254 (the federal habeas corpus statute). But the county hid the violation until after Wilson's sentence expired, making § 2254 unavailable. So she sued for damages under § 1983. The Fifth Circuit, sitting en banc, held that § 1983 is also unavailable to Wilson under this Court's decision in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and that she must go to state court for different relief instead.

Six judges "emphatically" dissented. They called on this Court to resolve a "deep and enduring circuit split" regarding § 1983's presumptive availability in Wilson's circumstances. In five circuits, § 1983 is unavailable without regard for the lack of access to § 2254. But in six circuits, § 2254's unavailability typically means § 1983's availability. This Court has yet "to settle" that debate of statutory interpretation. *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004).

The questions presented are:

1. If a person never had access to § 2254 to impugn the constitutionality of her state criminal proceeding, is § 1983 presumptively available (as in six circuits), or must she always use state law instead (as in five)?

2. Is a § 1983 damages claim that impugns the constitutionality of a state criminal proceeding always analogous to a claim of malicious prosecution?

Parties to the Proceeding

Petitioner Erma Wilson was the plaintiff in the district court and the appellant in the Fifth Circuit.

Respondent Midland County, Texas was a municipal defendant in the district court and an appellee in the Fifth Circuit.

Respondents Weldon "Ralph" Petty, Jr. and Albert Schorre, Jr. were individual defendants in the district court and appellees in the Fifth Circuit.

Related Proceedings

This case arises from the following proceedings:

- *Wilson* v. *Midland County, Texas, et al.*, No. 22-50998 (CA5 Sept. 13, 2024) (en banc affirmance of dismissal of plaintiff's claims);
- *Wilson* v. *Midland County, Texas, et al.*, No. 22-50998 (CA5 Dec. 14, 2023) (panel affirmance of dismissal of plaintiff's claims);
- *Wilson* v. *Midland County, Texas, et al.*, No. 7:22-cv-85 (W.D. Tex. Oct. 13, 2022) (dismissal of plaintiff's claims);
- *Wilson* v. *Midland County, Texas, et al.*, No. 7:22-cv-85 (W.D. Tex. Sept. 9, 2022) (recommendation of dismissal of plaintiff's claims).

There are no other related proceedings.

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Petition for a Writ of Certiorari

Petitioner Erma Wilson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The en banc decision of the court of appeals is published at 116 F.4th 384 (reprinted at Petitioner's Appendix (App.) 1a). The panel decision of the court of appeals is published at 89 F.4th 446 (reprinted at App. 84a). The district court order of dismissal is unpublished but available at 2022 WL 16861301 (reprinted at App. 114a). The magistrate judge's recommendation of dismissal is unpublished but available at 2022 WL 16861302.

Jurisdiction

The court of appeals issued its en banc decision on September 13, 2024. App. 1a. Petitioner timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions

See Appendix E (Due Process Clause, Fourteenth Amendment); Appendix F (42 U.S.C. 1983); Appendix G (28 U.S.C. 2254).

Statement

The first question presented implicates a "deep and enduring circuit split" regarding a question of federal statutory interpretation. App. 47a (Willett, J., en banc dissent). Dueling opinions from this Court "provide[] grist for circuits on both sides of this dilemma," resulting in a six-to-five circuit split on how to approach the issue. *Wilson* v. *Johnson*, 535 F.3d 262, 267 (CA4 2008). As this Court acknowledged, it has yet "to settle" the debate. *Muhammad* v. *Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam). In this case, the en banc Fifth Circuit stayed on the minority side of the split, over the views of six "emphatically" dissenting judges calling for this Court's review. App. 83a (en banc dissent).

When respondent Midland County prosecuted petitioner Erma Wilson for alleged drug possession, the county concealed what Fifth Circuit judges below called an "egregious" and "utterly bonkers" due process violation and a "DEFCON 1 legal scandal": An active county prosecutor, respondent Weldon "Ralph" Petty, Jr. was secretly working on Wilson's criminal trial (and others') as her presiding judge's law clerk. App. 2a–3a (Oldham, J., en banc plurality); App. 46a (en banc dissent).

That dual-hat system resulted in a conviction that derailed Wilson's lifelong dream of becoming a registered nurse. But respondents hid their conflict of interest until Wilson's sentence expired—and with it, her state custodial status. App. 2a–3a (en banc plurality). So she could never bring a claim impugning the constitutionality of her conviction

under 28 U.S.C. 2254 (the federal habeas corpus statute), which only reaches individuals "in [state] custody."

The question is whether she can bring that constitutional claim by seeking damages under 42 U.S.C. 1983. Six circuits would answer the threshold question of § 1983's availability by asking whether there is a conflict between § 1983 and § 2254: Because Wilson never had access to § 2254—by no fault of her own—§ 1983's presumptive availability would typically govern. But in five circuits, including the Fifth Circuit below, the unavailability of § 2254 is irrelevant: Wilson cannot bring a § 1983 damages claim if some *state* avenue exists to impugn her conviction (including the potential for a pardon). App. 43a (Haynes, J., en banc concurrence in the judgment).

As urged by the six dissenting judges, this Court should grant certiorari to resolve that "persistent" circuit split regarding the presumptive availability of § 1983. App. 83a.

I. Legal background

The deep circuit split as to Wilson's first question presented arose because this Court twice debated whether § 1983's presumptive availability must govern when § 2254 is unavailable due to a plaintiff's noncustodial status—with each side of the debate once drawing five Justices. See *Heck* v. *Humphrey*, 512 U.S. 477, 490 n.10 (1994); *Spencer* v. *Kemna*, 523 U.S. 1, 18–25 (1998) (concurring and dissenting opinions of Souter, J., Ginsburg, J., and Stevens, J.).

Citing that debate, this Court said it had "no occasion to settle the issue." *Muhammad*, 540 U.S. at 752 n.2 (citing the *Heck* and *Spencer* concurrences).

1. To start with what is settled: When § 2254 is available, § 1983 is not.

a. By statutory text, one can challenge the constitutionality of a state conviction, sentence, or confinement in two ways under federal law: the Civil Rights Act of 1871 (known as § 1983) and the Habeas Corpus Act of 1867 (known as § 2254). Section 1983 is general: It provides "[e]very person" a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." That broad statute is "presumptively" available to redress a host of unlawful conduct by state actors. *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, 599 U.S. 166, 172 (2023). Section 2254 is more specific: It provides "a person in custody pursuant to the judgment of a State court" only the right to invalidate an extant conviction, sentence, or confinement, subject to substantive and procedural requirements (including custodial status and state-law exhaustion).

Because § 1983 and § 2254 have some overlapping remedial reach, a person in state custody seeking to impugn the constitutionality of that custody must proceed pursuant to § 2254, rather than seeking an injunction for release under § 1983. "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).

This Court addressed the "intersection of the two" federal statutes again in *Heck* v. *Humphrey*. 512 U.S. at 480. State prisoner Heck invoked § 1983 to challenge the constitutionality of his conviction, based on the defendants' manipulation of evidence. *Id.* at 479. But, unlike in *Preiser*, he sought damages instead of an injunction for release. *Id.* at 480–481. Nevertheless, the Court treated the prisoner's claim "the same as the issue was with respect to injunctive relief challenging conviction in *Preiser*"—so 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" because Congress requires individuals in state custody to bring their conviction-impugning claims via § 2254. *Id.* at 483, 487.

b. With that explanation, *Heck*'s extension of *Preiser* to a damages claim challenging the constitutionality of ongoing state custody is easily understood as 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). Because Heck's claim, regardless of the label he put on it, implicated what *Preiser* called the "core of habeas" by challenging the lawfulness of his continued custody, the claim was in § 2254's domain, not § 1983's. See *Preiser*, 411 U.S. at 489.

This Court recently confirmed that *Preiser* and *Heck* are both core-of-habeas cases. *Nance* v. *Ward*, 597 U.S. 159, 167–168 (2022). And it explained that that core has two pillars: (1) the plaintiff is in custody, and (2) his complaint impugns the lawfulness of that custody. *Ibid.* For claims in that core, whether labeled as seeking an injunction for release or damages, the more specific § 2254 "supplant[s]" the otherwise "presumptively" available § 1983. Cf. *Talevski*, 599 U.S. at 172, 190. And given § 2254's state-law-exhaustion requirement, a core-of-habeas plaintiff must "resort to state litigation and federal habeas before § 1983." *Muhammad*, 540 U.S. at 751.

In short, when § 2254 is available, § 1983 is not.

2. But in *Muhammad* v. *Close*, this Court recognized that an unsettled question remains: If § 2254 is *un*available because the plaintiff is not in custody, is § 1983 available? That threshold question of § 1983's presumptive availability (before asking whether any particular § 1983 claim can succeed on the merits) has divided members of this Court and is the subject of the six-to-five circuit split at issue here.

a. The debate goes back to *Heck*. Even though the facts did not present the issue (Heck was in custody and therefore in § 2254's domain), four concurring Justices insisted that the case could not extend to "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). They argued it would violate Congress's statutory scheme "[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." *Ibid.*

In a footnote unnecessary to the Court's holding, a five-Justice *Heck* majority countered that it was unconvinced § 1983 could become available to collaterally attack a conviction "by the fortuity that a convicted criminal is no longer incarcerated." *Id.* at 490 n.10.

The debate resurfaced in *Spencer* v. *Kemna*. There, five concurring and dissenting Justices maintained that because a noncustodial plaintiff "does not have a remedy under the habeas statute, it is perfectly clear * * * that he may bring an action under 42 U.S.C. § 1983." 523 U.S. 1, 25 n.8 (1998) (Stevens, J., dissenting); see *id.* at 18–21 (Souter, J., concurring). Justice Ginsburg, who joined *Heck*'s footnote 10, disavowed it and adopted the *Heck* concurrence's "reasoning"; so she joined the Court's denial of access to § 2254 in *Spencer* on the "understanding" that § 1983 *would* accordingly be available. *Id.* at 21–22 (Ginsburg, J., concurring).

b. In sum: Five members of the *Heck* Court said noncustodial status is not relevant to § 1983's availability; five members of the *Spencer* Court said it is relevant. So the *Muhammad* Court acknowledged that the question remains unsettled. *Muhammad*

held that *Heck* did not bar a prisoner's § 1983 claim because the claim did not impugn his conviction, sentence, or confinement—that is, because it was outside § 2254's core-of-habeas domain. 540 U.S. at 751–752. The Court went on: "Members of the Court have expressed the view that unavailability of habeas for other reasons [i.e., noncustodial status] may also dispense with the *Heck* requirement." *Id.* at 752 n.2 (citing the *Heck* and *Spencer* concurrences). But the Court had "no occasion to settle" whether the unavailability of § 2254 for lack of custody must mean the availability of § 1983. *Ibid.*

"The unsurprising upshot is a deep and enduring circuit split" regarding that threshold question of § 1983's availability in the absence of access to § 2254. App. 47a (en banc dissent). Eleven circuits have weighed in. Six circuits approach the issue the way *Spencer*'s five concurring and dissenting Justices would, holding that § 1983's presumptive availability typically governs in the absence of a conflict with § 2254. Five circuits hold otherwise, reading *Heck*'s footnote 10 to treat the unavailability of § 2254 as irrelevant and requiring instead the use of any potential state-law remedial process. The Fifth Circuit became "the second circuit to take the issue en banc in recent years," joining the Seventh Circuit, with both resulting decisions drawing vehement dissents. App. 48a (en banc dissent) (citing *Savory* v. *Cannon*, 947 F.3d 409 (CA7 2020) (en banc)).[1]

[1] The Second Circuit also went en banc to consider the issue a decade ago, but resolved the case on other grounds and left its precedent on the issue undisturbed. *Poventud* v. *City of New York*, 750 F.3d 121, 125 n.1 (CA2 2014) (en banc).

3. That circuit-splitting question regarding § 1983's *presumptive availability* is the basis of Wilson's first question presented. There is also a subsequent, merits-based question that forms the basis of Wilson's second question presented (on which a nonbinding plurality of the court below would have ruled): whether a plaintiff—custodial or not—seeking to impugn the constitutionality of her criminal proceeding or conviction has pleaded the *elements* of her particular constitutional claim.

The common law of torts "provide[s] the appropriate starting point" for the elements of a constitutional tort under § 1983. *Carey* v. *Piphus*, 435 U.S. 247, 257–258 (1978).[2] One such tort is malicious prosecution under the Fourth Amendment. *Thompson* v. *Clark*, 596 U.S. 36, 39 (2022). One element of that tort, regardless of custodial status, is lack of probable cause. *Id.* at 43. So the malicious-prosecution tort is bound up with the sufficiency or legitimacy of the evidence used to prosecute or convict the plaintiff. And again regardless of custodial status, "a Fourth Amendment claim under § 1983 for malicious prosecution requires the plaintiff to show a favorable termination of the underlying criminal case against him." *Id.* at 44. For that evidence-bound tort, the favorable-termination element guards, in part, against "parallel litigation in civil and criminal

[2] That said, common-law "principles are meant to guide rather than to control the definition of § 1983 claims, such that the common law serves more as a source of inspired examples than of prefabricated components." *McDonough* v. *Smith*, 588 U.S. 109, 116 (2019) (cleaned up; citation omitted).

proceedings over the issues of probable cause and guilt." *Ibid.*

On the other hand, a constitutional tort can "posit[] that the procedures were wrong, but not necessarily that the result was. The distinction between these two sorts of claims is clearly established in our case law, as is the plaintiff's entitlement to recover at least nominal damages under § 1983 if he proves the former one without also proving the latter one." *Edwards* v. *Balisok*, 520 U.S. 641, 645 (1997) (citing *Carey*, 435 U.S. at 266–267). Such a claim can impugn a criminal proceeding "no matter how strong the evidence" if, for example, the proceeding was imbued with a conflict of interest. *Edwards*, 520 U.S. at 647 (citing *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927)). Such a claim sounds in due process under the Fourteenth Amendment (because it attacks the procedure, not the outcome).[3]

Simply put: Under § 1983, different conviction-impugning constitutional torts have different elements and different quantums of damages. "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, * * * the denial of procedural due process should be actionable for

[3] That makes it distinct from a claim of malicious prosecution under the Fourth Amendment, which necessarily attacks the outcome because of its no-probable-cause element. Of course, for *custodial* plaintiffs, both types of conviction-impugning claims are in § 2254's core-of-habeas domain. *Edwards*, 520 U.S. at 648.

nominal damages without proof of actual injury." *Carey*, 435 U.S. at 266.

II. Factual and procedural history

In this case, Wilson brought a § 1983 procedural due process claim seeking at least nominal damages because respondents convicted her with an active county prosecutor secretly working on her trial as the presiding judge's law clerk. Because the county hid that conflict of interest until Wilson was out of custody, she never had access to § 2254 for her due process claim. Staying on the minority side of the known circuit split regarding § 1983's presumptive availability in such circumstances, the en banc Fifth Circuit held that § 2254's unavailability is irrelevant, and that Wilson also does not have access to § 1983, simply because she has access to some potential state-law remedy. A nonbinding plurality would have ruled against Wilson by eliding that threshold question and instead holding, on the merits, that Wilson did not plead an element of her constitutional claim. Six judges dissented as to both rationales and called for this Court's review.

1. *The facts.* Wilson's childhood dream of becoming a nurse was derailed by a Midland County drug-possession conviction. "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." She "placed her faith in the justice system, trusting she would get due process and a fair trial," but her "faith was misplaced." App. 84a–85a (panel opinion).

Only after Wilson's sentence expired did she learn of the "brazen prosecutorial misconduct that laid waste to her fundamental fair-trial right." "The stunning revelation came to light in 2021, when *USA Today* broke the story of a Texas death-row inmate, Clinton Lee Young, whose prosecutor, Weldon 'Ralph' Petty Jr., had been moonlighting as a paid law clerk to the judge overseeing Lee's capital trial. Turns out, prosecutor Petty had been clerking for multiple Midland County judges for almost two decades, seeking favorable rulings in judges' public courtrooms by day and surreptitiously drafting those rulings in judges' private chambers by night." App. 45a–46a (en banc dissent).

"This was a DEFCON 1 legal scandal—a prosecutor being on the judge's payroll—and Wilson learned of Petty's dual-hat arrangement along with the rest of the nation. But for her, it was personal—Petty had been working both sides of the bench during her prosecution." Midland County records showed that Petty invoiced the judge "for work he performed on [Wilson's] case while he was employed by the DA's office," as corroborated by trial documents and Petty's dual-advisory role throughout the case. App. 46a & n.8 (en banc dissent).

"Wilson responded to the belated revelation by suing for damages under 42 U.S.C. § 1983, alleging that Petty's covert side hustle—acting as both accuser and de facto adjudicator—flattened her due process rights under the Fourteenth Amendment." App. 46a (en banc dissent).

Wilson's due process claim did not attack the evidentiary basis for her arrest, prosecution, or conviction. Rather, it was among the subset of due process claims that impugn the constitutionality of a conviction "[n]o matter what the evidence was," because the conviction was obtained via proceedings imbued with a conflict of interest that denied Wilson "the right to have an impartial judge." *Tumey*, 273 U.S. at 535. Wilson could not adjudicate her due process claim at trial, on direct appeal, or under § 2254 because respondents concealed their double-dealing until after Wilson's sentence expired. The only avenues available to Wilson when she learned of the due process violation were § 1983, a potential state postconviction proceeding that happens to reach individuals in her circumstances, or the ability to seek a gubernatorial pardon. App. 26a (en banc plurality).

2. *The proceedings below.* A Fifth Circuit panel dismissed Wilson's due process claim (her only claim), answering just one question: whether *Heck* bars Wilson's access to § 1983. Bound by circuit precedent, the panel reluctantly said yes, but urged the en banc court to reconsider. App. 110a–111a (panel opinion). The court granted Wilson's en banc petition, App. 113a, but ruled against her.

The en banc Fifth Circuit dismissed Wilson's claim by leaving intact its minority-side precedent regarding the threshold question that has divided eleven circuits: whether § 1983 is presumptively available where § 2254 is not. The controlling three-judge en banc concurrence echoed that precedent, holding that § 2254's unavailability is irrelevant and that Wilson does not have access to § 1983 for the

simple reason that she does have access to a state postconviction proceeding. A nonbinding plurality of the en banc court (nine out of eighteen judges) would have ruled against Wilson on other grounds—by eliding the threshold question about the relevance of § 2254 and instead analogizing Wilson's due process claim to one of malicious prosecution, with that tort's favorable-termination element unmet. Six dissenting judges vehemently disagreed with both rationales for foreclosing Wilson's access to § 1983 and called for this Court's review.

a. While a nonbinding plurality of the en banc court would have dismissed Wilson's claim on the merits, she instead lost on the threshold issue that divides the circuits: whether § 1983 is presumptively available in the absence of access to § 2254. See App. 43a (en banc concurrence).

The Fifth Circuit originally joined the minority side of the circuit split on that issue in *Randell* v. *Johnson*, 227 F.3d 300 (CA5 2000). *Randell* rejected the argument that *Spencer* v. *Kemna*'s concurring and dissenting opinions must mean § 1983 is available when § 2254 is not. *Id.* at 301. *Randell* held that *Heck* resolved the threshold question of § 1983's availability by treating the unavailability of § 2254 as irrelevant and asking only whether some *state* "procedural vehicle" exists for the plaintiff to potentially impugn his conviction. *Ibid.* In other words, *Randell* held that, under *Heck*, not only does the availability of § 2254 render § 1983 unavailable, but so does the availability of any state process alone, including a postconviction tribunal or the executive pardon power.

In this case, the three-judge en banc concurrence echoed *Randell*, explaining that *Heck* makes § 1983 unavailable to Wilson simply "[b]ecause she has the ability to go to the state." App. 43a (en banc concurrence). That, like § 2254, is itself "one method to satisfy *Heck*." *Ibid.* In other words, the concurrence reaffirmed *Randell*'s holding: The unavailability of § 2254 is irrelevant because *Heck* places state law on equal footing with § 2254 for purposes of supplanting § 1983's presumptive availability. So, in the Fifth Circuit (as in four others), § 1983 is unavailable to Wilson and any other conviction-impugning plaintiff with access to a state postconviction tribunal or the ability to seek a discretionary pardon, regardless of the elements of their conviction-impugning claim.

b. A nonbinding plurality of the en banc court would have dismissed Wilson's claim on different grounds (not endorsed by any circuit). Eliding the threshold question of § 1983's availability decided by *Randell* and the en banc concurrence, the en banc plurality would have held that Wilson's due process claim must be dismissed on the merits because, they argued, it sounds in malicious prosecution and carries that tort's unmet favorable-termination element. The plurality argued that *Heck* held "favorable termination is itself an element of any § 1983 claim that seeks money damages for a tainted conviction." App. 9a (en banc plurality). In the plurality's view, *Heck* eliminated the distinction between a § 1983 damages claim that is concerned only with procedure and not outcome (like Wilson's) versus one that is all about outcome (like malicious prosecution). But see *Edwards*, 520 U.S. at 645 ("The distinction between these two sorts of claims is clearly established in our

case law, as is the plaintiff's entitlement to recover at least nominal damages under § 1983 if he proves the former one without also proving the latter one.").

c. Six dissenting judges disagreed with both rationales for dismissing Wilson's § 1983 due process claim and called for this Court's intervention.

First, the en banc dissent would have overturned *Randell* and joined the majority side of the circuit split regarding the threshold issue of § 1983's presumptive availability in the absence of access to § 2254. Echoing the five concurring and dissenting Justices in *Spencer*, the dissent would hold that § 1983 is presumptively available where § 2254 is not, without regard for the potential availability of state law. *Randell* and the en banc concurrence erred, the dissent argued, because "to consider the existence of state remedies when determining the reach of § 1983 is, respectfully, contrary to the historical record" and impermissibly imposes a state-law-exhaustion requirement on § 1983 claims like Wilson's. App. 79a–81a (en banc dissent).

Second, the dissent rejected the nonbinding plurality's analogy of Wilson's due process claim to one of malicious prosecution, arguing: "Malicious prosecution makes little sense as a common-law analog for Wilson's claim[]," which is unconcerned with evidence or motive and therefore should not carry malicious prosecution's favorable-termination element. App. 67a–68a (en banc dissent).

Finally, the six "emphatically" dissenting judges closed with a call to action for this Court. App. 83a (en

banc dissent). "When Justice Ginsburg disavowed *Heck*'s footnoted musings on the ancillary question of noncustodial plaintiffs, she cited Justice Frankfurter's maxim that '[w]isdom too often never comes, and so one ought not to reject it merely because it comes late.' Unfortunately for our circuit—and unfortunately for Wilson—wisdom remains a no-show. The only hope for wronged noncustodial plaintiffs like Erma Wilson is that the Supreme Court will at last confront the persistent circuit split, seize this 'occasion to settle the issue,' and vindicate a bedrock constitutional guarantee that, sadly, is even more tenuous in today's plea-bargain age than when the Founding generation first enshrined it." App. 83a (en banc dissent) (citations omitted).

Reasons for Granting the Petition

This Court should heed the en banc dissent's call and resolve the six-to-five circuit split regarding § 1983's presumptive availability for a plaintiff who never had access to § 2254. As the conflicting circuits acknowledge, one side of that split finds support in the view of five Justices in *Spencer* v. *Kemna*; the other side finds support in the view of five Justices in *Heck* v. *Humphrey*. This Court itself cited those disagreements and noted that it has yet "to settle" the debate. *Muhammad*, 540 U.S. at 752 n.2.

This case is an excellent vehicle to settle it. The Fifth Circuit's rule is like that of four others, and it splits from that of six more—dictating Wilson's fate by geography. Eighteen Fifth Circuit judges analyzed every aspect of the *Heck*-related issues involved. And

neither the district court, the panel, nor the en banc court addressed any non-*Heck* issues.

I. Eleven circuits are in open, six-to-five conflict over the first question presented.

Heck v. *Humphrey* and *Spencer* v. *Kemna* have engendered a six-to-five circuit split regarding the threshold issue raised by Wilson's first question presented: whether § 1983 is presumptively available where § 2254 never was. "This question has been hotly debated in the lower courts since *Heck* was decided three decades ago. Footnoted dicta and vehement concurrences from various Supreme Court justices over the years have played starring roles. The unsurprising upshot is a deep and enduring circuit split." App. 47a (en banc dissent) (collecting cases). Indeed, the split could hardly be deeper: Eleven circuits have weighed in, regularly acknowledging that they choose one side or the other between *Spencer*'s five Justices and *Heck*'s. In short, the cognizability of Wilson's § 1983 due process claim is almost entirely geography dependent, and everyone knows it.

A. Six circuits approach the first question presented as five Justices in *Spencer* v. *Kemna* would, treating the unavailability of § 2254 as relevant to the availability of § 1983.

As discussed above, five concurring and dissenting Justices in *Spencer* v. *Kemna* "expressed the view that unavailability of" § 2254 based on the plaintiff's noncustodial status must mean § 1983's availability.

Muhammad, 540 U.S. at 752 n.2. They reasoned that the threshold task is to "avoid collisions at the intersection of habeas and § 1983," a concern inapplicable to noncustodial plaintiffs, whom § 2254 does not reach. *Spencer*, 523 U.S. at 20–21 (Souter, J., concurring); accord *id.* at 25 n.8 (Stevens, J., dissenting). Six of the eleven circuits to address the threshold issue of § 1983's availability follow the *Spencer* concurrences' and dissent's approach to Wilson's first question presented. So too would the six dissenting Fifth Circuit judges below.

1. The Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits follow the *Spencer* concurrences' and dissent's statutory-conciliation approach to the threshold issue of § 1983's presumptive availability. So, unlike in the Fifth Circuit below, Wilson's lack of access to § 2254 would be highly relevant in those six circuits. That lack of a conflict with § 2254 would certainly result in § 1983's availability for Wilson in at least four of the majority-side circuits, and probably all six.

The Second Circuit. Section 1983 would certainly be available to Wilson in the Second Circuit because she never had access to § 2254. The Second Circuit holds that "where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be." *Huang* v. *Johnson*, 251 F.3d 65, 75 (CA2 2001) (citation omitted). It agrees with "the pronouncement of five justices [in *Spencer*] that some federal remedy—either habeas corpus or § 1983—must be available." *Jenkins* v. *Haubert*, 179 F.3d 19, 27 (CA2 1999). Among the circuits, its rule is the most straightforwardly textual: If the plaintiff is not

"presently in state custody, his § 1983 action is not barred by *Heck*." *Green* v. *Montgomery*, 219 F.3d 52, 60 n.3 (CA2 2000). So, on this threshold question as to "dismissal of the whole § 1983 action *ab initio*," Wilson would win in the Second Circuit because she was not in state custody when she sued. *Poventud* v. *City of New York*, 750 F.3d 121, 137 n.21 (CA2 2014) (en banc).

The Fourth Circuit. Section 1983 would also certainly be available to Wilson in the Fourth Circuit because she never had access to § 2254 by no fault of her own. The Fourth Circuit holds (over a dissent) that "the reasoning employed by [five Justices] in *Spencer* must prevail in a case, like Wilson's, where an individual would be left without any access to federal court if his § 1983 claim was barred." *Wilson* v. *Johnson*, 535 F.3d 262, 267–268 (CA4 2008). It reasons that the "sweeping breadth, high purposes, and uniqueness of § 1983 would be compromised in an unprincipled manner if it could not be applied" where § 2254 was unavailable. *Id.* at 268 (cleaned up; citation omitted). To guard against gamesmanship, the Fourth Circuit asks whether the plaintiff could, "as a practical matter," have sought relief under § 2254 while in custody. *Ibid.* A "would-be plaintiff who is no longer in custody may bring a § 1983 claim undermining the validity of a prior conviction only if he lacked access to federal habeas corpus while in custody." *Griffin* v. *Baltimore Police Dep't*, 804 F.3d 692, 697 (CA4 2015). Wilson would meet that standard because respondents concealed the violation at issue here until after her sentence expired.

The Sixth Circuit. Section 1983 would also certainly be available to Wilson in the Sixth Circuit because she never had access to § 2254 by no fault of her own. Following the lead of the *Spencer* concurrences and dissent, the Sixth Circuit asks whether the plaintiff was "precluded 'as a matter of law' from seeking habeas redress" under § 2254, or if there was "no way that [he] could have obtained habeas review" under § 2254. *Powers* v. *Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 601, 603 (CA6 2007) (citation omitted). Wilson would meet those standards because respondents concealed the violation at issue here until after her sentence expired. That is "precisely the kind of situation that Justice Souter had in mind when he argued in *Heck* and *Spencer* that the favorable-termination requirement could not be deployed to foreclose federal review of asserted deprivations of federal rights by habeas-ineligible plaintiffs." *Id.* at 603.

The Ninth Circuit. The Ninth Circuit also follows the lead of the *Spencer* concurrences and dissent and starts with the presumptive availability of § 1983 in the absence of access to § 2254. So § 1983 might be available to Wilson in the Ninth Circuit because she never had access to § 2254 by no fault of her own, but that outcome is less certain than in the other majority-side circuits. While the Ninth Circuit applies the reasoning of the *Spencer* concurrences and dissent to § 1983 claims "challenging loss of good-time credits, revocation of parole[,] or similar matters," it departs from that reasoning for "challenges to an underlying conviction," like Wilson's. *Lyall* v. *City of Los Angeles*, 807 F.3d 1178, 1192 (CA9 2015) (quotation marks and citations omitted). But that departure appears

premised on whether the plaintiff (1) "continue[s] to be able to petition for a writ of habeas corpus" under § 2254 or (2) had an opportunity to take a direct appeal on the claim presented but failed to do so. *Id.* at 1191, 1192 n.12 (citations omitted). Because neither of those conditions applies to Wilson, she might successfully argue under current Ninth Circuit law that § 1983 is available for her conviction-impugning claim because it arises from a violation that respondents concealed until after the expiration of her sentence, her ability to take a direct appeal, and her ability to invoke § 2254.

The Tenth Circuit. Section 1983 would certainly be available to Wilson in the Tenth Circuit because she never had access to § 2254 by no fault of her own. Like the Second, Fourth, and Sixth Circuits, the Tenth Circuit holds that "the *Spencer* [concurring and dissenting Justices'] approach is both more just and more in accordance with the purpose of § 1983 than the approach of those circuits that strictly apply *Heck* even to petitioners who have been released from custody. If a petitioner is unable to obtain habeas relief—at least where this inability is not due to the petitioner's own lack of diligence—it would be unjust to place his claim for relief beyond the scope of § 1983." *Cohen* v. *Longshore*, 621 F.3d 1311, 1316–1317 (CA10 2010). So the Tenth Circuit "adopt[s] the reasoning of these circuits and hold[s] that a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a § 1983 claim." *Id.* at 1317. Wilson would meet that standard because respondents concealed the violation at issue here until after her sentence expired.

The Eleventh Circuit. Finally, § 1983 would almost certainly be available to Wilson in the Eleventh Circuit because she never had access to § 2254 by no fault of her own. While the Eleventh Circuit has not directly ruled on the issue in precisely analogous circumstances, it has agreed with the *Spencer* concurrences and dissent to hold that "because federal habeas corpus is not available to a person extradited in violation of his or her federally protected rights, even where the extradition was illegal, § 1983 must be" available. *Harden* v. *Pataki*, 320 F.3d 1289, 1299 (CA11 2003). And in a case where it was unnecessary to the holding because the plaintiff's claim did not "impl[y] the invalidity of his conviction," the Eleventh Circuit nonetheless echoed the concerns of the other majority-side circuits about foreclosing a § 1983 claim where "the alleged length of unlawful imprisonment—10 days—is obviously of a duration that a petition for habeas corpus could not have been filed and granted while [p]laintiff was unlawfully in custody." *Morrow* v. *Fed. Bureau of Prisons*, 610 F.3d 1271, 1272 (CA11 2010). Guided by those principles, § 1983 would almost certainly be available to Wilson because respondents concealed the violation at issue here until after her sentence expired.

2. That makes six circuits where the first question presented—regarding § 1983's threshold availability in the absence of access to § 2254—would certainly or likely resolve in Wilson's favor, in accordance with the *Spencer* concurrences and dissent. The six en banc dissenters below would agree. And that outcome would accord with this Court's recent explanation that § 1983 is "presumptively" available in the absence of "incompatibility between enforcement

under § 1983" and an alternative "enforcement scheme that Congress has enacted." *Talevski*, 599 U.S. at 172, 187. When it comes to noncustodial plaintiffs, § 2254 does not meet that incompatibility standard for foreclosing access to § 1983, because § 2254 does not reach noncustodial plaintiffs.

B. Five circuits approach the first question presented as five Justices in *Heck* v. *Humphrey* would, treating the unavailability of § 2254 as irrelevant to the availability of § 1983.

In contrast to the six circuits that approach the first question presented by asking whether the plaintiff's § 1983 claim conflicts with § 2254, five circuits—including the Fifth Circuit below—hold that *Heck* makes § 2254's unavailability irrelevant. If any *state* process exists for the plaintiff to seek invalidation of his conviction (which it always will, at least in the form of a potential pardon), then access to a conviction-impugning § 1983 damages claim is universally foreclosed. The en banc dissent below criticized this minority-side approach as the imposition of an impermissible state-law-exhaustion requirement on due process claims like Wilson's.

1. The First, Third, Fifth, Seventh, and Eighth Circuits hold that *Heck* makes the unavailability of § 2254 irrelevant in Wilson's circumstances. Those circuits hold that *Heck* requires any conviction-impugning claim to be brought in a state proceeding instead of a § 1983 damages action. This minority-side approach to the threshold question of § 1983's presumptive availability is unconcerned with

whether the plaintiff ever had access to § 2254 and unconcerned with the elements of the plaintiff's particular constitutional tort claim.

The First Circuit. In Wilson's circumstances, the lack of access to § 2254 is irrelevant in the First Circuit. It holds that *Heck* "makes the impugning of an allegedly unconstitutional conviction *in a separate, antecedent proceeding* a prerequisite to a resultant section 1983 action for damages. The exclusive method of challenging an allegedly unconstitutional state conviction in the lower federal courts is by means of a habeas corpus action" under § 2254. *Figueroa* v. *Rivera*, 147 F.3d 77, 81 (CA1 1998) (citations omitted). That splits from the majority-side circuits discussed above because its reasoning is independent of § 2254's unavailability and because the *Spencer* concurrences and dissent are deemed "dicta" unaffecting the "universality" of *Heck*'s foreclosing of § 1983 for any conviction-impugning claim. *Id.* at 81 n.3.

The Third Circuit. In Wilson's circumstances, the lack of access to § 2254 is also irrelevant in the Third Circuit. Like the First and Fifth Circuits, the Third Circuit rejects the *Spencer* concurrences and dissent; it holds that *Heck* makes the unavailability of "recourse under the habeas statute" irrelevant. *Gilles* v. *Davis*, 427 F.3d 197, 210 (CA3 2005). In dissent, Judge Fuentes argued that the Third Circuit should heed the *Spencer* concurrences and dissent and join the majority-side circuits that would not apply *Heck* where the plaintiff "was not in custody when he filed his § 1983 [First Amendment] action." *Id.* at 216–219 (Fuentes, J., dissenting in part).

The Fifth Circuit. For Wilson, the lack of access to § 2254 is irrelevant in the Fifth Circuit. As detailed above, the Fifth Circuit—like the other circuits on this side of the circuit split—rejects the *Spencer* concurrences and dissent, holding instead that *Heck* requires any conviction-impugning plaintiff to "go to the state" because, like § 2254, a state postconviction proceeding or executive pardon process is "one method to satisfy *Heck*." App. 43a (en banc concurrence).[4]

The Seventh Circuit. In Wilson's circumstances, the lack of access to § 2254 is also irrelevant in the Seventh Circuit. The Seventh Circuit also declines to treat the *Spencer* concurrences and dissent, "cobbled together," as "a new majority, essentially overruling footnote 10 in *Heck*." *Savory* v. *Cannon*, 947 F.3d 409, 421 (CA7 2020) (en banc). Its reasoning tracks that of the Fifth Circuit: The salient question is not the unavailability of § 2254, but rather the availability of a state process in the form of a potential "executive

[4] The en banc concurrence's formulation of the rule differs slightly from the other minority circuits', but the rule is the same in all five. The First, Third, Seventh, and Eighth Circuits require resort to state proceedings without conditioning that rule on the *availability* of state proceedings. The en banc concurrence, meanwhile, suggests that Wilson must resort to state proceedings *because* they are available. App. 43a (en banc concurrence). But that is not a real distinction, because some form of state proceeding is *always* available—be it a postconviction statute that happens to reach noncustodial plaintiffs, a common-law or statutory coram nobis procedure, or simply the universal executive pardon power. So in all five minority-side circuits, the would-be § 1983 plaintiff faces the same universal rule, based on those circuits' reading of *Heck*: Go to the state's courthouse or governor's mansion instead of § 1983.

pardon" or "a statutory remedy allowing petitioners to seek relief from final judgments in certain circumstances." *Id.* at 420 n.7. In dissent, Judge Easterbrook would have adopted the *Spencer* concurrence's rule, like the majority-side circuits discussed above. *Id.* at 431 (Easterbrook, J., dissenting).

The Eighth Circuit. In Wilson's circumstances, the lack of access to § 2254 is also irrelevant in the Eighth Circuit. Like the other circuits on this side of the split, the Eighth Circuit holds that "the combination of concurring and dissenting opinions in *Spencer* did not amount to a holding," so it has also "opted instead to follow [*Heck*'s] footnote 10." *Newmy* v. *Johnson*, 758 F.3d 1008, 1010–1011 (CA8 2014) (citing *Entzi* v. *Redmann*, 485 F.3d 998, 1003 (CA8 2007)). Its rule is not "limited to circumstances in which an individual could have accessed federal habeas but failed to do so." *Id.* at 1011. Like the "First, Third, and Fifth" Circuits (and now also the Seventh), the Eighth Circuit treats *Heck* as "a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence." *Id.* at 1011–1012 (quotation marks and citation omitted). Judge Kelly has called for reconsideration of the Eighth Circuit's approach, to instead align with the majority-side circuits. *Id.* at 1012 (Kelly, J., concurring).

2. Like Judges Fuentes, Easterbrook, and Kelly before them, the six-judge en banc dissent below criticized the minority-side approach to assessing the threshold question of § 1983's availability:

> The [minority approach] asserts that if the plaintiff has the opportunity to obtain state relief then she still has the chance to terminate her conviction. [That] argument, in effect, requires the plaintiff to avail herself of state court relief if the courthouse doors remain open. But this misses the point. The state court's labors, or lack thereof, have no bearing on access to § 1983. One of the defining features of § 1983 is that plaintiffs *don't* have to go to state court first. The Court has had "no occasion to settle the issue" of whether *Heck* reaches noncustodial plaintiffs, but it has declared a "settled rule . . . that exhaustion of state remedies is not a prerequisite to an action under 42 U.S.C. § 1983." Indeed, § 1983 provides "individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary." Inexplicably, the plurality and concurrence point Wilson back to state court anyway[—as would four other circuits].

App. 80a–81a (en banc dissent) (citations omitted).

In short, according to the en banc dissent, "to consider the existence of state remedies when determining the reach of § 1983 is, respectfully, contrary to the historical record." App. 79a.

* * *

To summarize, as to the first question presented: "A landscape consisting of *Heck* and the collection of opinions in *Spencer* has resulted in a conflict in the circuits about the scope of *Heck*'s favorable-termination rule. Several courts—counting up the five Justices who opined in concurring and dissenting opinions in *Spencer*—have concluded that the *Heck* bar does not apply to a § 1983 plaintiff who cannot bring a habeas action." *Newmy*, 758 F.3d at 1010 (CA8). Other circuits "have adhered to the conclusion set forth in footnote 10 of *Heck*—that the favorable-termination rule still applies when a § 1983 plaintiff is not incarcerated." *Ibid.*

"As evidenced by the circuit split, [this Court] has yet to conclusively decide" the issue. *Wilson*, 535 F.3d at 267 (CA4). Only this Court can bridge that six-to-five divide on this question of federal statutory interpretation, regarding the threshold issue of § 1983's presumptive availability in the absence of a conflict with § 2254.

II. In the interest of completeness, the Court may also wish to decide the second question presented, which implicates the noncontrolling plurality opinion below.

Addressing the first question presented—the threshold issue of § 1983's presumptive availability in the absence of a conflict with § 2254—is enough to resolve this petition because it is the only issue the en banc Fifth Circuit decided. A nonbinding plurality of the en banc court (nine out of eighteen judges) would

have ruled against Wilson on other grounds: by eliding the threshold question about § 2254's relevance and instead analogizing Wilson's due process claim to one of malicious prosecution, with that tort's favorable-termination element unmet. That is, the plurality would have decided Wilson's case on logically distinct grounds: not based on whether § 1983 is presumptively available for noncustodial plaintiffs (step one), but instead based on the merits of Wilson's particular constitutional claim (step two). While the plurality's argument is not the law in any circuit, including the Fifth, this Court may wish to address it under the second question presented in the interest of completeness. Alternatively, it can let the issue percolate after ruling for Wilson on the first question presented.

1. The Fifth Circuit en banc plurality would have answered the second question presented. It argued that "favorable termination is itself an element of any § 1983 claim that seeks money damages for a tainted conviction." App. 9a (en banc plurality). It reasoned that *Heck* eliminated the distinction between a § 1983 damages claim that is concerned only with procedure and not outcome (like Wilson's) versus one that is all about outcome (like malicious prosecution)—notwithstanding this Court's explanation that the distinction between the two types of claims is "clearly established in our case law, as is the plaintiff's entitlement to recover at least nominal damages under § 1983 if he proves the former one without also proving the latter one." *Edwards*, 520 U.S. at 645.

The plurality's proposal to collapse the two distinct constitutional torts and impose a favorable-

termination element on due process claims is not the law in any circuit, including the Fifth.[5] To the contrary, some circuits on the majority side of the circuit split regarding the first question presented (§ 1983's presumptive availability) would likely reject the plurality's proposed one-size-fits-all approach to the subsequent analogous-tort analysis under the second question presented. See *Poventud*, 750 F.3d at 131–132; *Powers*, 501 F.3d at 603–605.

As the en banc dissent below summarized it:

> Malicious prosecution makes little sense as a common-law analog for Wilson's claims. Nothing about her allegations resemble[s] the elements of malicious prosecution. Wilson is not challenging the probable cause for her arrest, nor is she arguing that the motive in instituting her prosecution was malicious. She is instead bringing a procedural due process claim, asserting that a fundamental requirement of due process—a fair trial in a fair tribunal with a judge who is independent of the prosecution—was violated. Malicious

[5] The case that comes closest to potentially endorsing the en banc plurality's view is the First Circuit's *Figueroa* decision, which said that "annulment of the underlying conviction is an element of a section 1983 'unconstitutional conviction' claim." 147 F.3d at 81. But it said so (1) without any analysis of the distinction this Court identified in *Edwards* between the two types of conviction-impugning claims, and (2) without the *need* to do any such analysis because the facts plainly sounded in malicious prosecution: "framing" for a murder to secure an unwarranted conviction. *Id.* at 80.

> prosecution with its favorable-termination requirement is no analog, much less a close one.

App. 67a–68a (en banc dissent).

2. While the en banc plurality's proposed approach to the second question presented would likely be rejected by some other circuits, no Rule 10 circuit split exists on the issue, given the plurality's failure to garner a majority below.

Moreover, circuits on the minority side of the circuit split regarding the first question presented have had no occasion to grapple with the en banc plurality's proposed rule because they dismiss all conviction-impugning claims under a different threshold rationale (just like the Fifth Circuit under its controlling *Randell* rule). If this Court rejects that minority rule under the first question presented, those minority-side circuits may need to grapple with the plurality's proposed rule in future cases—further illuminating the discussion and potentially creating the circuit split that is currently lacking as to the second question presented.

In short, while the Court may wish to address the second question presented for the sake of completeness, tackling the en banc plurality's novel approach is unnecessary to the resolution of Wilson's petition. So the Court may wish to allow the second question presented to percolate, after resolving the threshold issue of § 1983's presumptive availability in Wilson's favor under the first question presented. Cf. *Ladner* v. *United States*, 358 U.S. 169, 173 (1958) ("The question of the scope of collateral attack upon

criminal sentences is an important and complex one, judging from the number of decisions discussing it in the District Courts and the Courts of Appeals. We think that we should have the benefit of a full argument before dealing with the question.").

III. This case is an excellent vehicle to resolve an important and recurring question of § 1983's availability.

As detailed above, whether *Heck* forecloses access to § 1983 for noncustodial plaintiffs who never had access to § 2254 has divided eleven circuits nearly evenly, caused three to go en banc, and drawn vehement dissents—all invoking dueling opinions from this Court. This case is an excellent vehicle to settle that important and recurring debate.

The issue will not go away. *Heck*'s footnote 10, which forms the basis for five circuits' approach to this case, was premised in part on a mistaken assumption: that its pronouncement about noncustodial plaintiffs—which "did not matter to the disposition of *Heck*'s claim"—"would not matter to anyone, ever." *Savory*, 947 F.3d at 432 (Easterbrook, J., dissenting). But the Seventh Circuit "alone has seen dozens of such cases." *Id.* at 432 n.2. And the seminal cases embodying the circuit split discussed above "represent the tip of the iceberg in other circuits." *Ibid.* Wilson's case is yet another.

The issue is vital. Per the en banc dissent below:

> Amidst the careful parsing of caselaw, it is important not to lose sight of what is at stake: the justification for stripping an

> explicitly conferred statutory cause of action to right constitutional wrongs. Comparing the justification for a custodial plaintiff to the one offered by the plurality is instructive. To the custodial litigant who is told that habeas is the only path, the message is reasonable: A canonical tool of statutory construction—that the general gives way to the specific—requires that your presumptive § 1983 cause of action give way to the habeas statute. By contrast, to the noncustodial litigant who is told that she is at the mercy of the state, the same state that nuked her constitutional rights, the message is unintelligible: Her statutorily conferred cause of action has been judicially negated to protect a set of values—comity, finality, and consistency—that § 1983 is necessarily and always in opposition to. That those values apparently only become relevant when you have the dual misfortune of the government violating your rights and then successfully hiding its dirty work only make the rationalization more dismaying.

App. 69a (en banc dissent).

And protecting § 1983's presumptive availability is particularly important in an era where it is easy to weaponize criminal codes for abusive or retaliatory ends. Cf. *Nieves* v. *Bartlett*, 587 U.S. 391, 412–414 (2019) (Gorsuch, J., concurring in part and dissenting

in part). Such abuses often result only in noncustodial monetary fines, sentences that are "too short to allow collateral relief," or belated revelations (as here). *Savory*, 947 F.3d at 433–434 (Easterbrook, J., dissenting). So foreclosing the availability of § 1983 in such circumstances exposes the "double horror" of rewarding petty, retaliatory, or hidden abuse. App. 78a (en banc dissent).

This case is an ideal vehicle. No judge below disputed the "egregious" due process violation Wilson was subjected to: a county double-employing a prosecutor to help judges decide his own cases for nearly twenty years. App. 2a–3a (en banc plurality). No judge below purported to reach any issue other than the *Heck* ones raised by Wilson's two questions presented. Eighteen judges analyzed every aspect of those questions. And geography dictates the answers to those questions—one threshold approach governing in six circuits, another governing in five.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

December 12, 2024

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