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May 20, 2021

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RE: 21-1071 Marcus Mitchell v. Kyle Kirchmeier, et al

Dear Counsel:

The amicus curiae brief of the Institute for Justice has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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District Court/Agency Case Number(s): 1:19-cv-00149-DMT

Case No.: 21-1071

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Marcus Mitchell,

Plaintiff – Appellant,

v.

Morton County Sheriff Kyle Kirchmeier, Morton County, City of Bismarck, Morton County Sheriff's Deputy George Piehl, Bismarck Police Officer Tyler Welk, North Dakota Highway Patrol Sergeant Benjamin Kennelly, John Does 1–2,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of North Dakota

AMICUS BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the Institute for Justice does not have a parent corporation, and no publicly held corporation owns any portion of its stock.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society. One such foundational principle is the American people's ability to hold the government and its officials accountable. IJ represents clients in cases like this one concerning the scope of government accountability,[2] and it regularly files *amicus* briefs on the topic.[3]

Part of IJ's mission is to remove procedural barriers that make it harder to enforce constitutional rights. By applying *Heck v. Humphrey*, 512 U.S. 477 (1994), to Marcus Mitchell's First Amendment claims, the district court here created a new procedural barrier to enforcing constitutional rights. For this reason, *amicus* has an interest in this

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[1] No party's counsel authored this brief in whole or in part. No one other than *amicus* Institute for Justice contributed money for this brief's preparation or submission. *See* Fed. R. App. P. 28(a)(4)(E).

Amicus Institute for Justice sought the parties' consent to file this brief. All parties consented. *See* Fed. R. App. P. 29(a)(2).

[2] *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740 (2021); *Serrano v. Customs & Border Prot.*, 975 F.3d 488 (5th Cir. 2020), *cert. denied*, No. 20-768, 2021 WL 1520791 (2021) (mem.); *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 111 (2020) (mem.).

[3] *See, e.g.*, *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); *Hernandez v. Mesa*, 140 S. Ct. 735 (2020); *Stewart v. City of Euclid*, 970 F.3d 667 (6th Cir. 2020), *petition for cert. filed*, No. 20-951 (Jan. 11, 2021).

Court's review and reversal of the district court's decision, which departs from Supreme Court precedent.

ARGUMENT

This appeal concerns whether Appellant Marcus Mitchell may bring claims under § 1983 against various state, county, and city government officials whom he alleges severely injured him while arresting him at a protest against the Dakota Access Pipeline. The court below held that Mitchell's claims were barred by the Supreme Court's ruling in *Heck v. Humphrey*, 512 U.S. 477 (1994), which prevents a plaintiff from bringing a § 1983 claim that, if successful, would necessarily imply the invalidity of a conviction or sentence. *See id.* at 486–87. That was error. The *Heck* bar does not apply here because all criminal charges against Mitchell were dismissed, so his claims cannot impugn a conviction or sentence.

Although the district court purported to apply the *Heck* bar, its misapplication of that bar more closely resembles a different rule arising out of the Supreme Court's decision in *McDonough v. Smith*, 139 S. Ct.

2149 (2019).[4] The *McDonough* rule prevents a plaintiff from bringing a § 1983 claim that directly challenges an underlying prosecution—that is, the legal process initiated against the accused—unless that prosecution has ended in the accused's favor. *Id.* at 2159.[5] And, unlike the *Heck* bar, the *McDonough* rule can apply even if there has not been a conviction. *Id.* at 2160. But the *McDonough* rule does not apply here because Mitchell's claims do not directly challenge the prosecution itself.

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[4] Both the *Heck* bar and the *McDonough* rule have been said to include a "favorable termination" requirement. *See McDonough*, 139 S. Ct. at 2157, 2160. But these rules are not identical. The favorable-termination requirement of *Heck* is this: If a § 1983 claim impugns a conviction or sentence, the claim is barred unless the conviction or sentence has terminated in the accused's favor—through expungement, reversal on direct appeal, or invalidation by either a state tribunal or a writ of habeas corpus. *See Heck*, 512 U.S. at 486–87. The favorable-termination requirement of *McDonough* is this: A § 1983 claim that impugns the legal process itself does not accrue unless and until the criminal proceeding has terminated in the accused's favor. *See McDonough*, 139 S. Ct. at 2159. Because these favorable-termination requirements differ, *amicus* refers to the favorable-termination requirement of *Heck* as "the *Heck* bar" and the favorable-termination requirement of *McDonough* as "the *McDonough* rule."

[5] *See Wallace v. Kato*, 549 U.S. 384, 389 (2007) (observing a magistrate's finding of probable cause or arraignment on charges as the start of legal process); *Manuel v. City of Joliet*, 137 S. Ct. 911, 914 (2017) (observing the judge's determination of probable cause as the start of legal process).

The ruling below thus creates a new, hybrid rule that grafts *McDonough*'s "favorable termination" requirement for challenged prosecutions onto the *Heck* bar, vastly expanding the scope of that bar to create a new shield against government accountability under § 1983 when officers violate constitutional rights. Specifically, the district court's new variant on the *Heck* bar extends *Heck* beyond claims that impugn a criminal conviction. And it extends *McDonough* beyond claims that directly challenge the legal process initiated against the accused.

The court's decision is both wrong and damaging. If not reversed, it would deprive a large group of people of the ability to vindicate their constitutional rights: those who encounter the criminal justice system and whose charges are dismissed through pretrial diversion, without a conviction being imposed.

I. Neither the *Heck* bar nor the *McDonough* rule applies to Mitchell's First Amendment claims.

The *Heck* bar and the *McDonough* rule are distinct doctrines that the Supreme Court has applied to prohibit certain § 1983 claims. The *Heck* bar applies only when a § 1983 claim would necessarily imply the invalidity of a conviction or sentence. *Heck*, 512 U.S. at 486. By contrast, the *McDonough* rule applies in the absence of a conviction or sentence,

but only to claims that "directly challenge[] . . . the prosecution itself"—that is, the ways in which criminal charges were prosecuted in the legal process against the accused. *McDonough*, 139 S. Ct. at 2159; *Wallace v. Kato*, 549 U.S. 384, 389 (2007). Neither doctrine applies here, however, because Mitchell was never convicted and does not challenge his prosecution.

A. The Heck *bar does not apply because Mitchell's claims do not imply the invalidity of a conviction.*

The *Heck* bar is triggered only when (1) there exists a still-valid conviction and (2) the plaintiff's § 1983 claim would necessarily imply the conviction's invalidity. *Heck*, 512 U.S. at 486–87. Mitchell's case meets neither requirement.

i. *Heck* does not apply without a conviction.

Heck established a bar limited to § 1983 claims that—if successful—"would render a conviction or sentence invalid." *Id.* at 486. Under this bar, a plaintiff who has been convicted of a crime may not proceed with any § 1983 claims that would necessarily undermine the conviction unless that conviction has been reversed, expunged, invalidated by a state court, or called into question by a writ of habeas corpus. *Id.* at 486–87.

The Supreme Court crafted this rule to prevent litigants from using § 1983 to skirt around the more onerous requirements of the federal habeas corpus statute, 28 U.S.C. § 2254. Like a successful habeas petition, some successful § 1983 claims necessarily imply the unlawfulness of a conviction or sentence. But whereas the habeas statute requires a claimant to exhaust available state remedies, § 1983 does not include an exhaustion requirement. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982). The *Heck* bar was designed to close this loophole. *See Heck*, 512 U.S. at 480; *id.* at 491 (Souter, J., concurring in judgment). And it does so by screening out "§ 1983 damages claims that do call into question the lawfulness of conviction or confinement." *Id.* at 483.

The *Heck* decision itself perfectly demonstrates this. The question in *Heck* was "whether a state prisoner may challenge the constitutionality *of his conviction* in a suit for damages under 42 U.S.C. § 1983." 512 U.S. at 478 (emphasis added).[6] The Court answered: No, unless the conviction has already been invalidated. *See id.* at 486–87. In

[6] *See also id.* at 480 n.2 (stating the question as "whether money damages premised on an *unlawful conviction* could be pursued under § 1983" (emphasis added)).

doing so, the Court made clear that it was focused on specific, narrow concerns with (1) collateral attacks on "the validity of outstanding criminal judgments," *id.* at 486, and (2) the intersection between § 1983 and the habeas statute, *id.* at 480–83.

Reflecting these concerns, the Court repeatedly emphasized that the *Heck* bar is limited to claims that "necessarily imply the invalidity of [the § 1983 plaintiff's] conviction or sentence." *Id.* at 487; *see id.* at 484–90. After all, a successful § 1983 claim does not conflict with a state criminal judgment unless there exists a still-valid conviction. And the habeas statute and § 1983 intersect only when a state prisoner obliquely "challenge[s] . . . the fact or duration of his confinement" in a § 1983 claim. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). They do not collide when, like here, a prosecution ends in some way other than a conviction.[7]

[7] Because these statutes also do not collide unless a plaintiff is confined and can seek habeas relief, five Justices would apply the *Heck* bar even more narrowly—not to *all* claims that would necessarily imply the invalidity of a conviction or sentence, but only to those that are brought by a person who has the opportunity to obtain habeas relief. *See Heck*, 512 U.S. at 491 (Souter, J., joined by three other Justices, concurring in judgment); *Spencer v. Kemna*, 523 U.S. 1, 21–22 (1998) (Ginsburg, J., concurring) (announcing agreement with Justice Souter's separate opinion in *Heck*); *id.* at 25 n.8 (Stevens, J., dissenting, agreeing with Justice Souter's view of the *Heck* bar). *See also Proventud v. City of New York*, 715 F.3d 57, 61 (2d Cir. 2013) (concluding that the *Heck* bar is

Ultimately, because the *Heck* bar applies only when there exists an outstanding conviction, the appropriate question is whether Mitchell's pretrial-diversion agreement is a "conviction" that triggers the *Heck* bar. It is not.

ii. Mitchell was not convicted of any crime.

The Supreme Court made clear that a conviction, for purposes of the *Heck* bar, is an "outstanding criminal judgment." *Wallace*, 549 U.S. at 393. That's why the *Heck* bar is lifted only by reversal on direct appeal, expungement, nullification by a state tribunal, or a writ of habeas corpus. *See Heck*, 512 U.S. at 487. The Court in *Heck* did not address any concerns with § 1983 claims that undermine probable-cause determinations or other aspects of pending criminal proceedings. The Court only did so in 2019, when it crafted the *McDonough* rule for § 1983 claims that impugn the underlying legal process.

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removed when a prisoner's custody ends), *resolved en banc on other grounds*, 750 F.3d 121 (2014); *Savory v. Cannon*, 947 F.3d 409, 431–34 (7th Cir. 2020) (en banc) (Easterbrook, J., dissenting). At least five circuits have similarly held that when plaintiffs lack a habeas option for the vindication of their rights, *Heck* poses no obstacle. *See Cohen v. Longshore*, 621 F.3d 1311, 1316–17 (10th Cir. 2010) (citing cases).

It is undisputed that Mitchell was never convicted of *anything*. That should have been the end of the *Heck* inquiry. Without a conviction, the *Heck* bar was never triggered.[8]

The Supreme Court's ruling in *Wallace v. Kato* drives home the point. In *Wallace*, the Court explained that a plaintiff may bring a § 1983 claim for a wrongful, warrantless arrest at any time before a conviction is entered, even if the plaintiff is in custody. 549 U.S. at 388, 393. More specifically, the Court observed that the *Heck* bar would not prevent the plaintiff from bringing his § 1983 claim any time between the claim's accrual (as soon as the allegedly wrongful arrest occurred) and the entry of a criminal conviction. *See id.* at 392–95. This included the time during which the plaintiff was "held pursuant to legal process"—that is, after a probable-cause finding. *Id.* at 393. Even then, the *Heck* bar did not apply

[8] The Supreme Court's instructions for determining whether the *Heck* bar applies are crystal clear: "[C]onsider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his *conviction or sentence*," and if the plaintiff's (successful) action will not "demonstrate the invalidity of any *outstanding criminal judgment* against the plaintiff, the action should be allowed to proceed." 512 U.S. at 487 (emphases added).

because "there was in existence no criminal conviction that the cause of action would impugn." *Id.*

Wallace is instructive for Mitchell's case because, like the *Wallace* plaintiff, Mitchell brought § 1983 claims that accrued before any conviction was entered. He also entered a pretrial-diversion agreement whereby his "prosecution [would] be suspended for a specified period" of time, followed by dismissal of the charges if Mitchell acted lawfully during that time. N.D. R. Crim. P. 32.2(a)(1). As *Wallace* confirmed, *Heck* does not prevent Mitchell from bringing a § 1983 claim before a conviction is entered, regardless of whether the pretrial-diversion agreement were to fall through and the prosecution resume. If *Heck* does not bar a claim while the prosecution is ongoing, then it also does not bar Mitchell's claims after his charges were dismissed.

iii. Even if Mitchell had been convicted of trespass and obstruction, his claims would not imply those convictions' invalidity.

The district court's application of *Heck* is doubly incorrect because the *Heck* bar would not have applied *even if Mitchell had been convicted* of the crimes that were dismissed. This is because the existence of an outstanding conviction alone does not trigger the *Heck* bar; the bar is

triggered only when a plaintiff's § 1983 claim would necessarily imply a conviction's invalidity. And Mitchell's claims would not. His First Amendment claims are for retaliatory use of force and retaliatory arrest. Those claims would not imply the unlawfulness of convictions for trespass and obstruction—the charges that were ultimately dismissed.

Take Mitchell's retaliatory-use-of-force claim. If he had been found guilty of either crime, or both, that finding would not justify an officer's use of force on him for an impermissible reason. *See, e.g.*, *Huey v. Stine*, 230 F.3d 226, 230 (6th Cir. 2000) (observing general recognition among federal courts that "the degree of force used by a police or corrections officer is analytically distinct from the question whether the plaintiff violated the law"), *overruled on other grounds by Muhammad v. Close*, 540 U.S. 749, 754 (2004); *accord Colbert v. City of Monticello*, 775 F.3d 1006, 1008 (8th Cir. 2014) (per curiam).

Likewise, for Mitchell's retaliatory-arrest claim, if Mitchell had been found guilty, the police officer who arrested him may nevertheless have lacked probable cause to make the arrest. *See Moore v. Sims*, 200 F.3d 1170, 1171–72 (8th Cir. 2000). And even if the officer had probable cause at the time of the arrest, Mitchell could succeed on his retaliatory-

arrest claim by showing that similarly situated individuals were not arrested for the same crimes. *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019). *See generally* Appellant Br. at 23 (recounting requirements of retaliatory-arrest claim). The Court in *Heck* made similar observations when it noted that doctrines like independent source, inevitable discovery, and harmless error may keep the *Heck* bar from applying. *See Heck*, 512 U.S. at 487 n.7. Those observations were the basis for this Court's decision in *Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996), that a § 1983 claim for a Fifth Amendment violation based on an involuntary confession was not *Heck*-barred because harmless-error analysis applies to the admission at trial of coerced confessions.

Thus, *Heck* does not apply even if Mitchell had been convicted of the dismissed charges.

B. The McDonough *rule does not apply because Mitchell's claims do not directly challenge the prosecution.*

Although the district court stated that it was applying *Heck*, its decision looks like an application of the *McDonough* rule, which the Supreme Court established in 2019. In *McDonough*, the plaintiff had been acquitted of all criminal charges, and he brought a § 1983 claim alleging that the prosecutor fabricated evidence used against him in the

criminal prosecution. 139 S. Ct. at 2153, 2155. Because there was no conviction, *Heck* did not apply. *Id.* at 2155, 2158. Instead, the Court determined that the plaintiff's § 1983 claim did not accrue until the criminal proceedings ended in his favor, because his claim directly challenged the prosecution itself. *Id.* at 2159. Even though this rule applies in the absence of a conviction, it—like the *Heck* bar—does not apply to Mitchell's claims, which do not impugn the methods used in his prosecution.

i. The *McDonough* rule applies only to claims that impugn the prosecution itself.

Although the Court in *McDonough* explained that the rule established in that case derived from some of the same principles as the *Heck* bar, it also clarified how this new rule differs from the *Heck* bar. 139 S. Ct. at 2156–59. Specifically, the Court recognized that the *Heck* bar applies only to § 1983 claims that "collateral[ly] attack . . . a criminal judgment," while the rule in *McDonough* operated in the absence of a criminal judgment. *Id.* at 2155, 2159. After all, the *McDonough* plaintiff was acquitted. Ultimately, the Court in *McDonough* designed this rule: If a § 1983 claim directly challenges the prosecution itself, it does not

accrue unless and until the prosecution ends in the accused's favor. *Id.* at 2159.

The Court arrived at this rule by adopting a feature of common-law malicious-prosecution claims—namely, that the plaintiff's cause of action was complete "only once the criminal proceedings against him terminated in his favor." *Id.* at 2159; *cf. id.* at 2156–57; *Heck*, 512 U.S. at 484 ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.").

Adopting this feature was appropriate, the Court explained, because the plaintiff's § 1983 claim "directly challenge[d]—and thus necessarily threaten[ed] to impugn—the prosecution itself." *McDonough*, 139 S. Ct. at 2159. This contrasts with claims like the one in *Wallace*, which challenge conduct that occurred before, or otherwise outside of, the legal process. *Id.* at 2159; *Wallace*, 549 U.S. at 389. In sum, whereas the *Heck* bar does not apply without a conviction, the *McDonough* rule does apply in the absence of a conviction, but only to claims that directly challenge the prosecution itself. Mitchell's claims do not fall into this category.

ii. Mitchell's claims do not challenge the prosecution.

To determine whether the *McDonough* rule applies, a court must identify the § 1983 claim's composition and prerequisites. *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017). This is done by "look[ing] first to the common law of torts" as a guide. *Id.*; *see, e.g.*, *McDonough*, 139 S. Ct. at 2156, 2159; *Wallace*, 549 U.S. at 389–90. If the claim at issue directly targets the legal process initiated against the accused—like the fabricated-evidence claim in *McDonough*—then the claim's closest common-law analogue is malicious prosecution and the *McDonough* rule applies: The claim does not accrue unless and until the prosecution has ended in the accused's favor.

Mitchell's claims for retaliatory use of force and retaliatory arrest do not directly challenge the prosecution against him. So, the *McDonough* rule does not apply. Instead, like the *Wallace* plaintiff's claim, Mitchell's claims challenge only conduct that happened before any legal process began—indeed, before any probable-cause finding was made or any charges were filed. Nobody disputes that the officers fired their weapons at Mitchell and arrested him without a warrant. *Cf. Wallace*, 549 U.S. at 388–90. Thus, the defining feature of a common-law malicious-

prosecution claim is absent: a challenge to the legal process initiated against the accused.[9] *See* 35 C.J.S. *False Imprisonment* § 4 ("To support an action for malicious prosecution, there must be a valid warrant[.]"); *Wallace*, 549 U.S. at 388–90.[10]

Likewise, because Mitchell's claims do not challenge any aspect of the prosecution itself, the *McDonough* rule does not apply. Mitchell's claims were complete before a probable-cause finding was made or charges were filed. He challenges only police officers' conduct leading up to and including a warrantless arrest. As a result, his claims are like the false-imprisonment claim in *Wallace*: They have "a life independent of an

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[9] Regardless of whether Mitchell's claims most closely resemble common-law interference with religious or political rights, false imprisonment, battery, or some other tort, the key is that malicious prosecution is not an appropriate common-law analogue for the same reason it was not analogous to the *Wallace* plaintiff's wrongful-arrest claim: the claims challenge conduct before legal process began. *See generally* Thomas Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 37, 162, 290, 296–99 (1879) (addressing religious and political rights and battery); 6A C.J.S. *Assault* § 2 (defining battery); *Wallace*, 549 U.S. at 388–90 (explaining difference between false imprisonment and malicious prosecution).

[10] *Compare Wallace*, 549 U.S. at 389–90 (concluding that claim of unlawful detention *without legal process* was not analogous to malicious prosecution), *with McDonough*, 139 S. Ct. at 2156, 2159 (concluding that fabricated-evidence claim was analogous to malicious prosecution because it challenged the prosecution, itself).

ongoing trial or putative future conviction." *McDonough*, 139 S. Ct. at 2159. Accordingly, the *McDonough* rule—like the *Heck* bar—does not come into play.

C. *The district court's decision exceeds the limits of both the* Heck *bar and the* McDonough *rule.*

The district court veered off course by combining the most plaintiff-hostile aspects of the *Heck* bar and the *McDonough* rule. Specifically, in the absence of an outstanding criminal judgment or a challenge to the prosecution, the court required the criminal proceeding against Mitchell to have ended in his favor. *See* Appellant's Addendum at 20. It then concluded that the dismissal of Mitchell's charges under the pretrial-diversion agreement was not a favorable termination. *Id.* at 24–25. For support, the court relied on a Second Circuit case predating *Heck*; a Third Circuit case predating *Wallace*; and a district court's statement that was rejected on review by the Sixth Circuit. *See id.* at 19, 22; *Roesch v. Otarola*, 980 F.2d 850 (2d Cir. 1992); *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 638 (6th Cir. 2008).[11]

[11] The Fifth Circuit, like the district court here, has held that *Heck* bars claims that do not impugn an outstanding conviction. *See Morris v.*

This reliance was misplaced. For example, the district court leaned on a quote from the Third Circuit's discussion of *Heck*, saying that "[t]he purpose of the requirement . . . is to avoid parallel litigation of probable cause and guilt." *See* Appellant's Addendum at 19 (quoting *Gilles v. Davis*, 427 F.3d 197, 209 (3d Cir. 2005)). But that quote is not discussing the *Heck* bar; the Third Circuit quote comes from the Supreme Court's explanation of common-law malicious prosecution. *See Gilles*, 427 F.3d at 209; *Heck*, 512 U.S. at 484. And although the Court in *Heck* looked to the common law when crafting a way to screen out § 1983 claims that necessarily imply a conviction's invalidity, it did not adopt the common-law rule for malicious prosecution as the *Heck* bar. *See* 512 U.S. at 484. It instead limited the *Heck* bar to § 1983 claims "that necessarily require

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Mekdessie, 768 F. App'x 299, 301–02 (5th Cir. 2019). But in doing so, the Fifth Circuit leaned on *Gilles* (the Third Circuit's pre-*Wallace* case) and its own precedent that—although decided a few months after *Heck*—did not mention or rely on *Heck* and instead found persuasive a Second Circuit, pre-*Heck* decision about malicious prosecution. *See id.* (citing *Taylor v. Gregg*, 36 F.3d 453 (5th Cir. 1994) (citing *Singleton v. City of New York*, 632 F.2d 185 (2d Cir. 1980)). None of these decisions align with the Court's holdings or reasoning in *Heck*, *Wallace*, and *McDonough*. *See, e.g.*, *Muhammad v. Abington Twp. Police Dep't*, 37 F. Supp. 3d 746, 753–56 (E.D. Penn. 2014) (questioning whether *Gilles* remains binding authority).

the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* at 486. Further, in the years since the Third Circuit's ruling in *Gilles*, the Supreme Court has clarified the scope of *Heck* in decisions like *Wallace* and *McDonough*.[12]

Notably, other circuits have adhered to *Heck*'s limits, declining to apply the *Heck* bar in the absence of a conviction. *See Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009); *McClish v. Nugent*, 483 F.3d 1231, 1250–52 (11th Cir. 2007); *see also Grant Cnty. Bd. of Educ.*, 544 F.3d at 637–39. The courts in these cases, which post-date *Wallace*, have reasoned that pretrial-intervention programs resulting in dismissal of charges do not create a conflict between a § 1983 judgment and a state criminal judgment, so the *Heck* bar simply does not apply.[13]

Unlike the district court, these circuits did not base their decisions on the fact-specific features of states' pretrial-diversion programs. And

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[12] *See also Muhammad v. Close*, 540 U.S. 749, 751 (2004) (per curiam) ("In *Heck* . . . , we held that where success in a prisoner's § 1983 damages action would implicitly question the validity of *conviction or duration of sentence*, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying *conviction or sentence*." (emphases added)).

[13] *See Vasquez*, 589 F.3d at 1095; *McClish*, 483 F.3d at 1251; *see also Grant Cnty. Bd. of Educ.*, 544 F.3d at 639.

rightly so—those features are irrelevant because pretrial-diversion is not an outstanding criminal judgment, which is necessary to invoke the *Heck* bar.[14]

The district court did not need to consider (and should not have considered) whether the pretrial-diversion agreement and dismissal of charges was a favorable termination of the proceeding. *Contra* Appellant's Addendum at 20 ("[T]he Court must determine if Mitchell's entry into the pretrial diversion agreement with the State of North Dakota, which ultimately led to the dismissal of the charges, constitutes a 'favorable termination.'"). Neither the *Heck* bar nor the *McDonough* rule called for that analysis. In fact, *Heck* instructed against it. *See* 512 U.S. at 487 ("[I]f the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding

[14] Although the distinction sometimes gets lost in cases like this, there is an important difference between (a) whether the *Heck* bar (or the *McDonough* rule, for that matter) applies in the first place and (b) whether disposition of a criminal proceeding, including a conviction, is a "favorable termination." *See McClish*, 483 F.3d at 1251 ("The issue is not, as the district court saw it, whether [the plaintiff's] participation in [pretrial intervention] amounted to a favorable termination on the merits. Instead, the question is an antecedent one—whether *Heck* applies at all since [the plaintiff] was never convicted of *any* crime."); *accord Cabot v. Lewis*, 241 F. Supp. 3d 239, 251 n.10 (D. Mass. 2017).

criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.").

Ultimately, the district court adopted a variant of the *Heck* bar that cannot be squared with *Heck* or *McDonough*. That variant rule extends *Heck* by eliminating the criminal-conviction requirement. And it extends *McDonough* by stretching that case's favorable-termination requirement beyond challenges to the prosecution itself. The resulting hybrid test is flatly inconsistent with the Supreme Court's precedent, and this court should reject it.

II. The district court's decision imposes a burdensome penalty that threatens the integrity of the criminal-justice system and undermines government accountability.

The district court's holding imposes a new penalty on individuals whose rights were violated outside the legal process, who were later charged with a crime, and who agreed to conditions in exchange for the charge's dismissal. These individuals, who are presumed innocent, are stripped of the opportunity to hold government officials accountable in a § 1983 action for violating their constitutional rights.

This is troubling for two main reasons. First, these individuals already face a host of life-damaging challenges simply because they

briefly encountered law enforcement. For example, if a person was arrested—even unlawfully or mistakenly—her arrest record may factor into not only hiring and immigration decisions but also eligibility for occupational licenses, social welfare benefits, loans, and housing. *See Utz v. Cullinane*, 520 F.2d 467, 480 (D.C. Cir. 1975) (acknowledging "the considerable barriers that an arrest record interposes to employment, educational, and professional licensing opportunities" and citing cases).[15] In the words of Justice Sotomayor, an arrest record alone leads to "the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check." *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).[16] In effect, a criminal record imposes

[15] *See also* Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 809, 820–44 (2015) (describing how immigration authorities, social service agencies, schools, employers, public housing officials, and other private entities may use arrest information in ways that adversely affect the arrestee); Gary T. Lowenthall, *The Disclosure of Arrest Records to the Public Under the Uniform Criminal History Records Act*, 28 Jurimetrics J. 9, 12–17 (1987).

[16] *See also* Ryan A. Hancock, *The Double Bind: Obstacles to Employment and Resources for Survivors of the Criminal Justice System*, 15 U. Pa. J.L. & Soc. Change 515, 515–16 (2012) (describing a person with a criminal history record as "marked for life").

punishment in the absence of a conviction.[17] And this strains the principle that a person is presumed innocent until proven guilty.[18]

To strain that principle further, the district court's decision—if not reversed—would establish the following: If a criminal defendant agrees to any conditions in exchange for the dismissal of charges, she may not vindicate her constitutional rights, even if they were violated before the prosecution began, as Mitchell's rights allegedly were here. This rule would create a strange disparity in *Heck*'s application. The *Heck* bar would not apply to those whose convictions have been invalidated, but it would apply to those who were never convicted in the first place.

Another troubling result is decreased government accountability that threatens the criminal-justice system's integrity. Under the district

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[17] *Cf. Utz*, 520 F.2d at 481 (stating that government dissemination of an arrest record, knowing that employers may infer the individual was guilty rather than innocent, "effectively permits the government to inflict punishment despite the fact that guilt was not constitutionally established").

[18] *See Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); *Menard v. Mitchell*, 328 F. Supp. 718, 724 (D.C. Cir. 1971) ("Under our system of criminal justice, only a conviction carries legal significance as to a person's involvement in criminal behavior.").

court's decision, officers who violate a person's constitutional rights are given a free pass if that person enters a pretrial-diversion agreement. And prosecutors are given immense power to shield law enforcement officers from civil litigation by entering into such an agreement. This interplay between criminal process and shielding officers from civil liability for unconstitutional acts undermines the criminal justice system's integrity and subverts the purpose of § 1983, which is to provide a federal forum to remedy constitutional violations. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961) ("Its purpose is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'"), *overruled in part by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

CONCLUSION

In applying the *Heck* bar to Mitchell's First Amendment claims, the district court's decision not only departs doctrinally from Supreme Court precedents but also imposes a penalty on people who are presumed innocent, sheltering officers from accountability for their unlawful conduct. The district court's ruling should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that this Brief of Amicus Curiae Institute for Justice is proportionately spaced in compliance with Fed. R. App. P. 32(a)(5), (6), and contains 5,324 words excluding parts of the document exempted by Rule 32(f).

I further certify that the *Amicus Curiae* Brief of Institute for Justice has been scanned for viruses using Bitdefender Endpoint Security Tools, Version 6.6.26.382, and according to the program is free of viruses.

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I further certify that upon this brief being file-accepted one paper copy of the brief will be served on counsel for each party represented via commercial carrier in accordance with Local Rule 28A(d) and Fed. R. App. P. 25(c)(1)(C).

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