No. 21-16929

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCISCO DUARTE,

Plaintiff-Appellant,

v.

CITY OF STOCKTON, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:19-cv-00007-MCE-CKD
Hon. Morrison C. England, *District Judge*

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Heck v. Humphrey bars Mr. Duarte's claims if, and only if, Defendants prove it's "clear" that success on his claims would necessarily imply the invalidity of an existing conviction or sentence. *Smith v. City of Hemet*, 394 F.3d 689, 699 & n.5 (9th Cir. 2005) (en banc). It's Defendants' burden to show that the *Heck* bar applies—not Mr. Duarte's to show it doesn't. *Washington v. Los Angeles Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 & n.5 (9th Cir. 2016). Defendants did not meet their burden in the district court, and they have not met it before this Court.

There are at least four reasons why *Heck* does not apply, any one of which suffices to reverse the district court. First, Defendants have not shown that Mr. Duarte was either convicted or sentenced: his plea was never accepted, no criminal judgment was ever entered against him, and no sentence can be imposed without a conviction. Second, proceedings against Mr. Duarte were "favorably terminated"—as recent caselaw from the Supreme Court confirms—because all charges were dismissed and his plea was vacated. Third, even if the informal agreement between Mr. Duarte and the prosecution somehow constituted a conviction, success on Mr. Duarte's excessive-force claim would not necessarily imply the

invalidity of that "conviction" because there are multiple versions of events consistent with both a conviction for resisting arrest and a favorable excessive force verdict. Finally, two aspects of Mr. Duarte's criminal proceeding—that he never had recourse to habeas and that he pled no-contest, rather than guilty—render *Heck* inapplicable.

Defendants also ask this Court to affirm the district court's dismissal of Mr. Duarte's *Monell* claim on the ground that neither the City of Stockton nor the Stockton Police Department are "persons" for purposes of 42 U.S.C. § 1983. But controlling precedent of the Supreme Court and this Court holds just the opposite. Defendants' only contrary authority is a concurrence about a different statute altogether and a handful of district court cases. Defendants urge this Court to affirm anyway, because, according to them, Mr. Duarte's *Monell* allegations are insufficiently specific. Even if that were true (and it's not), Mr. Duarte was never given the opportunity to amend this claim because it was improperly dismissed with prejudice.

Like the district court's reasoning, Defendants' arguments are foreclosed by controlling caselaw at turn after turn. This Court should reverse.

ARGUMENT

I. *Heck* Poses No Obstacle to Mr. Duarte's Claims.

A. Defendants do not show that there was a conviction or sentence in Mr. Duarte's case.

As the opening brief explains, *Heck* only becomes relevant where there has actually been a "conviction or sentence." *See* OB-15; *Wallace v. Kato*, 549 U.S. 384, 393 (2007). It does not apply when there is merely an "anticipated future conviction," because that prospective conviction might "never occur[ ]" if, for example, the charges end up being dismissed. *Wallace*, 549 U.S. at 393.

That's exactly what happened here. After Mr. Duarte was charged with resisting arrest under California Penal Code § 148(a)(1), he and the prosecution agreed to a no-contest "plea in abeyance." ER-78, 75-76; OB-7.[1] That is, the trial court did not accept the no-contest plea, instead holding acceptance of that plea "in abeyance" for six months. ER-78. Mr. Duarte and the prosecution agreed that if Mr. Duarte did not break any laws and performed ten hours of community service at any nonprofit of his choice during that time, the prosecution would "vacate [the] plea and

[1] Citations to the opening brief are denoted as OB; citations to the answering brief are denoted as AB.

dismiss[ ]" all charges. ER-75. Mr. Duarte did as he agreed, and so did the prosecution: after six months, the prosecution dismissed all charges against Mr. Duarte in the "interest of justice," and no conviction or sentence was ever entered. ER-80.

1. Defendants concede that charges against Mr. Duarte were dismissed without a conviction.

That no conviction was ever entered against Mr. Duarte poses a problem for Defendants. After all, by its plain terms, *Heck* only comes into play with an extant "conviction or sentence." *Heck v. Humphrey*, 512 U.S. 477, 486 (1994); *Martin v. City of Boise*, 920 F.3d 584, 613 (9th Cir. 2019) ("the *Heck* doctrine has no application" where charges are dismissed, because there is "no 'conviction or sentence' that may be undermined"). Indeed, the Supreme Court called the idea that *Heck* might extend to "anticipated future convictions" "bizarre." *Wallace*, 549 U.S. at 393. Faced with this brick wall of unfavorable caselaw, Defendants make two contradictory arguments, neither persuasive.

First, Defendants concede that no conviction was entered against Mr. Duarte. AB-11-12 (admitting that "a conviction was not formally entered"). But they ask this Court to nonetheless decide that *Heck* applies, because the lack of conviction was, according to Defendants,

simply a "technicality." AB-11. Unsurprisingly, Defendants don't cite any law supporting the idea that this Court can simply overlook *Heck*'s central prerequisite: the existence of an "outstanding criminal judgment." *Wallace*, 549 U.S. at 393. The absence of a conviction thus isn't just a matter of "semantics" or a "technicality," *see* AB 11-12: when it comes to *Heck*, it's the whole ballgame. *See Wallace*, 549 U.S. at 393.

Perhaps realizing the weakness of *that* position, Defendants make a second argument contradicting their first: that Mr. Duarte's no-contest plea was accepted by the trial court and entered, such that a conviction *does* exist. *See* AB-31, 33-34. Defendants' argument turns the record on its head. Contrary to their claim that the trial court "accepted [Mr. Duarte's] no-contest plea," AB-33, the record makes clear that the plea was never accepted. The "Court's acceptance of [the] plea" was "held in abeyance," ER-78, and then all charges were dismissed six months later, ER-80. To hold something "in abeyance," of course, is not the same as effectuating that thing—just the opposite. *See, e.g.*, *Abeyance*, Black's Law Dictionary (11th ed.) (defining abeyance to include "suspension"); *Abeyance*, Garner's Dictionary of Modern Legal Usage (3d ed. 2011) ("a state of suspension [or] temporary nonexistence"); *Abeyance*, Cornell

Legal Information Institute-Wex (June 2022) (specifically citing example of plea in abeyance, explaining that the plea is entered only if the defendant fails to fulfill the specified conditions; otherwise, charges are dropped without entry of the plea). Courts routinely hold either particular aspects of a proceeding or entire proceedings in abeyance, and in no event does that mean the court has actually disposed of the case or particular piece being held in abeyance.[2]

California law confirms that the trial court did not actually accept the plea or enter judgment. For one, if the court *had* accepted Mr. Duarte's plea, it would've needed to set a "time for pronouncing judgment" no less than six hours and no more than five days after accepting the plea (or, subject to certain extensions, up to 110 days after)—but Mr. Duarte's next court date wasn't until six months later. Cal. Penal Code § 1449; ER-80. For another, California law would not have allowed a dismissal if judgment had already been entered. OB-17;

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[2] *See, e.g.*, *Vanderschuit v. Ryan*, No. CV-15-00915, 2016 WL 648622, at *1 (D. Ariz. Feb. 18, 2016) (holding habeas proceeding in abeyance "means that the Court will suspend any judgment one way or the other (neither granting nor dismissing)"); *Arkansas v. Gresham*, 141 S. Ct. 2461 (2021) (upon petitioner's motion, holding case in abeyance pending further order of the Court).

People v. Kim, 151 Cal. Rptr. 3d 154, 159 (Ct. App. 2012) (dismissals under California Penal Code § 1385(a) are "not authorize[d]" after "rendition of judgment"). Defendants point out that pleas in abeyance aren't listed in statute as a type of allowable plea, AB-33, but that doesn't help Defendants, either. To the contrary, that this type of agreement isn't codified anywhere in California law is further evidence that it was simply a private agreement between the prosecution and the defendant—not a conviction. *See Mitchell v. Kirchmeier*, 28 F.4th 888, 895 (8th Cir. 2022) (holding that analogous agreement was "simply a contract").[3]

If Defendants' position is that the plea agreement went into effect—such that a judgment was entered against Mr. Duarte—without the trial court's acceptance of the plea, they're wrong. Under California law, "[j]udicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution." *People v. Ellis*, 257 Cal. Rptr. 3d 79, 84 (Ct. App. 2019). That means a

[3] Defendants also fault Mr. Duarte for not exercising the right under California Penal Code § 1018 to substitute a not guilty plea for a guilty plea before judgment. *See* AB-34. That argument fails for two reasons: one, that statute only applies to guilty pleas, not no-contest pleas, and two, Mr. Duarte couldn't have withdrawn a plea that was never entered in the first place.

"plea bargain is ineffective unless and until it is approved by the court." *People v. Cantu*, 107 Cal. Rptr. 3d 429, 431 (Ct. App. 2010). Indeed, a court may even "initially indicate its approval of a plea agreement at the time of the plea," but later exercise its "broad discretion to withdraw its prior approval of a negotiated plea" up until sentencing. *People v. Flores*, 292 Cal. Rptr. 3d 488, 495 (Ct. App. 2022) (cleaned up).

California law thus makes clear that the plea agreement was never effective, because the trial court's acceptance of that plea was held in abeyance and then charges were dismissed without acceptance of the plea. Without an effective plea agreement, there is no conviction; without a conviction, there is no *Heck* bar.

2. The agreement to perform community service was not a "sentence."

Acknowledging that no conviction was ever entered against Mr. Duarte, *see* AB-11-12, Defendants take a different tack, arguing that the agreement between Mr. Duarte and the prosecution to perform 10 hours of community service at any nonprofit of Mr. Duarte's choice was "the equivalent of a sentence" such that the *Heck* bar applies. AB-31-32, 34. It's worth pausing on that for a moment: Defendants concede that the agreement to do community service was not *actually* a sentence under

California law, just as they concede that no conviction was *actually* entered against Mr. Duarte. Instead, they say that it was "the *equivalent* of a sentence." AB-34 (emphasis added). That's a glaring concession: *Heck* doesn't ask about "equivalents to" sentences or convictions, and Defendants do not cite a single case in the *Heck* context that supports their position.[4]

Defendants also don't explain how their argument could square with this Court's precedent, California law, or common sense. At the most basic level, this Court has held that "[t]here can be no sentence without a conviction." *Blazak v. Ricketts*, 971 F.2d 1408, 1413 (9th Cir. 1992). And the statute authorizing dismissals like Mr. Duarte's—California Penal Code § 1385(a)—"does not authorize a dismissal after imposition of sentence." *Kim*, 151 Cal. Rptr. 3d at 159. In fact, dismissing the case after

[4] The only two cases Defendants *do* cite in support of their extraordinary argument—*Barry v. Bergen Cnty. Prob. Dep't*, 128 F.3d 152 (3d Cir. 1997) and *Dow v. Cir. Ct. of the First Cir.*, 995 F.2d 922 (9th Cir. 1993)—are about habeas, not *Heck*. *See* AB-32-33. Both cases addressed the meaning of "in custody" for purposes of federal habeas; there was no dispute that the petitioners had been convicted and sentenced. *Dow*, 955 F.2d at 922-23; *Barry*, 128 F.3d at 154, 159-62. Defendants provide no authority for the idea that what counts as "in custody" for habeas purposes is the same as what counts as a "sentence" for *Heck* purposes.

Mr. Duarte had served a sentence would be "not only improper but also void." *Id.* at 161. Defendants' brief offers nothing in response.

Other features of California law also confirm that Mr. Duarte wasn't sentenced. For one, California law requires sentencing courts to "impose a separate and additional restitution fine" in "*every* case," unless the court makes a record of "compelling and extraordinary reasons for not doing so." Cal. Penal Code § 1202.4 (emphasis added). But there was no restitution fine imposed here, nor did the court state any reasons for not doing so. It didn't need to—because Mr. Duarte's agreement was not a "sentence." For another, Mr. Duarte couldn't be given a standalone sentence of community service under California law. Such a sentence would be allowed only if it were part of the statutory penalty (it is not), or if it were imposed in lieu of a fine, which would've required the court to explicitly state the amount of fines the service was replacing (it did not). *See* Cal. Penal Code § 148(a)(1) (punishment is fine up to $1,000, one year in jail, or both); § 1205.3 (allowing community service in place of fines, but only if court order specifies amount of fines to be replaced by service).

Nor do dictionary definitions support the idea that Mr. Duarte was "sentenced." Black's primary definition of "sentence" is "[t]he judgment that *a court formally pronounces* after finding a criminal defendant guilty." *Sentence*, Black's Law Dictionary (11th ed.) (emphasis added). Non-legal dictionaries define "sentence" similarly. *See, e.g.*, *Sentence*, Merriam-Webster's Dictionary (a "judgment," specifically "one *formally pronounced by a court or judge*") (emphasis added). No court "formally pronounced" a sentence here—rather, Mr. Duarte simply performed community service as part of an informal agreement with the prosecution.[5]

Finally, Defendants' definition of "sentence"—any "restraints on [] liberty not shared by the public generally" or any requirement for a person's "physical presence at a particular place," *see* AB-32-33—defies common sense. Accepting Defendants' definition would mean that *every*

[5] Defendants also contend that Mr. Duarte was "sentenced" because, according to Defendants, if Mr. Duarte failed to perform his end of the bargain, "there would be no need for a trial" and he would be sentenced to three years' informal probation. AB-34. In effect, Defendants claim there were *two* sentences in this case: the completed agreement to perform community service, *and* the prospective sentence of three years' probation—a proposition that makes little sense and for which they provide no authority.

person charged with a crime and released on recognizance pending trial in California would be "sentenced"—because, among other restrictions, they're forbidden from leaving the state without permission from the court. Cal. Penal Code § 1318(4). That's certainly a "restraint[] on [] liberty not shared by the public generally"—so, in Defendants' book, it's a "sentence." AB-33. But it cannot be the case that everyone released pretrial in California has been "sentenced" within the meaning of *Heck*, no matter the ultimate outcome of their criminal charges. This Court should reject Defendants' invitation to create such a "bizarre extension of *Heck*." *Wallace*, 549 U.S. at 393.

3. Defendants ask this Court to split from the majority of circuits, which hold that such agreements are neither convictions nor sentences.

Defendants acknowledge that most circuits to decide this issue have held that agreements like Mr. Duarte's do not constitute a conviction or a sentence, and thus do not trigger the *Heck* bar. *See* AB-41. Defendants' attempts to distinguish the decisions of those circuits are unpersuasive.

For example, Defendants contend this Court should ignore the Eighth Circuit's recent decision in *Mitchell v. Kirchmeier*, claiming it's "inapplicable" because there was "no indication in *Mitchell* that the

plaintiff there served any sentence whatsoever." AB-42. Not so. Like Defendants here, the district court and defendants in *Mitchell* specifically argued that the plaintiff served a "sentence" by entering a pretrial diversion program because "there was a judicially imposed limitation on his freedom." *Mitchell v. Kirchmeier*, No. 1:19-cv-149, 2020 WL 8073625, at *13 (D.N.D. Dec. 10, 2020) (cleaned up); Kirchmeier Resp. Br. at 20, *Mitchell*, 28 F.4th 888 (No. 21-1071), 2021 WL 2878753. The Eighth Circuit did not buy that argument, and this Court shouldn't either.

Likewise, Defendants claim the Sixth Circuit's opinion in *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633 (6th Cir. 2008), is of little use because "[t]here is no indication the plaintiff entered a plea or served any form of sentence." AB-41. That's wrong for two reasons. First, by Defendants' definition, the *S.E.* plaintiff *did* serve a "sentence": among other requirements, she had to participate in a drug education class as part of her diversion program. *See* Defs.' Supp. Summ. J. Mem., *S.E. v. Grant Cnty. Bd. of Educ.*, 522 F.Supp.2d 826 (E.D. Ky. 2007) (No. 06-CV-00124), 2007 WL 4515917. That's a "require[ment] to be in a certain place . . . to attend meetings"—Defendants' definition of a sentence. AB-32-33. Second, *S.E.*'s reasoning did not hinge on whether the plaintiff entered a

plea or had any "restraints on [her] liberty not shared by the public generally," AB-33. Instead, *S.E.* simply held that "where the plaintiff was neither convicted nor sentenced . . . *Heck* is inapplicable." 544 F.3d at 639. That holding applies with equal force here: Mr. Duarte was "neither convicted nor sentenced." *Id.*

Defendants' attempts to distinguish the Tenth Circuit's decision in *Vasquez Arroyo v. Starks*, 589 F.3d 1091 (10th Cir. 2009), are no more convincing. Defendants characterize that decision as a narrow one based on the particulars of Kansas law. AB-42-43. But under Defendants' overbroad definition of a "sentence," the plaintiff in *Vasquez* served one: he had to complete a drug and alcohol program, among other conditions. *See* Kan. Stat. Ann. § 22-2909(c) (1993); Compl., Ex. 2, *Vasquez v. Starks*, No. 07-3298, 2008 WL 11429983 (D. Kan. 2008) (diversion agreement requiring substance program, along with stipulation to facts supporting charge and payment of fines and fees); *cf.* AB-32-33 (defining sentence as any "require[ment] to be in a certain place . . . to attend meetings"). And particularly relevant here, *Vasquez* explicitly rejected the district court's rationale that the diversion program was "sufficiently analogous to a finding in a criminal action" such that *Heck* applied. 589 F.3d at 1094-95.

Defendants' similar contention that *Heck* applies when a plaintiff has "the equivalent of" a conviction or sentence, AB-35, would fare little better with the Tenth Circuit.

Finally, Defendants vaguely criticize the Eleventh Circuit's decision in *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007), as "circular." AB-43. They also claim that *McClish* did not say whether the plaintiff "pled to any charge or served any sentence," AB-43, but under Defendants' definition of "sentence," Florida's pretrial intervention programs are necessarily a "sentence." *See* Fla. Stat. § 948.08 (2002) (pretrial intervention program "shall provide appropriate counseling, education, supervision, and medical and psychological treatment"); AB-32-33 (defining "sentence" to include any requirement for "physical presence at a particular place"). In any event, *McClish* did not probe the specifics of Florida law. Instead, it rested its holding on the clear dictates of *Heck* and *Wallace*: *Heck* does not apply when the plaintiff, like Mr. Duarte, "was never convicted of *any* offense." *McClish*, 483 F.3d at 1251.

California law, this Court's precedent, and the majority view of the circuits all confirm what the record makes clear: Mr. Duarte was neither convicted nor sentenced, because judgment was never entered against

him, all charges were dismissed without the court ever accepting the plea, and the agreement to perform volunteer work was just that—an agreement.

B. Even if there were somehow a "conviction or sentence," *Heck* does not apply because Mr. Duarte's criminal case was favorably terminated.

Defendants have not met their burden to show that Mr. Duarte was convicted or sentenced; this Court can end its inquiry there. *Supra* at 3-12; OB-13-21. But even if an informal agreement with the prosecution to perform community service could somehow be considered a conviction or sentence, *Heck* still would not bar Mr. Duarte's claims because the criminal proceedings against him were favorably terminated: all charges were dismissed against him, his plea was vacated, or both. *See* OB-22-25.

1. The Supreme Court recently resolved any doubt about whether dismissal of charges constitutes a favorable termination for § 1983 malicious prosecution suits. *Thompson v. Clark*, 142 S. Ct. 1332, 1335 (2022); OB-22-24. Before *Thompson*, most circuits held that favorable termination for purposes of a § 1983 malicious prosecution claim required "some affirmative indication of innocence." *Id.* at 1336. *Thompson* rejected that standard, holding instead that "a plaintiff need only show

that his prosecution ended without a conviction"—in Mr. Thompson's case, that it ended in the dismissal of charges. *Id.* at 1335-36.

Of course, as Defendants rightly note, *Thompson* answered the favorable termination question in a different context. *See* AB-28. But that doesn't help Defendants, because the favorable termination standard for malicious prosecution is narrower and more stringent than for *Heck*. *See Roberts v. City of Fairbanks*, 947 F.3d 1191, 1202 (9th Cir. 2020). That is, fewer kinds of terminations count as favorable for malicious prosecution claims than for *Heck*. *Id.* So if dismissal of charges satisfies the more demanding standard for malicious-prosecution favorable termination, surely it also satisfies the standard for *Heck*. *See* OB-22-24.[6]

2. The only other possible termination mentioned in Mr. Duarte's case—vacatur—similarly qualifies as a "favorable termination." ER-75; OB-24-25. As this Court held in *Roberts*, any vacatur constitutes a

[6] Defendants also argue that *Thompson* isn't relevant because Mr. Thompson neither pled guilty nor was sentenced before charges were dismissed. AB-28. That makes sense—courts and prosecutors don't dismiss charges *after* a defendant has pled guilty and served a sentence, yet another indication that Mr. Duarte didn't do either. *Supra* at 3-12. But even assuming Mr. Duarte *had* served a sentence, *Thompson* stands for the proposition that dismissal is a favorable termination, no matter what happened before dismissal. 142 S. Ct. at 1335.

favorable termination for *Heck* purposes. 947 F.3d at 1201-02. Defendants contend *Roberts* is inapposite because there were doubts about the plaintiffs' guilt in that case. AB-28. But the *Roberts* plaintiffs signed settlement agreements stipulating that their convictions "were properly and validly entered based on proof beyond a reasonable doubt." *Roberts*, 847 F.3d at 1195. Ultimately, Defendants' argument is simply that *Roberts* was wrong—as further evidenced by Defendants' repeated reliance on the dissent. *See* AB-16, 27, 29. But that's not up to a three-judge panel to decide, particularly where intervening Supreme Court precedent—*Thompson*—has, if anything, affirmed that *Roberts* got it right. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).[7]

3. Defendants ask this Court to side with the minority view of circuits when it comes to similar terminations, contending that those circuits "promote[ ] the purposes of *Heck*" by focusing on a "plaintiff's

[7] Defendants also argue that there was no vacatur. AB-30. But the plea agreement says otherwise, providing that Mr. Duarte's charges would be "vacate[d] and dismiss[ed]" after the abeyance period expired. ER-75. Again, it's Defendants' burden to show that *Heck* applies, so any ambiguity is construed in Mr. Duarte's favor. *Washington*, 833 F.3d at 1056 & n.5. In any event, even if charges were dismissed without vacatur, *Thompson* tells us that's still a favorable termination. *Thompson*, 142 S. Ct. at 1335.

guilt, or at least lack of established innocence." AB-40. Defendants are wrong about the purposes of *Heck*. *Heck*'s favorable termination requirement isn't about a plaintiff's "lack of established innocence," AB-40, as *Thompson* just made clear. *See Thompson*, 142 S. Ct. at 1338. Rather, that requirement's purpose is to "(i) [ ] avoid[ ] parallel litigation in civil and criminal proceedings over probable cause and guilt; (ii) [ ] preclude[ ] inconsistent civil and criminal judgments . . . ; and (iii) [ ] prevent[ ] civil suits from being improperly used as collateral attacks on criminal proceedings." *Id.* Innocence simply isn't a part of the analysis: it all turns on whether the "prosecution ended without a conviction." *Id.* at 1341.

Because of their misguided focus on "innocence," the circuits Defendants rely on get the doctrine wrong. For example, the Second Circuit cases Defendants cite cannot be reconciled with *Thompson*. *Compare Singleton v. City of New York*, 632 F.2d 185, 193-94 (2d Cir. 1980) (pretrial diversion is not favorable termination for malicious prosecution claim because it does not "establish" the plaintiff's "innocence"), *with Thompson*, 142 S. Ct. at 1335 ("To demonstrate a favorable termination . . . a plaintiff need only show that his prosecution

ended without a conviction."). The same goes for the Fifth Circuit. *See Taylor v. Gregg*, 36 F.3d 453, 455-56 (5th Cir. 1994) (adopting Second Circuit's indications of innocence standard for malicious prosecution claims).[8] In any event, even before *Thompson*, the Second Circuit had cabined *Singleton* to the malicious prosecution context; for all other § 1983 claims (including excessive force), similar agreements constituted a favorable termination. *Smalls v. Collins*, 10 F.4th 117, 138, 142-43 (2d Cir. 2021); OB-27-28. And as the opening brief explained, the Third Circuit got it equally wrong by ignoring the antecedent question of whether a similar agreement constitutes a "conviction or sentence" at all. *See Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005); OB-20-21; *McClish*, 483 F.3d at 1251 (declining to follow *Gilles* for that reason).

[8] Contrary to Defendants' assertion, the Fifth Circuit has never decided whether a *successfully* completed agreement akin to Mr. Duarte's would invoke the *Heck* bar. *See DeLeon v. City of Corpus Christi*, 488 F.3d 649, 656 (5th Cir. 2007); *cf. Taylor*, 36 F.3d at 456-57 (declining to decide whether such agreements bar § 1983 false arrest claims). In any event, the reasoning of *DeLeon* and *Taylor* does not survive *Thompson*, and those cases would not be decided the same way today.

C. Defendants do not show that success on Mr. Duarte's claim would *necessarily* imply the invalidity of his purported conviction.

Heck does not bar Mr. Duarte's excessive-force claim for yet another reason: As this Court just reiterated *en banc*, prevailing on a § 1983 excessive-force claim does not *necessarily* imply the invalidity of a conviction for resisting arrest under California Penal Code § 148(a)(1). *See Lemos v. Cnty. of Sonoma*, 40 F.4th 1002, 1006-09 (9th Cir. 2022) (en banc). Instead, courts must examine the record of the criminal case to figure out which acts may have undergirded the conviction and which acts could support an excessive-force claim. *Id.* at 1006. As long as there is at least one version of events where a § 148(a)(1) conviction could coexist with an excessive-force claim, the claim is not *Heck* barred. *Id.* at 1006-09; OB-31-37. Put differently, to successfully invoke the *Heck* bar, Defendants must show that *no* version of events could exist that would allow for a still-valid conviction. *See Washington*, 833 F.3d at 1056 n.5; *Sanford v. Motts*, 258 F.3d 1117, 1119 (9th Cir. 2001) ("It was the burden of the defendants to establish their defense by showing what the basis [for the conviction] was.").

Defendants insist that there must be "spatial or temporal distinction" between the acts underlying Mr. Duarte's "conviction" and the acts supporting his excessive-force claim. AB-24. But that argument is squarely foreclosed by this Court's precedent. Even if the events at issue were "one continuous transaction," and even if that single transaction were as brief as "45 seconds," *Heck* still doesn't necessarily bar an excessive-force claim. *See, e.g.*, *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1129, 1134 (9th Cir. 2011). The critical question is whether there were at least two different actions within that single "continuous transaction," one of which could have formed the basis for the conviction and one of which could form the basis for a successful excessive-force claim. *Id.* at 1134.

In *Hooper*, this principle meant that a woman who was bitten by a police dog while resisting arrest was not *Heck*-barred by her § 148(a)(1) conviction from pursuing an excessive-force claim, even though the events constituted "one continuous transaction" and took place in only 45 seconds. *Id.* at 1129, 1133-34. Similarly, in *Lemos*, *Heck* did not bar an excessive-force claim by the plaintiff for being tackled by an officer, even though the tackling was part of the same "uninterrupted interaction" as

the actions underlying her conviction. 40 F.4th at 1007-08. Indeed, *Lemos* specifically rejected the district court's rationale—echoed by Defendants here—that *Heck* must apply where "there was 'no temporal or spatial distinction or other separation'" between the two actions. *Id.* at 1007.

Here, as the opening brief recounts, multiple versions of events allow Mr. Duarte's theoretical § 148(a)(1) "conviction" to coexist with his excessive-force claim. OB-31-37. Defendants even concede that the record supports at least two of those versions of events. *See* AB-22. In one, the act that could've undergirded Mr. Duarte's "conviction" was him allegedly pushing Defendant Gandy. AB-22; ER-54 (Gandy incident report stating Mr. Duarte "pushed away at me"). In that version of events, two other acts could support Mr. Duarte's excessive-force claim while still being consistent with his "conviction": Defendant Hachler breaking Mr. Duarte's leg with a baton, and officers forcing Mr. Duarte to walk on his broken leg several minutes later.[9] OB-32-33. In another version of events,

[9] Defendants claim "there is no evidence any officer knew [Mr. Duarte] had a broken leg." AB-26. That's blatantly contradicted by the record. For one, Gandy's own report says otherwise. ER-55 (Mr. Duarte "complained that his left ankle was broken . . . from being struck by the police baton" and that "he couldn't walk on it"). And Gandy's bodycam video shows Mr. Duarte repeatedly telling officers they broke his leg, as well as Mr. Duarte moaning in pain. *See, e.g.*, D.Ct. Dkt. 52-10, Ex. G., Ex. 1 [Gandy

Mr. Duarte's failure to put his hands behind his back when Gandy ordered him to do so could support his "conviction," while the same two uses of force—Hachler breaking Mr. Duarte's leg and officers forcing Mr. Duarte to walk on his broken leg—could support an excessive-force claim. *Id.* Because "the subsequent use[s] of excessive force [would] not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness" of Mr. Duarte's alleged "attempt to resist it," *Lemos*, 40 F.4th at 1008 (cleaned up), an excessive-force claim based on these versions of events would not undermine any "conviction."

Defendants also trot out the district court's erroneous distinction between excessive force used *before* Mr. Duarte was handcuffed and excessive force used *after* Mr. Duarte was handcuffed. *See* AB-25-26. But the opening brief recounts why this Court's precedent forecloses such a distinction. OB-35-36. In *Smith*, this Court held *en banc* that *Heck* did not bar an excessive-force claim where the force at issue was used against an unrestrained suspect who was still in the process of being arrested.

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video 1, evidence ID 694926], at 1:13 (in response to being told to stand up, Mr. Duarte says "I can't, my leg's broken, dude, you broke my leg"); 1:15 ("I swear you broke my leg"); 1:26 ("You broke my leg, officer"); 1:45 ("Officer, you broke my leg").

394 F.3d at 699. Indeed, *Smith* rejected this precise argument—attempting to distinguish between excessive force used "*while* [the plaintiff] was being arrested" and excessive force used "after [the] arrest was made"—made in a dissent. *See id.* at 707-08 (Silverman, J., dissenting). More recently, in *Lemos*, this Court again held *en banc* that an excessive-force claim based on force used *before* the plaintiff was handcuffed was not *Heck*-barred. *Lemos*, 40 F.4th at 1004, 1007 (alleged excessive force was officer tackling plaintiff before handcuffing her). In any event, at least one act that could support an excessive-force claim—officers forcing Mr. Duarte to walk over 60 feet on a broken leg—occurred after Mr. Duarte had been handcuffed. ER-58.

In short, Defendants must prove that there is no version of events where the § 148(a)(1) "conviction" and the alleged excessive force could be based on different actions. *See Washington*, 833 F.3d at 1056 n.5; *Sanford*, 258 F.3d at 1119. They do not and cannot meet this burden. Success on Mr. Duarte's excessive-force claim would thus not *necessarily* imply the invalidity of his purported conviction.

D. *Heck* also does not apply because habeas was never available to Mr. Duarte and because no factual basis is required for a no-contest misdemeanor plea under California law.

Finally, *Heck* also does not apply here because of two features of Mr. Duarte's criminal proceedings: one, Mr. Duarte never had access to habeas or other similar post-conviction relief, and two, California law does not require a factual basis for a no-contest misdemeanor plea.

1. This Court's precedent holds that if a plaintiff never had access to federal habeas or similar state proceedings in their criminal case through no fault of their own, *Heck* does not bar their civil claims. OB-41-44; *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002); *Martin*, 920 F.3d at 613. In response, Defendants claim that *Nonnette* only applies to prisoners challenging good-time credits. AB-45. That's not right. As this Court explained in *Martin*, the central holding of *Nonnette* asks whether the plaintiff had an opportunity to challenge their conviction, whether via federal habeas or proceedings in state court. *Martin*, 920 F.3d at 613. If the answer is no—as in Mr. Duarte's case—then *Heck* does not bar their claims. *Id.* If the answer is yes, and the plaintiff squandered that opportunity, then *Heck* may apply. *Id.*

The latter scenario is precisely what happened in the two cases Defendants rely on. *See* AB-45 (citing *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2006), and *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 (9th Cir. 2015)). In both cases, the plaintiffs failed to timely take advantage of available opportunities to challenge their convictions. *Guerrero*, 442 F.3d at 705 (plaintiff "never challenged his convictions by any means" prior to suing under § 1983, even though habeas relief was unquestionably available to him during his years-long state prison sentence); *Lyall*, 807 F.3d at 1183 (plaintiff could've appealed conviction under state law, but failed to do so).

Defendants also say that *Nonnette* is about whether it would be "patently unfair" to apply the *Heck* bar to a particular plaintiff. AB-45. Even if that's true, it would surely be unfair to apply *Heck* to a plaintiff like Mr. Duarte, who was (1) neither convicted nor sentenced, (2) had all charges against him dismissed, and (3) had no opportunity to challenge his purported "conviction," whether in federal habeas or state proceedings. *See supra* at §§ I(A)-(B). In any event, as five justices held in *Spencer*, *Heck* is simply about "avoid[ing] collisions at the intersections of habeas and § 1983." *Spencer v. Kenma*, 523 U.S. 1, 20-21 (1998)

(Souter, J., concurring); *see* OB-41-42 (explaining five-justice view in *Spencer*). If there's no applicable post-conviction or direct appeal statute for § 1983 to conflict with, then *Heck* doesn't apply. *See* OB-41-43.[10]

2. Defendants admit that California law doesn't require a factual basis for a no-contest plea to a misdemeanor. AB-18; *see* OB-38-40 (citing authorities). Indeed, the California Supreme Court has explicitly held that no-contest pleas are not reliable indicators of guilt, unlike guilty pleas. *Cartwright v. Bd. of Chiropractic Examiners*, 548 P.2d 1134, 1142 (Cal. 1976).

Defendants' primary rejoinder is that even though no factual basis was required, the trial court found a factual basis anyway when it "accepted" the plea. AB-18-19. But that argument hinges on Defendants' incorrect representation of the record. In reality, the finding of a factual basis would have gone hand-in-hand with acceptance of the plea. *See* ER-

[10] Defendants also attempt to undermine this Court's controlling precedent in *Nonnette* by characterizing it as an outlier among circuits. AB-44-46. That's simply not the case: at least five circuits agree. *See* OB-43-44 & n.10 (citing cases from the Second, Fourth, Sixth, Tenth, and Eleventh Circuits). Indeed, both the Sixth and Eleventh Circuits applied this precise reasoning to hold that agreements like Mr. Duarte's do not trigger the *Heck* bar. *See* OB-44; *McClish*, 483 F.3d at 1252 n.19; *S.E.*, 544 F.3d at 639.

76 ("The Court finds that . . . there is a factual basis for the plea(s). The Court accepts the defendant's plea(s) and admission(s) . . . ."). But because the trial court never actually accepted the plea, those purported findings were never entered, either. *Supra* at 4-8; OB-15-16.[11]

* * *

Defendants' attempt to invoke the *Heck* bar fails at the first and most crucial step: proving the existence of an "outstanding criminal judgment." *Wallace*, 549 U.S. at 393. It fails again at every subsequent step. For one, all charges were dismissed against Mr. Duarte, which recent Supreme Court precedent tells us is a favorable termination. For another, there are multiple versions of events where success on Mr. Duarte's excessive-force claim would not *necessarily* imply that his "conviction" was invalid, because different acts underlie the civil and criminal claims. And even in a world where Defendants could win at

[11] Defendants also claim that this Court has, in fact, "squarely addressed" whether no-contest and guilty pleas are treated the same for *Heck* purposes. AB-17-18 & n.6. But in the only published case Defendants cite, *Szajer v. City of Los Angeles*, 632 F.3d 607 (9th Cir. 2011), the plaintiffs never argued that no-contest pleas should be treated differently under *Heck*. *See* Opening Br. at 12-14, *Szajer*, 632 F.3d 607 (No. 08-57010) (contesting *Heck*'s application, but not arguing that no-contest pleas are different).

those steps, there are yet more reasons why *Heck* doesn't apply: Mr. Duarte never had access to federal habeas or state post-conviction proceedings, and California law does not require a factual basis for no-contest misdemeanor pleas.

Defendants cannot successfully invoke *Heck* unless they win on each and every one of these issues. *See Smith*, 394 F.3d at 699 n.5; *Washington*, 833 F.3d at 1056 & n.5. Defendants' arguments twist the record, flout controlling precedent, and fail to meet their burden. This Court should hold that *Heck* does not bar Mr. Duarte's claims.

II. Mr. Duarte's *Monell* Claim Should Not Have Been Dismissed.

The district court granted Defendants' motion to dismiss Mr. Duarte's *Monell* claim against the City of Stockton and the Stockton Police Department for one reason, and one reason only: it believed that neither Defendant qualified as a "person" for § 1983 purposes. ER-67-68. Controlling caselaw from this Court and the Supreme Court says otherwise.

As for the City of Stockton, Defendants do not bother defending the district court's finding. *See* AB-3-4. Nor could they: it is beyond dispute

that cities are "persons" within the meaning of § 1983. OB-46; *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 662-63 (1978).

As for the Stockton Police Department, Defendants concede that this Court's binding precedent treats California's municipal police departments as "persons" under § 1983. *See* AB-49. They're right, and that ends the inquiry: this Court explicitly held so in *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir. 1988). Defendants' only rejoinder is that *Karim-Panahi* is "older" and, according to them, on "shaky legal ground." AB-49-50. But that *Karim-Panahi* is "older" of course means that it is controlling over any subsequent precedent. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("[T]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals."). And even if this three-judge panel could consider Defendants' assertion that *Karim-Panahi* is on "shaky legal ground," all Defendants point to in support of that assertion is a one-judge concurrence in a case involving a different statute and a handful of district court cases that either aren't about this issue or else don't say what Defendants say they

do.[12] *See* AB-48-51. Defendants also protest that the opening brief didn't analyze how California law classifies police departments. *See* AB-50. But that's because there was no need to: *Karim-Panahi* already did that analysis before concluding that as a matter of federal law, California police departments are "persons" under § 1983. *Karim-Panahi*, 839 F.2d at 624 n.2; *see Streit v. Cnty. of Los Angeles*, 236 F.3d 552, 560 (9th Cir. 2001) (this Court "must consider the state's legal characterization of the government entities which are parties to [§ 1983] actions," but "federal law provides the rule of decision"). Defendants offer no reason why *Karim-Panahi*'s analysis got it wrong.

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[12] The only district court case Defendants cite involving a police department says the opposite of what Defendants claim. *Sussman v. San Diego Police Dep't*, No. 20-CV-1085, 2022 WL 961559, at *9 (S.D. Cal. Mar. 30, 2022) (holding the San Diego Police Department *is* a municipality that could be sued in a *Monell* claim). The others are about entirely different issues, like whether county-run hospitals can be sued for negligence or employment discrimination. *See, e.g.*, *Williams v. Lorenz*, No. 15-cv-04494, 2018 WL 5816180, at *3 (N.D. Cal. Nov. 5, 2018) (employment discrimination against county-run hospital); *Johnson v. Valley Medical Moorpark Lab Clinic*, No. 4:13-cv-00090, 2013 WL 12174692, at *2 (E.D. Ark. Nov. 18, 2013) (negligence against county-run medical lab that is subsidiary of county-run hospital); *Walker v. Child Protective Servs.*, No. 1:22-cv-00466, 2022 WL 1645089, at *4 (E.D. Cal. May 24, 2022) (county department of social services); *Langley v. Twin Towers Corr. Facility*, No 2:20-cv-009593, 2021 U.S. Dist. Lexis 253169, at *10 (C.D. Cal. Nov. 22, 2021) (correctional facility).

Finally, Defendants contend that this Court should affirm on alternative grounds, characterizing Mr. Duarte's *Monell* allegations as overly "conclusory." AB-52-55. This Court should decline the invitation. Even if this Court believes the *Monell* allegations to be too conclusory (and they aren't), the district court denied Mr. Duarte leave to amend his *Monell* claim because of its erroneous view of "person" under § 1983. ER-69. Mr. Duarte thus never had a chance to add more detail to his *Monell* claim. And as this Court has made clear, "dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (cleaned up). Defendants don't, and can't, contend that Mr. Duarte's *Monell* allegations "could not be saved by any amendment." *Id.* At minimum, then, this Court should reverse the dismissal of Mr. Duarte's *Monell* claim and allow him the opportunity to amend his complaint on remand.

CONCLUSION

This Court should reverse the district court and remand for further proceedings.

Dated: September 19, 2022 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32 and 9th Circuit Rule 32-1, I certify that:

This brief complies with the type-volume limitation of 9th Cir. R. 32-1(b) because this brief contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 9th Cir. R. 32-1(c).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Respectfully submitted,

/s/ Elizabeth A. Bixby

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2022, I electronically filed the foregoing *Appellant's Reply Brief* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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