No. 17-16980

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS TAYLOR, A SINGLE MAN,
Plaintiff-Appellee,

v.

COUNTY OF PIMA, A BODY POLITIC, AND
THE CITY OF TUCSON, A BODY POLITIC,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona

Case No. 4:15-CV-00152-TUC-RM
Honorable Rosemary Marquez, Presiding

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE INNOCENCE PROJECT, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, THE NATIONAL POLICE ACCOUNTABILITY PROJECT, CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AT NYU SCHOOL OF LAW, HUMAN RIGHTS DEFENSE CENTER, AND NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLANTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers does not have a parent corporation or issue publicly traded securities.

The National Police Accountability Project is a nonprofit organization that has no parent company and does not issue stock.

California Attorneys for Criminal Justice does not have a parent corporation or issue publicly traded securities.

The Center on the Administration of Criminal Law at NYU School of Law does not have a parent corporation or issue publicly traded securities.

The Human Rights Defense Center does not have a parent corporation or issue publicly traded securities.

The New Mexico Criminal Defense Lawyers Association has no parent corporation and issues no publicly traded securities.

The Innocence Project has no parent corporation and issues no publicly traded securities.

/s/ *Donald M. Falk*

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Robert H. Jackson, *The Federal Prosecutor*,
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INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for persons accused of crime and other misconduct. NACDL has thousands of members nationwide and when its affiliates' members are included, total membership amounts to approximately 40,000 attorneys. NACDL's members include public defenders, criminal defense attorneys, law professors, U.S. military defense counsel, and even judges.

NACDL strives to preserve fairness and justice within the American criminal justice system. To advance that purpose, NACDL files numerous amicus briefs each year addressing issues of importance to criminal defendants, criminal defense lawyers, and the entire criminal justice system.

California Attorneys for Criminal Justice (CACJ) is the second largest organization of criminal defense lawyers in California, and the largest statewide affiliate of NACDL. CACJ has more than 1,500 members, most of whom are lawyers who practice law in the federal and state courts throughout California. CACJ's members include public

defenders as well as lawyers in private practice. Among CACJ's stated purposes is the defense of individuals' rights under the U.S. and California Constitutions. Throughout its more than 35 years of existence, CACJ has appeared as an *amicus curiae* in matters of importance to its membership, including before the United States Supreme Court, the California Supreme Court and before several federal courts of appeals, including this one.

The Innocence Project provides *pro bono* legal services and other resources to indigent prisoners whose innocence may be established through post-conviction DNA testing. To date, the Innocence Project and affiliated organizations have used DNA evidence to exonerate 364 individuals wrongfully convicted of crimes they did not commit. In almost half of those cases, the work of the Innocence Project also helped to identify the real perpetrators of the crimes.

In addition to post-conviction litigation, the Innocence Project works to prevent future miscarriages of justice by identifying the causes of wrongful convictions, participating as *amicus curiae* in cases of broader significance to the criminal justice system, and pursuing legislative and administrative reforms—all with the aim of enhancing the truth-seeking

function of the criminal justice system. The Innocence Project's work helps to ensure a more just society—and a safer one—by preventing wrongful convictions that not only destroy lives, but often allow the actual perpetrators of serious crimes to remain at large.

As a leading national advocate for the wrongly convicted, dedicated to improving the criminal justice system, the Innocence Project has a compelling interest in ensuring that civil legal remedies are available to wrongfully convicted individuals.

The National Police Accountability Project (NPAP) is a nonprofit, public interest organization dedicated to protecting the rights of individuals in their encounters with law enforcement. NPAP was founded in 1999 by members of the National Lawyers Guild. NPAP has more than five hundred attorney members throughout the United States who represent people in civil rights, police misconduct, and prison conditions cases. NPAP provides public education and information on issues relating to police misconduct and supports reform efforts aimed at increasing police accountability. NPAP often presents the views of victims of civil rights violations through *amicus curiae* filings in cases raising issues likely to have a broad impact beyond the interests of the

parties. One of the central missions of NPAP is to promote the accountability of law enforcement and government officials for violations of the Constitution or laws of the United States.

The Center on the Administration of Criminal Law at NYU School of Law is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and public policy advocacy.[1] The Center regularly participates as *amicus curiae* in cases raising substantial legal issues regarding interpretation of the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law-enforcement priorities.

The Human Rights Defense Center (HRDC) is a nonprofit 501(c)(3) corporation headquartered in the State of Florida that advocates for the human rights of people held in state and federal prisons, local jails,

[1] The Center on the Administration of Criminal Law is affiliated with New York University, but no part of this brief purports to represent the views of New York University School of Law or New York University.

immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing two monthly publications, *Prison Legal News* (PLN), which covers national and international news and litigation concerning prisons and jails, as well as *Criminal Legal News* (CLN), which is focused on criminal law and procedure and policing issues. HRDC also publishes and distributes self-help reference books for prisoners, and engages in state and federal court litigation on prisoner rights issues, including wrongful death, public records, class actions, and Section 1983 civil rights litigation concerning the First Amendment rights of prisoners and their correspondents.

The New Mexico Criminal Defense Lawyers Association is a voluntary membership organization whose members spend their time actively engaged in practice on behalf of the accused in the state and federal courts. The NMCDLA's mission is to advocate for fair and effective criminal justice in the courts, legislature, and community. NMCDLA members have advocated at trial, on direct appeal, in post-conviction proceedings, and in civil rights actions on behalf of the actually innocent.

The *amici*'s interest in this matter arises from the involvement of their members in litigation and policy advocacy related to wrongful convictions and wrongful imprisonments, and in ensuring that the rights of individuals who have been wrongfully imprisoned are fully protected. Wrongful convictions based on fabricated evidence and willful law enforcement misconduct present stark reminders of the importance of civil legal remedies to deter future governmental misconduct and to compensate wrongfully convicted individuals.

For all these reasons, the *amici* have an interest in a rehearing of this case that would permit redress for gross injustices of the type at issue here.

No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

All parties in this matter have consented to the filing of this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition presents two important questions that are critical to the ability of persons who have been wrongfully imprisoned to recover for the lost years of their lives: whether the bar of *Heck v. Humphrey*, 512 U.S. 477 (1994), applies to persons who are no longer imprisoned and had no chance to seek *habeas* relief, and whether a no-contest plea entered upon release "caused" the preceding period of incarceration.

The legal issues are sharply drawn. As the petition explains, each issue has produced divergent opinions in this and other courts of appeals. Indeed, the two panel members from this Court are on opposite sides in this very case. The deep injustice of the panel decision, which bars Louis Taylor from recovering compensation for his 42 years of racially motivated imprisonment for what apparently was no crime at all, makes it an ideal vehicle to rehear the erroneously decided questions presented here.

Those issues warrant rehearing because the panel majority's misapplication of *Heck*, together with the majority's idiosyncratic view of causation, will produce systemically harmful results. If the panel decision stands, prosecuting authorities who learn that an inmate's

conviction is unsustainable have a strong incentive—and a virtually fail-safe tool—to buy themselves immunity from the consequences of misconduct. All they need to do is offer immediate release conditioned on the inmate's no-contest plea to the charges underlying the false conviction, with a stipulated sentence of time served.

A wrongfully convicted inmate should not be put to the choice of languishing even longer in prison or waiving the right to be compensated for the government's theft of years of his life. As Judge Schroeder observed, correctly interpreted, the "law is not that unjust." Add. 19. The petition for rehearing should be granted and the judgment reversed.

ARGUMENT

The issues presented for rehearing are both common and significant. The panel decision approves a blueprint for governments to immunize themselves from liability for the most egregious miscarriages of justice. The tactic at issue is already used frequently both in and out of this Circuit. And the panel decision misapprehends both *Heck's habeas*-based limitation on Section 1983 actions and the most basic principles of causation.

A. Rehearing Is Warranted to Preclude Governments from Immunizing Themselves from Liability by Conditioning Release from Wrongful Incarceration on a No-Contest Plea.

In the experience of the *amici* and their members, governments commonly make immediate release from incarceration based on an invalid conviction contingent on the defendant's *post hoc* no-contest plea. The panel majority's opinion makes that tactic a nearly fail-proof means to provide immunity from wrongful imprisonment liability. Once a government determines that a defendant was wrongfully imprisoned based on an invalid conviction where guilt could not be proved at retrial, the prosecutor can immunize the relevant agencies by offering immediate release on the condition that the wrongful conviction be vacated and replaced with a no-contest plea to time served. This case should be reheard to prevent that result.

1. The inherently coercive no-contest plea required as a condition of release from wrongful imprisonment should not be allowed to confer immunity.

The no-contest plea imposed as a condition of Taylor's release was the product of extreme and unconstitutional coercion. Taylor had already spent 42 years in prison for a crime that, in all probability, did not even occur. His conviction could not possibly withstand collateral review, and

a second conviction following retrial was exceedingly unlikely, if not impossible. But the government could easily prolong the process for years until Taylor's case was complete at both the trial and appellate levels. Fact and expert discovery could take months, briefing and a hearing months more, and a decision months beyond that—followed in the best case by another year of delay on appeal, and possibly by new federal *habeas* proceedings and reprosecution as well.

As Justice O'Connor observed long ago, "[t]he coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole." *Town of Newton v. Rumery*, 480 U.S. 386, 400 (1987) (O'Connor, J., concurring in part and in the judgment). That coercive power is at its apogee when the victim has already been imprisoned for decades as the result of official abuse.

In light of the panel decision in the present case, a no-contest plea like Taylor's has the same immunizing effect as the release-dismissal agreement evaluated in *Rumery*, where prosecutors dismissed unproved charges in exchange for a release from liability for police and other government misconduct. This Court and other courts decline to enforce

release-dismissal agreements if enforcement will harm the public interest, as may occur when there is substantial evidence of police misconduct. *See Lynch v. City of Alhambra,* 880 F.2d 1122 (9th Cir. 1989); *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390 (9th Cir. 1991); *Coughlen v. Coots*, 5 F.3d 970, 975 (6th Cir.1993).

Here there was substantial evidence of prosecutorial and police misconduct. And the no-contest plea requirement would not survive the type of case-specific analysis that *Rumery* requires. *See* 480 U.S. at 397–98. Taylor's plea was coerced rather than voluntary, and for this 42-year-old case the prosecutor was unlikely to produce "an independent, legitimate reason to make this agreement" that "directly related to his prosecutorial responsibilities." *Id.* at 398. The release-dismissal agreement in *Rumery* was enforceable because the plaintiff's waiver of a "questionably valid civil action" "did not have a significant impact upon the public at large," while the agreement served an admittedly legitimate criminal justice objective: "avoidance of embarrassment to and public scrutiny of the … complainant in a sexual assault case." *Davies*, 930 F.2d at 1396–97 (citing *Rumery*, 480 U.S. at 394–95). Here, in contrast, there were no witnesses to protect from "the public scrutiny and

embarrassment" of testimony. *Rumery*, 480 U.S. at 398. Rather, the only beneficiaries (other than the public purse) were prosecutors and expert witnesses from more than four decades earlier, who had no legitimate right to protection from well-warranted "public scrutiny."

Moreover, using a no-contest plea or release-dismissal agreement to extract a waiver of *meritorious* misconduct claims as a condition for freeing an innocent man is the opposite of "an independent, legitimate reason to make th[e] agreement." *Rumery*, 480 U.S. at 398. As this Court has observed, a prosecutor's legitimate "interest in a particular case is not necessarily to win, but to do justice." *United States v. Chapman*, 524 F.3d 1073, 1088 (9th Cir. 2008). That interest derives from the "twofold aim" recognized by the Supreme Court: "that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). As Justice Jackson observed while Attorney General, "[a]lthough the government technically loses its case, it has really won if justice has been done." Robert H. Jackson, *The Federal Prosecutor*, 24 Am. Jud. Soc'y 18 (1940).

When a no-contest plea has been the condition of release from wrongful imprisonment, flatly barring Section 1983 lawsuits disserves

one of the primary purposes of that civil rights law. "[T]he purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978)). Deterrence necessarily fails if the offending agencies can relieve themselves of the consequences of their misconduct with a second abuse of authority.

In addition, the Innocence Project has documented additional benefits from Section 1983 lawsuits that addressed misconduct by prosecuting authorities. Exposure through civil rights litigation can lead to prosecutorial reforms designed to prevent wrongful convictions, a benefit to all citizens. For example, after Michael Green was exonerated in a civil lawsuit, Cleveland audited its forensic laboratory—an audit that led to the exoneration of two more men and the termination of Cleveland's forensic criminalist. *See* The Innocence Project, Michael Green, https://tinyurl.com/y7ofqmap. Similarly, the settlement of a wrongful imprisonment lawsuit by Obie Anthony led Los Angeles County to create a system for tracking and disclosing benefits to witnesses to prevent *Brady* violations like the one that underlay the settlement.

Wrongful imprisonment as a result of official misconduct is not rare. According to the National Registry of Exonerations, the definitive source, 1,260 exonerations since 1989 have involved some form of official misconduct, and account for more than 13,200 years lost due to wrongful imprisonment. NAT'L REG. EXONERATIONS, EXONERATIONS IN THE UNITED STATES, https://tinyurl.com/jo85y77. In 2017 alone, 84% of exonerations related to homicides involved some form of official misconduct. EXONERATIONS IN 2017, *supra*, at 2.

Unlike demands for liability releases for typical civil disputes, the imposition of a release of liability as a condition for release from prison does not provide a potential litigant the choice of waiting with the confidence that a favorable result in the end will provide full compensation including the time-value of the delay. Compensation for wrongful conviction, while better than nothing, does not replace the lost years of a person's life, and there is no equivalent of prejudgment interest that extends a lifespan. Because wrongful conviction cases are difficult to litigate and win, no rational person would delay release from prison in the hope of a money judgment down the road. Treating a coerced no-contest plea as a release from liability does not honor a legitimate

agreement negotiated at arm's length, but imposes unconscionable consequences on those most mistreated by society.

2. *Heck* does not apply to lawsuits by former prisoners who have completed their sentences and cannot seek a writ of *habeas corpus*.

The petition explains at length why *Heck* does not bar lawsuits by prisoners, like Taylor, who have completed sentences that placed them in custody fleetingly if at all. The core reason is simple. *Heck* aimed at collateral attacks on sentences that were open to challenge through a writ of habeas corpus. But an inmate who has been released from all forms of custody cannot seek that writ. The panel majority agreed that *Heck* did not bar Taylor's challenge to the vacated 1972 conviction. *See* Add. 10. Yet the panel held that *Heck* nonetheless barred any challenge to the 2013 no-contest judgment, even though Taylor was not imprisoned for a minute as a result of that judgment accompanying his release. *See* Add. 10–11.

The *Heck* bar arose from the perceived need to police "the intersection of the two most fertile sources of federal-court prisoner litigation—the Civil Rights Act of 1871, … 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254." 512 U.S. at 480. But

there is no "intersection" to regulate with respect to the 2013 no-contest judgment. "[I]ndividuals not 'in custody' cannot invoke federal habeas jurisdiction, the only statutory mechanism besides § 1983 by which individuals may sue state officials in federal court for violating federal rights." *Heck*, 512 U.S. at 500 (Souter, J., concurring in the judgment).

Taylor was never able to seek a writ of *habeas corpus* with respect to the 2013 judgment because he was released from custody immediately upon its entry. *See* Add. 4; Add. 19 (Schroeder, J., dissenting). Neither the letter nor the underlying policy of *Heck* bars Taylor's ability to seek relief here.

B. The Panel Majority's Causation Holding Should Be Reheard to Prevent Significant and Deleterious Practical Effects.

The panel majority raised another substantial issue in holding that Taylor's no-contest plea entered simultaneously with his release from custody was the "sole legal cause" of the preceding 42 years of imprisonment. Add. 12.

One looks in vain through the nearly five hundred pages of analysis in Hart and Honoré's treatise on causation for an example of a legally recognized "cause" that occurred *after* the event in question. *See* H.L.A. Hart & T. Honoré, Causation in the Law (2d ed. 1985).

Nor can the addition of the adjective "legal" legitimize the majority's counterfactual and counterintuitive conclusion. A "legal cause" is term of art that limits the potentially infinite array of but-for causes that *precede* an injury. *See* Prosser and Keeton on Law of Torts §§ 41-42 (5th ed. 1984); *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701-02 (2011); *Schwirse v. Director, OWCP.*, 736 F.3d 1165, 1170 (9th Cir. 2013). The adjective does not expand the array of causes beyond those that both precede and contribute to an event. One likewise searches in vain for a "legal cause" that is not even in the broadest sense a but-for cause of the event caused. It makes far more sense to recognize that the vacated conviction and associated 42-year imprisonment caused the no-contest plea than to insist that the plea caused the imprisonment that preceded it.

Just as the majority's holding removes the most fundamental limitation on the concept of causation, the holding's implications are nearly limitless. If this precedent remains on the books, district courts and other panels of this Court will be tempted to adopt similarly flexible views of causation, widening the scope of criminal or civil liability by dramatically increasing the range of events that a defendant's conduct

may be said to have "caused." The panel majority's approach in that way undercuts one of the most predictable aspects of the law—that causes of an injury or other event must be sought before, not after, the event occurs.

This case becomes simpler upon recognition that the no-contest plea that resulted in release for time served did not cause the time to be served in the first place. Because the actual, but-for, and legal cause of Taylor's 42 years of imprisonment was the 1971 conviction that was vacated, even the narrowest reading of *Heck* does not bar his lawsuit.

C. Restricting *Heck* to its Proper Scope Will Not Unduly Burden Governments, but Would Serve the Interests of Justice.

No flood of Section 1983 litigation and liability would follow reaffirmation that *Heck* does not preclude lawsuits challenging a sentence for which *habeas corpus* was never available. Other Circuits—and this Circuit—have permitted lawsuits targeting such sentences without triggering a profusion of wrongful imprisonment actions. And provable wrongful imprisonment—particularly wrongful imprisonment that is provably a Section 1983 violation—remains rare. Mr. Taylor has a stronger case than most. But few inmates will be able to present a

similar combination of fraudulent and suppressed evidence and overt racism in a context where the very existence of a crime is in significant doubt.

In contrast, the expanded *Heck* bar embraced by the panel majority falls hardest on the victims of the most severe civil rights violations: those imprisoned so long that they have no meaningful option to wait out the litigation and appellate process rather than accept immediate relief. States might argue that they will not offer earlier release in the absence of some type of a waiver of the right to sue. But that argument does a disservice to the role of the prosecutor, who should be expected to do justice whether by conceding a meritorious habeas claim without extracting a pound of flesh or by contesting a habeas claim that appears meritless.

At least in cases like this one, where proof of wrongful imprisonment caused by constitutional violations seems well within reach, the risk of increased damages—and of punitive damages for the period of incarceration after discovery of the wrong—would provide strong incentives for a reasonable release policy. Rehearing the panel decision will benefit, not harm, the wrongfully imprisoned.

CONCLUSION

The petition for rehearing should be granted and the judgment reversed.

March 14, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 29–2, the undersigned counsel for the *amici curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 29–2(c)(2) because it contains 3,644 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Donald M. Falk*

CERTIFICATE OF SERVICE

I hereby certify that all participants in this case are registered CM/ECF users and that, on March 14, 2019, service of the foregoing brief was accomplished electronically via the Court's CM/ECF system.

/s/ *Donald M. Falk*