12-1011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARCOS POVENTUD,
Plaintiff-Appellant,

– v. –

CITY OF NEW YORK, ROBERT T. JOHNSON, District Attorney, Bronx County, FRANKIE ROSADO, Individually, Members of the New York City Police Department, KENNETH UMLAUFT, Individually, Member of the New York City Police Department, DANIEL TOOHEY, Individually, Member of the New York City Police Department,
Defendants-Appellees.

On Appeal from a Final Judgment of the United States District Court for the Southern District of New York

BRIEF OF THE NATIONAL AND NEW YORK STATE ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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INTRODUCTION[1]

We agree with the panel majority that "*Heck*'s narrow exception to § 1983's otherwise broad coverage does not apply" to Marcos Poventud's present Section 1983 suit. *Poventud v. City of N.Y.*, 715 F.3d 57, 57 (2d Cir. 2013). But the full Court need not reach the question whether that holding is a faithful extension of *Heck*'s rationale or a break from it—a question that has divided both the judges of this Court and numerous other federal courts of appeals. There is, instead, a narrower and less controversial ground for deciding this appeal: *Heck* does not apply here, not because Poventud is no longer in custody, but because when he *was* in custody, the state courts declared his conviction invalid. *See People v. Poventud*, 802 N.Y.S.2d 605, 608 (Sup. Ct. 2005). That is all that *Heck* requires. *See Heck v. Humphrey*, 512 U.S. 477, 486-487 (1994).

To be sure, Poventud later pleaded guilty to a lesser-included offense in exchange for a promise from the State not to appeal the vacatur of his original conviction. But his *Brady* claim, if successful, would not imply the invalidity of the conviction entered on the plea agreement. Against this

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[1] No party or counsel for any party authored this brief in whole or in part or otherwise contributed monetarily towards its preparation or submission. No other person (other than *amici*, their members, and their counsel) contributed monetarily towards the preparation or submission of this brief. This brief is submitted pursuant to the Court's invitation. *See* June 6, 2013 Order at 2, ll. 7-8.

backdrop, the Court need not reach any of the first four questions identified in the order granting *in banc* rehearing.[2] Whether *Heck*'s favorable termination rule admits of exceptions is, respectfully, not relevant in a case like this one, where the plaintiff has fully satisfied the rule's requirements, to the extent the rule applies at all.

But if the Court disagrees with us on that score, it should hold that the *Heck* favorable-termination rule does not apply to individuals who are no longer in custody and for whom obtaining federal habeas relief while in custody was a practical impossibility—a holding that also would require reversal. As we demonstrate below, such a holding (which has been adopted by six other circuits) is consistent with the history and purpose of Section 1983 and the *Heck* rule. It also ensures that state actors are effectively deterred from committing constitutional violations and prevented from using the undue leverage of plea offers (which even innocent defendants may feel pressured to accept) to escape liability for those violations. Either way, the judgment below should be reversed and the case remanded to the district court.

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[2] The first four questions identified in the Court's order granting rehearing *in banc* are: (1) "whether *Heck v. Humphrey*, 512 U.S. 477 (1994), categorically bars any action under § 1983 that necessarily implies the invalidity of an outstanding conviction"; (2) "whether there are exceptions to the Supreme Court's holding in *Heck*"; (3) "whether such exceptions are compatible with principles of federalism, consistency, and finality"; and (4) "if exceptions exist, in what circumstances they apply."

INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit professional bar association that represents the Nation's criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice and to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of approximately 10,000 direct members and an additional 35,000 affiliate members in all fifty States and thirty nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a non-profit organization of more than 750 criminal defense attorneys who practice in the State of New York; it is the largest private criminal bar association in the State. Its purpose is to provide assistance to the criminal defense bar to enable its members to better serve the interests of their clients and to enhance their professional standing.

This case implicates the core mission of NACDL and NYSACDL. As criminal defense lawyers know all too well, those accused of crimes sometimes *themselves* become victims of the misdeeds of unscrupulous police officers or over-zealous prosecutors. The ordinary avenue for victims to remediate constitutional violations suffered at the hands of such state ac-

tors is habeas corpus; but sometimes habeas corpus relief is a practical impossibility. In those circumstances, the availability of a cause of action under Section 1983 is essential to ensuring the vindication of individuals' constitutional rights. NACDL and NYSACDL therefore have a deep and direct interest in seeing the issues presented here properly resolved.

ARGUMENT

I. THE COURT NEED NOT ADDRESS THE QUESTION WHETHER *HECK*'S FAVORABLE-TERMINATION RULE APPLIES IN CASES LIKE THIS ONE.

The panel opinion begins with a simple proposition, one with which we wholeheartedly agree: "[A] plaintiff alleging civil rights violations in connection with his conviction or imprisonment must have access to a federal remedy either under habeas or under § 1983." 715 F.3d at 62. From there, the panel observes that "Poventud is no longer in custody," and therefore "ha[s] no remedy in habeas." *Id*. at 58, 61. Thus, the panel concludes, "*Heck* does not bar Poventud's § 1983 claims." *Id*. at 60.

We agree with that conclusion in theory. But in our view, *Heck* does not bar Poventud's Section 1983 claims for a simpler and narrower reason: He *complied* with *Heck*'s requirement that his underlying conviction first be "declared invalid by a state tribunal authorized to make such determination." 512 U.S. at 486-487. *See Poventud*, 802 N.Y.S.2d at 608 ("the defendant's conviction is hereby vacated"). It is therefore unnecessary to

decide whether the availability of habeas relief has any bearing on the *Heck* favorable-termination requirement. Poventud's later plea of guilty to a lesser included offense changes nothing: Unlike Poventud's original 1998 jury-trial conviction, his subsequent 2006 plea-based conviction is not tied to the *Brady* violation in any way. Thus success on the *Brady* claim would not call into question the validity of that conviction. Concluding so is all that is necessary to reverse.

A. Success on Poventud's *Brady* claim would imply the invalidity of his already-vacated 1998 conviction, not the 2006 conviction on his plea agreement.

The *Heck* favorable-termination rule is familiar: To recover damages for harm caused by conduct that, if proven, would imply that an outstanding conviction or sentence is invalid, a Section 1983 plaintiff first must prove that the conviction or sentence has been reversed, expunged, or invalidated on direct appeal or in a state or federal collateral proceeding. *Heck*, 512 U.S. at 486-487. The flip-side of that rule also is clear: "[I]f the district court determines that the plaintiff's [Section 1983] action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff"—if, for example, the conviction is unrelated or otherwise was invalidated and is no longer "outstanding"—then *Heck* presents no obstacle, and "the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* at 487 (footnotes omitted).

This case falls on the flip-side: Success on Poventud's Section 1983 civil rights action would not imply the invalidity of any outstanding conviction against him. That is an independently sufficient basis for reversing the district court.

1. We begin with Poventud's complaint. In it, he alleges that the complainant in the original criminal case against him initially identified as his assailant Poventud's *brother*, Francisco—*not* Poventud himself. A37 (¶ 19). In fact, on two separate occasions, the complainant affirmatively *declined* to identify Poventud as his assailant. A38 (¶¶ 26-33). And that refusal was not surprising because Poventud "did not physically resemble his brother" (A37 (¶ 25)), who was then (and is again today) incarcerated on a conviction for assault. The detectives investigating the case nevertheless declined to disclose to Poventud's counsel the identification of Poventud's brother. A37 (¶ 23), A40 (¶ 50). Because the complainant's identification of Poventud was the lynchpin of the prosecution's case (*see Poventud*, 802 N.Y.S.2d at 607; A73 (¶ 35)), the suppression of the original misidentification unquestionably was important (A119-120 (¶¶ 227-233)).

Based on these allegations, Poventud asserts three causes of action: a violation by the detectives of his federal due process rights for failing to disclose evidence favorable to the defense, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and two related claims against New York City for

the deliberate indifference of policymaking officials, in violation of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and state-law negligent training of the defendant detectives.

There is no doubt that success on these Section 1983 claims would imply the invalidity of Poventud's original, 1998 conviction. It is fundamental, after all, that a *Brady* violation is a reversible error on direct appeal; success on Section 1983 *Brady* claim "therefore [would] indeed call into question the validity of [the underlying] conviction." *Amaker v. Weiner*, 179 F.3d 48, 51 (2d Cir. 1999); *see also Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) ("a *Brady* violation undermines a conviction"). But that is not a problem in this case, because—as the dissent itself observes (715 F.3d at 66)—in 2005, a New York court "vacated the conviction and ordered a re-trial" on precisely the same basis raised in Poventud's complaint, that "the prosecution had withheld potentially exculpatory evidence." The order vacating Poventud's 1998 conviction was not appealed and remains in effect; Poventud therefore has satisfied the *Heck* favorable-termination rule with respect to his 1998 conviction.

2. The question remains whether success on Poventud's Section 1983 claims would imply the invalidity of his subsequent 2006 conviction based on his plea of guilty to a lesser-included offence. It would not.

Proof of a constitutional violation implies the invalidity of a conviction only when the violation would have required reversal of the conviction if it had been raised and sustained on direct appeal. The *Brady* violation alleged in this case, if sustained in a hypothetical direct appeal from Poventud's 2006 plea-based conviction, assuredly would not have required a reversal. The reason why is clear: The 2006 conviction is based, not on the 1998 *Brady*-tainted trial, but on an independent admission of guilt, made at a time when Poventud was *aware* of the improperly suppressed evidence favorable to his defense.

Matters admittedly would be different if success on Poventud's *Brady* claim would establish his innocence. But it would not. On the contrary, "a true *Brady* violation" requires proof of just three things: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *United States v. Rigas*, 377 F.3d 195, 199 (2d Cir. 2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999)). To recover in a Section 1983 suit, a *Brady* plaintiff also must prove injury and "that the defendant's action was a proximate cause of the plaintiff's injury." *Loria v. Gorman*, 306 F.3d 1271, 1287 (2d Cir. 2002) (quoting *Gierlinger v.*

Gleason, 160 F.3d 858, 872 (2d Cir. 1998)). None of those elements is inconsistent with Poventud's 2006 guilty plea.

Suppression of favorable evidence. It is clear enough that proof of the first two elements of Poventud's *Brady* claim have no possible bearing on the validity of the 2006 conviction based on his plea agreement. As to the first element, the evidence at issue here was favorable to Poventud's defense because it tended to undermine the reliability of the complainant's identification of Poventud as his assailant. But proof of the existence of such evidence does nothing whatever to suggest that the conviction based on Poventud's independent plea deal—entered into with full knowledge of the existence of that evidence—is in any way invalid.

As to the second element, the New York courts found that the State never disclosed the misidentification to Poventud's counsel. *Poventud*, 802 N.Y.S.2d at 606. But proof that the defense-favorable evidence was wrongfully suppressed in Poventud's *prior* trial likewise does nothing to suggest the invalidity of his later plea agreement, which (again) was made with full knowledge that the suppression had taken place.

Prejudice. The only issue, therefore, is whether success on the third element of Poventud's *Brady* claim—whether the State's suppression of the evidence was *prejudicial* to Poventud—would imply the invalidity of his later plea-based conviction. Like the first two elements, it would not.

The prejudice element of a *Brady* claim requires proof that there was a "'reasonable *probability* of a different result' had the suppressed information been disclosed to the defense." *Banks v. Dretke*, 540 U.S. 668, 703 (2004) (emphasis added) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). Thus, Poventud must show only that the jury *could* have reached a different verdict with the favorable evidence in the mix; he need not show that it *necessarily would have*. That much is established by the order vacating Poventud's conviction on the basis of his *Brady* claim—the upshot was not that he was deemed innocent and ordered released. It was, instead, that "a new trial is hereby ordered." *Poventud*, 802 N.Y.S.2d at 608.

Other courts agree. As the Eighth Circuit has put it, "*Brady v. Maryland* does not require the plaintiff to show that the jury in his criminal trial would have acquitted him or that he was innocent." *White v. McKinley*, 605 F.3d 525, 537-538 (8th Cir. 2010). Put another way, a reversal "on *Brady* grounds is not a holding that 'the Government has not produced sufficient evidence to establish the guilt of the defendant'" and thus "does not itself negat[e] criminal responsibility." *Sedgwick v. Superior Court for D.C.*, 584 F.2d 1044, 1049-1050 (D.C. Cir. 1978).

Injury and causation. Neither does Poventud's theory of injury or causation cast any doubt on the validity of his second conviction. Poventud seeks recompense, not for the *entire* duration of his nine-year confinement,

but "only for punishment he suffered in excess of the one-year imprisonment he accepted as part of his plea." Appellant's Initial Opening Br. 32; *see also* A50 (¶ 121). That theory of injury is not only *consistent* with Poventud's 2006 guilty plea, but it affirmatively *depends* upon it.

When Poventud's original conviction was vacated in 2005, the entire term of his imprisonment was invalidated. Later, when he was duly convicted on his 2006 plea agreement, the legal validity of *one* year of his time served was restored. Recognizing as much, Poventud does not claim any injury in connection with that one year of imprisonment; instead, he claims damages only for that portion of his incarceration above and beyond the one year applied to the valid conviction on his guilty plea—that is, for the portion of his incarceration predicated exclusively on (and resulting exclusively from) his constitutionally infirm 1998 conviction. A50 (¶ 121). In that way, the damages remedy that Poventud seeks in this case fully respects the validity of Poventud's second, plea-based conviction.

There accordingly is no circumstance in which success on the merits of Poventud's Section 1983 civil rights suit would render either the statement underlying his 2006 plea agreement necessarily false or the conviction based on that plea agreement necessarily invalid. The pendency of this action poses no risk of producing "two conflicting resolutions arising

out of the same or identical transaction." *Heck*, 512 U.S. at 484. Poventud's second, plea-based conviction accordingly does not *Heck*-bar this suit.

3. The Chief Judge disagrees. In his view, Poventud's original 1998 conviction (tainted by the now-established *Brady* violation) is analytically indistinguishable from his 2006 plea-based conviction (entered with Poventud's *knowledge* of the *Brady* violation) because the convictions "aris[e] out of the same facts." 715 F.3d at 76 (quoting *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (*en banc*)). "Poventud's guilty plea," the dissent observes, "placed him at the scene of the crime of which he was originally convicted, at the same time of the same day, wielding a weapon, and holding up the victim." *Id.* at 78. Thus, as the dissent sees it, "Poventud's § 1983 action calls [his 2006] conviction and plea into question" and "[s]uccess on Poventud's § 1983 action 'would necessarily imply the invalidity' of his outstanding conviction." *Id.*

We respectfully disagree with that view. Poventud's *Brady* claim simply is not, in the words of the dissent, "premised on his innocence" (715 F.3d at 78). As we have just shown, Poventud can prove that the detectives violated *Brady* and that he sustained a remediable injury as a result of the violation, all without showing either that he is necessarily innocent or that his affirmative answer to the question whether he "attempt[ed] to steal personal property from another person by using force" (A93) was neces-

sarily a lie. While ordinarily "[a] guilty plea conclusively resolves the question of factual guilt" (715 F.3d at 76), that is simply beside the point: Poventud's *Brady* claim does not turn on his factual guilt or innocence.

To sum up, Poventud has satisfied *Heck*'s favorable-termination requirement with respect to his 1998 trial-based conviction because, in 2005, he obtained a state-court order vacating that conviction. As to his 2006 plea-based conviction, the favorable-termination rule does not apply because success on the merits here would not establish the invalidity of that conviction. On those bases alone, the district court's grant of summary judgment on *Heck* grounds can and should be reversed.

B. The Court need not decide the first four questions presented in the order granting *in banc* rehearing.

The majority reached the same conclusion in substance. "[T]he dissent is incorrect in its statement that this § 1983 action calls into question Poventud's second conviction," the majority explained, because the *Brady* violation "constitute an independent infringement of Poventud's constitutional rights, regardless of his subsequent conviction." 715 F.3d at 64-65 (emphasis omitted). Stated another way, "[b]ecause [the 1998 *Brady*-tainted] conviction was vacated—regardless of whether Poventud then pled guilty or was retried—victory in his § 1983 suit would no longer implicate the validity of an outstanding criminal judgment." *Id.* at 61, n.2.

The majority nevertheless found it "unnecessary to reach the issue" whether Poventud's *Brady* claim would imply the invalidity of the 2006 conviction because it already had "conclu[ded] that *Heck*'s bar does not apply to a § 1983 plaintiff who is not in custody." 715 F.3d at 61 n.2. But that is an unusual approach—courts ordinarily decide easy questions turning on settled law to avoid having to reach difficult ones that implicate circuit splits, not the other way around.

Respectfully, we think there is good reason to hew to a narrower path in this case. As the Supreme Court has explained, it is "preferable to dispose of" cases on the "narrow[est] grounds" possible because "broad holding[s] . . . might have implications for future cases that cannot be predicted." *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2010). There is just such a risk here: A holding that *Heck*'s favorable-termination rule does not apply to Section 1983 plaintiffs who are not in custody may have unintended consequences for future *Brady* cases.

Notwithstanding the dissent's contrary view (715 F.3d at 78), it is settled that *Brady* "does not require the plaintiff to show that . . . he was innocent" (*White*, 605 F.3d at 537), and that success on a *Brady* claim therefore does not "negat[e] criminal responsibility" (*Sedgwick*, 584 F.2d at 1050). Yet, if the full Court reverses on the basis that *Heck* does not apply to individuals not in custody, defendants in future Section 1983 suits

raising *Brady* claims may point to the Court's holding here as evidence that *Brady* plaintiffs, in fact, *do* have to prove innocence. Why else would Poventud's *Brady* claim necessitate a holding from the *in banc* Court that *Heck*'s favorable-termination rule does not apply to his 2006 plea-based conviction? And that is just one example; there is potential for additional mischief "that cannot be predicted." *Quon*, 130 S. Ct. at 2630.

"Caution is always warranted when venturing down the road of deciding a weighty question of first impression," and "surely caution must be doubly warranted when nothing turns on [the decision]." *Hooks v. Workman*, 689 F.3d 1148, 1208 (10th Cir. 2012) (Gorsuch, J., concurring in part and dissenting in part). Just so here. The Court need not reach the thorny *Heck* custody question, which notably has divided the circuits. As to Poventud's 1998 conviction, he has satisfied *Heck*'s favorable-termination requirement; and as to his 2006 conviction, the favorable-termination rule does not apply because success on the merits would not imply the conviction's invalidity. No more is necessary to dispose of this appeal. And "if it is not necessary to decide more, it is necessary not to decide more." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 692 (2d Cir. 2013) (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment)). On that single, simple, and settled basis, this Court should reverse.

II. THE *HECK* FAVORABLE-TERMINATION RULE DOES NOT APPLY TO INDIVIDUALS, LIKE POVENTUD, WHO COULD NOT HAVE OBTAINED FEDERAL HABEAS RELIEF WHILE IN CUSTODY.

If the Court disagrees and concludes that success on Poventud's *Brady* claim would imply the invalidity of his plea-based conviction, it should conclude that *Heck* still does not bar this action. In doing so, the Court need reach the question whether *Heck*'s favorable-termination rule applies to *all* Section 1983 plaintiffs who are no longer in custody. Other courts have concluded—consistent with the history and purpose of Section 1983 and the *Heck* doctrine—that when a Section 1983 plaintiff, like Poventud, was wholly "unable to obtain habeas relief" while in custody, and that "inability [was] not due to the [plaintiff]'s own lack of diligence," "it would be unjust to place his claim for relief beyond the scope of [Section] 1983." *Cohen v. Longshore*, 621 F.3d 1311, 1316-1317 (10th Cir. 2010). Such actions accordingly are "not barred by *Heck*." *Id*. at 1317.[3]

A. The history, purpose, and rationale of Section 1983 and the *Heck* doctrine counsel in favor of reversal.

One of the principal goals motivating the enactment of the Civil Rights Act of 1871, today more commonly known as Section 1983, was to ensure that victims of constitutional transgressions at the hands of

[3] This rationale is sometimes referred to as the impossibility "exception" to the *Heck* rule. But it is more accurate to say that it supports an interpretation of *Heck* as never applying to such cases in the first place.

government actors had access to a *federal* remedy in a *federal* forum. "As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established." *Mitchum v. Foster*, 407 U.S. 225, 238-239 (1972). Thus, "Section 1983 opened the federal courts to private citizens, offering a uniquely *federal* remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* at 239 (emphasis added). Congress's purpose of ensuring federal courthouse doors were always open made good sense: At the time of the statute's enactment, "state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Id.* at 240.

The *Heck* doctrine, which emerged more than a century later, inhabits "the intersection" of Section 1983 and federal habeas corpus relief. *Heck*, 512 U.S. at 480. Recognizing that Section 1983 and habeas corpus substantially overlap in the modern context of prisoner litigation, the prospect arose that Section 1983—which is not subject to the same procedural safeguards as habeas—might displace the Great Writ altogether. Starting with *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Supreme Court thus

began to limit the availability of Section 1983 in its effort to prevent prisoners from using Section 1983 civil rights claims as an end-run around the procedural limitations imposed by the habeas statute.

In *Preiser*, certain state prisoners attempted to challenge a deprivation of their good-time credits, which had resulted in longer sentences. Their Section 1983 suit sought an injunction to compel restoration of the credits, which would have reduced their sentences and, as a practical matter, required their immediate release. 411 U.S. at 476. Such relief, the Court found, "fell squarely within this traditional scope of habeas corpus." *Id.* at 487. And, unlike Section 1983, habeas requires "exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief." *Id.* at 489. Thus, it "would wholly frustrate explicit congressional intent" to allow a plaintiff to "evade this requirement" through use of a civil rights suit. *Id.* at 489-490. The Court concluded that, "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500.

Next came *Heck* itself, where the Court extended *Preiser* to prisoner suits seeking only damages awards. "We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of

outstanding criminal judgments," the Court explained, "applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* at 486. To bring such a civil rights claim, a "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 477.

Justice Souter (joined in his concurrence by Justices Blackmun, Stevens, and O'Connor), noted that a "sensible way to read" the Court's opinion in *Heck* is that its favorable-termination requirement applies only to "*prison inmates* seeking § 1983 damages in federal court for unconstitutional conviction or confinement." 512 U.S. at 500 (emphasis added). Individuals not "in custody" for purposes of federal habeas, such as "people who were merely fined" or "who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences," need not show "favorable termination." *Id.* at 499-500. The *Heck* doctrine should not, in other words, "shut off federal courts altogether" to claims challenging state criminal convictions. *Id.* at 501.

Finally, in *Spencer v. Kemna*, 523 U.S. 1 (1998), the Court concluded that a federal habeas petition was moot because the petitioner, who had completed his term of incarceration, was unable to show collateral consequences sufficient to satisfy Article III's case-or-controversy requirement. In that case, Justice Souter (joined this time in his concurrence by Justices O'Connor, Ginsburg, and Breyer) reiterated his position from *Heck*, explaining that, on his reading of the opinion in that case, the favorable-termination requirement applies only to individuals who have had adequate recourse to federal habeas. Justice Ginsburg wrote separately: "Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broad reach.'" *Id.* at 21 (Ginsburg, J., concurring). In dissent, Justice Stevens likewise agreed: "Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear . . . that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25 n.8.

As the five justices in *Spencer* recognized, interpreting the *Heck* favorable-termination rule as inapplicable to Section 1983 plaintiffs who never could have obtained habeas relief while in custody is consistent with the core purposes underpinning Section 1983 and the *Heck* doctrine itself. The Supreme Court was motivated in *Heck* by concern that a civil rights

claim seeking damages "would permit a collateral attack on the conviction through the vehicle of a civil suit," thus circumventing the carefully-designed limitations on federal habeas corpus. *Heck*, 512 U.S. at 484. Because "allowing a state prisoner to proceed directly with a federal-court § 1983 attack on his conviction or sentence 'would wholly frustrate explicit congressional intent' as declared in the habeas exhaustion requirement, the statutory scheme must be read as precluding such attacks." *Id*. at 498 (Souter, J., concurring) (quoting *Preiser*, 411 U.S. at 489).

The *opposite* conclusion applies when it comes to individuals for whom habeas relief is a practical impossibility, "people who were merely fined, for example, or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences." *Heck*, 512 U.S. at 500 (Souter, J., concurring). Allowing such individuals to proceed under Section 1983 with their civil rights claims—even claims that would imply the invalidity of an outstanding conviction—would not undermine the limitations placed by Congress on habeas corpus actions because habeas corpus was never available to them in the first place. But a contrary conclusion *would* frustrate the central purpose of Section 1983 to ensure that individuals claiming violations of the federal Constitution have access to a federal forum. *Mitchum*, 407 U.S. at 238-240.

Heck is thus best understood as recognizing that the federal habeas statute limits the availability of federal remedies under other causes of action only when there is a meaningful opportunity to obtain habeas relief. When an individual can obtain relief through a writ of habeas corpus, in other words, the federal habeas statute is the exclusive federal avenue for doing so. But *Heck* was never meant to shut the federal courthouse doors on individuals who, as a practical matter, never could have obtained habeas relief to begin with. To hold otherwise would "shut off federal courts altogether to claims that fall within the plain language of § 1983" (*Heck*, 512 U.S. at 501 (Souter, J., concurring)), without any basis in the text of either statute, and in contravention of the clear purpose of Section 1983.

In the Chief Judge's view, coming to that conclusion encroaches on the Supreme Court's "prerogative of overruling its own decisions." 715 F.3d at 69 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). But reaching the conclusion we advocate here would not *overrule Heck*; instead, it would extend *Heck*'s rationale to its logical conclusion. As the Sixth Circuit has put it, "ordinary rule refinement" is not the same thing as "departure from binding Supreme Court precedent." *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 602 (6th Cir. 2007).

B. When federal habeas relief is unavailable, a Section 1983 cause of action often is the only means of vindicating constitutional rights and deterring misconduct.

Interpreting the *Heck* favorable-termination rule as inapplicable to Section 1983 plaintiffs for whom federal habeas relief was impossible also serves important policy objectives. Section 1983 is designed "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). Even as the Supreme Court arguably has limited, in recent years, the availability of certain remedies for constitutional violations in criminal trials and on direct appeal, it accordingly has approved "the slow but steady expansion of" Section 1983 relief as a backstop. *Hudson v. Mich.*, 547 U.S. 586, 597 (2006).

The Court has limited the applicability of the Fourth Amendment's exclusionary rule in certain contexts, for example, on the theory that it is not as "necessary [to] deterrence" as it was "long ago." *Id.* That is because Section 1983 and its fee-shifting "remedy [were] unavailable in the heydays of [the Court's] exclusionary-rule jurisprudence"; today, unlike then, "civil liability [under Section 1983] is an effective deterrent" to constitutional violations. *Id.* at 597, 611. The availability of a cause of action under Section 1983 (and its federal-agent analogue, *Bivens*), the Court has recognized, is especially crucial for "a plaintiff who lack[s] *any alternative*

remedy for harms caused by an individual officer's unconstitutional conduct." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

Finding the *Heck* bar applicable in cases where habeas relief is a practical impossibility would turn that reasoning on its head. It is precisely the point that an individual who is no longer in custody, and for whom habeas relief is categorically unavailable, often has *no* alternative remedy for redressing constitutional violations suffered in connection with the underlying conviction. A civil cause of action under Section 1983 thus often provides the only measure of justice available to those unfairly imprisoned as a result of prosecutorial and police misconduct.[4]

These concerns take on special force in cases, like this one, involving subsequent plea deals. Here, the New York courts have confirmed that Poventud's constitutional rights were violated when the detectives suppressed the misidentification. In response to the vacatur of Poventud's 1998 conviction on that basis, the State presented Poventud with a choice: either he could continue to insist upon his innocence (as he had all along), and remain in jail for years longer pending retrial; or he could confess to a

[4] To be sure, many States provide avenues for postconviction relief not subject to a custody requirement (*e.g.*, a petition for extraordinary relief under Vermont Rules of Appellate Procedure 21). But such avenues often set prohibitively high bars for relief, and unless an individual is subject to particularly burdensome collateral consequences of conviction, there will be little incentive for pursuing them. Even when relief is granted under such procedures, it will do little to deter future constitutional violations.

lesser-included offense and obtain an immediate release. That was, of course, no choice at all—no matter how fervently they insist upon their innocence, few people would agree to indefinite incarceration to prove it.

As the dissent sees it, accepting such a plea deal (which is explained just as readily by an innocent plaintiff's desire to be free as by a culpable plaintiff's candid admission of guilt), together with an inflexible interpretation of the *Heck* rule, necessarily shield the State from Section 1983 liability for an established constitutional violation. That is a perverse result. Plea bargains serve the important "public policy to encourage the efficient and economical administration of criminal justice" by "eliminat[ing] the need for expensive and time-consuming public trials." *Gelfand v. People*, 586 P.2d 1331, 1333 (Colo. 1978). They are not meant to give the State a free pass to commit constitutional violations without fear of consequence.

Interpreting the *Heck* favorable termination rule as inapplicable in cases like this one thus ensures that plaintiffs like Poventud have access to a meaningful federal remedy, and that state actors are properly deterred from committing further constitutional violations in circumstances where no other recourse is available.

C. Six other circuits have held that the *Heck* bar is inapplicable to Section 1983 plaintiffs who could not have obtained federal habeas relief while in custody.

Consistent with the foregoing, six other circuits have interpreted the *Heck* bar as inapplicable to plaintiffs for whom habeas relief was impossible while in custody. Most recently, the Tenth Circuit considered the claim of a plaintiff whose pending federal habeas petition was mooted when he was released from custody. *Cohen*, 621 F.3d at 1315. That court explained that "[i]f a petitioner is unable to obtain habeas relief—at least where this inability is not due to the petitioner's own lack of diligence—it would be unjust to place his claim for relief beyond the scope of [Section] 1983." *Id.* at 1316-1317. The court therefore held "that a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a § 1983 claim." *Id.* at 1317.

In reaching that conclusion, the Tenth Circuit drew heavily on the Sixth Circuit's holding in *Powers*. Reviewing *Heck* and *Spencer*, that court determined that "a § 1983 plaintiff is entitled to a *Heck* exception if the plaintiff was precluded 'as a matter of law' from seeking habeas redress, but not entitled to such an exception if the plaintiff could have sought and obtained habeas review while still in prison but failed to do so." *Powers*, 501 F.3d at 601. The plaintiff there was entitled to such an exception be-

cause "his term of incarceration—one day—was too short to enable him to seek habeas relief." *Id.*

The Fourth Circuit reached the same result in *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008). There, a prisoner's release date was extended approximately three months. Following the extension, the prisoner filed administrative grievances, but they were not resolved prior to his release. *Id.* at 263-264. Given the short period of incarceration, the prisoner also could not obtain relief via federal habeas. *Id.* at 268 n.8. The Fourth Circuit concluded that *Heck*'s favorable-termination requirement does not apply in circumstances where "a prisoner could not, as a practical matter, seek habeas relief." *Id.* at 268. Consistent with *Mitchum* and panel opinion in this case, the Fourth Circuit explained that it "d[id] not believe that a habeas-ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court." *Id.* The Seventh, Ninth, and Eleventh Circuits each follow a similar approach. *See, e.g.*, *Morrow v. Fed. Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir. 2010); *Nonnette v. Small*, 316 F.3d 872, 876-877 (9th Cir. 2002); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999).[5]

[5] Four other circuits have rejected this reasoning. *See Entzi v. Redmann*, 485 F.3d 998, 1003-1004 (8th Cir. 2007); *Gilles v. Davis*, 427 F.3d 197, 209-210 (3d Cir. 2005); *Randell v. Johnson*, 227 F.3d 300, 301-302 (5th Cir. 2000); *Figueroa v. Rivera*, 147 F.3d 77, 79-81 (1st Cir. 1998).

If it decides to reach the first four questions presented in the order granting *in banc* review, the Court should join the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits and hold that *Heck*'s favorable-termination requirement does not apply when habeas relief is, by no fault of the plaintiff, a practical impossibility.

D. Poventud never had access to a federal habeas court to challenge his second conviction.

Interpreting the *Heck* favorable-termination rule as inapplicable to Section 1983 plaintiffs who had no practical opportunity to obtain habeas relief requires that Poventud's suit be allowed to proceed. At the time that Poventud pleaded guilty to the lesser included offence and accepted a one-year sentence of imprisonment, he already had served his time; he was released from custody as soon as his plea was entered. A95-96. It therefore goes without saying that Poventud never had access to a federal habeas court to challenge his second conviction, and applying the *Heck* bar here would mean that Poventud is "left without access to a federal court" to vindicate his federal constitutional rights. *Wilson*, 535 F.3d at 268.

The Chief Judge once again disagrees. In his view, the "narrow [impossibility] exception" to the *Heck* rule "would not be applicable here" because Poventud "had the option of filing a motion to challenge the voluntariness of his plea" under state law but "withdrew it." 715 F.3d at 75. "It

was therefore by no means 'impossible as a matter of law' for Poventud to challenge his conviction and thereby satisfy *Heck*'s favorable termination requirement; he simply decided not to." *Id*.

We think that reasoning misunderstands the *Heck* doctrine. *Heck* defines the circumstances under which the *federal* habeas corpus statute provides the exclusive *federal* avenue for raising *federal* civil rights claims that call into question the validity of an inmate's imprisonment. The availability of parallel state-law remedies is irrelevant, except insofar as those remedies must be exhausted before a prisoner may file for federal habeas relief. The question is not whether Poventud could have availed himself of a state-law avenue for challenging his plea-based conviction; it is, instead, whether he had a practical opportunity to file and litigate a *federal* writ of habeas corpus before he was released from custody. He plainly did not. The upshot is that Section 1983 (rather than the federal habeas statute) is Poventud's only key to the federal courthouse doors.

This is therefore a paradigm case to which the *Heck* favorable-termination rule should be deemed inapplicable on impossibility grounds—or at least it would be if Poventud's *Brady* claim actually implied the invalidity of his plea-based conviction, which it does not.

CONCLUSION

The Court should decline to answer the first four questions presented in the order granting *in banc* rehearing and reverse the district court's grant of summary judgment on the grounds that (1) Poventud has satisfied *Heck*'s favorable-termination requirement with respect to his 1998 trial-based conviction and (2) success on his *Brady* claim would not imply the invalidity of his 2006 plea-based conviction. Otherwise, the Court should reverse on the basis that *Heck*'s favorable-termination requirement does not apply in cases like this one, where habeas relief is, by no fault of the plaintiff, a practical impossibility.

Respectfully submitted,

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Dated: July 3, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), the undersigned counsel for *amici curiae*, the National and New York State Associations of Criminal Defense Lawyers, certifies that this brief:

(i) complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) because it contains 6,886 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rules 29(c) and 32(a)(5) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 3, 2013

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