No. 13-1153

IN THE

Supreme Court of the United States

JAMES MARTIN DEEMER,

Petitioner,

v.

JEFFREY BEARD, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous *amicus curiae* briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to encourage a rational and humane criminal justice policy for America, NACDL frequently appears as *amicus curiae* in cases involving procedural rights of defendants.

NACDL is filing the instant *amicus* brief given the importance of the question of whether individuals who are no longer in state custody, and therefore

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[1] No counsel for a party authored this *amicus curiae* brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. By letters dated April 11, 2014, counsel for the *amicus curiae* timely notified counsel of record for all parties in this case of the intent to file this *amicus* brief, and all the parties have consented to the filing of this brief.

have no recourse to federal habeas relief, should be precluded from seeking relief under 42 U.S.C. § 1983. In NACDL's view, the decision by the U.S. Court of Appeals for the Third Circuit improperly extends this Court's favorable-termination requirement of *Heck v. Humphrey*, 512 U.S. 477 (1994), to situations where federal habeas relief is unavailable to an individual seeking relief under Section 1983. This inflexible and unfair rule, which has been rejected by the majority of federal courts of appeals, creates a class of cases where an individual who may have been subjected to unconstitutional treatment at the hands of state officials is left with no federal avenue of relief. The Third Circuit's erroneous rule also exacerbates the already serious problem of overincarceration, which imposes enormous human, social, and financial costs upon both individual prisoners and society in general.

INTRODUCTION

In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that an incarcerated individual who seeks to pursue a § 1983 claim that would call into question the lawfulness of his conviction or the duration of his confinement must first demonstrate that his conviction or sentence has been declared invalid, either by state authorities or by a federal court on a writ of habeas corpus. 512 U.S. at 486-87. Since that time, federal courts of appeals have divided deeply as to whether the favorable-termination rule established in *Heck* also bars a § 1983 action by individuals for whom a federal habeas corpus remedy is not available through no fault of their own. As Petitioner James Martin Deemer demonstrated, seven circuits have held that *Heck* does not prevent an individual who has been released from confinement from pursuing a § 1983 action without satisfying the favorable-termination requirement. *See* Pet. 13-16. By contrast, four other circuits — including the Third Circuit in this case — have interpreted *Heck* differently, and adopted a universal favorable termination requirement for all § 1983 plaintiffs who challenge the validity of their conviction or sentence. *See* Pet. 17-19. As the court of appeals below acknowledged, the courts on both sides of this entrenched split have considered the contrary position, but have decided to adhere to their prior views. *See* Pet. App. 8a-9a (citing cases).

NACDL agrees with Petitioner that this Court's intervention is necessary to resolve this deep and irreconcilable division among federal courts of appeals. The issue occurs frequently, especially given the lengthy period of time that elapses between the

imposition of a state-court judgment and the conclusion (if any) of the state-court proceedings challenging that conviction or sentence. By foreclosing the courtroom doors to individuals (like Petitioner here) whose period of incarceration ends while these state-court proceedings are still ongoing, the minority circuit reading of *Heck* eliminates an important avenue for the vindication of state prisoners' constitutional rights and reduces an incentive for state law enforcement officials to scrupulously observe those rights. In a similar way, by foreclosing constitutional challenges to the duration of an individual's confinement where that individual has already been released, the minority rule removes the incentives to correctly calculate the period of incarceration, thereby exacerbating the problem of overincarceration.

SUMMARY OF ARGUMENT

The federal courts of appeals are deeply divided over the proper application of this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), to instances where an individual is no longer in state custody and therefore cannot challenge his conviction or sentence on federal habeas. The minority rule, followed by the Third Circuit here, leaves a considerable number of individuals without any recourse for a violation of their constitutional rights. Empirical studies demonstrate that the state review process is lengthy, and especially so for individuals who challenge their sentences, in addition to the convictions. Given the length of this review, these challenges risk becoming moot before federal habeas relief even becomes available. The problem is compounded by the

increasing length of time that federal courts take to decide habeas petitions. As a result, an average state prisoner is likely to be released from incarceration prior to even filing a federal habeas petition, much less having that petition adjudicated. Yet, under the Third Circuit's inflexible rule, such an individual would then be categorically barred from obtaining any relief in a federal court. This misguided approach creates perverse incentives for state courts to delay further the resolution of state prisoners' challenges to their conviction or sentence. This approach also eliminates the incentives for state officials to correctly calculate prisoners' sentences, exacerbating the problem of overincarceration.

The Third Circuit's reading of *Heck* also misunderstands that case's rationale and leads to highly inequitable results. *Heck* concerned the intersection of Section 1983 and the habeas corpus statute, and sought to guard against an impermissible circumvention of congressional limitations on federal habeas review. But where habeas review is not available, these considerations simply do not arise. When an individual bringing a § 1983 suit is no longer in custody, there is no risk that his suit would collaterally attack a state-court conviction. Foreclosing § 1983 relief in such circumstances unnecessarily denies access to *any* federal forum for individuals claiming unconstitutional treatment at the hands of state officials. The deep division among federal courts of appeals as to whether a federal forum remains available to such individuals is an issue warranting this Court's review.

ARGUMENT

A. *The Applicability of* Heck*'s Favorable-Termination Requirement to Litigants for Whom Habeas Relief Is Unavailable Is an Issue of Wide-Reaching Importance.*

The question of whether this Court's decision in *Heck v. Humphrey* categorically bars an individual for whom habeas relief is unavailable from seeking to vindicate his constitutional rights via a § 1983 action is of considerable importance. As this Court stressed, "[t]he very purpose" of Section 1983 is "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). An individual who is still in federal custody can seek vindication of his constitutional rights in a federal court "sitting as a habeas court; and, depending on the circumstances, he may be able to obtain § 1983 damages." *Heck*, 512 U.S. at 501 (Souter, J., concurring in the judgment). The Third Circuit's inflexible rule, however, leaves many individuals without any recourse for a violation of their constitutional rights when habeas relief is unavailable to them through no fault of their own.

The proper application of *Heck*'s favorable-termination rule is a systemic issue. As Petitioner demonstrated, federal courts confront this question with considerable frequency. *See* Pet. 21-22 (noting that the issue arose in at least 154 cases in the past six years, with at least 62 individuals being barred from pursuing a § 1983 remedy because their actions were filed in circuits that adhere to the minority reading of *Heck*). The impact of the minority

interpretation of *Heck* is, however, even more wide-reaching.

In this case, Petitioner asserted that prison officials miscalculated his release date, increasing the length of his confinement by 366 days — an entire year. Pet. App. 4a-5a. Although Petitioner challenged the calculation of his release date in a state court, that court did not rule on his petition prior to Petitioner's release from prison, and subsequently dismissed his appeal as moot. Pet. App. 4a. Thus, at the time of his release, Petitioner could neither obtain a state-court declaration invalidating the challenged period of his confinement, nor pursue such a challenge through federal habeas.

Petitioner's situation is not unique, but rather is representative of a systemic problem. A state prisoner must exhaust all available state-court remedies before seeking habeas relief in a federal court. 28 U.S.C. § 2254(b)(1). Empirical studies indicate that the average length of time between a state-court judgment and the filing of a federal habeas case is 6.3 years. Nancy J. King, *et al.*, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 22 (Aug. 2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.[2] The corresponding median period is 5.7

[2] This study, conducted jointly by specialists from the National Center for State Courts and Vanderbilt University Law School, and supported by the U.S. Department of Justice, sampled 2,384 of the 36,745 total identified non-capital habeas cases filed by state prisoners between 2003 and 2004. King, *et al.*, *supra*, at 15.

years. *Id.* Given the length of time between the entry of a state-court judgment and the exhaustion of all direct appeals in state courts, numerous litigants can expect to fully serve their sentences and see their state-court appeals dismissed as moot following their release from custody before even being eligible to file a federal habeas petition.

The prisoners who challenge their sentences, as opposed to the fact of their conviction alone, face an even greater risk that their state-court challenge would become moot. According to the same studies, these challenges took an average of 9.6 years to reach federal court following the entry of a state-court judgment. *Id.* Thus, like Petitioner here, these individuals risk that their state-court challenge to the duration of their sentence would be mooted before federal habeas relief becomes available.

Even if a state prisoner's challenge does not become moot by the time he can seek federal habeas relief, there is no guarantee that mootness would not result while his federal habeas case is pending. The number of undecided federal habeas petitions has been increasing steadily in recent years. *See* Marc D. Falkoff, *The Hidden Costs of Habeas Delay*, 83 Colo. L. Rev. 339, 372 (2012). Thus, "the number of undecided [federal habeas] petitions has increased from 13,249 in 1998, to 14,335 in 2003, to 15,824 in 2008." *Id.* This increase, moreover, "suggests that the courts are not … keeping up with their habeas caseload." *Id.* In fact, studies have found that "the age of the open petitions is rising, and many of the petitions that remain pending on the district court's dockets annually have been there for years." *Id.* (footnote omitted). For instance, the number of

undecided federal habeas petitions that were at least three years old "has trended upward since 1996, and was more than five times as large in 2008 (1,291 petitions) as in 1996 (only 255 petitions). *Id.* at 373 & fig. 5; *see also id.* at 374 & fig. 6 (observing "an almost five-fold increase since 1996 in the number of [federal habeas] petitions appearing on the courts' dockets that were aged at least three years"). Thus, there has been a steady increase in both the absolute number of pending federal habeas cases and in the number of pending habeas cases that take longer to decide.

The length of time that it takes both state and federal courts to adjudicate state prisoners' challenges to their convictions and sentences poses a significant risk that these challenges will become moot by the time of the prisoner's release from incarceration. For instance, an average sentence of an adult convicted of a felony in a state court in 2004 was 4 years and 9 months.[3] Given that a state prisoner's challenge to his conviction took 6.3 years on average to reach the federal habeas petition stage, *see supra* at 7, an average state prisoner would be released from incarceration prior to ever filing a habeas petition, much less before such petition would be adjudicated by increasingly overstretched federal courts. Under the view espoused by the Third Circuit, such individuals would then be categorically

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[3] Bureau of Justice Statistics, U.S. Department of Justice Office of Justice Programs, *Felony Sentences in State Courts, 2004*, at 3 (July 2007), *available at* http://www.bjs.gov/content/pub/pdf/fssc04.pdf. The overall number of such felony convictions is significant. In 2004, approximately 1,079,000 adults were convicted of a felony in state courts. *Id.* at 1.

barred from pursuing any federal relief for the violations of their constitutional rights.

In fact, the minority approach creates a perverse incentive for state courts to delay further the resolution of state prisoners' challenges to their conviction or sentence. A prompt resolution of that challenge would enable the prisoner to pursue federal habeas relief and, if successful, then bring a § 1983 action for any damages resulting from the violation of his constitutional rights. Under the Third Circuit's misreading of *Heck*, however, a delay in state post-conviction proceedings until the prisoner's release would insulate state officials from any future liability under Section 1983. By doing so, the minority approach exacerbates the already considerable problem of overincarceration in state prison systems, with its attendant human, social, and financial costs.

The consequences to overincarceration are particularly acute where, as here, a state prisoner challenges the duration of his confinement. By foreclosing federal relief under Section 1983 where an individual's challenge to his sentence has been mooted by his release, the minority rule removes the incentives for prison officials to correctly calculate the prison sentence or to accurately apply any credit for time served or for good behavior. Once a person has completed his sentence, he lacks the ability to demand restoration of his good time credits or to otherwise challenge the unlawful increase of his confinement on federal habeas. The increase in the overall incarceration time can be quite dramatic, as evidenced by the extra 366 days that Petitioner spent in jail beyond what, he argues, was the correct period because of the state officials' failure to credit his prior

time served. *See* Pet. 4a-5a, 16a.[4] Unless that individual is able to bring a damages action under Section 1983, he will be left without any federal remedy. That is so because "individuals 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). "[T]he result would be to deny any federal forum for claiming a deprivation of federal rights" — "an untoward result." *Id.*

B. *The Minority Interpretation of* Heck *Is Deeply Misguided and Should Be Corrected by this Court.*

The minority interpretation of *Heck* is misguided. As several Members of this Court have indicated, *Heck* should be read as limited to currently incarcerated individuals, for whom the federal habeas remedy is available. *See Heck*, 512 U.S. at 500-01 (Souter, J., concurring in the judgment); *Spencer v. Kemna*, 523 U.S. 1, 20-21 (1998) (Souter, J., concurring, joined by Justices O'Connor, Ginsburg, and Breyer); *id.* at 21 (Ginsburg, J., concurring); *id.*

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[4] The hurdle to obtain vindication of their constitutional rights becomes nearly insurmountable for individuals who are merely fined, *see Spencer*, 523 U.S. at 21 (Ginsburg, J., concurring), or whose sentence is of a short duration. Yet, the brevity of unconstitutional confinement does not render this injury insignificant. As Justice Kennedy noted, even "[o]ne day in prison is longer than almost any day you and I have had to endure." Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting (Aug. 9, 2003). Indeed, as this Court observed, "any amount of actual jail time has [constitutional] significance." *Glover v. United States*, 531 U.S. 198, 203 (2000).

at 25 n.8 (Stevens, J. dissenting). As they emphasized, the alternative interpretation of *Heck* — the interpretation that the Third Circuit followed here — "would needlessly place at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not 'in custody' for federal purposes." *Heck*, 512 U.S. at 500 (Souter, J., concurring in the judgment). The consequence "would be to deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling." *Id.*; *see also Spencer*, 523 U.S. at 20 (Souter, J., concurring) (applying *Heck*'s favorable-termination requirement to individuals who are no longer in custody would "unjustifiably limit[]" "the plain breadth" of § 1983 remedy for such individuals). Accordingly, the "better view" of *Heck*

> is that a former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.

Id. at 21 (Souter, J., concurring); *see also id.* (Ginsburg, J., concurring) ("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.'") (citations omitted).

In relying on *Heck* to deny relief to § 1983 plaintiffs who lack access to habeas corpus, the Third Circuit below (and the other three circuits that adhere to the same rule) misconstrued this Court's

decision and its underlying rationale.[5] Unlike the case presented, *see* Pet. 7, *Heck* involved an individual who brought his § 1983 claim while he was "in custody" for habeas purposes. *See* 512 U.S. at 479. This Court accordingly held that, in order for the petitioner in *Heck* to recover damages under Section 1983, he first "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 486-87.

As the *Heck* Court explained, its decision concerned "the intersection" between the habeas corpus statute and Section 1983. *Id.* at 480. But where habeas is not available to challenge state officials' unconstitutional conduct, the case lies "outside the intersection of § 1983 and the habeas statute." *Id.* at 500 (Souter, J., concurring in the judgment); *see also Spencer*, 523 U.S. at 20 (Souter, J., concurring) (explaining that *Heck* requires the dismissal of § 1983 suits that would imply the invalidity of an inmate's custody "not because the favorable termination requirement was necessarily an element of the § 1983 cause of action for unconstitutional conviction or custody, but because it

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[5] Seven circuits have reached the opposite conclusion. *See, e.g.*, *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010); *Wilson v. Johnson*, 535 F.3d 262, 266-68 (4th Cir. 2008); *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 603 (6th Cir. 2007); *Harden v. Pataki*, 320 F.3d 1289, 1298-99 (11th Cir. 2003); *Nonnette v. Small*, 316 F.3d 872, 876-77 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999); *see also* Pet. 13-19.

was a simple way to avoid collisions at the intersection of habeas and § 1983") (internal quotation marks omitted). As Petitioner correctly explained, *see* Pet. 23-26, § 1983 action by a plaintiff who is unable to challenge his conviction through habeas corpus does not implicate the concerns that underlie the habeas exhaustion requirement. When an incarcerated plaintiff files a § 1983 claim, there is a risk that the prisoner could use that claim to collaterally attack his underlying conviction, which would undermine the core purpose of the federal habeas statute. *See* 512 U.S. at 484-85. This concern simply does not exist when a § 1983 petitioner is not in custody.

Section 1983 applies broadly to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. "Absent a statutory edict to the contrary or a restriction within the common law, the reach of § 1983 should not be compromised." *Wilson*, 535 F.3d at 266. Unlike in *Heck*, where the Court limited the § 1983 remedy to prevent conflicts with the habeas statute, there is no reason to limit the relief where no conflict exists between the two. A case involving an individual who is no longer incarcerated does not trigger a concern that Section 1983 could be used — in place of habeas — to collaterally attack a state-court decision. *See, e.g.*, *Peralta v. Vasquez*, 467 F.3d 98, 104 (2d Cir. 2006) ("the purpose of the *Heck* favorable termination requirement is to prevent prisoners from using § 1983 to vitiate collaterally a judicial or administrative decision that affected the overall length of their confinement" and to guarantee "that punishments related to their term of imprisonment, or the procedures that led to them … must be attacked

through a habeas petition."); *Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995) (the rule's intention "was to limit the opportunities for collateral attack on state court convictions because such collateral attacks undermine the finality of criminal proceedings and may create conflicting resolutions of issues").

The minority rule, followed by the Third Circuit here, categorically forecloses the federal mechanism for the vindication of civil rights to individuals who, through no fault of their own, can no longer obtain a favorable termination of their state-court conviction or sentence. As Judge Rendell noted in the decision below, "it could be said that fairness mandates that a former prisoner, who no longer has habeas review available, should be permitted via § 1983 to seek recourse for alleged violations of his rights." Pet. App. 12a (Rendell, J., concurring). These strong equitable concerns have led numerous lower courts to reach a result that is squarely contrary to the Third Circuit's approach. *See, e.g.*, *Wilson*, 535 F.3d at 268 ("a habeas ineligible former prisoner seeking redress for denial of his most precious right — freedom" should not "be left without access to a federal court"); *Harden*, 320 F.3d at 1299 ("because federal habeas corpus is not available to a person extradited in violation of his or her federally protected rights, even where the extradition itself was illegal, Section 1983 must be" an available remedy for redressing an unconstitutional extradition); *Cohen*, 621 F.3d at 1316-17 ("If a petitioner is unable to obtain habeas relief — at least where this inability is not due to the petitioner's own lack of diligence — it would be unjust to place his claim for relief beyond the scope of Section 1983 where 'exactly the same claim could be

redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.'") (quoting *Spencer*, 523 U.S. at 21 (Souter, J., concurring)).

As this Court observed, freedom from unlawful imprisonment "lies at the heart of liberty." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (internal citation omitted). Yet, with divergent interpretations of *Heck*, the ability of a former prisoner to obtain relief for being unconstitutionally detained depends on the state in which he happens to have been held. An individual in Petitioner's position — one seeking relief for more than a year of unconstitutional imprisonment — could have pursued his § 1983 claim if he had brought it in one of the seven circuits that have interpreted *Heck* not to bar such relief when habeas is unavailable. The ability of prisoners to obtain relief for unconstitutional treatment at the hands of state officials should not depend on geographical happenstance. This Court should grant certiorari in order to restore nationwide consistency in the application of its precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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